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Guide to ICSID Arbitration

SECOND EDITION

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Acknowledgements

We acknowledged in the first edition of this Guide that it is a far greater challenge to write a short book than a long one, with the challenge being magnified when the goal is to explain a complex field to newcomers rather than to analyze nuances for fellow experienced practitioners. Here we acknowledge that the major challenge in drafting the second edition was to cover the scores of new ICSID awards and decisions in investment treaty arbitrations without overwhelming our intended readers.

We could not have met this new challenge without the help of many of our valued colleagues in the Freshfields Bruckhaus Deringer international arbitration group. Greatest thanks go to our senior associate Jeffery Commission, who oversaw the painstaking task of collecting, reviewing and culling new ICSID jurisprudence, and who also prepared the extremely helpful tables of cases in Annex 10. We also thank our New York associates Katie Duglin, Katie Palms, Lindsay Gastrell, Patrick Childress and Jonathan Davis.

Foreword

by Meg Kinnear, ICSID Secretary-General

The last two decades have seen unprecedented growth in cross-border investment flows, the number of concluded investment treaties regulating those flows, and the number of international investment arbitrations. ICSID has been privileged to host the majority of these arbitrations and to play a leadership role in this field.

What may be less evident is the extent to which international investment arbitration has become an increasingly specialized and procedurally innovative endeavour. One need only consider recent cases and commentary on subjects as varied as arbitrator conflict of interest, the scope of provisional measures, the role of non-disputing third parties, or the standard of review for awards, to demonstrate the complexity of this field.

At the same time, the number and diversity of stakeholders involved in international investment arbitration has expanded. For example, 25% of the new cases at ICSID in fiscal year 2010 were initiated by investors from developing economies, more than in any prior year. An analogous trend emerged with respect to the identity of respondents, where the 27 newly registered ICSID cases named 24 different States from every region of the world.

Given this environment, the second edition of this guide is an especially welcome complement to the several excellent sources of information about the ICSID Convention and ICSID arbitration practice that are currently available. It provides a thorough yet succinct roadmap for parties and counsel navigating an ICSID arbitration, whether as novice or experienced litigants. The authors have shared their considerable expertise and knowledge of this field in a user-friendly, accessible and practical manner. In so doing, they

have enhanced the ability of all stakeholders to put their best case forward in future arbitrations.

Meg Kinnear
Washington, D.C.
October 2010

Preface to the second edition

An impediment to foreign investment in many developing countries has been the investors' perception that, in the event of disputes with the host State, they would find themselves without an effective legal remedy. Investors cannot realistically rely on their own governments to raise their claims promptly and vigorously under traditional avenues of diplomatic protection. If investors proceed alone in the local courts against the host State, they often fear discrimination.

To help resolve this quandary, the World Bank conceived a unique forum for arbitrating investment disputes. Since its entry into force in 1966, the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ***ICSID Convention*** or the ***Convention***) has offered Contracting States and eligible foreign investors the opportunity to bring their investment disputes to neutral arbitration tribunals constituted on an *ad hoc* basis. The tribunals are administered by the World Bank Group's International Centre for Settlement of Investment Disputes (***ICSID*** or the ***Centre***) in Washington, DC. They function independently of local courts and local procedural law. Most important, ICSID awards – unlike any other international arbitration awards – are immune from any form of national court review, and yet are enforceable in the courts of the more than 144 Contracting States as if they were national court judgments.

Nonetheless, because arbitration arising *directly* under the ICSID Convention is limited to cases in which foreign investors and States have explicitly provided for ICSID arbitration in an investment contract to which the relevant State (or a specifically designated subdivision of the State) is required to be a party, ICSID arbitration was little used for the first 20 years of its existence. There were isolated

cases that did provide valuable guidance for investors and States and attracted scholarly interest, but ICSID arbitration remained rather esoteric.

The situation changed dramatically beginning in the mid-1990s as a consequence of the proliferation of bilateral treaties for the promotion and protection of investment, known as bilateral investment treaties (***BITs***) (as well as multilateral treaties, most notably the North American Free Trade Agreement and the Energy Charter Treaty), providing for ICSID arbitration of foreign investment disputes. Broadly speaking, each State party to a BIT pledges to provide investors from the other State with certain minimum substantive protections, including the right to fair and equitable treatment and the right to be compensated fairly for expropriation, and agrees that such investors may commence ICSID arbitration (or another agreed form of international arbitration) directly against it to obtain redress for violations of the substantive protections of the BIT. Between 1990 and 2008, the number of BITs increased from about 385 to 2,676. By 2002, almost 75 percent of the cases registered with ICSID were investment treaty arbitrations.

This dramatic legal development, which we predicted in 1995, involves the emergence of non-contractual arbitration – or "arbitration without privity" (see Chapter 3) – out of investment treaties. Today, any company considering a new investment in a foreign country and any financing entity playing a role in the investment must be aware of ICSID and of the growing matrix of BITs providing access to ICSID. At the project negotiation and documentation stage, as well as at possible junctures for restructuring, counsel for investors, financiers and government entities must be attuned to possible rights and responsibilities under the ICSID Convention and under available treaties. In sum, advisers to all sides must be at least familiar with the ICSID arbitration regime long before actual disputes develop.

