Australia to Ratify the ICSID Convention

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The ICSID Implementation Act 1990 (Cth.) was approved by both Houses of the Federal Parliament and received the royal assent on 18 December, 1990. The Convention provides an autonomous regime for the conciliation and arbitration of investment disputes between host States and foreign investors. Consequently, it is potentially relevant to investment in Australia from overseas and from Australia to other countries, where there is a State involvement.

By mid-1991, Australia will become the 93rd contracting State party to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The ICSID Implementation Act 1990 (Cth.) was approved by both Houses of the Federal Parliament and received the royal assent on 18 December, 1990. It is expected that the formal instrument of ratification will be deposited by May 1991.

The Convention provides an autonomous regime for the conciliation and arbitration of investment disputes between host States and foreign investors. Proceedings are administered by the International Centre for the Settlement of Investment Disputes (ICSID) - the internationally-constituted dispute settlement machinery established by the Convention.

Elsewhere, the author has provided a general overview of the structure of the Convention and considered some of the legal and practical implications of its legislative implementation in Australia (see J R Moti, "Settling Disputes the ICSID Way" (1990) 25 Australian Law News (June issue) 25-29). This article examines the principal features of the ICSID Implementation Act and focuses on the jurisdictional aspects of the Convention from the perspective of potential users of ICSID's facilities.

1. The ICSID Implementation Act 1990 (Cth.)

The ICSID Implementation Act gives legislative effect to the Convention in Australia by amending the International Arbitration Act 1974 (Cth.). The operative provisions of the Act are enacted as part IV of the 1974 statute. The English text of the Convention is contained in the Schedule 3 to the 1974 Act. This scheme accords with the Commonwealth Government's policy of accommodating all of the provisions relating to international arbitrations within a single statute.

Four features of the operative provisions of the Act merit consideration. First, s.33 provides that an arbitral award rendered under the Convention is binding upon the parties and not appellable except in accordance with the procedures delineated in the Convention. Consequently, the objectives of the Convention cannot be frustrated through ancillary litigation. Secondly, s.34 precludes the application of other laws pertaining to the recognition and enforcement of arbitral awards to ICSID arbitral awards. Thirdly, s.35 designates the Supreme Courts of each state and territory as the appropriate authority for the purposes of recognition and enforcement of ICSID awards. Finally, s.37 enables a party to ICSID conciliation and arbitration proceedings to be represented and assisted by a duly qualified legal practitioner or any other person of its choice. The provision therefore permits representation by foreign legal practitioners in ICSID proceedings.

2. Jurisdictional Requirements

Recourse to ICSID conciliation and arbitration proceedings is only available upon the satisfaction of the "jurisdictional" requirements specified in the Convention. Foremost amongst these is the necessity for both the host State and the national State of the foreign investor to have ratified the Convention. Ratification does not oblige the contracting State to submit disputes to ICSID. Australia's ratification is, however, a fundamental precondition for access to the ICSID machinery by Australians investing abroad.

Pursuant to Article 25 of the Convention, three further preconditions must be satisfied. First, both the host State and the foreign investor must have agreed to submit the particular dispute to ICSID. The necessary consent may be furnished either before or after the dispute has arisen. Such consent is usually embedded in an arbitration or conciliation clause in the investment agreement. Alternatively, consent of the host State may be expressed in its foreign investment legislation. The provision of consent in this form constitutes a unilateral offer by the host State to submit disputes to ICSID which may be accepted by the foreign investor upon entering the contract or at any time prior to the initiation of proceedings. Consent may also be recorded in bilateral investment treaties concluded between the host State and the national State of the foreign investor. In this regard, attention is drawn to The Australia-China Agreement on the Reciprocal Encouragement and Protection of Investments (11/7/88); The Agreement between Australia and Papua New Guinea on the Promotion and Protection of Investments (3/9/90); and The Agreement between Australia and the Socialist Republic of Vietnam on the Reciprocal Promotion and Protection of Investments (5/3/91). All three treaties contain provisions for submission of disputes to ICSID. However, China and Vietnam are not yet parties to the Convention. Submission to ICSID's jurisdiction is also likely to be a feature of the treaties to be concluded between Australia and Poland, Czechoslovakia and Hungary in the near future.

