



**International Centre for
Settlement of Investment Disputes**



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



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ON TRADE AND
DEVELOPMENT**

SYMPOSIUM CO-ORGANISED BY ICSID, OECD AND UNCTAD

**MAKING THE MOST OF INTERNATIONAL INVESTMENT AGREEMENTS:
A COMMON AGENDA**

***12 December 2005, Paris
Room 1, OECD Headquarters, Paris***

**Opening remarks by Roberto Dañino
Secretary-General, ICSID**

Good morning. I am pleased to join Richard Hecklinger and James Zhan in welcoming you to this very timely and important Symposium on “Making the Most of International Investment Agreements.”

The ICSID Convention, as a multilateral legal framework for the settlement of international investment disputes, has clearly had a meaningful impact on the formulation of international investment law. We believe it also has contributed to the improvement of the investment climate in many developing countries.

Typically, the countries that have ratified the ICSID Convention are also parties to bilateral, regional and multilateral agreements that include investment protection provisions. Together with the ICSID Convention, these international instruments aim to contribute towards creating a predictable legal framework, which is necessary for sustained economic development.

The increase in the volume of foreign private financing into developing countries during the recent past has been enormous — from some US\$75 billion in the early 1990s to over US\$400 billion by the end of 2004. Equally impressive has been the increase in the number of bilateral investment treaties. We now have more than 2000 bilateral investment treaties, with more than 1500 providing for ICSID as the forum for the settlement of investment disputes.

As a result, the demand for ICSID’s services has grown exponentially, and today this probably constitutes ICSID’s main challenge. Merely a decade ago, ICSID had a caseload of five pending cases for an aggregate amount of US\$15 million in claims, whereas today, we have 113 pending cases for an aggregate amount exceeding US\$30 billion in claims.

The overwhelming majority of the new cases have been brought to ICSID under the investor-State arbitration provisions of investment treaties. Indeed, of the 113 cases pending with ICSID, 96 have been brought under investment treaties. It is foreseeable that these trends of growing investment flows, together with the larger number of international instruments, will continue increasing the number of ICSID cases. ICSID will likely, therefore, continue to play a key role in contributing to the conditions necessary for the promotion of capital flows into developing countries.

I would like to focus the remainder of my remarks on the implications that this substantial increase of investment disputes will have for ICSID's future role.

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After its first 40 years, ICSID has begun a new chapter in its institutional life. The Centre will have to face the new challenges posed by the large and growing demand for its services, while preserving its neutrality, professionalism and efficiency.

For this reason, over the last year we have been immersed in a process of stocktaking and identifying the improvements we need to implement to successfully address our future challenges. We started this process with a client survey to measure the quality of our services. We have also held a series of consultations with a large number of stakeholders around the world regarding their perception of the strengths and weaknesses of ICSID and sought their recommendations for the future development of the institution. The results have been both useful and encouraging.

Based on the trends described earlier and on the feedback we have received, I believe that ICSID may face two types of challenges. One is to maintain its efficiency in handling a caseload which is increasing in number and complexity. The other is to preserve its reputation of professionalism, impartiality and integrity. Let me address each of these.

Addressing the Efficiency Challenge

We have taken several initiatives to increase the efficiency of our services. The principal one is to expand the cadre of professionals at ICSID. We have now an excellent and motivated staff of fifteen lawyers, five paralegals and five support staff. It is still a small team but composed of highly qualified individuals, and considerably larger than two years ago. To afford the increase of our staff, we have also periodically increased our fees and charges. We will continue doing so as the demand for our services may require additional staff.

In response to concerns that delays in registering requests for arbitration might be hurting the perception of ICSID's efficiency, I should note that from our review of the recent caseload, much of the delay is driven by the parties. Nevertheless, as regards those aspects which are under our control, we have worked hard and have been successful in reducing the time period required for decisions on registration requests. I am pleased to report that most of our recent decisions on registration are now being made within 45 days.

We have also promoted a greater use of the ICSID conciliation mechanisms as an alternative to arbitration. Our interest lies, of course, in the promotion of even faster and more economic methods of dispute settlement, where circumstances allow. Therefore, it has now become our practice to remind the parties of the availability of the conciliation mechanism as soon as we acknowledge receipt of a request for arbitration. Progress on this area is still relatively slow.

We have also taken note that a large percentage of ICSID cases are ultimately settled between the parties. As at November 2005, seven out of the last ten arbitration cases were settled. Therefore, ICSID has led an effort to explore the establishment of a mediation facility within the World Bank Group. The system would be somewhat similar to a process of *assisted negotiation*. This system would be an informal and voluntary one, allowing parties to discuss their differences confidentially with the help of an independent third party who may or may not have subject-matter expertise, with a view to arriving at an amicable resolution of the dispute. The process would be devoid of the formalities of arbitration or national court litigation, or even the form of conciliation presently offered by ICSID. In effect, the Centre would simply be involved in making it possible for parties to communicate, without losing face, in a neutral

environment and with the assistance of an independent expert. The process would, of course, be without prejudice to the rights of the parties to resort to other forms of dispute resolution, and might indeed be conducted alongside arbitration proceedings. In such case, the result could be made binding on the parties, especially if a settlement agreement were to be incorporated into an award.

