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AN INTRODUCTION TO THE INTERNATIONAL CENTER FOR SETTTLEMENT OF INVESTMENT DISPUTES (ICSID) ARBITRATION

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INTRODUCTION

The International Center for the Settlement of Investment Disputes (ICSID) is an institution of the World Bank established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Washington Convention, 1965). The Convention sets forth ICSID's mandate, organization and core functions. The primary purpose of ICSID is to provide facilities for conciliation and arbitration of international investment disputes. The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank). It was opened for signature on March 18, 1965 and entered into force on October 14, 1966[2].

The Convention sought to remove major impediments to the free international flows of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement. ICSID was created by the Convention as an impartial international forum providing facilities for the resolution of legal disputes between eligible parties, through conciliation or arbitration procedures. Recourse to the ICSID facilities is always subject to the parties' consent[3]. As evidenced by its large membership[4], considerable caseload[5], and by the numerous references to its arbitration facilities in investment treaties and laws, ICSID plays an important role in the field of international investment and economic development.

ICSID is an autonomous international organization and is considered to be the leading international

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1 + I would like to acknowledge the contributions of Ms Izuoma Egeruoh, Assistant Research Fellow, Nigerian Institute of Advanced Legal Studies, Abuja in the writing of this article.

2 http:// icsid.worldbank .org/icsid/index.jsp

3 ibid

4 As at May 2011, 157 countries had signed the Convention while 144 countries ratified it. Nigeria signed on 13 July, 1965 and ratified it on August 23, 1965. See http://en.wikipedia.org/wiki/International_Centre_for_Settlement_of_Investment-Disputes

5 As at 31 December, 2010, 331 cases were registered under the Convention and the Additional Facility Rules. See http://icsid.worldbank.org/ICSID/FrontServlet . See also ICSID, "The ICSID Caseload – Statistics" (Issue 2011-1) p 11, http:// icsid.worldbank.org/ICSID/Index.jsp and Reed L *et al Guide to ICSID Arbitration* (2nd Edn, The Netherlands, Kluwer Law International, 2011) p7 . 73% of the registered cases are investment treaty cases.

arbitration institution devoted to investor-State dispute settlement (also known as investment treaty arbitration)[6].

HISTORY OF ICSID

In the past, the World Bank as an institution has assisted in mediation or conciliation of investment disputes between nations and private foreign investors[7]. Thus to reduce the burden on World Bank , Aron Broches, then General Counsel of the World Bank conceived the idea for the Convention in 1961 in conjunction with the Organization for Economic Cooperation and Development (OECD), The idea was to create a framework for the protection of international investment. This idea gave birth to the International Centre for Settlement of Investment Disputes (ICSID) under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* which came into force on October 14,1966. The aim of establishing the ICSID was the Bank's belief that an institution specially designed to facilitate the settlement of investment disputes between governments and foreign investors, could help promote increased flow of international investment.

ICSID has an Administrative Council and a Secretariat. The Administrative Council is chaired by the World Bank's President and consists of one representative of each State which has ratified the ICSID Convention. Annual meetings of the Council are held in conjunction with the joint Bank/Fund annual meetings[8] . ICSID has close links with the World Bank and all ICSID's members are also members of World Bank. Unless a government makes a contrary designation, each Governor or Alternate Governor of a Bank appointed by a Contracting State shall be *ex officio* its representative and its alternate respectively on ICSID's Administrative Council. The expenses of the ICSID Secretariat are financed out of World Bank budget, although the costs of proceedings are borne by the parties involved individually.

GOALS OF ICSID

Article 1(2) of the ICSID Convention, Regulations and Rules of April 10, 2006 provides for the purpose of ICSID, which is to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of the Convention. However, the report of the Executive Directors on the Convention emphasized the aim of promoting global economic development through private international investment.[9] Thus the basic goal of ICSID is to promote much needed international investment by offering a neutral dispute resolution forum both to investors that are either rightly or wrongly wary of nationalistic decisions by local courts and to host states that are rightly or wrongly wary of self–interested actions by foreign investors, hence the preamble of the ICSID Convention underlines this goal and the operational objective of establishing an effective regime for neutral resolution of investment disputes that is attractive to both Governments and investors.

