Welcome!

Cross-Border Disputes: Dissecting Int’l Investment Arbitration

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Outline for Today

• Informal Survey Results & Law School Education
• Cross-Border Disputes: Introduction
  – What is Arbitration?
  – Current Domestic and International State of Arbitration
• Investment Arbitration under ICSID: Research Considerations in Practice
Informal Survey Results & Law School Education

By Lucie Olejnikova
Thank You!

- Florida Coastal
- University of Chicago
- University of Pennsylvania
- Cardozo Law School
- Loyola University Chicago School of Law
- Pace Law School
- Yale Law Schools
- Harvard Law School
- Brooklyn Law School
- FIU College of Law, Miami, FL
Results

• Arbitration is taught
  – in conjunction with another substantive course, as part of FCIL, or Vis
  – to JDs, LLMs, SJDs
  – for 60, 90, 120 minutes
  – as continuous support for Vis participants
Materials Used

• Electronic or online databases

• Print
  – Commentaries, practice materials, treatises
  – Vis Book, Gary Born, James M. Zimmerman, Eric E. Bergsten, Philippe Fouchard, Redfern & Hunter, etc.) (see bibliography)
Focus Placed On

• Research Strategies

• Issues:
  – Finding agreements
  – Finding awards
  – Introducing main sources of law and basics of research
  – Practice materials
Cross-Border Disputes: Introduction

By Saskia Melhorn
Overview

• What is arbitration?
• Forum selection
• International arbitration v. multinational litigation
What is arbitration?

- Dispute resolution
- Alternative resolution
Key Concepts of Arbitration

- Consensual
- Neutral
- Choice
- Privacy and confidentiality
- Finality
- Enforceability
Forum Selection

• Institutional Arbitration
  – Incorporation of rules
  – Administration of arbitration
  – Set and proven framework
  – Key arbitral institutions
Forum Selection

• Ad-Hoc Arbitration
  – Conducted under the rules set for specific arbitration
  – No involvement of an arbitral institution
Why Choose Arbitration?

**Advantages**
- Confidential
- Flexible procedure
- Arbitrator can be selected
- Enforcement of award mostly straightforward
- Avoidance of national courts
- Forum selection

**Disadvantages**
- Arbitrator fees costly
- Avenues for appealing/challenging awards are limited
- Adversarial process
Investment Arbitration under ICSID: Considerations in Practice

By Natalie M. Lira
Outline

• ICSID: Background
• Legal Framework
• Structuring the Investment
• How Disputes Arise
• Common Tasks
• Conclusion
ICSID: Background

- Established in 1965 (in force October 1966)
- An organization of the World Bank Group
- Administers arbitrations
- Promotes foreign investment
- Structure:
  - Administrative Council
  - Secretariat
ICSID: Background cont.

• Advantages of ICSID
  – Neutrality
  – Provisional measures
  – Binding awards
  – Not subject to review by domestic courts
  – Limited post-award remedies
  – Efforts to provide transparency
  – Clear cost schedules
  – Association with the World Bank
ICSID: Background cont.

- 159 member states (151 contracting and 8 signatory states)
- 497 cases registered (2014 YE)
- Disputes registered from various countries and industries
Legal Framework

• ICSID Convention: Scope of Jurisdiction:
  – Consent in writing
  – Dispute involve member states / nationals of member states
  – Legal dispute arising directly out of an investment

• Basis of Consent:
  – Contract
  – National legislation
  – Bilateral investment treaties
  – Multilateral investment treaties
    • NAFTA
    • ECT
    • CAFTA
    • Cartagena Free Trade Agreement
Legal Framework cont.

Basis of Consent Invoked to Establish ICSID Jurisdiction in Registered ICSID Cases

- Oman-U.S. Free Trade Agreement (Oman-U.S. FTA) 0.2%
- Canada-Peru Free Trade Agreement (Canada-Peru FTA) 0.2%
- Energy Charter Treaty (ECT) 6.1%
- ASEAN Agreement for the Promotion and Protection of Investments 0.2%
- Bilateral Investment Treaty (BIT) 61.8%
- Investment Law of the Host-State 9.4%
- Investment Contract between the Investor and the Host-State 18.3%
- Dominican Republic-United States-Central America Free Trade Agreement (DR-CAFTA) 0.9%

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Legal Framework cont.

Common BIT provisions / protections

• Define investment and investor
• National treatment / most favored nation
• Fair and equitable treatment
• Protection against expropriation
• Full protection and security
• Umbrella provisions
• Fork in the road provision
Legal Framework cont.

