

Settlement of international investment disputes through the International Centre for Settlement of Investment Disputes (ICSID) case study in Fraport v. Republic of the Philippines

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ABSTRACT

Globalization has increased international investment flows, but has also given rise to potential disputes between foreign investors and host countries. The International Centre for Settlement of Investment Disputes (ICSID), established under the 1965 Washington Convention, has emerged as the primary mechanism for the settlement of such disputes through arbitration and conciliation. This article examines the mechanism for the settlement of international investment disputes through ICSID, focusing on its jurisdictional aspects and analyzing the case study of Fraport AG v. The Republic of the Philippines. The discussion covers the basis of ICSID jurisdiction which is consensual, requires written consent of the parties, legal disputes arising directly from investment, and involves a member state and nationals of another member state. The case study of Fraport v. Philippines highlights the complexities of applying ICSID rules, including the issue of initial refusal of jurisdiction because the investment is considered illegal under Philippine law, as well as the important procedural issue of conflict of interest of legal counsel raised by the Philippines. The case analysis highlights the challenges in developing and applying ethical rules for legal representation in ad hoc international arbitrations and the crucial role of arbitral tribunals in upholding due process standards. In conclusion, ICSID jurisdiction depends on the fulfillment of the Convention requirements and the consent of the parties, while the Fraport case demonstrates the importance of clear procedural rules, particularly regarding legal representation, in maintaining the integrity of the international investment arbitration process.

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1. INTRODUCTION

The era of globalization is increasing in tandem with the growth of the global economy, and investment is certainly an important issue. The essential conditions for sustainable economic development are stable and continuous economic growth. One way to encourage this growth is through sources of financing, such as investment. Consistent economic growth can increase investment, especially from foreign capital, as this is considered one of the main indicators by investors. If foreign capital investment is managed efficiently, positive contributions can be expected.

Rapid capital flows offer opportunities to finance sustainable economic development. Therefore, in international investment relations, disputes are inevitable, necessitating an institution capable of resolving such disputes. Thus, ICSID was established as a court handling investment cases.

ICSID stands for "International Centre for Settlement of Investment Disputes." ICSID is an institution established in 1966 based on the ICSID Convention (often referred to as the Washington Convention), which is one of the organizations affiliated with the World Bank. The purpose of ICSID is to provide a facility for arbitration and conciliation of investment disputes between countries and foreign investors. Through ICSID, the two parties to the dispute can resolve their dispute without having to go through the local courts of that country, which may be considered by foreign investors to be less neutral or potentially biased. ICSID plays an important role in international investment law and is often used as a forum for resolving disputes between foreign investors and host countries. The ISDS clause in BITs and FTAs grants rights to investors who feel they have been harmed because the host country has failed to fulfill its obligations to protect investor interests (Van Harten, 2020). Such investors can file claims with an international institution known as the International Centre for Settlement of Investment Disputes (ICSID) (Ekleisia, 2022).

Many parties are concerned about the ICSIDS mechanism for resolving investment disputes, as it is considered to favor the interests of investors over those of the host country. Currently, foreign investors often sue countries over regulations related to taxes, exports, water tariffs, public policy, and environmental issues. According to data from UNCTAD, most cases under ICSIDS currently involve the energy production and distribution sector, as well as the oil, gas, and mining industries. The ICSIDS mechanism itself opens the door to more potential lawsuits against host countries. The significant losses that countries may incur are one of the sources of controversy and concern in the investment dispute resolution mechanism through ICSIDS. Additionally, many parties have conducted in-depth analyses of the ICSIDS process, as disputes under various international agreements tend to share similar characteristics. This has become a hot topic of discussion within the field of international law today. Some experts even argue that ICSIDS in certain global economic agreements could provide opportunities for violations and undermine the integrity of human rights (Bortner, 2020).

