

## Preamble

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### 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:

#### A. “The Contracting States . . . *Have agreed* as follows:”

The Convention’s preparation took place in the years 1961 to 1965.<sup>1</sup> The drafting history is fully documented in a four-volume collection:<sup>2</sup>

Vol. I: Analysis of Documents Concerning the Origin and the Formulation of the Convention (1970);

1 For descriptions of the Convention’s drafting history see: History, Vol. I, pp. 2–10; Report of the Executive Directors on the Convention, paras. 6–8, 1 ICSID Reports 24/5; Broches, A., Development of International Law by the International Bank for Reconstruction and Development, 59 American Society of International Law Proceedings 33 (1965); Broches, A., The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 136 Recueil des Cours 331, 342–347 (1972-II); Sutherland, P. F., The World Bank Convention on the Settlement of Investment Disputes, 28 International and Comparative Law Quarterly 367, 374–378 (1979).

2 Reprinted in 2001.

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Vol. II (in two parts): Documents Concerning the Origin and the Formulation of the Convention (in English) (1968);

Vol. III: Documents Relatifs à l'Origine et à l'Elaboration de la Convention (in French) (1968);

Vol. IV: Documentos Relativos al Origen y a la Formulación del Convenio (in Spanish) (1969).

In this Commentary reference to that collection is made as: History, Vol. number and page.

- 2 The initiative for the Convention came from the staff of the World Bank, notably its General Counsel, *A. Broches*, who can be described as the ICSID Convention's principal architect. On 28 August 1961, Mr. *Broches* sent a note to the World Bank's Executive Directors setting out the basic idea for the Convention (History, Vol. II, pp. 1 *et seq.*). The idea was taken up by the World Bank's President in his address to the Bank's Annual Meeting in Vienna on 19 September 1961 (at p. 3). This was followed by Notes from the President and from Mr. *Broches* to the Executive Directors (at pp. 4, 6). A meeting of the Executive Directors on 10 April 1962 led to a request for a more detailed proposal (at p. 13).
- 3 On 5 June 1962 Mr. *Broches* presented a Working Paper, the first draft to the Convention (History, Vol. II, p. 19). This draft was considered by the Executive Directors, meeting as a special Committee of the Whole on Settlement of Investment Disputes, from December 1962 to June 1963. Following these considerations, the staff of the Bank submitted an annotated First Preliminary Draft on 9 August 1963 (at p. 133) and an annotated Preliminary Draft on 15 October 1963 (at p. 184).
- 4 In view of the highly technical nature of the questions involved, the next step was a series of regional consultative meetings of legal experts chaired by Mr. *Broches*. These meetings took place in Addis Ababa (16–20 December 1963), in Santiago de Chile (3–7 February 1964), in Geneva (17–21 February 1964) and in Bangkok (27 April–1 May 1964). The basis for the deliberations at these meetings was the Preliminary Draft. The meetings were attended by legal experts from 86 countries. The debate was mainly on an article-by-article basis. No votes or formal decisions were taken. Rather, detailed summary records were prepared. These were submitted to the Executive Directors together with a detailed summary of collective conclusions prepared by Mr. *Broches*.
- 5 The Executive Directors considered these documents in July and August 1964. On 6 August 1964, the Executive Directors submitted a Report to the World Bank's Board of Governors concluding that it would be advisable for the Executive Directors to undertake the formulation of a convention on the settlement of investment disputes between States and nationals of other States (History, Vol. II, p. 606).<sup>3</sup> The Board of Governors considered this Report at its Annual Meeting in

<sup>3</sup> 3 ILM 1172 (1964).

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Tokyo in September 1964. Despite some dissent from Latin American countries (see Art. 68, para. 9), it adopted a Resolution on 10 September 1964 requesting the Executive Directors to formulate such a convention and to submit it directly to member governments (History, Vol. II, p. 608).<sup>4</sup>

In the meantime, the staff of the World Bank had prepared, in the light of the discussions at the regional consultative meetings, a new draft convention called the First Draft (History, Vol. II, p. 610). This draft formed the basis for deliberations in the Legal Committee on Settlement of Investment Disputes convened in Washington from 23 November to 11 December 1964. The Legal Committee consisted of government experts and acted as an advisory organ of the Executive Directors. Representatives of 61 governments participated in its work. The Legal Committee was chaired by Mr. *Broches*. It acted mostly through consensus. The Legal Committee used English, French and Spanish. It adopted a decision to use British rather than American spelling for the English version (at p. 749).

The Legal Committee considered the draft convention on an article-by-article basis. Working groups considered certain specific issues. A Drafting Subcommittee went over the text after consensus on substance had been reached. On 11 December 1964 the Legal Committee adopted the Revised Draft of the Convention (History, Vol. II, p. 911).