Similarly, when a dispute arises in connection with an existing foreign investment, counsel for the investor must consider all of the potentially applicable BITs to identify the substantive rights and arbitral mechanisms that may be envisaged under them. This must be done promptly and effectively. Parties commencing litigation or pursuing other arbitration remedies may unknowingly waive the essential right of access to ICSID.

This fundamental change in the legal context of international investment flows inspired the first edition of this Guide in 2004. The wave of ICSID awards and decisions since 2004, as well as significant amendments to ICSID rules and practices, have provided the impetus for this second edition in 2010.

Scope of this Guide

We intend this Guide to be true to its purposefully modest title. It is designed to give international investors and their in-house counsel, as well as government legal advisers, an elemental understanding of the ICSID arbitration system and how it may (and may not) be used. For those desiring more detailed and analytical treatment of the ICSID regime, we have included a Selected Bibliography in Annex 9.

We start with a general introduction to the ICSID regime and the comparative merits of ICSID arbitration (Chapter 1). We then explain:

- the contours of an ICSID contractual arbitration and how to draft an effective ICSID arbitration clause (Chapter 2);
- the growth in bilateral investment treaties and other investment treaties providing for ICSID arbitration and the basics of ICSID treaty arbitration (Chapter 3);
- the ICSID rules and how the ICSID arbitration process works in practice (Chapter 4);
- the unique "self-contained" ICSID regime of post-award review, in particular, the annulment process (Chapter 5); and
- the recognition, enforcement and execution of ICSID awards in national courts (Chapter 6).

The ICSID Convention, the many sets of ICSID rules (most recently amended in 2006) and the ICSID case docket are readily available on the ICSID website at www.worldbank.org/icsid. For ease of reference, we have annexed the basic ICSID materials most useful for practitioners, as well as illustrative treaty

materials, the Selected Bibliography previously mentioned, and charts of all ICSID awards and decisions on various issues as of January 2010:

- the ICSID Convention (Annex 1);
- the ICSID Institution Rules (Annex 2);
- the ICSID Arbitration Rules (Annex 3);
- the ICSID Additional Facility Rules and the Arbitration (Additional Facility) Rules (Annex 4);
- as an example, the UK Model BIT (Annex 5);
- as an example, the US-Argentina BIT (Annex 6);
- Chapter 11 of the North American Free Trade Agreement (Annex 7);
- Part III and Part V of the Energy Charter Treaty (Annex 8);
- a Selected Bibliography (Annex 9); and
- tables of ICSID awards and decisions on substantive, procedural and other issues (Annex 10).

A primer like this could not possibly be a complete instruction manual for conducting a case. ICSID arbitrations typically raise complex issues of public international law, including state responsibility and jurisdiction, as well as their interplay with local law. The disputes frequently arise in long-term major projects with multiple private and public players, so that the factual and contractual context also tends to be complex. To assume responsibility for such cases calls for experience and learning that cannot be distilled in an introductory guide such as this. Our goal here is much more circumscribed – to familiarize prospective or first-time users with the ICSID regime.

Although we have, of necessity, added significantly more description of ICSID awards and decisions in investor-state arbitration cases in Chapter 3 in this edition, we repeat the emphatic disclaimer from the first edition that critical analysis of ICSID case law is beyond the scope of this Guide. ICSID jurisprudence on issues of jurisdiction, merits and damages, as well as annulment

of awards, continues to grow rapidly. In this brief book, our discussion of cases is illustrative rather than analytical.

Finally, this Guide assumes basic familiarity with the principles and practice of international commercial arbitration. ICSID arbitration has many distinct procedural and jurisdictional features, but the process as such bears many similarities to international commercial arbitration – as one would expect considering the predominance of economic issues. For those unversed in the basics or wishing a refresher, we recommend *The Freshfields Guide to Arbitration Clauses in International Contracts* (Kluwer Law International, 3rd edition, 2010) and *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th edition, 2009).

Table of contents

Chapter 1

Introduction to ICSID

The International Centre for Settlement of Investment Disputes was established under the 1965 ICSID Convention, which came into force in October 1966 (Annex 1). Executed in Washington, DC, the ICSID Convention is also known as the Washington Convention. As of January 2010, 144 States had both signed and ratified the ICSID Convention (***Contracting States***).[1] Notable exceptions include Russia, Brazil, Canada (signed but not ratified) and Mexico. A list of the Contracting States is available on the ICSID website.

History of the ICSID Convention

The International Bank for Reconstruction and Development, more commonly known as the World Bank, sponsored the Convention. As described by Professor Sir Elihu Lauterpacht in his Foreword to the second edition of Christoph Schreuer's detailed commentary on the ICSID Convention,[2] Aron Broches, then General Counsel of the World Bank, conceived the idea for the Convention in

1 Since the publication of the first edition of this Guide in 2004, the Convention has entered into force in six additional States (the Republic of Yemen (2004), the Kingdom of Cambodia (2005), the Syrian Arab Republic (2006), the Republic of Serbia (2007), the Republic of Kosovo (2009) and the Republic of Haiti (2009)). Two States, the Plurinational State of Bolivia (2007) and the Republic of Ecuador (2009), have notified their withdrawal from the Convention.

