EVALUATING THE EFFICACY OF ICSID RULES IN INVESTMENT ARBITRATION: ARE THEY INDISPENSABLE FOR RESOLVING ENERGY AND NATURAL RESOURCES DISPUTES?*

Abstract
The International Centre for Settlement of Investment Disputes (ICSID) has long been a cornerstone in the resolution of investment disputes, particularly in the energy and natural resources sectors, where the stakes are often high and complex. This paper evaluates the efficacy of ICSID rules in investment arbitration, with a specific focus on their role in resolving disputes arising in the energy and natural resources sectors. The study examines whether ICSID rules are indispensable for achieving fair, efficient, and enforceable outcomes in these specialised disputes. Through an analysis of case law, arbitral awards, and scholarly commentary, the study explores the strengths and limitations of ICSID's procedural framework, including its transparency, enforceability, and adaptability to the unique challenges posed by energy and natural resources disputes. The findings suggest that while ICSID rules provide a robust and widely accepted framework for resolving investment disputes, certain limitations, such as concerns over procedural delays, costs, and perceived biases, may undermine their effectiveness in some cases. The study concludes by offering recommendations for potential reforms to enhance the efficacy of ICSID rules, ensuring they remain a vital tool for resolving energy and natural resources disputes in an increasingly complex global investment landscape.

Keywords: ICSID, Investment Arbitration, Energy Disputes, Natural Resources, Dispute Resolution, Arbitration Rules, Enforceability, Procedural Efficiency.

1. Introduction

Energy investments are complex business as it involves many players (the host country where the investment will take place, lawyers that will negotiate and draft the agreements, and financial lenders who will finance the project, etc.) that require sophisticated technical skills.[1] Due to the long-term nature of energy investments, the interest of investors could be adversely affected by expropriation, nationalisation, an increase in taxes or royalties, price fluctuation, and legal changes while the contract subsists.[2] For example, the players that negotiated the contract, the economic terms agreed on, and the government that sanctioned the transaction changes most of the time. These changes often lead to disputes between the investors and the host country or its representatives. Similarly, the new government may decide not to honour the earlier agreement entered by the previous administration due to political reasons and unilaterally cancel or reverse what was agreed on earlier. In the event a new government reverses or cancels an agreement entered by its predecessors, investors will suffer a significant financial loss because investment in energy projects requires front-end investments and host countries hardly contribute financially at the beginning of the operation.

Furthermore, the extractive industry is known for sudden shifts in the price of raw materials. That presents the possibility for the host country to demand more from the share of product proceeds from the investors (more than what was agreed on) when the price of the commodity goes down. These present serious problems to the investors, who may have borrowed money to invest and have a financial obligation to repay the debt with interest within a certain number of years. With such probable political, economic, and non-commercial risks, investors whose large capital and technical skills are involved, as well as third parties like banks with stakes in such contracts, invoke arbitration clauses to safeguard their interests.[3] Arbitration is a form of alternative dispute resolution (ADR) where parties agree to resolve their disputes outside of traditional court systems. It is a consensual process, meaning that parties voluntarily submit their disputes to one or more arbitrators who render a binding decision, known as an arbitral award. In other words, 'the gaps left by the traditional methods of dispute settlement have led to the idea of offering direct access to effective international procedures, especially arbitration.'.[4]

Arbitration can be either ad hoc or institutional, depending on the framework chosen by the parties. Ad hoc arbitration occurs when the parties agree to resolve their dispute without the involvement of an administering institution. In this case, the parties themselves determine the rules and procedures governing the arbitration process. This includes selecting the arbitrators, setting timelines, and deciding on the applicable law.[5] Ad hoc arbitration is often governed by the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 1966, which provides a flexible framework for conducting arbitration proceedings. Ad hoc arbitration is typically chosen when parties seek greater control over the process and wish to avoid the administrative fees associated with institutional arbitration. However, it requires a high level of cooperation between the parties, as they must agree on all procedural aspects.[6] On the other hand, institutional arbitration is conducted under the auspices of a recognised arbitration institution, such as the International Chamber of Commerce (ICC), the London Court of International