For example, the ICSID tribunal found that the illegality associated with Fraport's initial investment resulted in a lack of jurisdiction under the 1997 Germany-Philippines bilateral investment treaty (BIT) (Kryvoi, 2023). At the same time, the tribunal rejected jurisdiction over counterclaims related to alleged corruption and fraud by Fraport. In the early 1990s, under President Ramos' leadership, the Philippines decided to build a third terminal at Manila's main airport. A local consortium won the project tender and established PIATCO to manage the concession agreement. Fraport, an experienced airport operator, acquired shares in PIATCO and several Philippine companies involved in the project in 1999. However, between 2001 and 2002, relations between PIATCO and the government deteriorated. In November 2002, when the new terminal was nearly complete (according to Fraport's statement), President Macapagal-Arroyo declared the concession agreement invalid. Subsequently, the Philippine Supreme Court ruled that the concession was unlawful. Under domestic regulations, ownership was transferred to the government, which began operations in 2008. Legal proceedings to determine compensation continued. In 2007, the ICSID rejected Fraport's claim under the German-Philippine Bilateral Investment Treaty, citing Fraport's violation of local law. However, in 2010, that decision was overturned by the ICSID committee. In response, Fraport refiled its claim with ICSID in 2011. The Philippines challenged the court's jurisdiction, arguing that Fraport's investment did not comply with local law and was therefore not recognized as an investment under the BIT (Reyes, 2017).

Based on the above, a legal gap arose in the case of *Fraport v. The Republic of the Philippines*. The ICSID tribunal found that the illegality associated with Fraport's initial investment resulted in a lack of jurisdiction under the 1997 German-Philippine bilateral investment treaty (BIT). At the same time, the tribunal rejected jurisdiction over counterclaims related to alleged corruption and fraud by Fraport. Therefore, the author is interested in examining this issue in this article through the title "Resolution of international investment disputes through the International Centre for Settlement of Investment Disputes (ICSID): A case study of *In Fraport v. The Republic of the Philippines*."

2. METHOD

This study uses a normative legal approach with a focus on case studies. This method was chosen to analyze in depth the mechanism for resolving international investment disputes through the International Centre for Settlement of Investment Disputes (ICSID), as well as to examine the

application of ICSID's jurisdiction and procedural rules in the specific case of *Fraport AG v. The Republic of the Philippines*. The normative legal approach is used to examine various laws and legal principles relevant to ICSID jurisdiction, while the case study allows for an in-depth analysis of the implementation and challenges that arise in practice.

Data collection was carried out through a comprehensive literature study, covering primary and secondary legal sources. The main primary legal source is the 1965 Washington Convention establishing ICSID, along with ICSID's procedural rules and regulations. In addition, documents related to the *Fraport v. Philippines* case, such as arbitration awards and related case analyses, are also important primary sources. Secondary legal sources include textbooks on international investment law, scientific journal articles, publications from international organizations such as UNCTAD, and the views of legal experts relevant to the research topic.

The collected data were analyzed qualitatively using descriptive-analytical methods. The analysis focused on the interpretation of the provisions of the ICSID Convention relating to jurisdictional requirements, such as the consent of the parties, the nature of the legal dispute arising from the investment, and the status of the disputing parties. The case study of *Fraport v. Philippines* was analyzed in depth to identify the complexities of the application of ICSID rules, including the issue of initial jurisdictional refusal and procedural issues regarding the conflict of interest of legal counsel. The results of the analysis were then synthesized to answer the problem formulation regarding how ICSID jurisdiction in the scope of international investment and how the dispute resolution in the *Fraport* case was through ICSID.

3. RESULTS AND DISCUSSION

3.1 ICSID jurisdiction in the context of international investment

Initially, a country's economic activities or investment began with the formation of FCN (Friendship, Commerce and Navigation) agreements between countries. However, since the 1960s, FCNs have been replaced by BITs (Widhiyanti et al., 2020). Typically, BITs serve as the basis for a country to file a claim against another country before the ICSID arbitration body. ICSID (International Centre for Settlement of Investment Disputes) is an institution established by the ICSID Convention, also known as the "Washington Convention," in 1965. This institution was formed to provide facilities for arbitration and conciliation of investment disputes between governments and foreign investors. The jurisdiction of ICSID is regulated in the ICSID Convention, specifically in Article 25 of the Washington Convention of 1965, particularly paragraph (1), which states: The Center has jurisdiction over investment disputes between a Contractor and another State Party to the Convention and a national of another State Party, which are submitted to the Center with the consent of the disputing parties. (The subject of the dispute relates to investment.) "Investment dispute" means a dispute arising directly from an investment. (Involving a participating state and a national of a participating state); ICSID's jurisdiction is consensual, meaning both parties (the state and the investor) must agree to submit their dispute to ICSID. (Involving participating states and nationals of participating states in the form of a written agreement); Cannot withdraw unilaterally.