The Executive Directors considered this draft in a series of meetings from 16 February to 4 March 1965. They made a number of changes. The most important of these concerned the issue of subrogation (see Art. 25, para. 366) and the standing of a foreign controlled company that is incorporated in the host State (see Art. 25, para. 762). The Executive Directors also considered their draft report on the Convention.

On 18 March 1965 the Executive Directors adopted a resolution approving the final text of the Convention (History, Vol. II, p. 1039). At the same time they approved the Report of the Executive Directors on the Convention. The President of the World Bank was instructed to transmit the text of the Convention and the Report to all member governments of the Bank. The Executive Directors also instructed the President and the General Counsel of the Bank to sign a copy of the Convention (see Final Clause, para. 1). This was designed to indicate the Bank's agreement to fulfil the functions, principally those of depositary, with which it is charged under the Convention.

The Convention entered into force on 14 October 1966 in accordance with its Art. 68(2) (see Art. 68, para. 7). On 1 January 2008 the Convention had 143 Parties. A further 12 States had signed but not yet ratified the Convention (see Art. 68, para. 8).

<sup>4</sup> 3 ILM 1171 (1964).

**B. “Considering the need for international cooperation for economic development, and the role of private international investment therein;”**

**11** The Convention’s primary aim is the promotion of economic development. Economic development depends in large measure on private international investment. The Convention is designed to facilitate private international investment through the creation of a favourable investment climate.<sup>5</sup>

**12** The link between an orderly settlement of investment disputes, the stimulation of private international investments and economic development is explained in the Report of the Executive Directors on the Convention in the following terms:

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.

...

12... adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.<sup>6</sup>

**13** The Tribunal in *Amco v. Indonesia* explained that ICSID arbitration is in the interest not only of investors but also of host States. It concluded:

Thus, the Convention is aimed to protect, to the same extent and with the same vigour, the investor and the host State, not forgetting that to protect investments is to protect the general interest of development and of developing countries.<sup>7</sup>

**14** Several tribunals have quoted this passage of the Preamble in support of the conclusion that an “investment” in the sense of Article 25(1) would have to contribute to the host State’s economic development.<sup>8</sup> The Tribunal in *CSOB v. Slovakia* said:

This language permits an inference that an international transaction which contributes to cooperation designed to promote the economic development of a

5 *Amerasinghe, C. F.*, The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation, 9 *Vanderbilt Journal of Transnational Law* 793, 794/5 (1976); *Broches, A.*, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 136 *Recueil des Cours* 331, 342/3 (1972-II); *Kahn, P.*, The Law Applicable to Foreign Investments: The Contribution of the World Bank Convention on the Settlement of Investment Disputes, 44 *Indiana Law Journal* 1 *et seq.* (1968); *Shihata, I. F. I.*, Promotion of Foreign Direct Investment – A General Account, with Particular Reference to the Role of the World Bank Group, 6 *ICSID Review – FILJ* 484 *et seq.* (1991).

6 1 *ICSID Reports* 25.

7 *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 23. See also Award, 20 November 1984, para. 249.

8 *Mitchell v. Congo*, Decision on Annulment, 1 November 2006, para. 28; *Malaysian Historical Salvors v. Malaysia*, Award, 17 May 2007, para. 66. See also *Siag v. Egypt*, Decision on Jurisdiction, 11 April 2007, para. 38.

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Contracting State may be deemed to be an investment as that term is understood in the Convention.<sup>9</sup>

**C. “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;”**

The Convention does not attempt to develop substantive rules for the protection of private international investments (see Art. 42, para. 1).<sup>10</sup> It contributes to the improvement of the investment climate by offering a procedural framework for the settlement of disputes. The substantive rules to be applied are left to the agreement of the parties. In the absence of such an agreement, Art. 42 provides that a tribunal will apply the law of the host State and applicable rules of international law. 15

The disputes in question must arise in connection with an investment (see Art. 25, paras. 113–210). One party to the dispute must be a host State that has ratified the Convention (see Art. 25, paras. 211–229). The other party must be an investor who is a national of another State that has ratified the Convention (see Art. 25, paras. 268–302, 635–902). Certain disputes that do not meet all of these requirements may be settled by means of the Additional Facility created in 1978 (see Art. 6, paras. 25, 26; Art. 25, paras. 9–13). 16

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

Under general principles of the conflict of laws, jurisdiction over disputes between a State and a foreign investor would normally be with the courts and tribunals of the host State. Subjection of such disputes to the local legal process increases the host State’s control over foreign investors. Therefore, capital importing States have traditionally favoured this method of dispute settlement.<sup>11</sup> 17