Ibrahim Shihata, former Secretary-General of ICSID (1983 and 2000) is of the view that the goal of the Convention in creating ICSID was ''to provide a forum for conflict resolution in a framework which carefully balances the interests and requirements of all the parties involved, and attempts

6 See generally Idornigie, P O *Investment Treaty Arbitration and Emerging Markets: Issues, Prospects and Challenges* (Abuja: Nigerian Institute of Advanced Legal Studies: 2011)

7 www.wikipedia.com

8 www.wikipedia.com

9 Reed at al, Op Cit at 3

to depoliticize the settlement of investment disputes"[10]. Therefore, it can be concluded that the Convention is aimed at encouraging investment between States as they facilitate the settlement of investment dispute .

ICSID ARBITRATION PROCEDURE

The ICSID arbitral process is governed by the following laws, the ICSID Convention, Rules of Procedure for the Institution of Conciliation and Arbitral Proceedings also called the *Institutional Rules,* the Rules of Procedure for Arbitral Proceedings (*Arbitral Rules)* and the Administrative and Financial Regulations (*the Regulations*). The Convention requirements are more rigid than the requirement in the Rules and Regulations.

To initiate arbitration under the Convention, the Convention /institution rule requires the Contracting State or its citizen to do the following;

send a written request;
send five additional signed copies to the Secretary General at ICSID headquarters;
submit electronic copy of the request;
request must be in one of the ICSID's official language (English, French or Spanish); and
the request must be signed by the claimant or its duly authorized representative, and dated[11].

Thus, the Convention Article 59 and Regulation 16 requires the claimant to pay a non-refundable filling fee called a lodging fee of US$ 25,000 as provided in the January 2008 schedule of Fees , this was an increase from US$7,000 filling fee set out in the 2003 Schedule of fees. The essence of the increase was to put an end to frivolous action. ,

Article 36(2) of the Convention provides for what must be contained in the Request for Arbitration. These are: the facts of the matters in dispute, the identity of the parties and their consent to arbitrate.

Also the Institution Rule 2(1) set out the requirement for the request to arbitrate to include:

parties to the dispute and their address;
whether one of the parties to the dispute is a subdivision or agency of the Contracting State ;
the evidence of the consent of the Contracting State;
for the party that is a national of a Contacting State there is need to indicate, its nationality on the date of consent, that he is a natural person and also national of the contracting part at the date of the request, also his nationality as at the date of the consent or request was not granted on the date of the request or consent;
a proof that the dispute between the parties is an investment dispute;
also state that the requesting party is a juridical person and has taken all actions to authorize the request.

Institution Rule 2 and 3 covers all the contents and procedure for the commencement of arbitration under the ICSID Convention. It is noteworthy that the Convention has no limitation period for the filling of a request except the parties included that in their Contract agreement or is contained in any other legislation/treaty authorizing ICSID arbitration to which the parties have agreed to be binding on them.

Rule 5 of the Institution Rules provides that on the receipt of the request the ICSID Secretary–Gen-

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10 Shibata, I "Towards a Greater Depoliticisation of Investment Disputes: The Roles of ICSID and MIGA", ICSID Review – FILJ 1 (1986): 4

11 See Rules 1 – 9 of the Rules of Procedure (Institution Rules) of ICSID.

eral is required to send an acknowledgement of the receipt to the Claimant and also forward a copy of the request with the supporting document to the Respondent provided the filling fees have been paid. On the other hand, the Secretary-General may register or refuse to register the request once there is a defect which includes lack of jurisdiction on the part of ICSID[12]. Where the defect is curable the claimant may remedy the situation and file another request even though the Institution Rule 6(2) establishes that an ICSID arbitration is deemed instituted on the date the request was registered. The proceeding can only be discontinued with the consent of the respondent.

ICSID ARBITRATION PROCEDURE UNDER THE ADDITIONAL FACILITY RULES.

The Centre has since 1978 established the Additional Facility Rules which authorized the ICSID Secretariat to administer certain types of proceedings between States and foreign nationals which fall outside the scope of the Convention. These proceedings are provided for in Article 2 of the Additional Facility Rules and they include; conciliation and arbitration proceedings where either the State party or the home State of the foreign national is not a member of ICSID. Additional Facility conciliation and arbitration are also available for cases where the dispute is not an investment dispute provided it relates to a transaction which has features that distinguishes it from an ordinary commercial transaction.