Many bilateral investment treaties (BITs) and multilateral agreements contain clauses referring to ICSID as one of the options for resolving investment disputes. Broche classifies arbitration jurisdiction in BITs into four categories. First, there are BIT clauses that merely state that if both parties agree, disputes may be resolved in an arbitration institution. Second, there are clauses that provide sympathetic consideration of requests for conciliation or arbitration at the Center, but without requiring agreement from both parties. Third, there are clauses that require the host country to approve requests from national investors to initiate conciliation or arbitration regarding disputes arising from investments. Finally, the fourth clause mandates ICSID as the dispute resolution mechanism in the event of future disputes between the parties (Sutrisno et al., 2021).

There are two main objectives behind the establishment of the ICSID Convention. First, to fill the legal vacuum in resolving investment cases by providing a special mechanism in the form of arbitration or conciliation facilities (Paparinskis, 2008). Second, to encourage and protect the flow of capital from developed countries to third countries. Regarding ICSID's jurisdiction, disputes that can be resolved through ICSID only concern legal disputes arising from investment. ICSID does not have jurisdiction over the resolution of disputes related to political interests. ICSID only obtains jurisdiction over disputes to be resolved if there is a written agreement from both parties. Once both parties have

expressed their consent, no party may unilaterally withdraw from the ICSID dispute resolution process (Kryvoi, 2023).

Subject to the applicable terms and conditions, ICSID serves as the final forum for resolving foreign investment disputes and is the last resort for the parties involved to settle their differences. As a result, its decisions are final and cannot be appealed or reviewed. However, there is still room for the parties to request the annulment of the decision. For a claim to be accepted by ICSID, the grounds must be clearly and specifically stated. If the grounds in the claim are deemed ambiguous or unclear, the claim may be rejected. Therefore, both foreign investors and governments or private entities must be careful and thorough when filing a claim to avoid failure that could be detrimental to both parties.

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When a dispute arises, the parties choosing ICSID as the mediation body must submit their request to the Secretary-General of ICSID. This request is based on a written agreement indicating the agreement of both parties to resolve the dispute through ICSID. The request must include a description of the problem, identification of the parties involved, mutual agreement on the method of resolution, and the procedural rules to be used. The Secretary-General of ICSID will then assess the request to determine whether it can proceed or not. If approved, the request for conciliation will be directed to form an ICSID conciliation commission, while the request for arbitration will lead to the formation of an Arbitration Tribunal by the ICSID Arbitration Board.

When there is a dispute related to foreign investment, the arbitration council will examine all criteria related to the dispute and evaluate whether there is a 'legal dispute'. If all requirements are met, the ICSID arbitration council will form a panel of arbitrators consisting of at least three people. Each party to the dispute may appoint one arbitrator, with an additional arbitrator from a neutral country. The other two arbitrators represent each party to the dispute. Furthermore, the law that will be applied by the arbitration panel in resolving the dispute is determined based on the choice of the parties to the dispute.

The jurisdiction of ICSID refers to the scope of application of the 1965 Washington Convention, which forms the basis for the establishment of ICSID Arbitration, ensuring that the institution operates effectively. Thus, this jurisdiction underscores the limits of ICSID Arbitration's authority in handling disputes submitted to it. According to Article 41(1) of the ICSID Convention, the ICSID Arbitration Tribunal acts as the determiner of its own authority. Similarly, other international arbitration bodies, when discussing their competence, recognize themselves as entities entitled to determine the scope of their own authority (Hoellering, 1986).

The provisions governing the jurisdiction of the ICSID arbitration body are regulated in Article 25 of the 1965 Washington Convention. According to this article, there are at least three basic requirements that must be met by the parties to be able to use the ICSID arbitration facility to resolve disputes given to it. Regarding the jurisdiction of ICSID, disputes that can be resolved through ICSID only concern legal disputes arising from investment. ICSID does not have jurisdiction over the settlement of disputes related to political interests. ICSID has just obtained jurisdiction (Tupman, 1986).