2 C. Schreuer et al., *The ICSID Convention: A Commentary*, 2d ed. (Cambridge: Cambridge University Press, 2009), ix-x.

1961 in the wake of earlier efforts by the Organization for European Economic Co-operation (now the Organization for Economic Cooperation and Development, or ***OECD***) to create a framework for the protection of international investment. The OECD exercise (which led to the OECD Draft Convention on the Protection of Foreign Property) revealed intractable controversy as to the proper level of compensation for expropriation of foreign investments. Broches and others recognized that it would be more productive to strive for multilateral agreement on a *process* for independent resolution of individual investment disputes rather than on actual substantive standards.

Broches conceived and pursued a *sui generis* strategy for negotiation of the necessary international convention. First, he convened consultative conferences of legal experts in Addis Ababa, Santiago de Chile, Geneva and Bangkok to discuss a preliminary draft. On the basis of the reports of these conferences,[3] the World Bank staff prepared a first official draft of the Convention, met with the Legal Committee of the Executive Directors of the World Bank, and then submitted the final draft to the Executive Directors for approval.

In March 1965, the Executive Directors approved the text of the ICSID Convention, issued an important companion Report,[4] and directed the President of the World Bank to circulate the Convention and Report to all member States. The mandatory minimum 20 States quickly ratified the Convention, and it entered into force on 14 October 1966. Industrialized and developing countries alike have signed on as Contracting States over the years, resulting in the remarkably high membership of 144 States (as of January 2010).

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3 The detailed reports of the 1963 and 1964 regional conferences are compiled in *History of the ICSID Convention: Documents Concerning the Origin and Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, vols. I–IV (Washington, DC: ICSID, 1970).

4 "Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965", *ICSID Reports* 1 (1993): 23-33.

Goals of the ICSID Convention

Given the now considerable body of ICSID jurisprudence, resulting from the proliferation of bilateral investment treaties and international agreements with investment provisions,[5] and the continued interest of arbitration practitioners in the ICSID dispute resolution process as a forensic art, it is easy to forget that the primary purpose of the ICSID Convention is to promote foreign investment. The Report of the Executive Directors on the Convention emphasizes the aim of promoting global economic development through private international investment. The theme of partnership and interdependence between industrialized and developing countries, protected by a regime of truly independent dispute resolution, is highlighted in the Report:

> "9. In submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.
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> 10. The Executive Directors recognize that investment disputes are as a rule settled through administrative, judicial or arbitral procedures available under the laws of the country in which the investment concerned is made. However, experience shows that disputes may arise which the parties wish to settle by other methods; and investment agreements entered into in recent years show that both States and investors frequently consider that it is in their mutual interest to agree to resort to international methods of settlement.

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5 International agreements with investment provisions include free trade agreements (such as the North American Free Trade Agreement (the ***NAFTA***, *see* Annex 7) and the Dominican Republic–Central America–United States Free Trade Agreement) and sector-specific agreements (such as the Energy Charter Treaty (the ***ECT***, *see* Annex 8)).

> 11. The present Convention would offer international methods of settlement designed to take account of the special characteristics of the dispute covered, as well as of the parties to whom it would apply. It would provide facilities for conciliation and arbitration by specially qualified persons of independent judgment carried out according to rules known and accepted in advance by the parties concerned. In particular, it would ensure that once a government or investor had given consent to conciliation or arbitration under the auspices of the Centre, such consent could not be unilaterally withdrawn.
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> 12. The Executive Directors believe that private capital will continue to flow to countries offering a favorable climate for attractive and sound investments, even if such countries did not become parties to the Convention or, having joined, did not make use of the facilities of the Centre. On the other hand, adherence to the Convention by a country would provide additional inducement and stimulate a large flow of private international investment into its territories, which is the primary purpose of the Convention.
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> 13. While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States. Moreover, the Convention permits the institution of proceedings by host States as well as by investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases."[6]

In sum, the Executive Directors of the World Bank underscored the importance of the balance inherent in the Convention: the basic goal of the ICSID system is to promote much-needed international investment by offering a neutral dispute resolution forum both to investors that are (rightly or wrongly) wary

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6 "Report of the Executive Directors", *supra* note 4, at 25.

of nationalistic decisions by local courts and to host States that are (rightly or wrongly) wary of self-interested actions by foreign investors.

The Preamble of the Convention itself underlines this economic goal, and the operational objective of establishing an effective regime for neutral resolution of investment disputes that is attractive to States and investors alike:

"The Contracting States

Considering the need for international cooperation for economic development, and the role of private international investment therein;

Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;

Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;

Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;

Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development;

Recognizing that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and

Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,

Have agreed as follows:" (emphasis in original).