Global Journal of Politics and Law Research
Vol.6, No.4, pp.50-53, June 2018
Published by European Centre for Research Training and Development UK (www.eajournals.org)

THE NECESSITY OF REFORMS WITHIN THE ARBITRATION SYSTEM UNDER THE ICSID CONVENTION: MYTH OR REALITY?

Konstantin Volkov

Ph.D. Candidate, Law School, Xiamen University

ABSTRACT: *The present paper analyses the existing arbitration system under the ICSID Convention and explores what advantages and deficiencies the said system consists of. On the grounds of an objective appraisal of the positive and negative sides of the above-mentioned arbitration system, which are contained in the available literature, relevant to the topic, and selected arbitral practice, the proposed work explores how realistic the necessity of reforms of the said system is. Furthermore, based on the found results, the paper discusses the question whether the arbitration system under the ICSID Convention has to be only reformed or replaced as a whole. It argues that the system of rules, regulating the arbitration proceedings under the mentioned convention, has many deficiencies, but this in no way means that it has to disappear.*

KEYWORDS: ICSID Convention, Arbitration System, Reforms, International Investment Law.

INTRODUCTION

In the recent years, many critiques against the existing arbitration system under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (hereinafter referred to as ICSID Convention) have been raised, followed even by voices from some Latin American countries for withdrawal from the Convention. While some of the problems of the arbitration system pointed out, are objectively existing, many of them could be considered rather as a "conspiracy theory", the existence of which has not been proved so far in reality. Nevertheless, the arbitration system under the ICSID Convention has its strengths, which characterize it as a unique system and could justify the efforts for maintaining the system and its further improvement and development. It is clear that reforming of the existing system and creating a completely new one both are ways to change the *status quo* and eventually to improve it. However, from the pragmatical point of view, it is questionable how reasonable the creation of a new arbitration system, different from the existing one under the ICSID Convention, would be. Bearing in mind the strengths of the said system, which will be presented shortly beneath, it can be argued that maintaining the old system would be economically and legally more reasonable than simply substituting it with another system of rules, the functioning of which has never been proved in reality. Since there is no proof on the complete exhaustion of methods for reforming the old system, the emotional dissatisfaction with it cannot justify the creation of something, which might be even more harmful to the peaceful settlement of investment disputes.

Does the Arbitration System under the ICSID Convention has any Advantages?

Starting with the positive sides of the arbitration system under the ICSID Convention, it has to be mentioned, that this is the only self-contained system in the world, specialized in resolving investment disputes, where the one party is a host state of the investment and the other is a

ISSN: 2052-6350(Print) ISSN: 2052-6369(Online)

private legal subject: an investor. Its creation is meant to provide an impartial mechanism for investment dispute resolution and so to facilitate further the investment inflow into host states. Through concrete provisions of ICSID Convention, regulating, in particular, finality and compliance of arbitral awards, availability of qualified arbitrators, transparency of the proceedings etc., the arbitration system under the Convention contributes to the development of the rule of law and the creation of a favorable investment environment. The result of the impact of this system can be seen in the increase of the number of cases, brought before the International Center for Settlement of Investment Disputes (hereinafter referred to as ICSID).

Appraisal of the Negative Sides of the Arbitration System under the ICSID Convention

However, there are some problematic issues as well, which raise questions about the necessity of existing of the arbitration system under the ICSID Convention.

The first group of critiques includes rather conspiracy-theories-statements, that the system is broken and has to be replaced as a whole. Some examples of populist arguments are that the arbitration system favors in most cases the private investors and does not take into account the interests of the host states. However, statistical data of the outcome of ICSID's cases show that only in around 50% of the disputes the arbitral awards were ruled in favor of the investors. The next argument that each arbitrator should decide once in favor of the investor and once- of the host state, so to pretend that the arbitration system under the Convention is balanced regarding the outcome of the cases, does not rest upon concrete evidence either. Some parties use empirical data to raise the question that the arbitration system, in reality, does not contribute to increasing the investment inflow into host states. However, the quantity of investment is, objectively speaking, not the only, even not the major factor for measuring the quality and necessity of the arbitration system under ICSID Convention. Finally, there is a concern that the investment arbitration system is limiting the sovereignty of the host states by preventing them from taking measures for regulating i.e. public health, public order, and environment. This statement lacks again legal justification. Firstly, an arbitral award cannot limit the state's sovereignty, but the question is rather about compensation for economic losses or damages. Secondly, the host state has voluntarily entered into an agreement with the investor, according to which each party has certain rights and obligations. If the host state violates the investor's rights, it has to bear the negative legal consequences of its behavior.

Much more relevant for the conclusion whether the arbitration system under the ICSID Convention is broken and what measures should be taken is the analysis of the second group of critiques, which is based on existing real problems of the system. Beneath are discussed some of the main issues representing this group of problems.

The first area concerns compliance with the arbitral awards by the host state. There are already concrete examples where the host state has refused to pay the amount under the award rendered against it by an arbitral tribunal under the ICSID Convention Arbitration Rules, although the award is binding and directly enforceable according to Art. 54 of the Convention. However, there are no rules, which stipulate the legal consequences in case of non-compliance with the above-mentioned provision. Such a situation could discourage investors from seeking support under ICSID Convention, which poses a danger to the effectiveness of the whole arbitration system under the Convention.