First, there must be an agreement. To start the dispute resolution process through arbitration, it is important for the parties involved to agree on a mutual understanding and agreement to submit the problem to the International Center for Settlement of Investment Disputes (ICSID). In this scenario, the Convention mandates that there must be a written agreement that explicitly mentions the use of an arbitration body. This requirement is stated in a paragraph of the investment agreement, which regulates the settlement of any potential disputes that may arise from the agreement. However, as stipulated in Article 25 paragraph (1) of the convention, the need to express consent to submit a dispute to this entity does not require the dispute to be included in a separate instrument.

Second, *ratione materiae* jurisdiction. The scope of the jurisdiction of the ICSID arbitration body is limited to legal disputes arising from investment activities. The phrase "legal dispute" is used to describe disputes relating to economic or political issues. In addition, this arbitration body has the

authority to resolve issues relating to rights. However, it should be noted that differences of opinion or conflicts of interest are not included in the consideration.

Third, *ratione personae* jurisdiction. The jurisdiction of the International Center for Settlement of Investment Disputes (ICSID) is limited to resolving conflicts only between states and foreign individuals whose states are also signatories to the Washington Convention. The existing arbitration bodies do not have jurisdiction to resolve conflicts involving inter-state or inter-state issues, regardless of the fact that the disputes relate to legal issues arising from investment agreements.

In connection with the consensus reached by the parties to the dispute, one of the parties, in particular the state which is a signatory to the convention, may give prior notification to the International Centre for Settlement of Investment Disputes (ICSID) in its jurisdiction (Schreuer, 2009). The notification may be made at the time of ratification of the convention or at any time regarding disputes relating to investment which may be subject to the jurisdiction of the arbitration body (Waibel, 2015).

Although the ICSID Convention only has member states, not individuals or companies, disputes between states and individuals or companies can be resolved through ICSID provided that there has been an agreement on the appointment. On the other hand, although this convention has been in force for a country, there is no obligation for a country to resolve investment disputes through ICSID Arbitration, except with written consent. Ratification of the ICSID Convention alone does not cause a country party to withdraw from the jurisdiction of ICSID (Bottini, 2007).

3.2 Settlement of international investment disputes through the International Center Settlement for Investment Dispute (ICSID) case study In Fraport vs The Republic of the Philippines

When a dispute arises, the parties who agree to resolve the dispute through ICSID must submit an application to the Secretary General of ICSID. This application is based on a written agreement regarding the agreement of the parties to resolve the dispute through ICSID. The application must also describe the issues in dispute, the identities of the parties, a joint commitment to the chosen dispute resolution and the procedural law that will be used. This application is then examined by the Secretary General of ICSID to determine whether it can be accepted or rejected. If the submitted application is accepted, then for the application for dispute resolution through conciliation, the ICSID conciliation board will immediately form a commission. Meanwhile, for the application for dispute resolution through arbitration that is accepted, the ICSID arbitration board will form an Arbitration Tribunal.

In the examination process conducted by the arbitration board based on the existence of a lawsuit or claim filed by the parties who feel disadvantaged in relation to foreign investment, the board will examine all the necessary requirements in relation to the lawsuit and also examine and examine whether there is a "legal dispute" or not. If all the requirements have been met by the ICSID arbitration board, a referee board is formed consisting of 3 (three) referees or more arbitrators, each appointed by the parties with the provision that one arbitrator is from a neutral country. While 2 (two) or more other people each represent the disputing parties. In the context of dispute resolution by arbitration, it has also been determined that the applicable law that is the basis for use by the arbitration board in resolving the dispute is the law chosen by the parties (Disputes, 1967).

ICSID jurisdiction refers to the limits of the application of the 1965 Washington Convention which established the ICSID Arbitration so that this body can function properly. In other words, this jurisdiction refers to the limits of the authority of the ICSID arbitration body in resolving disputes submitted to it. Article 41 paragraph (1) of the ICSID Convention stipulates that the ICSID Arbitration Board is a "Judge" over its authorities or jurisdiction. Other international arbitration bodies in matters concerning competence also determine themselves as bodies or parties authorized to determine what matters are within their competence.

