

ICSID AT A CROSSROADS

William Rowley QC of 20 Essex Street and McMillan Binch Mendelsohn LLP says ICSID is too important to be run part time by the World Bank's general counsel

Resolving commercial disputes efficiently is vital in the modern business world. Until relatively recently, the burden of doing so fell on those national court systems that seemed to capture the bulk of such disputes. But economic liberalisation and technological change have been altering the global economy. In particular, business has responded to the fall of trade barriers by expanding abroad and forging cross-border partnerships and joint ventures of every description. The growing multiculturalism of business and trade alone would have jet-propelled growth in international arbitration. But, because of the uncertainties inherent in court processes and because, for most international transactions, no national court is likely to be acceptable to both sides, the stage was set for processes and institutions more suited to resolving transborder disputes.

Unsurprisingly, the concept and number of international commercial arbitrations have grown enormously. And, with some 2,300 bilateral investment treaties now in place, the increase in investor/state arbitrations – especially those conducted under the auspices of ICSID – has been nothing short of extraordinary. In the last five years, ICSID has seen a 150 percent increase in the number of arbitrations filed over the total number of cases instituted in its first 35 years.

ICSID's history

The World Bank recognised in the early 1960s the need for an investor/state dispute settlement process if flows of foreign direct investment into developing countries were to be fostered. To create such a process, the World Bank sponsored the drafting of the Convention on the Settlement of Investment Disputes between States and Nationals of other States which was opened for signature on 18 March 1965. The 'ICSID Convention' became effective a year and half later, and 14 October 2006 will mark its 40th anniversary of entry into force. It will also mark the 40th anniversary of the centre it created: the International Centre for Settlement of Investment Disputes.

Today, 142 states have ratified the ICSID Convention and are 'contracting states'. In addition to providing facilities for conciliation and arbitration under the convention, ICSID has, since 1978, had Additional Facility Rules authorising its secretariat to administer certain

types of proceedings between states and foreign nationals that otherwise fall outside the scope of the convention.

Looking back, it might fairly be argued the dispute settlement mechanism that was established was ahead of its time. For several decades, only a few cases were brought to ICSID. From then on, things changed. In the next 10 years, that number almost doubled, and by 2000, only four years later, the number had doubled again. Today, the total of registered cases stands at 200, with more than 100 cases pending.

Moreover, of the 2,300-odd bilateral investment treaties now in existence, more than 1,500 provide for arbitration administered by the centre. In addition, a number of multilateral regional and sectoral instruments, such as the European Energy Charter Treaty and the North American Free Trade Agreement incorporate references to the ICSID mechanism.

The need for ICSID is undoubted. And in recent years it has gained a reputation as a first class arbitral institution. Against this backdrop, it is timely to ask whether the centre receives sufficient support from its governmental stakeholders to meet the needs of the global investment community. It may also be timely, in the light of Roberto Dañino's resignation as general counsel at the World Bank, and with it, from the position of secretary-general of ICSID, to look at the centre's governance structure. Specifically: is it appropriate to continue combining the roles of bank general counsel and ICSID secretary-general.

Continuity, consistency, expertise

The proliferation of treaties containing consents to ICSID arbitration is a testament to the centre's success establishing itself as an arbitral institution. More importantly, though, each consent can be seen as a legal remedy that a party may seek to rely on in the future. Seen from this perspective, the members of ICSID's administrative council must recognise that continuity, consistency and technical expertise are critical to the centre's future success.

When a party names an arbitral institution and its rules for use in the event of a dispute, be it under a contract or in a treaty, that party is making a long-term investment: it is relying on that institution existing and being effective years from now. More pertinently, the party is relying on the institution being able to offer the same type and quality of arbitration in the future. This is why the world's leading arbitration institutions, such as the ICC International Court of Arbitration, the London Court of International Arbitration or the American Arbitration Association, generally refrain from modifying their rules more than once every 10 years. Here, consistency and predictability are virtues that transcend the need to respond to novel issues.

For an institution such as ICSID, these concerns are multiplied. The minimum term of

bilateral investment treaties is generally 15 to 20 years; most will remain in force indefinitely. Giving effect to the expectations of states at the time they agreed to the ICSID arbitration process is, and should be, a major concern for the centre's stakeholders and administrators.

Popularity brings responsibility

If the growth in the ICSID centre's case load is a positive, it comes with a negative. The rapid case expansion has strained a small organisation that until recently was staffed by only a handful of lawyers, with the general counsel of the World Bank, by tradition, serving as its secretary-general. Even now, the centre remains relatively small – nowadays about a dozen lawyers work there.

But its prominence today suggests that the time is ripe for stakeholders to ensure it has the financial backing, governmental support and 'ICSID-arbitration focused' senior management required to fulfil its growing responsibilities.

Achieving consistency and enhancing technical expertise was less of a challenge a few years ago when the centre's caseload was very limited. Today, the organisation and its secretary-general face an entirely different state of affairs. The burdens associated with the popularity of ICSID-arbitration cannot easily be discharged by a chief executive who, of necessity, can act only part-time.