The Additional Facility Rules further allow ICSID to administer a type of proceedings not provided for in the Convention, namely fact-finding proceedings to which any State and foreign national may have recourse if they wish to institute an inquiry to examine and make reports on facts. Article 4 of the Additional Facility Rule contains special circumstances where the Secretary –General will grant approval and access to arbitrate under additional facility in ICSID.

ARBITRATING UNDER ICSID CONVENTION

National investment laws[13] and international treaties[14] make it possible for private investors to initiate ICSID arbitration against host states even when there is no contractual agreement between them. Despite the provisions of Article 102 of the Charter of the UN obligating member states who are parties to BITs to deposit them with the UN Secretariat, ascertain the exact number of BITs in existence is difficult. For example from the ICSID website[15], Nigeria has 11 BITs but from the UNCTAD website[16], Nigeria has 22 BITs. As will be seen shortly, such arbitration is possible under Article 25

12 See also Article 36(3) of the Convention and Institution Rule 6(1)

13 See the Nigerian Investment Promotion Commission Act of 2004 (s26), Ghana Investment Promotion Act (GIPA) 1994, South African International Arbitration Act, and Ugandan Arbitration and Conciliation Act of 2000.

14 See the various BITs in force. As at 30 June, 2010, there were over 2,700 BITs since the first BIT was concluded between Pakistan and Germany in 1959. Out of this number, countries like Comoros, Guinea Bissau, Ireland, San Marino, Sao Tome and Principe, Somalia, St Vincent and the Grenadines, Suriname, Tonga and Vanuatu entered into one BIT each while Germany has the highest number of BITs – 147. See http://icsid.worldbank.org/ICSID/FrontServlet

15 http://icsid.worldbank.org/ICSID/FrontServlet . Nigeria has entered into BITS with Algeria, Egypt, France, Germany, Netherlands, Serbia, Spain, Sweden, Switzerland, Turkey and the UK.

16 See United Nations Conference on Trade and Development Document No UNCTAD/DIAE/PCG/2008/1 – http://www.unctad.org/en/docs/diaepcb20081_en.pdf . The countries in this list are Algeria, Bulgaria, China, Egypt, France, Finland, Germany, Jamaica, Republic of Korea, Democratic People's Republic of Korea, Italy, Netherlands, Romania, Serbia and Montenegro, Spain, South Africa, Sweden, Switzerland, Taiwan Province of China, Turkey, Uganda and United Kingdom.

of the ICSID Convention if so authorised by the legislation or treaty. For example, Article 9 of the Nigeria-Netherlands BIT[17] provides thus:

> *Each Contracting State hereby consents to submit any legal dispute arising between that Contracting State and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to the International Centre for Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March, 1965. A legal person which is a national of one Contracting Party and which before such a dispute arises is controlled by nations of the other Contracting Party shall, in accordance with Article 25(2)(b) of the Convention, for the purposes of the Convention be treated as a national of the other Contracting Party.*

Similar provisions are found in all Multilateral Investment Treaties (MITs)[18] and Bilateral Investment Treaties (BITs)[19]. In the Sri Lanka Model BIT, Article 8 provides for arbitration under ICSID, or the competent tribunal of the Contracting Party in whose territory the investment was made, or the Regional Centre for International Commercial Arbitration in Cairo, or the Regional Centre for Arbitration in Kuala Lumpur, or the International Arbitration Institute of Stockholm Chamber of Commerce or ad hoc arbitration under arbitration rules of UNCITRAL. This type of dispute settlement clause is usually described as a 'cafeteria style' approach where the investor has a choice between a range of different dispute settlement fora.

Investment treaties are often silent as to the preclusive effect to be accorded to the different modes of dispute resolution afforded to the investor in a 'cafeteria-style'. However, two techniques have been employed in order to limit the investor's choice, by utilizing the concepts of estoppels and waiver. The choice being made has been described in awards as the fork-in-the-road. The second technique does not require an early election. Rather, the investor may pursue any and all domestic remedies available to him in the courts of the host State. However, once the investor has elected to pursue investment arbitration, he must waive his rights to pursue any other form of dispute resolution.