Resources to Locate Treaties

- UNCTAD database
- Investor-State Law Guide
- Investment Claims
- Kluwer Arbitration
- Westlaw
- SICE
- Foreign state offices
- Trade Compliance Center
- UN Treaty Collection
- Energy Charter Treaty website
- ICSID Website (data) / Investment Treaty Series (print resource)
- NAFTAclaims.com
Structuring the Investment

• Structuring foreign investment
  – Consideration of BITs in effect with host state & scope
    • Investor State Law Guide, Kluwer Arbitration, Investment Claims, Westlaw, UNCTAD, foreign state office (i.e. UKFCO), UN Treaty Collection
  – Advising on potential political risks
    • Economist Intelligence Unit, BMI Research, HIS, World Bank reports
  – Drafting arbitration agreements / clauses (contracts)
    • Practical Law Guide – Arbitration Clause Toolkit
    • Kluwer Smart Charts
    • Standard clauses recommended by institutions (i.e.: ICC, LCIA, ICDR, UNCITRAL, etc.)
How Disputes Arise

Argentina announced it is expropriating oil company YPF

Hugo Chavez ramps up nationalisation drive in Venezuela

Chávez Seizes Assets of Oil Contractors

The Public Emergency Act Nº 25.561 and its impact on the Argentina’s power sector.

Bolivia Seizes Spanish Power Firm

President Marks May Day With Electricity-Grid Takeover in Latest Episode of Corporate Madrid’s Latin American Travails

Cutting the loss: Western firms eye Libya exodus as oil flow clogged by infighting
How Disputes Arise: Sempra v. Argentina

• **1990s** –
  – Argentina privatized several industries
  – Enacted legislation to attract foreign investors
  – Many international companies invested

• **2000s** –
  – Economic crisis in Argentina
  – Changed its currency regime
  – Altered the terms of contracts
  – Devalued foreign investments in the region
  – Companies filed requests for arbitration
Common Tasks in Practice

- Case Assessment
  - Request for arbitration
  - Jurisdiction
- Company nationality research
- Arbitrator research
- Locating and vetting experts
- Issue-based research
- Treaty research / interpretation
- Discovery
- Enforcement issues
- Asset research
ICSID Arbitral Proceedings

• Request for arbitration
  – Provisional / Interim Measures

• Constitution of Tribunal

• Proceedings
  – Procedural hearing / orders
  – Challenge to jurisdiction
  – Written submissions & expert statements
    • Memorial, Counter-memorial, Reply, Rejoinder
  – Oral Arguments
  – Closing submissions
  – Closure of proceedings
ICSID Arbitral Proceedings cont.

- Post-Award Remedies
  - Interpretation
  - Revision
  - Annulment

- Enforcement of awards
  - Recognition / confirmation
  - Execution
Request for Arbitration – Establishing Jurisdiction

Request for Arbitration / Jurisdiction:

• Parties must have consented in writing
  – Valid treaty in force? Territorial extensions?
  – National law providing consent?
  – Other agreement containing consent?

• Dispute between a contracting state and national of another contracting state
  – Nationality of entity? Siege social?
  – Qualify as an investor?

• Must be a legal dispute arising directly out of an investment
  – Constitute an investment?
Request for Arbitration – Establishing Jurisdiction cont.

Resources:

• Treaty Research:
  – Investor State Law Guide, Kluwer Arbitration, Investment Claims, Westlaw, UNCTAD, SICE, Energy Charter Treaty website, NAFTA website, Trade Compliance Center, foreign state offices (e.g. UKFCO) and other national treaty websites, UN Treaty Collection

• Nationality:
  – SEC/public filings (Edgar, Securities Mosaic, Intelligize); national company registry; Annual reports; Bloomberg company information; Hoovers Online, Mergent, Dun & Bradstreet reports, AMADEAUS, Capital IQ, Investext and ISI Emerging Markets Investment reports; articles searches from Lexis, Westlaw, and Bloomberg

• Investment:
  – Investor-State Law Guide or Investment Claims, and commentary through Kluwer Arbitration
Determining the existence of an "investment" and a dispute arising "directly" out of that investment

1. See ICSID Convention, Article 25 (Legal Instrument Text) view in new window.
2. See "Investment, tribunal discussions of what constitutes an "investment" and a dispute arising "directly" out of that investment for the purposes of the ICSID Convention, Article 25" (Cross-reference).
3. See "Salini test (and other approaches to determining the existence of an "investment" under the ICSID Convention)" (Cross-reference).
4. No attempt was made to define "investment" in the ICSID Convention.

