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JURISDICTION AND ADMISSION OF INVESTMENT ARBITRATION: PRACTICE AND THEORY

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Abstract:

In this article, research was conducted on the conduct of court proceedings of international investment arbitration, the procedure for the resolution of disputes and the application of sanctions within the scope of competence, as well as the manner in which this jurisdiction is exercised and accepted. Also, the similarities and differences between the scientific theory of international investment arbitration and the practical rules used in real life are considered on the example of practical international disputes, and based on the researches of world scientists, scientific works, statistics of the international arbitration court , current problems are discussed. Personal suggestions have been developed that can be a practical solution.

Keywords: international arbitration, jurisdiction, ICSID, TIAC, UNCITRAL

As we all know, international arbitration is an alternative way of resolving disputes arising between different countries and parties originating from different jurisdictions. International arbitration is a neutral third party that hears the arguments of both parties and makes a binding decision. The range of disputes that can be considered by international arbitration is very wide, and it also covers investment disputes. It is common to resolve international disputes between states mainly in international arbitration courts, because it is relatively confidential and flexible in nature.

Disputes in international arbitration can be considered based on rules such as the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL), and the London Court of International Arbitration (LCIA). Investment disputes are resolved in accordance with the rules of the ICSID Convention - the International Center for Settlement of Investment Disputes.

The jurisdiction of the Investment Arbitration Court refers to the jurisdiction of a court or administrative body to accept and fairly resolve a dispute arising between an investor and a recipient party. By instruments such as investor-recipient agreements, bilateral treaties (BITs) or mutual consent agreements, it is agreed in advance on the jurisdiction of which investment disputes should be settled. In addition, according to the well-known legal scholar Michael Waibel, the jurisdiction of investment arbitrations is chosen by the foreign investor and the host state expressing their consent as follows:

1. As in commercial arbitration, by entering into agreements between the foreign investor and the host state, investment arbitration rules can be established;
2. By providing for investment codes that offer arbitral jurisdiction established in the domestic law of the host state;
3. Through the conclusion of bilateral or multilateral treaties by the host state agreeing to arbitration.

The second and third methods are also known as "arbitration without privity".[1]

It is clear that the choice of the jurisdiction of the arbitration court for the resolution of the dispute is at the sole discretion of the parties. Depending on the document drawn up between the investor and the recipient of the investment, in the event of a dispute between them, it is determined which international arbitration court will hear the case. It is appropriate to analyze the jurisdiction of international arbitration and its practice and scientific theory of accepting disputes and resolving them according to the ICSID Convention.

The ICSID (International Center for the Settlement of Investment Disputes) convention is an independent neutral international arbitration institute established in 1965 for the purpose of investment settlement between states and citizens of states, and

[1] https://ssrn.com/abstract=2391789

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its headquarters is located in the state of Washington, USA. Initially, ICSID cases were accepted only if the domestic law of the host state provided for them, but in later years disputes based on bilateral and multilateral investment treaties were accepted. This has made ICSID popular and a reliable mechanism.

The 52 new cases registered by ICSID in fiscal year 2015 demonstrate the widespread use of ICSID by States and investors. It took nearly twenty-five years, from 1966 to the end of 1980, to register the first twenty-six ICSID cases. However, by the end of fiscal year 2015, ICSID had registered 525 cases since its inception. While the number of cases may seem small, the dollar amount is usually very large and the disputes to be resolved are very complex. The beginning of the increase in the number of cases in the 1990s is due to the increase in bilateral investment treaties.[2]

The ICSID Convention includes the Administrative and Financial Rules, the ICSID Institutional Rules, the ICSID Agreement Rules and the ICSID Arbitration Rules.[3]Analyzing the general jurisdiction of the ICSID Convention, according to Article 25 of the ICSID Convention, any direct investment-related dispute may be subject to the jurisdiction of the Center. Based on the mutual agreement between the contracting states, which are the parties, the application is submitted to the center and the request for withdrawal of the unilateral application is not taken into account. It is noteworthy that both the application to the center and its withdrawal are decided based on the mutual consent of the parties. In order for States or their nationals to apply to ICSID, they must have taken appropriate action, such as the existence of a national law or treaty, as listed above.