The provision of the ICSID Convention that regulates jurisdiction is Article 25[20]. It is commonly interpreted as requiring the fulfilment of five criteria. These are:

a) a legal dispute;

b) arising directly out of an investment;

c) between a contracting State; and

d) the national of another contracting State; and

e) which the parties to the dispute consent in writing to subject to ICSID.

Unless these five criteria are met, the jurisdiction of ICSID Centre can not be invoked. The inter-

17 Signed on 2 November, 1992 and came into force on 1 February, 1994

18 See Article 1120 of the North American Free Trade Agreement (NAFTA) and Articles IX and X of the ASEAN Agreement for the Promotion and Protection of Investments

19 See Article 8 of the UK 2005 Model BIT, Article X of the US 1994 Model BIT, and Article 10 of the Germany Model BIT

20 See Schreuer C H *The ICSID Convention: A Commentary*, 2nd Edn, Cambridge University Press, 2009 at 71 and McLachlan, Op cit at 56

pretation of these criteria has been complex and daunting especially in relation to the meaning of 'legal dispute', 'investment' and 'national of another Contracting State'. In this regard, there is a mix of international law and domestic law. Whereas international law regulates treaties, domestic laws regulate who is a national of that contracting state. As can be seen above, there are similar provisions in the BITs.

It is noteworthy that the Convention provides no definition of 'legal dispute' or 'investment'. All these can be ascertained from their definition in the BIT. The existence of a dispute may be in doubt in several ways. An open question may not have matured into a dispute between the parties. Or a difference of opinion may not be sufficiently concrete to amount to a dispute that is susceptible of arbitration. There may have been a dispute that has since become moot. The International Court of Justice (ICJ) has defined a dispute as "a disagreement on a point of law or fact, a conflict of legal views or interests between parties". ICSID Tribunals have adopted similar descriptions of "disputes" often relying on the ICJ's definition[21].

The disagreement between the parties must also have some practical relevance to their relationship and must not be purely theoretical. It is the not the task of ICSID to clarify legal questions *in abstracto.* The dispute must relate to clearly identified issues between the parties and must not be merely academic.[22]

Another issue is the time of the dispute. The ICSID Convention does not indicate at what time a dispute must have arisen. A guide in this area is the BIT. Some BITs apply retrospectively and others prospectively.[23]

In *Tokios Tokeles v Ukraine, supra*, the Respondent argued that the dispute did not arise directly out of an investment because the alleged wrongful acts by Ukrainian governmental authorities were not directed against the Claimant's physical assets. The Tribunal rejected this argument and held thus:

> *For a dispute to arise directly out of an investment, the allegedly wrongful conduct of the government need not be directed against the physical property of the investor. The requirement of directness is met if the dispute arises from the investment itself or the operations of its investment, as in the present case.*

Generally the interpretation of Article 25 of the ICSID Convention is contentious because that is the basis of its jurisdiction. There are arguments as to who is a national of a contracting state and how is consent in writing given. However, consent through the BIT has become accepted practice. Such a BIT must be in force at the relevant time. In *Tradex v Albania*[24], the Tribunal found that the

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21 See *Maffezini v Spain*, Decision on Jurisdiction, 25 January, 2000, paras 93, 94.; *Tokios Tokeles v Ukraine,* Decision on Jurisdiction, 29 April, 2004, paras 106, 107; *Siemens v Argentina*, Decision on Jurisdiction, 3 August, 2004, para 159; *Luchetti v Peru*, Award, 7 February, 2005 para 48; *Impregilo v Pakistan*, Decision on Jurisdiction, 22 April, 2005, paras 302, 303; *AES v Argentina*, Decision on Jurisdiction, 26 April, 2005, para 43; *El Paso v Argentina*, Decision on Jurisdiction, 27 April, 2006, para 61; *Suez at al v Argentina*, Decision on Jurisdiction, 16 May, 2006, para 29; *MCI v Ecuador*, Award, 31 July, 2007, para 63

22 See *Enron v Argentina*, Decision on Jurisdiction, 14 January, 2004, *Continental Casualty v Argentina*, Decision on Jurisdiction, 22 February, 2006, para 92 and *Pan American v Argentina*, Decision on Preliminary Objections, 27 July 2006

23 See Argentina-Spain BIT of 1991 that provides that the BIT shall not apply to disputes or claims originating before its entry into force.