5. Determining the existence of an "investment"

1. See also "Definitions of "investment" and "investor"" (since the decisions frequently turn on the applicable treaty's definition of "investment" and/or "investor" and/or "investment dispute") (Cross-reference).
2. The complementary aspects of the ICSID Convention and the BIT.
3. Does the analysis start with the BIT, then the ICSID Convention or vice versa?
4. There are benchmarks or yardsticks that may be consulted but they need not be satisfied cumulatively.
5. The three objective criteria approach.
6. The Salini four objective criteria approach (and other tests formulated by tribunals).


PARAGRAPH(S):
52. The Tribunal notes that there have been almost no cases where the notion of investment within the meaning of Article 25 of the Convention was raised. However, it would be inaccurate to consider that the requirement that a dispute be "in direct relation to an investment" is diluted by the consent of the Contracting Parties. To the contrary, ICSID case law and legal authors agree that the investment requirement must be respected as an objective condition of the jurisdiction of the Centre (cf. in particular, the commentary by E. Gaillard, in JDI 1999, p. 278 et seq., who cites the award rendered in 1975 in the Alcoa Minerals vs. Jamaica case as well as several other authors).

The criteria to be used for the definition of an investment pursuant to the Convention would be easier to define if there were awards denying the Centre's jurisdiction on the basis of the transaction giving rise to the dispute. With the exception of a decision of the Secretary General of ICSID refusing to register a request for arbitration dealing with a dispute arising out of a simple sale (J.F. Shihata and A.R. Parra, The Experience of the International Centre for Settlement of Investment Disputes: ICSID Review, Foreign Investment Law Journal, vol. 14, no 2, 1000, p. 308) the awards at hand only very rarely...

Tribunals following the Salini approach (with variations as to the interrelationship of the factors, the extent to which tribunals emphasize certain factors (such as whether the contribution to the host State's development must be "significant"), etc.)

Tribunals that either reject the approach taken by Salini or argue for its flexible application, emphasizing that the BIT's definition is the relevant definition of "investment".

Jurisprudence Citer
The Salini four objective criteria approach (and other tests formulated by tribunals)

1. Salini v. Morocco Decision on Jurisdiction holds that “investment” means: (i) a contribution, (ii) a certain duration of performance of the contract, (iii) and a participation in the risks of the transaction, and (iv) a contribution to the economic development of the host State of the investment.


Specific References  General References to this Decision or Award

Paragraph(s) 52 [77]  Paragraph(s) 74 [11]  Paragraph(s) 85 [11]
Paragraph(s) 53 [77]  Paragraph(s) 75 [11]  Paragraph(s) 86 [11]
Paragraph(s) 54 [77]  Paragraph(s) 76 [11]  Paragraph(s) 87 [11]
Paragraph(s) 56 [77]  Paragraph(s) 78 [11]  Paragraph(s) 89 [11]
Paragraph(s) 58 [77]  Paragraph(s) 80 [11]  Paragraph(s) 91 [11]
Paragraph(s) 60 [77]  Paragraph(s) 82 [11]  Paragraph(s) 93 [11]
Paragraph(s) 62 [77]  Paragraph(s) 84 [11]  Paragraph(s) 95 [11]
The Salini four objective criteria approach (and other tests formulated by tribunals)

Salini v. Morocco Decision on Jurisdiction holds that “investment” involves: (i) a contribution, (ii) a certain duration of performance of the contract, (iii) and a participation in the risks of the transaction, and (iv) a contribution to the economic development of the host State of the investment.


This paragraph or footnote of this report, award or decision is referred to in:

