



**International Centre for
Settlement of Investment Disputes**



**Organisation for Economic
Co-operation and Development**



**UNITED NATIONS
CONFERENCE
ON TRADE AND
DEVELOPMENT**

MAKING THE MOST OF INTERNATIONAL INVESTMENT AGREEMENTS: A COMMON AGENDA

SYMPOSIUM CO-ORGANISED BY ICSID, OECD AND UNCTAD

**12 December 2005
Room 1, OECD Headquarters
2, rue André Pascal, 75016 Paris**

Agenda

1. International investment is the motor of globalisation. Investment flows have tripled within 10 years and foreign capital stocks are now twice the size of global GDP. International investment agreements, instruments of co-operation for the promotion, protection and liberalisation of foreign investment, have been on the rise in the last decade. More than 2300 Bilateral Investment Treaties and about 150 trade and economic integration agreements with substantive investment provisions chapters have been concluded. Some 60 more agreements are currently under negotiation. The legal architecture of investment agreements has also evolved considerably during this period and a growing body of jurisprudence poses new questions of interpretation and implementation to governments and investors in both developed and developing countries.

2. The number of international investment disputes arising from investment agreements has also sharply increased. The cumulative total of known cases brought under bilateral, regional (e.g. NAFTA) or multilateral (e.g. Energy Charter Treaty) agreements that contain investment clauses is now approximately 174. Well over half of the known claims were filed within the past three years. The cases brought to dispute settlement have become increasingly complex, attracting varying interpretations of their substantive and procedural provisions and generating lively discussions among governments, academics and practitioners. Investment arbitration has raised public interest issues, calling for reconciliation of public international law doctrines and principles with the private legal principles of contract law. In addition, the cases have been eroding the traditional division between so-called capital exporting and importing countries. OECD countries, traditionally parties to agreements as home-countries of investors, have become respondent in an increased number of disputes. While this evolution began with NAFTA, developing countries and transition economies have increasingly become involved in investment disputes as a result of increased investment flows and the growing number of investment treaties concluded, including South-South treaties.

3. ICSID, OECD and UNCTAD are three organisations which play significant and complementary roles at the international level in the field of investment agreements, whether monitoring and analyzing investment agreements and disputes or acting as a secretariat of a dispute settlement forum (see Annex).

4. This Symposium is organized jointly by ICSID, OECD and UNCTAD. Its purpose is for non-governmental actors to share their perspectives on emerging investment arbitration issues identified by governments and their international organizations; to explore and advance the agenda which developed and developing country parties to investment agreements have in common; and to consider ways for the three organizations and other interested institutions to best work together and respond to the needs of their members and the investment community. Press will attend upon invitation.

5. The Symposium will address the following issues:

- Recent developments in investment arbitration.
- Specific challenging issues of jurisdictional and substantive nature facing the parties in investor-state dispute settlement procedures.
- Possible ways for improving the system of investment arbitration.
- Co-operation among international organisations active in this field.

6. The expected outcomes of the Symposium include:

- Improved understanding among the main actors (governments, investors and the arbitration community) and among OECD and non-OECD governments in the field of investor-state dispute settlement.
- Action plans for exploring synergies between ICSID, OECD, UNCTAD and other international organizations active in this field, in particular in the strengthening of technical assistance and capacity-building.
- Public record of the discussions and publication of selected contributions.

AGENDA OUTLINE

08.30-09.00 **REGISTRATION**

09.00-09.30 **OPENING SESSION: INVESTMENT AGREEMENTS AND INVESTMENT DISPUTES ON THE RISE – A REFLECTION**

Richard Hecklinger, Deputy Secretary-General of OECD

Roberto Dañino, Secretary-General of ICSID

UNCTAD

09.30-13.00 **SESSION 1: INVESTOR-STATE DISPUTE SETTLEMENT – BALANCING INVESTORS' RIGHTS AND PUBLIC INTERESTS**

Chair: Manfred Schekulin (OECD Investment Committee Chair)

09.30-09.50 **A decade of increasing awareness of investment arbitration and intensive activity: an assessment**

Professor Christoph Schreuer (University of Vienna, Austria)

09.50-11.15 **Main jurisdictional challenges arising from investment disputes**

Defining investment and investor: Who is entitled to claim?

Bart Legum (Counsel, Debevoise and Plimpton, Paris)

Contractual claims and claims under investment treaties: the "umbrella" clause at test.