24 Decision on Jurisdiction, 24 December, 1996, 5 ICSID Reports 58. See also *CSOB v Slovakia*, Decision on Jurisdiction, 24 May, 1999, paras 37-43

Request for Arbitration had been submitted before the entry into force of the BIT between Albania and Greece. Therefore it was not possible to establish jurisdiction on the basis of that treaty.

Most BITs provide for 'cooling off periods' or 'consultation period' for amicable negotiations. It is unsettled whether such provisions are merely procedural or jurisdictional and whether failure to comply vitiates consent.[25]

In practice, there are other issues like whether the pre-conditions can be avoided or relying on the "most favoured nation" clause of the applicable treaty in order to access more favourable pre-conditions in other treaties concluded by the host state of the investment[26]; and whether a state's consent to arbitration in a BIT is overridden by a contractual arbitration clause in a related investment contract[27].

This raises the issue of a contractual right and a treaty right. What separates treaty rights from contractual rights is the source of the right. The foundation of a treaty claim is a right established in an investment treaty and this exist on the plane of international law, while the basis of a contractual claim is a right established in a contract which is found in the domestic law.[28] Ultimately, each jurisdiction is responsible for the application of the law under which it exercises its mandate. Different legal consequences may well flow from the application of the different applicable law. For example, if it is a breach of a treaty, the remedies will be the substantive rights provided in the BIT while if it is a breach of contract, the domestic laws will provide its own remedies. In this regard, the provisions of Article 27 of the Vienna Convention on Law of Treaties should be borne in mind – a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty[29]. However *Noble Energy and MachalaPower Cia Ltd v Republic of Equador and Consejo Nactional de Elictricidad*[30] is an example of a pragmatic 'mix and match' approach in which the arbitral tribunal exercised the power to determine investment treaty question and the contract claim in the same proceedings when the claims are related.

In examining the provisions of Article 25 of the ICSID Convention, it is pertinent to also examine the effect of Article 26 of the Convention on the issue of 'consent to submission to the jurisdiction of ICSID'. Article 26 of the Convention provides thus:

> Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

It is settled that the consent required of a state is met by the State's consent given in the treaty while

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25 In *Roland S Lauder v The Czech Republic*, Final Award, September 3, 2001, it was held that a six-month waiting period is not a jurisdictional provision and it was waived: www.cetv-net.com/arbitration.asp and *Bayindir v Pakistan* (Jurisdiction) ICSID Case No. ARB/03/29. Compare *Enron Corporation v Argentine Republic* delivered on 14 January, 2004 where it was held that such a six-month requirement was jurisdictional: www.asil.org and *Goetz v Burundi* (Award: First Part) 6 ICSID Rep 3,

26 See *Maffezini v Spain*, ICSID Case No. ARB/97/7, January 25, 2000 (2001) 16 ICSID Review – Foreign Investment Law Journal 212 where Maffezini, a Spaniard relied on another BIT entered into with Chile.

27 *Lanco v Arginetina*, ICSID Case No. ARB/97/6, December 8, 1998, 40 I.L.M. 457, paras 39-40 where it was held that the BIT took precedence over the contractual claim as long as the arbitration claims allege a cause of action under the BIT.

28 Redfern & Hunter, Op Cit at 576 and McLachlan et al, Op Cit at 99

29 See also Article 3 of the ILC's Articles on State Responsibility

30 ICSID Case No. ARB/05/12

that of the investor is met by submission of the claim to arbitration[31]. This being so, the exclusion of other remedies under Article 26 will not apply vis-à-vis the investor until such time as he files his request for arbitration. Mclachlan, et al[32] has comprehensively examined this article and came to the following conclusion:

i) The choice of ICSID arbitration is only to be treated as exclusive once it has been commenced. Any prior proceedings in national courts or pursuit of other alternative remedies will be considered in order to determine whether the state has failed in its substantive obligations under the treaty.

ii) The right to pursue ICSID arbitration for breach of treaty is not waived under Article 26 by the investor's prior invocation of domestic or contractual remedies.

iii) The exclusivity of ICSID arbitration in the case of treaty claims will, however, only relate to the investment dispute which forms the subject of such claim.