The convention requires the secretary-general to perform a variety of administrative functions, including as legal representative, registrar, and principal officer of the centre. The responsibilities associated with these three – substantial – roles are described in various provisions scattered throughout the convention, the Administrative and Financial Regulations, the Institution Rules, the Conciliation Rules and the Arbitration Rules. These responsibilities extend to:

- representing and administering the centre (ie managing its external relations and internal administration, including all budgetary matters);
- keeping all records;
- providing administrative support in conciliation and arbitration proceedings;
- publishing information on the centre's activities;
- performing various functions under the additional facility rules; and
- acting as the appointing authority for non-ICSID arbitrations.

Obviously, much of the day-to-day work underlying these responsibilities can, and should be, delegated. But a number require personal attention.

One of the most important functions of the secretary-general is the screening of requests to commence arbitral proceedings. Screening is key, as it serves to avoid the initiation of proceedings that are manifestly outside the centre's jurisdiction. But it is also fact-driven and time-consuming, and

ultimately requires the exercise of a considered judgment. The secretary-general has similar powers to control access to the centre's additional facility rules.

A second important function arises out of the secretary-general's role as appointing authority in cases where the parties cannot agree on the appointment of the presiding arbitrator (or where the respondent fails to appoint the second arbitrator). In well over half of the cases brought to ICSID, at least one arbitrator, usually the third, is selected by the secretary-general, or recommended by him or her as a candidate for appointment by the chairman of the administrative council. In these cases, the centre – rightly – goes to great lengths to consult with the parties on the proposed candidates, by engaging in several rounds of consultations before an appointment can be made. Again, choosing the right candidate to preside in a variety of highly sensitive cases requires not only time, but knowledge of the players in the global arbitration community.

In addition to the secretary-general's roles screening requests and acting as appointing authority, the convention and the rules and regulations governing the ICSID process charge the secretary-general with a range of responsibilities concerning the administration of pending cases. Most of these tasks can be and are carried out on a day-to-day basis by the secretariat's legal counsel, who are appointed as tribunal secretaries. With the growing number of cases, and taking into account the complexities of the factual and legal issues in dispute, ICSID's tribunal secretaries have come to perform an important task in contributing to procedural consistency in the cases pending before the centre. But there will be an increasing number of cases where, because of the importance of the issues, the secretary-general's personal attention will be required. A good example occurs with challenges to arbitrators.

Under the convention and additional facility rules a party may challenge an arbitrator for lack of independence. Such challenges are normally decided by the other two arbitrators. However, where these are divided, the decision falls to the chairman of ICSID's administrative council (a role filled by the president of the World Bank) who would only be wise to act on the basis of detailed consultation with the secretary-general. The same scenario occurs where an entire tribunal is challenged.

Similarly, when the secretary-general is designated as the appointing authority under the UNCITRAL Rules (now happening more often) he or she must decide challenges on an arbitrator's independence and impartiality; or on that of the entire panel. Given the stakes and political sensitivity involved in many investor/state arbitrations, this role needs to be carried out with all due process and considerable care. It is not delegable; and it is not a job to be undertaken

with one's left hand!

Moreover, in these decisions, the secretary-general lacks the support available in other established arbitral institutions. In the case of the London Court of International Arbitration or the ICC, for example, a standing court made up of highly reputed and experienced arbitrators either makes the decision on challenges or supports the institutional decision-making process.

Several other of the secretary-general's functions in pending proceedings are essentially non-delegable. These include notifications certifying the due constitution of tribunals, motions to stay proceedings for non-payment of advances on costs and ordering the discontinuance of proceedings before a tribunal is constituted. Major procedural questions and overall policy questions regarding case administration are also always forwarded to the secretary-general.

General counsel of the World Bank is a full-time job

Realistically, the responsibilities of the general counsel of the World Bank preclude the holder of that office from having a second – important – job. The bank now has 184 member countries and employs a staff of close to 10,000 in over a hundred countries. Its reach is enormous, and overseeing its legal affairs and responsibilities is daunting. Those who have been general counsel have all had the proper credentials. One might observe, without wishing them any discredit, that none possessed deep expertise in international arbitral issues.

The time has come, the Walrus said,...

Given the huge responsibilities on whoever is general counsel of the World Bank and given the global arbitration community's heavy reliance on the ICSID centre there appears to be a strong case for giving ICSID independence – not from the World Bank as such, but from the bank's legal department. The centre, after all, is a separate international organisation, established under its own multilateral treaty.

Happily, there is no legal impediment to such a change. There is no provision in the convention requiring the general counsel of the bank to serve as secretary-general, (as is the case for the bank's president who is ex officio chairman of the centre's administrative council). Rather, the amalgamation of the two functions has been an expediency of convenience and economy. In the early years, there was no need to create an expensive new bureaucracy with the insignificant demand on the centre's services.

But times and needs have changed. As an institution, ICSID has proved its usefulness to the world over the last four decades. Having done so, it is destined to be called upon in increasing numbers of investor/state disputes. It now needs to be supported and structured to ensure it can look to future challenges with confidence. It will be much better positioned to do so with its own,

full time secretary-general in charge.