Professor Emmanuel Gaillard (Partner, Head of the International Arbitration Group, Shearman Sterling, Paris)

Parallel and multiple proceedings: how to measure the risk of inconsistent decisions.

Professor Giorgio Sacerdoti (Bocconi University, Milan – WTO Appellate Body, Geneva)

Discussion

11.15-11.30 **Coffee Break**

11.30-13.00 **Main substantive issues arising from investment disputes**

Fair and equitable treatment: an evolving standard?

Dan Price (Partner, Head of the International Arbitration Group, Sidley Austin Brown and Wood, Washington DC)

Indirect expropriation: is the right to regulate at risk?

Jan Paulsson (*Partner, Head of the International Arbitration Group, Freshfields Bruckhaus Deringer, Paris*)

Most-Favoured Nation standard (MFN): what are its limits?

Horacio Grigera Naon (*Director, International Arbitration Programme, American University, Washington College of Law, Washington DC*)

National Treatment: new developments

Professor Rudolf Dolzer (*Professor of International Law, University of Bonn, Germany*)

An NGO perspective

Dan Magraw (*President and Chief Executive Officer of the Center for International Environmental Law, Washington DC*)

Discussion

13.00-14.00

Lunch

Kindly sponsored by Freshfields Bruckhaus Deringer, Shearman Sterling and Sidley Austin Brown and Wood

14.00-15.45

SESSION 2: INVESTOR-STATE DISPUTE SETTLEMENT – IMPROVING THE SYSTEM

Chair: Roberto Dañino, Secretary-General of ICSID

The case for additional transparency and third party participation in investor-state disputes

Meg Kinnear (*General Counsel/Director General, Department of Foreign Affairs and International Trade, Canada*)

Is consolidation of claims a step to improvement?

Louis Alberto Gonzalez García (*Director, Office of the Legal Counsel for International Trade Negotiations, Ministry of Economy, Mexico*)

Is enforcement of arbitral awards an issue for consideration and improvement?

– The case of Pakistan

Makhdoom Ali Khan (*Attorney General, Pakistan*)

– The case of China

Professor Chen An (*Professor of International Law, Chairman, Society of International Economic Law, China*)

– The New York Convention in action

Jernej Sekolec (*Secretary, UNCITRAL*)

Discussion

15.45-16.00

Coffee Break

16.00-17.30 SESSION 3: WAYS TO MOVE FORWARD

Chair: James Zhan (Chief, International Arrangements Section, Division on Investment, Technology and Enterprise Development, UNCTAD)

Technical assistance and capacity building, lessons learned from experiences and the way forward

Rohan Perera (Legal Counsel, Ministry of Foreign Affairs, Sri Lanka)

How do relevant international organisations contribute to capacity building? The way forward

Anne-Marie Whitesell (Secretary General, Court of Arbitration, ICC)

Anna Joubin-Bret (Senior Legal Advisor and Technical Assistance Coordinator, Division on Investment, Technology and Enterprise Development, UNCTAD)

Wesley Scholz (OECD Investment Committee Vice-Chair)

Discussion

17.30-18.00 Concluding remarks by the three Chairs

ANNEX

International Centre for Settlement of Investment Disputes (ICSID)

ICSID, as the main institution for settlement of international investment disputes, has unique expertise in administering arbitration proceedings under international investment agreements and in dealing on a daily basis with all related issues. ICSID's caseload has grown dramatically in the last ten years bringing the total number of cases registered by the Centre since its inception to close to 200. The large majority of these cases involve issues of interpretation and application of treaty provisions on investment protection. On the basis of its experience in investor-State arbitration, ICSID has recently embarked on an exercise to amend some of its Rules to better respond to the demands and the evolution of this rapidly changing field.

ICSID provides a multilateral framework for international dispute settlement. The Centre was established in 1966 under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID or the Washington Convention). ICSID is one of the five international organizations that form the World Bank Group. It has 142 member countries.