It is submitted that the examination of Article 26 boils down to the issue of the distinction between treaty and contractual claims. Furthermore the tribunal jurisprudence on this subject shows that it is difficult and controversial. Be this as it may, the examination of sources of the applicable laws will assist in resolving the issues arising from the treaty/contract divide.

The ICSID Convention will also supply the choice of law rule pursuant to which the law governing the substantive rights in the arbitration will be selected. Article 42 of the ICSID Convention provides:

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on conflict of laws) and such rules of international law as may be applicable.

(2) The Tribunal may not bring in a finding of *non-liquet* on the ground of silence or obscurity of the law.

(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

ICSID REVIEW REGIME.

This refers to the method by which the Center reviews its final award. The ICSID Convention spelt out three method by which it reviews final award and the include; interpretation, revision and annulment[33]. Article 53(1) of the Convention prohibits parties from challenging the Centers award in any national or international court until the party exhaust the internal remedy provided by the center which is appealing to the review regime and it is mandatory for parties. Thus, before any party can apply for any of the procedure for review of award, a non refundable fee of US$10,000 must be paid to the center in advance as this is a requirement set out in the January 2008, Schedule of Fees , hence, Articles 50,51 and 52 of the Convention and Arbitration Rules 50 to 55 set out the proce-

31 States can give their consent in three ways: by contract, domestic legislation and treaty. See A R Parra 'The Role of ICSID in the Settlement of Investment Disputes' (1999) 16(1) ICSID News 5. In Nigeria, the NIPC Act (s26) gives such consent by legislation where contracts and the various BITs also give such consent. See also Schreuer Op Cit at 190

32 McLaclan C, Shore L and Weiniger M. *International Investment Arbitration: Substantive Principles* (Oxford University Press: 2008) 98

33 Reed at al, Op Cit at 159

dures for interpretation, revision and annulment.

For interpretation procedure, just like the ordinary meaning of interpretation, a party is allowed to apply for the awards scope or meaning or for both through the Secretary –General, this procedure does not review nor alter the merit of the award. While revision procedure includes amending the award based on a new fact. A party applying under this procedure must show that the fact was known and that he lacked knowledge of the said fact as at the time of the award, and where the party discovers this fact a revision request must be filled in 90 days of discovering the fact and within three years after the award was rendered where the part fails to make the request during the stated period, the party will be barred from making a request.

Annulment refers to setting aside an award in whole or a part. Under annulment a new tribunal must be formed unlike the other procedure where the original tribunal can be reconstituted. A successful annulment invalidates the award and never amends the award as the parties are granted the opportunity to arbitrate afresh. Annulment renders the award null and void. Annulment can be granted under certain grounds and they are[34]

that the tribunal was not properly constituted

the tribunal exceeded its power

corruption by a member of the tribunal

departure from the rules of procedure

the award was not based on any reason.

Once a party can establish and prove any of the grounds stated above and fills a request within the stipulated time, the award will be annulled and the parties will get back to status quo before the award and arbitrate again on the same fact this was the case in *Amco Asia v Indonesia*[35].

Annulment Proceedings[36] is one area of conflict between the capital exporting countries and capital importing countries in relation to ICSID[37]. Quite unlike the provisions in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards where domestic courts can set aside an aside, there is no such provision in ICSID. While the capital importing countries would like their courts to be involved in the process of enforcement or setting aside an award, the capital exporting countries prefer the ICSID, where the only remedy available to an aggrieved party is application for annulment. While the capital exporting countries see annulment proceedings as one of the strengths of ICSID, the capital importing countries see them as infringing on their sovereignty. Over the years, there have been conflicting decisions on the interpretation of Arts 50 and 52-53 of the Arbitration Rules bearing in mind that ICSID excludes any appeal or other remedy except those provided in ICSID[38]