The second requirement pertains to ICSID's jurisdiction ratione personae. Article 25 confines ICSID's jurisdiction

to disputes between a contracting State (or any constituent subdivision or agency thereof) and a national of another contracting State. From the perspective of the foreign investor in Australia, three issues need to be considered. Firstly, in the context of Australia's federal constitutional structure, the expression "constituent subdivision" refers to states and territories of Australia. Each Australian state and territory is required to be designated to ICSID for the purposes of the Convention. Hitherto, all states and territories except Western Australia have agreed to be so designated.

Secondly, the term "agency" probably refers to statutory corporations and instrumentalities of the Australian Federal Government. Based upon my literal interpretation of Article 25, I have argued (ibid, at p 27) that state and territory statutory corporations and instrumentalities are not amenable to the jurisdiction of ICSID. The Convention does not refer to agencies of constituent subdivisions and therefore appears to exclude its application to such entities. This is undoubtedly a significant jurisdictional hurdle from the perspective of foreign investors in Australia.

Finally, insofar as the identity of the foreign investor is concerned, the Convention differentiates between "natural persons" and "juridical persons". Natural persons must possess the nationality of another contracting State. Juridical persons, on the other hand, must on the date of consent to submit the dispute to ICSID, either have the nationality of another contracting State or even if it has the nationality of the host State, "because of foreign control, the parties have agreed" that it "should be treated as a national of another contracting State for the purposes of the Convention" (Article 25(2)(b)). This provision caters for the not uncommon situation where foreign investors carry out their investment activities in the host country through locally incorporated companies or other entities. The generally accepted test for determining the nationality of a juridical person is that of the place of incorporation.

The third requirement relates to ICSID's jurisdiction ratione materiae. It is limited to "any legal dispute arising directly out of an investment". The characterization of a transaction as an "investment" has, in keeping with the essentially consensual nature of the Convention, been deliberately left for agreement between the parties. To avoid uncertainty and controversy, parties should stipulate if the transaction embodied in the substantive agreement is an "investment" for the purposes of the Convention.

Australia's ratification of the Convention will afford considerable advantages to both foreign investors in Australia and Australian investors abroad. Given the propensity of reluctant respondents to mount jurisdictional challenges in ICSID proceedings, the question of jurisdiction assumes particular significance. The jurisdictional aspects of the Convention outlined in this article, therefore, merit the attention of potential users of ICSID's facilities.

The ICC Pre-Arbitral Referee Procedure

- **Philip Davenport**

In a new publication called 'The ICC International Court of Arbitration Bulletin' Vol.1 No.1 June 1990 at pp.18 to 23 there is an explanation of the ICC Pre-arbitral Referee Procedure.

The bulletin describes it as a 'truly pioneering effort in the field of dispute resolution and at the same time a long awaited legal service'. The procedure contemplates that pending an arbitration or other dispute resolution procedure it may be that there should be urgent provisional measures. By agreement the parties to a dispute may ask the Secretariate of the ICC International Court of Arbitration to appoint a referee.

The referee would be invested with power to call a conference with the parties, to inspect documents and carry out urgent investigations. The referee would have power to order a party to take certain 'conservatory' measures, measures of restoration or even to make a payment or sign or deliver a document. The ICC International Court of Arbitration has published rules governing procedures and the powers of the referee.

The referee is not an arbitrator and the sanction for failing to comply with an order to take an interim measure is only that the party in default is in breach of the agreement to abide by the referee's order. The referee's order does not prejudge the merits of the dispute and the referee is disqualified from subsequently acting as arbitrator unless the parties otherwise agree. Submissions made and documents created for the purpose of the Pre-arbitral Referee proceedings, except for the order of the referee, are confidential.

The referee is not required to give reasons. There is a fee of US$1,500 payable to the Court for appointing a referee and in addition there is the referee's fee. The referee decides how the costs are ultimately to be borne by the parties. There is no right of appeal but by the same token, if a party refuses to comply with the referee's order, all the other party can do is to apply to a court to make an order which gives effect to the agreement to comply with the referee's order. The clause which the ICC recommends be inserted in contracts is:

> "Any party to this contract shall have the right to have recourse to and shall be bound by the Pre-arbitral Referee Procedure of the International Chamber of Commerce in accordance with its Rules."