The link between the orderly settlement of legal disputes between foreign investors and host governments, the stimulation of private investment and economic development are the underlying tenets of the ICSID Convention and the establishment of the Centre. ICSID provides three-lingual conciliation and arbitration facilities under two distinct sets of rules: (i) the ICSID Convention, Regulations and Rules; and (ii) the ICSID Additional Facility Rules. They differ in aspects of jurisdiction and procedure. The ICSID Convention and the rules were drafted to provide a balanced framework for international investment dispute settlement based on the consent of the parties involved. Advance consents by governments to submit investment disputes to ICSID arbitration are commonly found in bilateral and multilateral treaties on investment. The majority of ICSID cases have in recent years been based on such advance consents. The sharp rise in the number of cases under investment treaties has been accompanied by increased diversification of the legal issues raised by the parties. The body of case law that is developing under the auspices of ICSID has come to have a profound influence on the furtherance of international investment law. There is today far greater familiarity in the international legal and business community, as well as among civil society, with the ICSID process and jurisprudence. A major factor in this regard is ICSID's long-standing research, publication and advisory program. In addition to contributing annually to numerous international conferences and seminars, ICSID staff has maintained for more than three decades an ambitious publications program, which includes books, loose-leave collections on investment laws and treaties, a law journal and a website.

In addition to its case administration, ICSID's current tasks include the drafting of amendments of the arbitration rules; the promotion of conciliation; the enhancement of the training program in the field of investor-State dispute settlement; the expansion of research and publishing activities; and the diversification of the pool of arbitrators to include more women and developing country nationals.

Organisation for Economic Co-Operation and Development (OECD)

OECD has been at the centre of the discussion on investment agreements since the beginning of its existence: in the 1960s, the draft OECD Convention on the Protection of Foreign Property provided the basis for future bilateral investment treaties; in the 1980s, it reported on OECD members' positions on main features of investment agreements; and, in the 1990s, the work on a Multilateral Agreement on Investment, whilst not reaching a successful conclusion, advanced the understanding of issues facing investment treaty negotiators.

OECD carries out analysis and policy dialogue, shares experiences, develop policy recommendations and standards based on best practice and monitor policy developments through peer review. In the area of investment agreements, one of OECD's comparative strengths is quality analytical work, through a robust Committee "checks and balances" process. With the view to improving common understanding and ultimately outcomes of agreements both for governments and investors, the OECD Investment Committee has engaged in discussions on issues arising under investment agreements, including the relationship between investment agreements, the interpretation of core provisions (fair and equitable treatment, indirect expropriation and the right to regulate and MFN treatment) and issues related to the system of investor-state arbitration itself. In June 2005, the OECD Investment Committee has released a statement supporting additional transparency in international investment arbitration. Under way is a comprehensive stocktaking exercise of recent developments in investment agreements in OECD and non-OECD countries as a tool for organising further analytical work and articulating the Committee's dialogue with its non-member partners.

United Nations Conference for Trade and Development (UNCTAD)

UNCTAD has a long standing programme on issues related to international investment agreements, looking at their development dimension and focusing primarily on identifying the implications for developing countries by canalizing technical assistance and promoting capacity building. UNCTAD is the focal point of the United Nations for the integrated treatment of interrelated issues of trade, finance, technology, investment and sustainable development. UNCTAD's work is undertaken through an integrative approach that combines research and policy analysis, technical assistance and capacity-building and consensus-building activities.

Specifically, the Division on investment, technology and enterprise development (DITE) undertakes research and policy analysis in the area of international investment agreements (or IIAs for short) – through the pink paper series on Issues in IIAs (28 publications), the compilation of international investment instruments in a Compendium and the database of bilateral investment treaties available on line.

A second generation of research papers on international investment policies for development is being developed, including a research paper on Investment chapters in Economic Integration Agreements and on New Generation of Bilateral Investment Treaties.

UNCTAD's work programme on IIAs also comprises technical assistance and capacity-building activities consisting of intensive training programmes for negotiators of IIAs delivered in all regions, a distance-learning programme on key issues in IIAs (available in 5 languages) as well as *ad hoc* technical assistance to developing countries and regional organisations. A training course on managing investment disputes is being developed.

At the intergovernmental level, policy analysis and development is taking place in the form of contributions to the Commission on Investment, Technology and related Financial Issues and expert group meetings addressing issues related to IIAs. In November 2004, an ad-hoc expert meeting was convened bringing together several experts and practitioners in this field of international investment law to review substantive and procedural issues arising from investor-State dispute settlement cases and their development implications and providing inputs into a research paper on Review of Investment Disputes and an Occasional Note entitled International Investment Disputes on the Rise (UNCTAD/WEB/ITE/IIT/2004/2, dated 29 November 2004).