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34 ibid

35 ICSID Case No. ARB /81/1 Award (20 November 1984), ICSID Reports 1 (1993) page 413

36 See Reed et al, Op Cit at 162

37 See also Arts 50-52 of the Convention.

38 See *Klockner v Cameroon ,* ICSID Case No. ARB/81/2, Award, 21 October, 1983 *and Amco Asia v Indonesia* 1CSID Case No. ARB/81/1, Award, 20 November, 1984 (referred to as the first generation of annulment proceedings regarded as turning the annulment proceedings to appellant systems); *MINE v Guinea* , ICSID Case ARB/84/4, Decision on Annulment (22 December, 1989) (second generation – ruled for failure to state reasons); *Wena Hotels v Egypt,* ICSID Case ARB/93/1, Decision on the Application for Annulment, 5 February, 2002, *Vivendi v Argentina ,* ICSID Case No. ARB/97/3, Decision on Annulment, 3 July, 2002 *and CMS v Argentina* , ICSID Case No. ARB/01/18, Decision on Annulment, 25 September, 2007 (third generation – raised fresh issues including the role of ICSID Secretariat) and *Sempra v Argentina,* ICSID Case No.

RECOGNITION, ENFORCEMENT AND EXECUTION OF ICSID AWARDS.

Section 6 (Articles 53-55) of the ICSID Convention deals with recognition and enforcement of arbitral award under the Convention. Article 53 provides that the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in the Convention while Article 54 provides that each Contracting State shall recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State[39]. Article 55 provides that nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

Generally the effectiveness of any award is on its enforcement. An award without enforcement is a mere decision. Thus the ICSID Convention has carved out the various ways of enforcing its awards where the losing party fails to voluntarily comply with the decision of the tribunals; these methods are recognition, enforcement and execution[40] .

Recognition confirms the res judicata effect of an award that is the fact that issues resolved in the award may not be re-examined in another court or arbitral panel.[41]

Execution generally involves the assistance of local courts to ensure that the award is satisfied by the losing party, while enforcement on the other hand means declaration that an arbitral award is enforceable. Enforcement is also another way of referring to execution .

It is noteworthy that these procedure for enforcement of award only apply to awards under ICSID Convention and not award under Additional Facility Rules, or the UNCITRAL Rules as these other awards are governed by New York Convention.[42]

PARALLEL PROCEEDINGS[43]

The very nature of investment arbitration gives rise to the possibility of parallel proceedings[44] or the determination in another forum which may be said to affect the issue to be determined by the investment tribunal. This is so because the foreign investor usually enter into a contract in the host state that provides its rights and remedies while the BIT provides its own substantive rights and remedies too[45]. Similarly, it is possible that more than one investment tribunal is constituted by a different

ARB/02/16, Decision on Annulment, 29 June, 2010 *and Enron v Argentina,* ICSID Case No. ARB/01/3, Decision on Annulment, 30 July, 2010 (fourth generation – defence of necessity under customary international law and BIT failed): Promod Nair, 'ICSID Annulment Awards: The Fourth Generation' Global Arbitration Review, Volume 5, Issue 5 (October 2010): www.GlobalArbitratioinReview.com. See also C Schreuer 'Three Generations of ICSID Annulment Proceedings' in *IAI International Arbitration Series, No. 1, Annulment of ICSID Awards,* eds. E Gaillard and Y Banifatemi (New York, Juris Publishing, Inc. 2004

39 See the Nigerian International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act of 2004 which provides that such award shall have effect as if it were an award contained in a final judgment of the Supreme Court and the award shall be enforceable accordingly.

40 Reed et at, Op cit at 179

41 ibid

42 Ibid.

43 See Cremades M and Lew J D M (eds) *Parallel State and Arbitral Procedures in International Arbitration* (Paris: ICC Publications, 2005) and McLachlan Op Cit at 79

44 Baptista L O 'Parallel Arbitrations – Waivers and Estoppel in Cremades and Lew (eds) *Parallel State and Arbitral Procedures in International Arbitration, Op Cit* at 127-151

45 The substantive rights in a BIT include, fair and equitable treatment, full protection and security, no arbitrary or discriminatory measures impairing the investment, no expropriation without prompt, adequate and effective compensation, national and most favoured nation treatment.

