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Obstacles Facing International Arbitration

Ibrahim F.I. Shihata†

The International Centre for Settlement of Investment Disputes (hereinafter ICSID) was created almost twenty years ago to provide an internationally accepted forum for resolution of investment disputes between states and foreign investors. Unlike other arbitration institutions, ICSID deals with a specific category of disputes.

The significant increase in ICSID's caseload in the last few years shows that both investors and states are becoming conscious of the merits of ICSID in dispute settlement. The number of inquiries addressed to the Secretariat by parties seeking information or assistance in drafting ICSID clauses is also increasing significantly.

The major features of ICSID are well known and have been the subject of an abundant literature. However, I believe that certain issues are worth recalling, not only because they are of particular concern to states that are parties to ICSID proceedings and may affect their attitude toward ICSID and international arbitration in general, but also because I personally find them to be perfectly justified concerns. These include issues regarding the nationality of arbitrators, the duration of proceedings and the cost of arbitration.

I. THE NATIONALITY OF THE ARBITRATORS

It is no secret that developing countries often see international arbitration as a process administered, to a large extent, by nationals of the developed countries. This is not a phenomenon unique to ICSID arbitration. It applies as well, if not more, to other types of institutional arbitration. In the case of ICSID, states that are parties to a dispute have an effective remedy at their disposal, namely, to participate actively in the appointment of arbitrators. Most of the provisions of the ICSID Convention regarding the number and selection of arbitrators are permissive, so that the parties are free to make their own arrangements. The Secretariat keeps a panel of arbitrators, of which four are named by each contracting state and an additional ten are named by the chairman of the Administrative Council. The parties to a dispute may choose arbitrators from the panel or from outside the panel.

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If the parties do not exercise their power of appointment or cannot reach agreement on the choice of arbitrators, the Convention provides that, at the request of either party, the chairman shall make the selection. However, unlike the parties, the chairman can appoint only from the panel.

In practice, the parties to disputes have chosen arbitrators from developing countries in only six cases out of eighteen arbitration proceedings and in one out of two conciliation proceedings. In only two arbitration cases did the parties agree that the president of the tribunal would be a national of a developing country. In nine arbitration proceedings in which the chairman acted as appointing authority the persons appointed were, with one exception, nationals of European countries. In two cases where the president established ad hoc committees to consider requests for annulment of awards, only one member of each committee was a citizen of a developing country.

This situation is attributable to two major factors. First, a number of our developing country members have not designated persons to serve on the panels. Second, other states have designated only public officials to serve on the panels. Public officials may not always be appropriate candidates, or may not have the time to serve as arbitrators.

Nevertheless, certain developing countries have been more attentive in naming persons of talent and independence to the panels. This has enabled the chairman to appoint eminent jurists from developing countries.

It is essential to the future of ICSID that this matter be given attention. The objective of the Convention is to “depoliticize” the settlement of investment disputes and to provide a climate of confidence between investors and states to encourage the flow of resources to developing countries. Clearly, one way to achieve this is to seek increasingly diversified representation of nationalities on ICSID tribunals.

In many developing countries, there is no lack of persons qualified under the Convention to act as arbitrators. ICSID must, therefore, continue its efforts to convince these countries to supply a roster of candidates suited to serve as arbitrators on ICSID tribunals.

In some developing countries, a special effort should be made to train persons, particularly lawyers, in matters concerning the settlement of transnational disputes. A step in that direction has been made by ICSID in conjunction with the International Development Law Institute (hereinafter IDLI) in Rome. Recently, ICSID cooperated with IDLI in organizing seminars on international contract dispute resolution for senior lawyers in developing countries. This initiative should be pursued in cooperation with other specialized organizations, such as the institutes sponsored by the International Chamber of Commerce, the American Arbitration Association, and the London School of International Arbitration, which is starting a new program in this field. In the spring of 1986, ICSID also began publication of a new periodical called *ICSID Review — Foreign Investment Law Journal*,

which should increase awareness and expertise regarding issues related to investment disputes.

II. THE DURATION OF ARBITRATION PROCEEDINGS

Statistics regarding the average duration of such proceedings have little value because many factors may differentiate one proceeding from another. In this respect, ICSID arbitration is similar to other forms of arbitration. Unlike other forms of arbitration, however, ICSID's role is not limited to offering a specialized machinery for dispute resolution. The ultimate purpose of ICSID is to promote a climate of confidence between states and investors that is conducive to increasing the flow of capital to developing countries. In the event of a dispute, the objective of ICSID is to restore that climate as much as possible. The fact that more than half of the ICSID proceedings that have been closed have resulted in amicable settlement shows that ICSID has been successful in the pursuit of this objective.

With a view to increasing the effectiveness of ICSID, the ICSID Arbitration Rules, as revised last year, offer a new procedure in the form of a "pre-hearing conference," which may be called by the Secretary-General or the president of an arbitral tribunal. The purpose of such a conference is to expedite the arbitral proceedings by permitting early identification of undisputed facts, thereby limiting the proceeding to the real areas of contention. In a similar spirit, the rules also give the parties the right to request the convening of a prehearing conference between the tribunal and the parties in the hope that it will give them an opportunity to reach an amicable settlement.

III. THE INCREASING COST OF INTERNATIONAL ARBITRATION

ICSID attempts to keep the cost of arbitral proceedings to a minimum. Although costs necessarily vary from case to case, we believe that ICSID arbitration is less expensive than arbitration conducted under the auspices of other institutions. The reason for this is not only that ICSID receives financial support from the World Bank and benefits from the use of its facilities and services, but also because ICSID tries to limit the expenses incurred by the parties to the work performed in relation to individual proceedings. ICSID itself bears all the overhead cost of the Secretariat. Also, arbitrators' fees are calculated at a set daily rate. At present the rate is SDR 600 per eight-hour day of work or attendance at tribunal meetings. If the duration of the proceedings can be shortened, either through a prehearing conference or otherwise, the cost of ICSID can be reduced at significant savings to the parties.

IV. CONCLUSION

ICSID continues its efforts to address the concerns I have mentioned. We hope these concerns will also be addressed by all parties concerned with

international arbitration, with a view to enhancing its acceptance as a mechanism for settlement of disputes involving the governments of developing countries.