In accordance with the fact that the center is a neutral arbitration institution, it does not grant any preferential treatment or diplomatic protection to any country that refers a dispute to arbitration, and the center does not favor the interests of one party. Article 27 of the Convention reinforces this rule and gives priority to the fair resolution of cases.[4]In applying for arbitration, a Contracting State or a national of a Contracting State shall submit a written request to the General Secretariat, which shall send a copy of the written request to the other party. If the other party agrees to the request, the General Secretariat will investigate whether or not the request is within the jurisdiction of the Center. If the result of the check is related to the center's jurisdiction, it will be registered, and if it is not, it will refuse to register. Once the registration is successfully completed, the arbitration panel should be formed as soon as possible. In arbitration, the matter is decided by a single arbitrator or an odd number of arbitrators, depending on the dispute. Notably,

Now, first of all, we should analyze how the dispute will be resolved in the arbitration court. According to part 1 of Article 42 of the Convention, an attempt is made to resolve the dispute between the parties according to the legal norms defined in the agreement, so in the absence of an agreement expressing such legal norms, the provisions of the Convention are applied. The arbitration court should follow the principles of fairness and justice in resolving the dispute, and should not make a decision using the silence of the parties or unclear legal documents that are not related to the dispute. With the consent of the parties, arbitrators may also exercise the power of ex aequo et bono to resolve the dispute. Ex aequo et bono – without strictly following the rules established in relation to an arbitrator or a judge,[5]If the parties express opposition or displeasure to the exercise of this right by the arbitrator, it is naturally considered subjective and potentially unfair and its application will not be allowed.

Margaret L. Moses in her book "Principles and Practice of International Commercial Arbitration" has highlighted the distinctive features of ICSID. According to him, these characteristics include:

1. ICSID is completely delocalized, that is, its location - US law does not apply to its rules. This will be a priority for him to be independent and fair, to maintain the "golden mean" without compromising the interests of any party. Another important point is that if one of the parties disagrees with the arbitral award, another committee is formed within ICSID to review the award, which in a sense will review the case as a further instance, but the award will not be fully reviewed. does not allow to change, partially or completely cancels. The grounds for appealing the decision are also limited, with only five grounds for objection:

a) that the tribunal was not properly constituted;
b) Arbitrators committed corruption;
c) Deviation of the Tribunal's powers;

[2] www.cambridge.org/9781107151871
[3]https://icsid.worldbank.org/rules-regulations/convention
[4] https://icsid.worldbank.org/sites/default/files/ICSID_Convention_EN.pdf
[5] https://en.wikipedia.org/wiki/Ex_aequo_et_bono

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d) Violation of the procedural rules of ICSID in the proceedings;

e) Absence or complete lack of record of the fact justifying why such a decision was made.

2. After the issuance of a court document in ordinary state courts, efforts to ensure its execution begin. But according to the ICSID convention, three stages should be implemented after the decision is made. The first of these is enforcement, and the next step is recognition. Acknowledgment is a sign of firm recognition that the decision is binding and final. The last stage is execution. This stage indicates the beginning of the absolute execution stage, and the execution actions of the decision are carried out.

3. Disclosure of decisions. In 2006, the ICSID Rules were amended to make public proceedings mandatory.[6]

From the above-mentioned features, we can say that the rules of the ICSID Convention are becoming more perfect and effective in solving investment-related disputes.