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[1] Cameron Peter, *International Energy Investment Law: The Pursuit of Stability* (Oxford University Press, 2010)
[2] Fabio Solimene, Political risk in the oil and gas industry and legal tools for mitigation, *International Energy Law Review,* (2014), (34) 81
[3] Georges R Delaume, *Transnational Contracts: Applicable Law and Settlement of Disputes: Law and practice* (Oceana Publications, 1983), 307–309
[4] Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012) 232
[5] Clare Stanley, *Traps for the Unwary: The Pitfalls of Ad Hoc Arbitration (*Trusts & Trustees, 2012), 332-333
[6] ibid

Arbitration (LCIA), or the Singapore International Arbitration Centre (SIAC). These institutions provide a set of predefined rules and procedures, administer the arbitration process, and often appoint arbitrators if the parties cannot agree. Institutional arbitration offers the advantage of a structured and well-established framework, which can enhance the efficiency and credibility of the process. It is particularly useful in complex or high-stakes disputes where parties prefer the support and oversight of a reputable institution.[7] The aim of this paper is to determine whether the International Centre for Settlement of Investment Disputes (ICSID) is the best institution to resolve energy and natural resources disputes. The study analyses the aim and features of ICSID, comparing its rules with non-ICSID rules to identify the advantages and disadvantages of ICSID over other arbitration institutions in resolving energy and natural resources disputes.

2. International Centre for Settlement of Investment Disputes

To provide a neutral avenue for the settlement of disputes, the International Bank for Reconstruction and Development (World Bank) established ICSID. ICSID was established in 1965 and came into force in October 1966.[8] The aim of the World Bank was to provide private investors with direct access to an international forum.[9] The ICSID convention is a multilateral treaty with 158 contracting states[10]; it is 'one of the five international organisations that make up the World Bank Group'.[11] The support of the World Bank and its membership make ICSID an effective institution to institute investment arbitration claims. ICSID is an arbitration body tasked with resolving disputes between a state and an investor, a foreign investor. This is established in Article 1 of the International Centre for the Settlement of Investment Disputes (ICSID) Convention, which establishes the centre and states that its purpose is to provide facilities for the conciliation and arbitration of investment disputes.[12] The centre eases the burden on parties as all required facilities for hearing cases are provided.

The jurisdiction of ICSID to hear cases is covered by Article 25 of the Convention. This covers disputes arising out of an investment between a contracting state and a national (investor) of another contracting state who have consented to submit the dispute to ICSID.[13] This shows that there are 3 things to be satisfied: there must be a contracting state, a foreign investor, and the parties must consent to the dispute being submitted to ICSID. It is important to determine these factors; this is because the host state and investors must be from a member state. If this is not satisfied, the tribunal lacks jurisdiction over the dispute. Consent by both parties is another prerequisite for submission of any dispute to arbitration. Consent can be acquired by direct agreement of the parties, through a legislation of the host state (as seen in the Albanian Law on Foreign Investment, this specifically referred disputes arising out of expropriation to ICSID)[14], through Bilateral Investment Treaties (BIT's) or Multilateral Investment treaties.[15] Bilateral Investment Treaties (BIT's) have become the most common method of establishing consent under ICSID. This is because most of the Treaties refer to arbitration institutions for resolving disputes. As of 2019, 60% of the cases brought to ICSID were brought through BIT's.[16] Before investing in a state, it is important to determine if there is an existing BIT between the host state and the investor. In 1978, the Administrative Council of ICSID adopted the Additional Facility to enable non-contracting parties to gain access to the centre.[17] Therefore, when one party is a member of a contracting state, the parties can rely on ICSID. But the rule to be applied is the Additional Facility Rules. Arbitration can be initiated against a North American Free Trade Agreement (the 'NAFTA') party under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules or the Additional Facility Rules of ICSID.[18] The main difference between the Additional Facility Rules and ICSID Convention is that the UN Convention on the Recognition and Enforcement of Foreign Arbitral Award of 1958 (the New York Convention) applies to the enforcement of the award.[19] This opens it up to challenges. In the *MetalClad v Mexico* case, it was determined that the Canadian courts could challenge the additional facility awards.[20] One of the main advantages of resorting to the ICSID Convention is that the award cannot be challenged. The purpose of resorting to ICSID is defeated if any national court can set the award aside.