- Ol European Group B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/25, Award, 10 March 2015 [Spanish]
- Hassan Abdal, Enterprise Business Consultants, Inc. and Af El Corporation v. Romania, ICSID Case No. ARB/10/13, Award, 2 March 2015
- Flughafen Zürich A.G. and Gestion e Ingenieria I.D.C. S.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/19, Award, 16 November 2014 [Spanish]
- Energociatlantis SArl v. Republic of Moldova, UNCITRAL, Award, 23 October 2013 [Russian]
- KT Asia Investment Group B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/09/9, Award, 17 October 2013
- Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hernandez S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013
- Conviaq Callas S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru, ICSID Case No. ARB/10/2, Final Award, 21 May 2013 [Spanish]
- Ambiente Ufficio S.P.A. and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic, ICSID Case No. ARB/09/9, Dissenting Opinion of Santiago Torres Bermdez, 2 May 2013
- Ambiente Ufficio S.P.A. and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic, ICSID Case No. ARB/07/19, Decision on Jurisdiction and Admissibility, 8 February 2013
- Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012
- Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, Dissenting Opinion of Mahendro All Khan, 31 October 2012
- White Industries Australia Limited v. The Republic of India, UNCITRAL, Final Award, 30 November 2011
- Alps Finance and Trade AG v. Slovak Republic, UNCITRAL, Award [Redacted], 5 March 2011
- ABCI Investments N.V. v. Republic of Tunisia, ICSID Case No. ARB/04/12, Decision on Jurisdiction, 18 February 2011 [French]
- Global Trading Resource Corp. and Globex International, Inc. v. Ukraine, ICSID Case No. ARB/09/11, Award, 1 December 2010
Constitution of Tribunal

Due Diligence Memorandum

- Identify potential candidates
- Past experience and background information
- Affiliations & familiarity with industry
- Identify rulings on key issues in current case
- Note prior appointments – by state/investor
- Prior challenges
- Note any annulments
- Possible objections / conflicts in current case
- Success rate
- Availability / time
- Review, analyze and summarize cases, articles, books, speeches, blog posts, news articles
Constitution of Tribunal cont.

Resources:

- IAI Paris comparison tool & CV info
- Kluwer Arbitration
- Investment Claims
- Arbitrator Intelligence
- Investor State Law Guide
- Investment Treaty Arbitration website
- ICSID case listings / search tool
- ICC DRL (Commercial cases and commentary)
- Lexis/Westlaw
- Jstor
- Hein Online
- OGEMID
- Transnational Dispute Management (TDM)
- Global Arbitration Review
- Investment Arbitration Reporter
- SSRN
- National Bureau of Economic Research
- Peace Palace Library
- WorldCat
Constitution of Tribunal cont.

- Grounds for challenge
  - Lack of Independence or Impartiality
    - Related to one of the parties or counsel
    - Bias / prejudgment
    - Misconduct
- Challenge must be made promptly
- Arbitrator provides opportunity to respond
- If challenge made after close of proceedings, subject to annulment

- Cases
  - Canfor v. United States
  - EDF v. Argentina
  - Suez v. Argentina
  - Generation Ukraine v. Ukraine
Issues of Law

- Jurisdiction
- Treaty interpretation
- Violations of standards of protection
- Damages
  - I. Marboe, “Calculation of Compensation and Damages in International Investment Law”
  - S. Ripinski, “Damages in International Investment Law”
  - H. Woss, “Damages in International Arbitration Under Complex Long-Arm Contracts”
  - M. Kantor, “Valuation for Arbitration”
  - Iran-U.S. Claims Tribunal cases
Issues of Law cont.

• Research Approach:
  – **Start with commentary** (Kluwer, Investment Claims, Westlaw, Investment Arbitration Reporter, etc.)
  – From commentary, note relevant cases on the issue
  – Use ISGL or Investment Claims citator, search, indexing
Post Award Remedies

• **Interpretation**
  - Wena v. Egypt

• **Revision**
  - Pey Casado v. Chile

• **Annulment**
  - Sempra v. Argentina
  - Possible grounds for annulment:
    1. That the Tribunal was not properly constituted;
    2. That the Tribunal has manifestly exceeded its powers
    3. That there was corruption on the part of a member of the Tribunal;
    4. That there has been a serious departure from a fundamental rules of procedure; or
    5. That the award has failed to state reasons upon which it is based.

• **Resources**
  - Bishop & Marchili, “Annulment Under the ICSID Convention”
  - Gaillard, “Annulment of ICSID Awards”
Recognition, Enforcement & Execution

• **Recognition / Enforcement**
  – Confirms res judicata effect
  – Declares award binding, final and enforceable
  – Includes pecuniary and non-pecuniary
  – Third parties?

• **Execution**
  – Process of collecting on award
  – Ex: issuing judgments and/or seizing property
  – Usually requires assistance of national courts

• **New York Convention v. ICSID Convention**
  – No grounds to refuse enforcement under ICSID
  – NYC allows for a few narrow exceptions under which enforcement can be refused
Questions

Thank you for coming!