If we analyze the activity of arbitration courts in terms of national legislation, the Tashkent International Arbitration Center (TIAC) is of great importance. TIAC was established under the Chamber of Commerce and Industry in accordance with the Decision of the President of the Republic of Uzbekistan in 2018. Its exercise of jurisdiction with a fair mechanism can attract foreign investors. The jurisdiction and rules of this center for internal and external international disputes are based on the rules of international arbitration. The purpose of TIAC is to build confidence in the protection of foreign investors' rights in the event of actions against our national law and their interests through the application of a fair mechanism and jurisdiction. TIAC's jurisdiction is broad and includes commercial disputes such as contracts, intellectual property, construction, in addition to issues related to investment activities. In addition, he has the authority to consider disputes arising from an international contract or agreement involving a citizen of Uzbekistan.

TIAC's jurisdiction is organized using the UNCITRAL International Commercial Arbitration Laws as a model. Also, in order to ensure neutrality in its activities, representatives of different nationalities and genders were involved as arbitrators and experts. This ensures that decisions are absolutely fair and impartial.

UNCITRAL means the United Nations Commission on International Trade Law. In addition to carrying out activities aimed at the development of international trade laws and its practice, UNCITRAL has developed the UNCITRAL Model Law on International Commercial Arbitration, which is accepted as a basis for countries to create national arbitration laws, in the field of arbitration. plays an important role. TIAC also exercises its jurisdiction as a national arbitrator using the Model Arbitration Rules developed by UNCITRAL. The national legal document regulating the activities of TIAC is the Law of the Republic of Uzbekistan "On International Commercial Arbitration".

Article 7 of UNCITRAL's 1992 Model Convention on International Commercial Arbitration defines "Arbitration Agreement" as a contractual or non-contractual legal relationship between the parties arising or likely to arise between them. agreement to arbitrate all or some disputes. It is noted that the arbitration agreement may be in the form of an arbitration clause in the contract or in the form of a separate agreement.[7]We can see that this provision is reflected in Article 12 of the Law "On International Commercial Arbitration". In terms of the number of arbitrators, as defined in Article 10 of the Convention, the will of the parties is of primary importance in national legislation, if they cannot agree on the number of arbitrators, the discussion will be conducted by three arbitrators. If we compare it with the ICSID Convention, which is popular for States, cases are usually heard by three arbitrators, but it has the relative advantage that the number of arbitrators can be reduced or increased depending on the desire of the General Secretariat and the scope of the case.

In general, through a broader analysis, we can see that our national legislation has been formed and completed with the effective use of international experience. As we make our proposals for the development of our national arbitration industry, I believe that it is important, first of all, to make the parties' requirements for arbitration more understandable. It is necessary to use the experience of the ICSID Convention and put it into practice. As we analyzed above, when applying to the ICSID Convention, if the parties have an agreement containing arbitration provisions, the existence of bilateral agreements concluded between the parties or

[6]Margaret L. Moses **Principles and Practice of International Commercial Arbitration.**Third edition./T.:Lesson press,-298 pages

[7] https://www.trans-lex.org/450900/_/uncitral-model-law-on-international-commercial-arbitration/

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the mutual consent of the parties to resort to arbitration is considered a dispute of the ICSID arbitration court. rib is the basis for acceptance. By implementing this practice in our national law, we can offer several ways for investors to resort to arbitration.

The next important issue is gaining the trust of foreign investors and attracting them. In this regard, the fact that the foreign experience was used in the formation of the legal framework and that it was used as an example can ensure neutrality, that is, the creation of legislation that meets the requirements of world standards, and not the legislation created only for the sake of national interests, attracts the attention of foreign investors. can attract and strengthen their confidence. As a further step to build trust, general issues of disputes heard by national arbitrations should be published on the official website of national arbitrations, subject to the principle of confidentiality. This proposal is also used in international arbitrations.

Another important issue is the development of specialized expertise. National arbitration should develop special expertise to attract more cases in certain areas of law, such as energy or construction disputes, in addition to investment. This should be done through training programs for arbitrators and the recruitment of foreign experts working in these fields.

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