3. Non-ICSID Dispute Settlement Institutions

Most Bilateral Investment Treaties (BITs) allow disputing parties—the investor and the host state to choose the arbitration institution or rules under which their disputes will be resolved. This flexibility ensures that parties can select an institution that

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[7] Born, Gary B, *International Commercial Arbitration* (Kluwer Law International, 2021)

[8] Lucy Reed, Jan Paulsson, Nigel Blackaby, *Guide to ICSID Arbitration* (2nd edn Kluwer Law International 2011) 1,4

[9] Ibrahim F.I Shihata, 'The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Re ference to ICSID and MIGA' (1986) 1, no 1, American University International Law Review, 97, 102

[10] ICSID, Database of ICSID Member States, <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx >accessed 13th February 2025

[11] International Centre for the Settlement of Investment Disputes, 'Introducing ICSID', < https://icsid.worldbank.org/sites/default/files/publications/ICSID_Primer_Dec2021.pdf>, accessed 13th February 2025.

[12] International Centre for the Settlement of Investment Disputes (ICSID) Convention 1966, Art. 1(2)

[13] ICSID Convention 1966, Art. 25

[14] Albanian Law on Foreign Investment 1993, Art. 8(2)

[15] Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press, 2012), 245-247

[16] The ICSID Caseload- Statistics Issue 2020-1 < https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/The%20ICSID%20Caseload%20Statistics%20%282020-1%20Edition%29%20ENG.pdff > accessed 13th February 2025

[17] P Toriello, 'The Additional Facility of the International Centre for Settlement of Investment Disputes' (1978–79), 4 Italian Yearbook of Int'lL 59

[18] North American Free Trade Agreement Art 1120(1)(b)(c)

[19] ICSID Additional Facility Rules Art. 19

[20] *The United Mexican States v Metalclad Corporation 2001 BCSC 1529*

best aligns with their interests, procedural preferences, and legal traditions.[21]Due to this fact, different institutions offered arbitration services. In this study, arbitral institutions other than ICSID will be referred to as NON-ICSID. Some of the NON-ICSID arbitral bodies include the International Chamber of Commerce (ICC). This is one of the oldest international commercial arbitration organisations with its own court, the ICC International Court of Arbitration and the ICC Rules.[22] The main duty of the ICC court is to provide technical assistance and a list of arbitrators; the tribunal reaches the final award.[23] This is similar to the Permanent Court of Arbitration (PCA), whose 'current procedural rules are based on the 1976 UNCITRAL Rules'. [24] The London Court of International Arbitration (LCIA) has its own rule known as the LCIA Arbitration Rules, while the Stockholm Chamber of Commerce (SCC) administers investment disputes using the SCC Arbitration Rules. Most of these are commercial dispute institutions, but they also administer arbitration of investment disputes between a state and an investor. These arbitral institutions are bodies that facilitate and administer proceedings in investment arbitration disputes. This is different from the UNCITRAL rules.

The UNCITRAL Arbitration Rules are just rules 'and do not establish a machinery to administer proceedings in a particular case'.[25] This has no institution to administer the proceedings; rather, they are rules used by various arbitral bodies, such as the LCIA, or by parties in ad hoc arbitration. Recourse to these rules is usually agreed upon in the agreements containing the dispute settlement provisions; this could be in the BIT's.[26] Investment Agreements and Treaties such as NAFTA and the Energy Charter Treaty (ECT) contain provisions that allow the use of UNCITRAL Arbitration Rules.[27] These provisions provide the UNCITRAL rules as one or the only rule to govern arbitration proceedings. Unlike the UNCITRAL rules, the ICSID Convention only applies to disputes arising from Article 25 of the convention (parties from contracting states), while the ICSID Additional Facility Rules can be applied when one party is a member of ICSID or a national of a member state. Although under NAFTA, it gives parties the choice between UNCITRAL and ICSID Additional Facility Rules.