The second issue relates to the annulment of arbitral awards. Originally, it is designed to be an exceptional remedy, through which the ad hoc committee can confirm the initial award or annul

ISSN: 2052-6350(Print) ISSN: 2052-6369(Online)

it on specific and limited grounds. However, the recent trend is increasing the number of requests for annulment of arbitral awards under ICSID Convention. The new development could affect in a negative way the confidence in the effectiveness of the system and its ability to render final decisions. Moreover, some ad hoc committees tend to evaluate the initial award using a broad interpretation of the legal grounds for annulment under ICSID Convention, acting in this way as an appellate body. By doing so they disregard the difference between appeal and annulment and exceed the power, granted to them by the Convention. Concerns are raised also towards the way of constitution of these committees. Their members are often councils, arbitrators, chairpersons in important cases, which questions their impartiality in the concrete annulment procedures.

Furthermore, problems can be seen also in the existence of conflicting decisions. In many similar cases, different tribunals have been taking completely opposite views. It is true that the tribunals do not have any formal obligation to follow previously rendered awards. However, the lack of consistency, which is the current situation in many cases before ICSID, questions, on the one hand, the equality and fairness of the proceedings. On the other hand, it makes impossible to evaluate correctly the chances for success of each disputing party. In order to overcome the existing problem with consistency in dispute resolution within the current arbitration system under ICSID Convention, different proposals have been made: starting from introducing of a mechanism for preliminary ruling, going through creating of improved review facility and, finally, suggesting of a constitution of a completely new appellate body. Consequently, although the principle of binding precedent does not apply to ICSID arbitration, a certain degree of quality control over the ICSID system has to be maintained. Moreover, the right measure for improvement of the system, mentioned above, could also ensure the substantive correctness and legitimization of the arbitral awards.

Concerns about the current level of transparency in the arbitral proceedings under ICSID Convention have been also pointed out. The main argument for increasing the transparency level, in particular, allowing public access to documents and hearings, participation by third persons and non-disputing parties in the proceedings, publication of the awards etc., is that compared to commercial arbitration, international investment arbitration raises public interest issues. In order to ensure credibility in the arbitral awards, reforming of the existing system and granting a higher level of transparency is certainly needed.

Finally, problems exist in the changed nature of the arbitral proceedings. Arbitration is originally meant to provide fast and money-saving resolution of the dispute. However, bearing in mind the above-discussed shortcomings of the arbitration system under the ICSID Convention, investment arbitration has become in the recent years time-consuming and expensive procedure, questioning the effectiveness and reasonability of the system as a whole. There are certain efforts by ICSID as an institution to overcome this group of problems. Nevertheless, the case reality has not changed much.

CONCLUSION

Bearing in mind the analysis above, it can be concluded that there are problematic issues, which are rather a result of populist statements and cannot give an objective answer to the question whether the arbitration system under the ICSID Convention is broken. However, real problems exist as well, which have led to many discussions among practitioners and academia, followed

ISSN: 2052-6350(Print) ISSN: 2052-6369(Online)

by justified proposals for reforming the system. Since it has to be reformed because of its deficiencies, it will not be wrong to say that the system is broken. Nevertheless, taking into account the positive sides of the arbitration system, discussed at the beginning, a conclusion can be made that a reform should be conducted within the broken system, which in no way should lead to full withdrawal from the ICSID Convention and total fragmentation of the investment arbitration system. The last would bring many legal uncertainties within the system of rules, regulating investment dispute settlement through arbitration, especially when we think about conflicting decisions, rendered by arbitral tribunals, which do not stand in a subordinate relation between each other, or enforcement of these decisions. Such a situation will certainly not contribute to the improvement of the arbitration system, hence, the voices for complete substitution of the said system under the ICSID Convention with a new one lack logical and legal justification.

REFERENCES

Calamita, N. Jansen et al. (eds.), '*The Future of ICSID and the Place of Investment Treaties in International Law*' in *Current Issues in Investment Treaty Law (Vol. IV)*, British Institute of International and Comparative Law 2013.

Claxton, James, *Lecture on ICSID Arbitration*, Xiamen University, June 22, 2017.

ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, ICSID Secretariat Discussion Paper, October 22, 2004.

Kryvoi, Yaraslau, *International Centre for Settlement of Investment Disputes (ICSID)*, Kluwer Law International 2013.

Laird, Ian A. et al., *Investment Treaty Arbitration and International Law*, JurisNet LLC 2012.

McLachlan, Campbell et al., *International Investment Arbitration. Substantive Principles*, Oxford University Press 2010, 2nd ed.

Yannaca-Small, Catherine *'Transparency and Third Party Participation in Investor-state Dispute Settlement Procedures'* in *International Investment Law: A Changing Landscape. A Companion Volume to International Investment Perspectives*, OECD Publishing 2005.

Yannaca-Small, Catherine, *'Improving the System of Investor-State Dispute Settlement'* in *OECD Working Papers on International Investment*, OECD Publishing 2006/01.

ISSN: 2052-6350(Print) ISSN: 2052-6369(Online)