

*ICSID – A Forum for the Resolution of International Legal Disputes  
Through Arbitration and Conciliation*

**Roberto Dañino**

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Mesdames et Messieurs, bonne après-midi. C'est un grand honneur de participer à cette conférence et de m'entretenir avec des panélistes aussi prestigieux.

Notre discussion porte sur les places de droit. Celles-ci ont émergé avec la mondialisation, laquelle a aussi contribué à la convergence du droit et la mondialisation de la pratique du droit.

Le Centre International pour le Règlement des Différents relatifs aux Investissements (ou CIRDI en français /ICSID en anglais) en est un très bon exemple. Le CIRDI constitue l'une des cinq institutions du Groupe Banque Mondiale, et peut-être son secret le mieux gardé.

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Ladies and Gentlemen,

Good afternoon. I am honored to participate at this conference with such prestigious panelists.

We have been asked to speak about “forums of law” that have evolved as a result of the globalization, which in turn, also has promoted the convergence of law and the globalization of the practice of law.

A prime example of such a forum of law is the **International Centre for the Settlement of Disputes** or ICSID, which is one of the five institutions of the World Bank Group, and perhaps one of its best kept secrets.

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ICSID is a **unique “forum of law” or, more specifically, a “forum for resolving international legal disputes through arbitration and conciliation.”**

ICSID is a result of the growing economic interdependence among the international community, which is one of the three vectors of legal convergence which I referred to yesterday in my speech. In addition, by providing a universal forum for international investor-State arbitration, ICSID also helps to promote effective legal frameworks that encourage investment and economic growth.

ICSID’s history shows that the demand for its services has grown exponentially. Merely a decade ago, ICSID had registered five (5) pending cases for an aggregate amount of US\$15 million, whereas today, we have 113 pending cases for an aggregate amount close to US\$30 billion.

But what has made ICSID such a unique forum of law? I believe there are several internal and external factors that have contributed to make ICSID into the principal arbitration forum worldwide for the settlement of disputes between foreign investors and host States.

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Since its inception 60 years ago, the principal aim of the World Bank has been to stimulate the economic growth and social development of developing countries through the provision of financial resources and the

sharing of specialized knowledge and skill sets. A prerequisite for the accomplishment of these goals is an environment conducive to private investment.

As a result, the World Bank has over time been increasingly required to facilitate the amicable settlement of disagreements that arose between private investors and states. In doing so, the guiding principle was to promote an atmosphere of mutual confidence through the creation of a neutral institution for the resolution of investment-related disagreements.

It was within this context that, in 1965, the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* was drafted, thereby creating ICSID.

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ICSID is an autonomous intergovernmental organism, with its own governing body, the Administrative Council, and a Secretariat. I would like to make it clear that ICSID, in and of itself, does not arbitrate or conciliate these disputes. Rather, these responsibilities are carried out by conciliation commissions and arbitration tribunals, which are created on an “*ad-hoc*” basis by the parties for each individual proceeding. As such, the functions of ICSID are basically those of a secretariat providing support to the tasks of the arbitral Tribunals and conciliation commissions.

As noted earlier, in the past 40 years, ICSID has become the leading arbitral forum on an international level for the resolution of disputes between

investors and states. This is due in large part to the six main characteristics of the Centre.

**First, the universality of ICSID's system.** ICSID is currently comprised of 142 member countries. The vast majority of bilateral and multilateral investment treaties contain dispute-settlement provisions with consents from the State party to one or both of the forms of arbitration administered by ICSID – 113 arbitration cases are currently pending.

**Second, the unique and autonomous legal framework of the institution.** ICSID is based exclusively on its own constituting treaty, the ICSID Convention, regulation and is subject to its own rules, the ICSID Rules of Procedure.

ICSID is one of the few international forums to which international investors have direct access. That is to say that in order to access ICSID, an investor does not need to go through governmental channels, but rather can do so directly. It is worth noting that the Convention also permits a State to initiate a proceeding against an investor. In practice, this has only happened on two separate occasions.

The **third characteristic** of ICSID is that it is a **specialized forum**, limited to investment-related disputes of a juridical nature. Interestingly, the concept of “investment” is not defined in the Convention. This grants the arbitral Tribunals a certain degree of flexibility in the determination of their own jurisdiction, albeit while respecting objective standards which over time have helped clarify the Awards and Decisions of Tribunals.

The **fourth characteristic** of ICSID is its **consensual nature**. The ratification by the Member States of the Washington Convention, which created ICSID, does not impose any obligation on contracting states to submit to arbitral or conciliatory mechanisms of ICSID. These obligations only arise once a State has expressly accepted, in writing, that a particular dispute, or a certain type of disputes, is the subject of arbitration or conciliation. States may also give their consent to arbitration in anticipation of ICSID jurisdiction. Such is often the case within the context of Bilateral Investment Treaties (BITs), and in concession agreements or other State contracts. However, today most of the arbitrations before the Center are based on BITs.

The **fifth characteristic** of ICSID arbitration is its **independence from the judicial mechanisms of contracting states**. As established in the Convention, the consent to ICSID jurisdiction prohibits recourse to any alternative judicial mechanism. In addition, Arbitral Awards dictated by Tribunals constituted in accordance with ICSID procedures are binding, and cannot be revisited by local courts. Furthermore, the Convention states that the revision, rectification, interpretation, and annulment of Decisions and Awards are the only viable avenues to pursue, and they must be carried out in accordance with ICSID norms and regulations. The only recognition that the system ascribes to national courts is in their intervention, when necessary, with the implementation of Awards.