ICSID has also worked on a number of amendments to its Rules and Regulations this past year. The key proposed amendments concern preliminary procedures in regard to provisional measures and expedited review of requests for dismissal of unmeritorious claims; access of third parties to proceedings; publication of awards; and disclosure requirements of arbitrators. These amendments, which I will address in further detail this afternoon, are the result of two rounds of written consultations, as well as feedback that we received in various meetings with Governments, arbitration experts and representatives of business and civil society groups. They have now been submitted to our member countries for approval and, hopefully, they should come into effect in the first quarter of 2006.

We strongly believe these changes will have a positive impact on the work of ICSID, not only in improving its efficiency, but also increasing the transparency of the arbitration process.

Addressing the Reputational Challenges

Transparency leads us into the other potential challenge ICSID may need to confront in the future: the preservation of its well earned reputation. As the number of cases has grown, some have developed a perception that there is not a level playing field between investors and States.

In part, this perception has been fueled by the fact that a single defendant has had to face numerous and simultaneous claims by some of the largest companies in the world. Another issue of concern has been the growing cost of arbitration. This is particularly true for the low-income countries, and for a few small companies, which cannot afford being represented by the most experienced and sophisticated law firms in the field, as claimants usually are.

We are addressing some of these concerns through our numerous training activities, as well as through our publications, and by providing access to relevant and systematized legal information regarding the Centre and the growing body of persuasive case law through an ever expanding, and in future possibly an “intelligent,” website. In addition we are exploring the creation of a *pro bono* advisory service, most likely to be provided by private lawyers and law firms through the Justice Reform unit in the Legal Department of the World Bank. This is an idea which will merit further analysis in the next few months and which may be more suited for other organizations of the World Bank Group, rather than ICSID, in collaboration with organizations such as the OECD and UNCTAD.

Another concern which has been expressed by a few is that ICSID arbitrators are predominantly nationals from developed countries, the implication being that they may be more favorably inclined towards investors. The implication is baseless since the fact is that the outcomes of ICSID arbitrations are equally divided, almost exactly 50/50, in awards for investors and for States. Also, it needs to be noted that the large majority of arbitrators are appointed by the parties themselves. ICSID only appoints arbitrators in extraordinary circumstances. Of the total appointments made this past year, only 23% (16 of a total of 68) were made by ICSID.

However, I do have a different concern regarding the pool of arbitrators. Indeed, the efficiency that we hope to gain from the amendments to our rules and other improvements of internal processes will be of little or no effect if the proceeding ends up being delayed while in the hands of a tribunal.

Of course, this is not a deliberate situation. However, as the number of cases increases, we have found that the relatively small number of arbitrators who are involved in these cases are being stretched to the

limit. This is more so the case where the arbitrator is also involved as counsel or expert in other cases. While we have, whenever possible, attempted to address this problem by diversifying the candidates that we appoint as arbitrators, it is incumbent on the parties to also bear the same considerations in mind when making appointments.

Arbitrators should equally consider carefully their workload before accepting additional cases. It is in no one's interest for parties to have to wait several months for arbitrators to become available for hearings or deliberations.

Arbitrators are increasingly exposing themselves to challenges for potential conflicts arising from their roles as arbitrators and counsel in different cases before ICSID. In the interest of the integrity of the process, real or perceived, we hope that the situation will be self-regulating to avoid the need for the introduction of formal guidelines or rules on this matter

To address some of these concerns, whenever possible we have also tried to enlarge and diversify the pool of arbitrators who are normally involved in our cases. In line with these efforts, this last year appointees came from 28 different countries and nearly half of them are serving as ICSID arbitrators for the first time. Of the 68 appointees this past year, 20 were from developing countries. As regards gender balance, however, despite the efforts of the Centre only four appointees were women.

ICSID, however, has limitations and can only exercise its discretion to nominate arbitrators when the Secretary-General, or the Chairman of the ICSID Administrative Council, is called upon to make an appointment under the rules. Even in many of those cases, we are constrained by the language requirements of the case, and by the list of arbitrators appointed by the Contracting States. It is incumbent upon the States to ensure that only the best qualified and most experienced professionals are included in their lists. I cannot overemphasize the importance of this issue.

In this context, I should also note our concern regarding the increase of challenges to the impartiality and neutrality of tribunal members (what I call "challengitis"). Indeed, over the past year, we have had six challenges, which constitute an unprecedented number in ICSID's history. To address this issue and to strengthen the guarantees of independence and neutrality of ICSID tribunals, as part of the amendments to our rules, we have proposed to modify the applicable provisions to require greater and more exhaustive disclosures by arbitrators regarding any business or professional relationships which could cause a conflict, or the perception, of a conflict of interests and create distrust amongst the parties. At the same time, I urge the parties to avoid these challenges as mere dilatory practices. They may unfairly taint the reputation of the arbitrators and in the long run may affect the credibility of the process.

Finally, given the evolution of the Centre and its enormous responsibilities, I believe the time has come for ICSID to have a full time Secretary-General. For the last 40 years, the General Counsel of the World Bank has served *ex officio* as a part time Secretary-General of the Centre. However, the new volume and complexity of cases really require a full time commitment. I have proposed this to Mr. Wolfowitz for its implementation in the near future.

So, this is the way in which ICSID is trying to proactively improve its role and anticipate the potential challenges it may face. Of course, the most effective way of maintaining and enhancing the efficiency and the reputation of the Centre is through its staff. We are fortunate to have a superb team of professionals who are most competent, honest and committed. In them lies the future of the institution, a very promising one to be sure.

Many thanks.