From the investor’s perspective, the settlement of disputes through the host State’s court system is not attractive. Rightly or wrongly, the national courts of one of the disputing parties are not perceived as sufficiently impartial. Even in the absence of overt prejudice, these courts may be subject to outside pressures. Moreover, the courts will usually be bound by the local law even if it is at odds with the host State’s international obligations. In addition, the regular courts will often lack the technical expertise required to resolve complex international investment disputes. An excessive case load of courts in many countries leading to long delays compounds the misgivings that many investors have about this form of settlement. 18

<sup>9</sup> *CSOB v. Slovakia*, Decision on Jurisdiction, 24 May 1999, para. 64.

<sup>10</sup> The Development Committee of the World Bank and of the International Monetary Fund has since adopted non-binding Guidelines on the Treatment of Foreign Direct Investments, 7 ICSID Review – FILJ 295 (1992).

<sup>11</sup> This preference found its expression in Resolution 3281(XXIX) of the General Assembly of the United Nations of 12 December 1974, termed the Charter of Economic Rights and Duties of States, Art. 2, para. 2(c).

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19 Domestic courts of other countries, notably those of the investor's home State, are usually not a viable alternative. In most cases, they will lack territorial jurisdiction over investment operations taking place in another country. An agreement to submit to these courts, while theoretically possible, is usually unacceptable to the host State as a matter of principle. In addition, sovereign immunity will be a formidable obstacle to suing the host State in the courts of another country, at any rate where acts of official authority are involved.<sup>12</sup>

20 The Report of the Executive Directors on the Convention addresses this issue in the following terms:

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.<sup>13</sup>

21 Traditionally, private investors did not have access to international methods of dispute settlement. The International Court of Justice is open only to States in contentious proceedings. The classical method for the international settlement of investment disputes was diplomatic protection by the investor's home State. But diplomatic protection has serious disadvantages. The investor must have exhausted all local remedies in the host State. The investor depends entirely on its national government which may be unwilling to pursue the claim for political reasons (see Art. 27, paras. 1–4).

22 The Convention does not eliminate access to the national legal process for investment disputes. It merely opens an option to the host State and to the investor to utilize international conciliation and arbitration. Once arbitration under the Convention has been agreed to, this choice operates to the exclusion of other remedies, notably domestic courts, unless the parties agree otherwise (see Art. 26, paras. 44–54, 132–148). Exhaustion of local remedies is not a condition for arbitration under the Convention unless this is specifically required by the host State (see Art. 26, paras. 187–231).

**E. “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;”**

23 The Convention provides for conciliation and arbitration on an equal footing. In actual practice, resort to conciliation has been minimal (see Art. 28, para. 6; Art. 34, para. 5). Arbitration is by far the more significant method of dispute settlement under the Convention.

<sup>12</sup> For a description of unsuccessful proceedings in the domestic courts of the investor's home State see *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003, paras. 20–25.

<sup>13</sup> 1 ICSID Reports 25.

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International arbitration provides an attractive alternative to the settlement of investment disputes by national courts or through diplomatic protection. Arbitration is usually less costly and more efficient than litigation through regular courts. It offers the parties the opportunity to select arbitrators who enjoy their confidence and who have the necessary expertise in the field. Moreover, the private nature of arbitration, assuring the confidentiality of proceedings, is often valued by parties to major economic development projects. More recently, the principle of confidentiality has become subject to demands for more procedural transparency (see Art. 44, paras. 97–128). **24**

Arbitration agreements may be negotiated *ad hoc* between host States and foreign investors. Standard rules and procedures such as those offered by the UNCITRAL Rules<sup>14</sup> are useful in drafting such *ad hoc* agreements. The ICSID Convention goes one step further: it offers a system for dispute settlement that contains not only standard clauses and rules of procedure but also institutional support for the conduct of proceedings (see Art. 1, para. 4). It assures the non-frustration of proceedings and provides for an award's recognition and enforcement (paras. 32, 33 *infra*). **25**

The parties to ICSID arbitration retain a large degree of autonomy. They may attach conditions and limitations to their consent to the Centre's jurisdiction (see Art. 25, paras. 513–550). They have much latitude in shaping the composition of an arbitral tribunal (see Art. 37, paras. 15–35). They may choose the substantive rules of law to be applied by a tribunal (see Art. 42, para. 21). They may shape the procedural rules to be applied in proceedings (see Art. 44, paras. 11–19). **26**

ICSID arbitration offers advantages to the investor as well as to the host State. Proceedings may be instituted by either side but in the majority of cases the investor is in the position of claimant. The Report of the Executive Directors on the Convention describes this balance of interests in the following terms: **27**

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.<sup>15</sup>

The advantage for the investor is obvious: it gains direct access to an effective international forum should a dispute arise. The possibility of going to arbitration is an important element of the legal security required for an investment decision. **28**

<sup>14</sup> United Nations Commission on International Trade Law Arbitration Rules, 15 ILM 701 (1976).