Regarding Fraport's shoe research in the Philippines, it is worth noting that the International Centre for Settlement of Investment Disputes (ICSID) dismissed Fraport's claim under the Germany-Philippines Bilateral Investment Treaty. This decision was made due to a finding that Fraport had violated local regulations. However, the ICSID board overturned the decision in 2010. Fraport subsequently initiated further legal action by filing a claim with the International Centre for Settlement of Investment Disputes (ICSID) in 2011. The jurisdiction of the tribunal was challenged by the Philippines, which argued that Fraport's business failed to comply with domestic law, making it ineligible for recognition as an investment under the Bilateral Undertaking Treaty (BIT).

The ICSID ad hoc committee issued a decision in the case of *Fraport v. Philippines*, where it took action to reject legal advice. The aforementioned move was based on Fraport's intention to seek the annulment of the Award issued on 16 August 2007. As part of this effort, Fraport has formally requested the involvement of Mr. Eric Schwartz, a legal representative affiliated with the law firm. Dewey & Leboeuf. The objection raised by the Philippines was to Mr. Schwartz's apparent conflict of interest, arising from his purported representation of the Philippine government in a separate legal case involving Philippine International Air Terminals Co. (PIATCO) v. Philippines, five years prior to the current proceedings.

The objection raised by the Philippines was based on the principles of due process, which state that the Philippines should not be forced to engage in legal proceedings in which counsel "has the ability to access and use confidential information obtained from the opposing party" (para. 7). The Philippines formally petitioned the Committee to issue a directive prohibiting Mr. Schwartz from participating or engaging in any capacity on behalf of Fraport in this arbitration proceeding (para. 10). The grounds for this petition were to preserve the integrity of the arbitration process, afford all parties fair procedural rights during the proceedings, and prevent any procedural errors that could prejudice the final decision. In the tenth paragraph, the user text should be rewritten to be more academic in style.

The author argues that the *Fraport v. Philippines* case has the potential to find a resolution by using Article 44 of the ICSID Convention. This specific provision authorizes the Arbitral Tribunal to adjudicate on "any investment matter" not explicitly dealt with in the relevant regulations or treaty (paragraph 35). By the entities involved. Taken together, Articles 44 and 52(1Xd) empower the ICSID Council to assess the parties' compliance with "widely recognized principles regarding conflicts of interest and confidentiality, and to ensure that there are no significant departures from these principles" (para. 37). This capacity, according to the reasons given by the Committee (Antonietti, 2007).

One of the ICSID Resolution's efforts to address the problems faced by the Fraport Committee has been to develop meaningful international rules to protect against conflicts of interest in representation, as exemplified by the clear standards in the Code of Professional Conduct for Counsel promulgated for the International Criminal Court. Critics of the rules on legal representation in international arbitration argue that the inherently private and ad hoc nature of arbitration precludes the development of comprehensive rules similar to those established by permanent judicial bodies such as national courts or the International Criminal Court. Some critics argue that the application of clear rules has the potential to undermine the court's capacity for adaptability and discretion. An alternative view is that national governments have a superior ability to address issues of public policy and trends. culture. In an attempt to address these criticisms with foresight, the Committee in Fraport made an effort to limit its involvement in evaluating conflicts and the criteria for disqualifying a conflict. This was achieved by minimizing the scope of the investigation, and focusing only on allegations relating to "general principles that are clearly essential to ensure a fair conduct process" (para. 41). Despite this attempt to limit its own investigation, the Fraport decision ultimately demonstrates the inevitable and increasingly significant function that arbitral tribunals fulfill in overseeing legal representation (Rau, 2014).

4. CONCLUSION

From the description that the author has presented, the following conclusions regarding the issues raised are as follows: Regarding the jurisdiction of ICSID, that disputes that can be resolved through ICSID only concern legal disputes arising from investment. ICSID only obtains jurisdiction over disputes to be resolved if there is a written agreement from both parties. If both parties have stated their agreement, then no party can unilaterally withdraw from the ICSID dispute resolution. The resolution of the Fraport vs. Philippines Dispute at ICSID is by developing international regulations to protect against conflicts in representation, as stated in the Code of Professional Ethics for Counsel to the International Criminal Court. Opponents argue that the private nature of arbitration limits the development of regulations, weakening the flexibility of the court. The Committee in Fraport limits its role in assessing conflicts and disqualifying them, highlighting the increasingly important role of arbitral tribunals in regulating legal counsel.

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