Finally, the **sixth characteristic** of ICSID during its “first” 40 years has been its **effectiveness**. The Convention has granted ICSID the tools

necessary to deal with the potential lack of cooperation by a party with a Tribunal, which could disrupt or delay the arbitration process. The contracting states have come to realize the binding nature of ICSID Awards and Decisions, giving them equal authority as definitive sentences emanating from local courts.

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These six characteristics: universality, its legal framework, specialization, consensual nature, independence, and effectiveness, are the internal factors that have turned ICSID into the main arbitration forum worldwide for the settlement of disputes between foreign investors and host States.

As mentioned earlier, ICSID's history shows that the demand for its services has grown exponentially, and probably constitutes ICSID's main challenge.

This growth in our portfolio reflects, to a great extent, the spectacular increase of foreign direct investment flows during the last decade (from US\$25 billion in the early 1990s to US\$200 billion by the end of the decade). It is also a by-product of the boom in the number of bilateral investment treaties. In the last 10 years, more than 2000 bilateral investment treaties were signed, with more than 1500 providing for ICSID as an eligible forum for the settlement of investment disputes.

It is foreseeable that these trends of increasing investment flows and the increase of international instruments will continue, thereby increasing the number of ICSID cases. The Centre will thus continue to play a key role in

the establishment of the conditions necessary for the promotion of capital flows for development.

ICSID seems to have concluded its phase of institutional consolidation and to be opening a new chapter in its institutional life. It will have to face the new challenges posed by the large and growing demand for its services, while preserving its neutrality, professionalism and efficiency.

For this reason, over the last year we have been immersed in a process of strategic planning, aimed at addressing our future challenges and we have implemented initiatives that will help us face the challenges of the next 40 years. For example, ICSID has actively promoted conciliation as an alternative to arbitration in suitable cases; enlarged and diversified the pool of arbitrators who are normally involved in our cases to include more women and nationals of developing countries; enhanced its training programs; and have proposed a series of amendments to our procedural rules on provisional measures, third party submissions and access to process, compulsory publication of awards, and tighter disclosure requirements for arbitrators aimed at ensuring their independence and impartiality.

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Let me give you a flavor of just a few of the **prominent decisions and awards issued by Tribunals** in cases administered by ICSID during the last year.

An award was rendered in the **Gas Transmission Company v. Argentina** case. This is the first ICSID award resulting from the 2001 emergency regulations adopted by Argentina. CMS claimed that actions by Argentina changed the terms of its license in a manner prejudicial to CMS' interests. Although the Tribunal ruled that Argentina's actions did not constitute expropriation, the award rejected Argentina's "state necessity" defense and held that CMS suffered damages in the amount of US\$133.2 million, based principally on findings that Argentina's failure to abide by the terms of the license breached the provisions of the US-Argentina BIT that guarantee fair and equitable treatment of foreign investors. Argentina has since requested the annulment of the award under the ICSID Convention.

Another important award was rendered in the **Methanex v USA** case. The Methanex case concerned the enactment by the California legislature of regulations to prohibit a fuel additive, "MTBE." The prohibition was introduced on grounds that MTBE contaminated the groundwater and was difficult and expensive to clean up. Methanex, a Canadian company, claimed compensation under the NAFTA in the amount of US\$ 970 million on the grounds that the California measures were intended to discriminate against it, and that its share of the US market of oxygenates had "been taken" by the discriminate measure and that this was tantamount to expropriation. This case had received a great deal of public interest because it is one of the investor/State disputes that have highlighted the tension between environmental regulation and a foreign investor's rights under a treaty. In its award, the Tribunal dismissed Methanex's claims finding that there was no evidence that the measures had been taken to intentionally

discriminate against Methanex. Rather, the Tribunal concluded that California had acted in good faith and based on scientific considerations.

Also during 2005, ICSID administered the first two consolidation proceedings ever instituted under the Investment Chapter of the NAFTA. In one case, following Mexico's request for the consolidation of two pending ICSID proceedings, ICSID established a consolidation tribunal which finally rejected Mexico's request. In doing so, the tribunal gave great weight to the Claimants' assertion that, because of a "fierce competition" between them, they would not be able to fully present their cases in a consolidated proceeding. In the other case, a tribunal established by ICSID ordered the consolidation of three UNCITRAL proceedings requested by the United States. The tribunal, after carefully scrutinizing the NAFTA consolidation provisions, decided that the three claims have questions of law or fact in common and that it would be in the interest of a fair and efficient resolution of these claims to consolidate them. In accordance with NAFTA consolidation provisions, this Tribunal assumed jurisdiction over the three claims. The consolidated dispute is currently pending.

Finally, this year an ICSID tribunal recognized, for the first time, its power to admit *amicus curiae* submissions from non-parties in appropriate cases. Relying on previous decisions of NAFTA tribunals and WTO panels, the tribunal also set forth the requirements to be met by non-disputing parties wishing to file such submissions.

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Let me conclude by saying the following:

ICSID has managed over time to become a universal forum for international investor-State arbitration, ruled by an autonomous and unique legal system, and administered by specialized international practitioners. As such, ICSID aspires to contribute to the rule of law and economic prosperity of its member countries.

Thank you very much for your attention.