investment treaty and may be asked to rule upon the same underlying factual dispute[46]. In such a case, should one tribunal stay its proceedings in deference to the alternative tribunal or insist on the priority of its own process[47]? In the case of multiple claims between the same parties on the same subject matter, to what extent are the principles of *res judicata*[48], *lis pendens*[49] *and electa una via*[50] to be applied? Is there any international instrument on *lis pendens when, f*rom the same cause of action parallel proceedings are pending involving the same parties[51]*?* There is an obvious risk that, if the proceedings continue, this may result in two irreconcilable judgments. Will one forum decline jurisdiction or suspend proceedings on the basis of *forum non conveniens* or the 'mechanical first-seised approach'? Alternatively, should both sets of proceedings continue and rules of *res judicata* could be used to prevent two judgments/awards. If there are two judgments/awards, rules on recognition and enforcement could be used to decide which one is to have priority. Unfortunately, ICSID does not have such rules but Contracting States are obliged to enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state[52]. There is also nothing like judicial precedent in arbitral proceedings.

CONCLUSION.

With ICSID coming into force in October 14, 1966, the Convention has removed the major impediments to free flows of private investment posed by non-commercial risks and absence of international methods for settlement of investment dispute. However some of the terms of agreement laid down by ICSID make it difficult for third world country to sign the Convention. There is need to revise some of the terms of agreement to accommodate the developing country. We submit that the Convention is overdue for review.

Some Contracting States are now denouncing the Convention[53]. In April 2007, Bolivia, Venezuela, Nicaragua and Cuba proclaimed their intention to withdraw from the International Monetary Fund and the World Bank. The intention was borne out of the hostility towards international arbitration and the perception in many Latin American countries that international investment arbitration is

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46 As was the case with the Lauder Cases, supra based on Czech-Netherlands BIT and Czech-US BIT but with the same facts and different results.

47 See Fawcett J J (ed) *Declining Jurisdiction in Private International Law* (Oxford: University Press, 1995) 27

48 See Sheppard A 'Res Judicata and Estoppel' in Cremades abd Lew (eds) *Parallel State and Arbitral Procedures in International Arbitration, Op Cit* at 219-267

49 See Vicuna F O 'Lis pendens arbitralis' in Cremades and Lew (eds) *Parallel State and Arbitral Procedures in International Arbitration, Op Cit* at 207-218

50 See McLachlan et al, Op Cit at 95

51 See Article 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968.

52 See Art 54 of the Brussels Convention

53 Under the rules of customary international law as codified in Art 54 of the Vienna Convention on the Law of Treaties, 1969, a state can withdraw from a treaty if the treaty so provides or at any time by consent of all the parties after consultation with the other Contracting States.. Art 71 of ICSID provides that any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice. However, Art 72 of ICSID provides that such denunciation shall not affect the rights or obligations under this Convention of that State or any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depository. See also Schreuer, Op Cit at 257

biased towards investors[54]. Accordingly in May 2007, Bolivia submitted a notice of denunciation of ICSID. Ecuador has followed[55]. The Ecuadorian President stated that it was withdrawing from ICSID "for the liberation of our countries because (it) signifies colonialism, slavery with respect to transnationals with respect to Washington, with respect to the World Bank". At that time ICSID was handling $12 billion worth of requests for arbitration over several disputes against Ecuador (Argentina had over 30 claims and by 2009 had 46 treaty cases[56] outstanding against it!!). However a State's withdrawal does not affect its obligations under the Convention when it has given consent[57] to the jurisdiction of the centre before its notice of denunciation was received.[58] The effect of the denunciation depends on the duration of the respective BITs.

One challenge faced by capital importing countries is whether to submit to ICSID arbitration or to insist that in the contract or treaty, the dispute resolution mechanism should be through national courts. This is the model that Australia has now adopted.

54 See Gaillard E 'The Denunciation of the ICSID Convention' in *International Arbitration Law*, Vol 237, No. 122,

55 http:www.ejiltalk.org/Ecuador-denounces-icsid-much-abo-about-nothing/

56 *http:isslerhall.org/drupal/content/argentina/icsid-cases*

57 See Art 25(1) of ICSID that establishes the conditions for the jurisdiction of ICSID.

58 See also Art 70(1) of the Vienna Convention on the Law of Treaties, 1969