Deciding on an institution or rule to institute a claim largely depends on what has been agreed upon in the investment agreement or what parties subsequently decide upon. But most BITs contain a clause known as the 'fork in the road clause'. These are provisions that let an investor decide between litigation or arbitration; once this has been decided, the decision is final.[28] The Argentina-France BIT reflects this as it states that 'Once an investor has submitted the dispute either to the jurisdictions of the contracting party involved or to international arbitration, the choice of one or the other of these procedures shall be final.[29] In Argentina-the trademark case of *Pantechniki*, the tribunal held that since the investor had already consented to bringing the claim before the Albanian court, it could not pursue the same claim at the ICSID Tribunal.[30] This decision emphasises the fact that although the investor has a choice, it cannot resort to another mechanism if one fails. This is why it is important for an investor to weigh and determine what they aim to achieve in any given award before deciding between litigation or arbitration. This stems from the ease of enforcement, cost, appeal of an award, and so on.

4. Analysis

Based on the foregoing, it is safe to say that ICSID has meritorious rules over other rules provided by the arbitration institutions because of the following reasons: ICSID is a self-contained institution, as it is independent of any other body. This is highlighted under Article 44 of the convention; this states that any arbitration procedure shall be conducted in accordance with the section and the arbitration rules, and if any question of procedure arises that is not covered by the section or rules agreed by the parties', the tribunal shall decide the question. [31] This clearly does not give any outside body, be it a national court or the International Court of Justice, the power to interfere with ICSID arbitration proceedings. This is important as the tribunal maintains its independence without any interference. Domestic courts do not have the power to set aside or review ICSID awards.[32]

Another attraction of international arbitration over domestic arbitral tribunals or the courts is the finality of the award. ICSID awards are final and binding on the parties. Article 53 of the Convention states 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 this Convention.'. [33] This provision excludes any form of appeal by a dissatisfied party. This differs from litigation, where a party has the right to appeal. Article 54 of the Convention instructs the state to recognise the award rendered as binding and enforce it as a final judgement of a court of that state.[34] This provision acts as a push to the states to ensure compliance with the award. The political backing of the World Bank is another advantage enjoyed by ICSID, as most states being members of the World Bank will not want to face any political ramifications. The enforcement of non-ICSID foreign arbitral awards is governed by the New York Convention

[21] Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 242
[22] Peter Muchlinksi, Frederico Ortino, Christoph Schreuer, *The Oxford handbook of International Investment Law*, (OUP 2008)
[23] Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 242
[24] ibid 244
[25] ibid
[26] David D. Caron, Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd edn OUP 2010)
[27] NAFTA Art 1120(1), Energy Charter Treaty Art 26(4)(b)
[28] *C. Schreuer*, 'Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004), 5 Journal of World Investment & Trade 231, 240
[29] Argentina- France BIT 1991 Art 8(2)
[30] *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21
[31] ICSID Convention 1966, Art. 44
[32] Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2012), 239
[33] ICSID Convention 1966, Art. 53(1)
[34] ICSID Convention 1966, Art. 54 (1)

(including ICSID Additional Facility awards).[35] The main difference between the enforcement of arbitral awards under ICSID and the New York Convention is that Article V(1) of the New York Convention allows domestic courts to refuse recognition and enforcement of an arbitral award under certain grounds.[36] This defeats the purpose of resorting to international arbitration if the domestic court can set the arbitral award aside. In the case of *MINE v. Guinea*, it was held that state immunity is not a defence to non-compliance of an award, and non-compliance by a state constitutes a violation that will attract sanctions.[37] ICSID does not give any room to any outside body to set its award aside, nor does it tolerate non-compliance by a state. This provision is important, as the essence of resorting to international arbitration is to ensure that the state complies with it.

The finality of international arbitration awards attracts parties as it saves both time and money and cannot be appealed.[38] ICSID does not have a provision to appeal arbitral awards, but it allows a review of it; this is known as an annulment. Article 52 of the ICSID convention sets out five grounds that may lead a party to request an annulment and concludes that if annulled, either party may request for it to be submitted to a new tribunal.[39] The grounds are: that the tribunal was not properly constituted, exceeded its powers, corruption on the part of a member of the tribunal, a departure from a fundamental rule of procedure, or failure to state the reasons the award was based.[40] An annulment is different from an appeal, as this is only concerned with the legitimacy of the process of decision and not the substantive correctness.[41] This is used in exceptional circumstances involving wrongdoing on the part of the tribunal either by failing to follow the fundamental rule (i.e., non-consent of a party) or failing to state reasons for the award. A case highlighting an excess of power is that of *Vivendi*[42]. The ad hoc committee found that the tribunal exceeded its powers, contrary to Article 52 (1) b), by failing to decide claims it had jurisdiction over.[43] This shows how important it is for the tribunal to adhere to the prescribed rules under ICSID.

The New York Convention is silent on annulment. Rather, it relies on Article V of the Convention, which allows domestic courts to set aside awards on certain grounds. Under the UNCITRAL Arbitrations Rules, the grounds for challenging awards differ by jurisdiction and it must fall within the specified grounds; this does not include a review of the merits of the award.[44] There have been several ICSID and UNCITRAL cases challenging or requesting for an annulment. The difference between an annulment under ICSID and a challenge of an award under UNCITRAL rules is that in ICSID, it is referred to an ad hoc committee. While in UNCITRAL, it is heard by the domestic court of the seat of arbitration. As seen in the case of *Ecuador v. Occidental,*[45] this was heard by the English High Court. Arbitration is said to be a cheaper and faster alternative to litigation. But this is incorrect. To institute an ICSID arbitration, a request needs to be made to the Secretary General of ICSID, and a non-refundable lodging fee of $25,000 is paid.[46] This fee is not required under UNCITRAL. Nevertheless, ICSID and non-ICSID arbitration are both equally expensive. The UNCITRAL working group III at its thirty-sixth session determined that 'the average cost of tribunal and administrative costs for investment disputes was $933,000'.[47] The Working Group advises that a budget be established at the onset of the case. [48] The problem with this is, it does not take into account small and medium investors who may be unable to afford even the non-refundable lodging fee. This has led to third-party funding, which involves a third party providing funds in return for remuneration.[49] There is a general presumption of confidentiality in arbitration, but the involvement of a third party interferes with this as information may need to be disclosed. Ultimately, the high cost of instituting an arbitration may lead parties to involve third parties, which can be detrimental to the future of investor-state dispute settlement. The cost of investment disputes may lead investors to rely on state dispute mechanisms, i.e., domestic courts. However, the reliance on domestic courts may be inadvisable due to concerns regarding judicial independence and impartiality.

5. Conclusion

Over the years, various international arbitration institutions have handled cases on energy and natural resources disputes. ICSID and UNCITRAL Rules have been favoured by most parties. This is due to the fact that the rules ensure that the tribunal is independent from any outside body and also impartial. This makes it more favourable than settling disputes by the domestic courts of the state, as its impartiality cannot be guaranteed. ICSID is an expensive institution to use in resolving disputes, but what sets it apart and encourages parties is that the arbitral award cannot be set aside by any other institution. ICSID ensures that the award is recognised and enforced by courts in the state. The political backing of the World Bank ensures that states comply with the award when it is enforced. UNCITRAL rules are also effective, but the disadvantage of this is that the award can be set aside by domestic courts.

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[35] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York) 1958
[36] ibid., Art. V (1)
[37] *MINE v Guinea, Interim Order No. 1: Guinea's Application for Stay of Enforcement of the Award, 12 August 1988, para 25*
[38] J. Fernandez-Armesto, Different Systems for the Annulment of Investment Awards, ICSID Review, *Foreign Investment Law Journal,* (2011), 26 (1), 128
[39] ICSID Convention 1966. Art. 52(1)(6)
[40] ibid (1)(a)-(e)
[41] Christopher H. Schreuer*, The ICSID Convention: A Commentary (*Cambridge University Press, 2009), 901
[42] *Compañía de Aguas del Aconquija S.A & Vivendi Universal S.A v Argentine Republic ICSID* Case No. ARB/97/3
[43] ibid
[44] UNCITRAL Model Law on International Commercial Arbitration, 1985, Art. 36
[45] *Republic of Ecuador* v. *Occidental Exploration and Production Co.* [2006] EWHC 345 (Comm)
[46] ICSID Convention 1966, Art. 36(1)
[47] UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), 'Possible reform of Investor- State Dispute Settlement (ISDS)- Cost and duration' (2018) < https://undocs.org/en/A/CN.9/WG.III/WP.153 > accessed 13th February 2025
[48] ibid
[49] UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) 'Possible reform of investor- State dispute settlement (ISDS) Third- party funding'(2019) < https://undocs.org/en/A/CN.9/WG.III/WP.157 > accessed 14th February 2025