<sup>15</sup> 1 ICSID Reports 25.

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The advantage for the host State is twofold: by offering arbitration it improves its investment climate and is likely to attract more international investments. In addition, by consenting to ICSID arbitration the host State protects itself from other forms of foreign or international litigation (Art. 26). Also, the host State effectively shields itself against diplomatic protection by the State of the investor's nationality (Art. 27).<sup>16</sup>

- 29 The Convention's success cannot be measured in terms of the cases actually decided. A large number of cases submitted to ICSID arbitration were at some stage settled by agreement of the parties (see Art. 48, para. 86). It is safe to assume that the proceedings pending before ICSID were decisive in achieving these settlements.
- 30 The system is likely to be effective even without its actual use. The mere availability of an effective remedy tends to affect the behaviour of parties to potential disputes. It is likely to have a restraining influence on investors as well as on host States. Both sides will try to avoid actions that might involve them in arbitration that they are likely to lose. The prospect of litigation will strengthen the parties' willingness to settle a dispute amicably. Thus, the preventive effect of the Convention may be more important than its actual application.<sup>17</sup>

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

- 31 The establishment of a system for the settlement of investment disputes under the auspices of an international lending institution may not appear obvious at first sight. The reason for the World Bank's initiative (see para. 2 *supra*) can be found in the fact that the Bank is an international development agency.<sup>18</sup> In fact, the World Bank's Articles of Agreement list the promotion of private foreign investment among the Bank's purposes.<sup>19</sup>
- 32 The Convention establishes the Centre (Art. 1) with close administrative ties to the World Bank. These ties were not undisputed during the Convention's preparation but have since proven to be extremely useful (see Art. 2, paras. 4, 5).

16 *Delaume, G. R.*, ICSID Arbitration, in: *Contemporary Problems in International Arbitration* (Lew, J. ed.) 23, 24 (1987); *Shihata, I. F. I.*, The Role of ICSID and the Projected Multilateral Investment Guarantee Agency (MIGA), 41 *Außenwirtschaft* 105, 110/11 (1986); but see *Toope, S. J.*, Mixed International Arbitration. *Studies in Arbitration Between States and Private Persons* 219 *et seq.* (1990).

17 *Broches, A.*, The Experience of the International Centre for Settlement of Investment Disputes, in: *International Investment Disputes: Avoidance and Settlement* (Rubin, S./Nelson, R. eds.) 75, 83 (1985); *Delaume, G. R.*, ICSID Arbitration, in: *Contemporary Problems in International Arbitration* (Lew, J. ed.) 23, 25 (1987); *Lalive, P.*, Some Threats to International Investment Arbitration, 1 *ICSID Review – FILJ* 26 (1986); *Paulsson, J.*, ICSID's Achievements and Prospects, 6 *ICSID Review – FILJ* 380, 384 (1991).

18 *Broches, A.*, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 136 *Recueil des Cours* 331, 342 (1972-II).

19 Art. I(ii).



**G. “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;”**

Consent by the parties to conciliation or arbitration under the Convention is binding. Once given, it may not be withdrawn unilaterally (see Art. 25, paras. 596–634). Recommendations of conciliators must be considered in good faith (see Art. 34, paras. 26–27). Awards are binding and enforceable (Arts. 53, 54). The Convention effectively forestalls any attempt to deny the validity of the arbitration agreement unilaterally or to terminate it. Similarly, an award may not be repudiated based on the allegation of its nullity. The Convention’s provision on annulment (Art. 52) is the only avenue to attack an award. **33**

The Convention provides a watertight system against the frustration of proceedings by a recalcitrant party. Arbitrators not appointed by the parties will be appointed by the Centre (Art. 38). The decision on whether there is jurisdiction in a particular case is with the tribunal (Art. 41). Non-cooperation of a party will not stall the proceedings (Art. 45). **34**

**H. “. . . 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,”**

The Convention offers a regulatory and institutional framework for the settlement of disputes. But participation in the Convention does not, by itself, constitute a submission to the Centre’s jurisdiction. For jurisdiction to exist, the Convention requires separate consent in writing by both parties (see Art. 25, paras. 374–381). **35**

Consent to the Centre’s jurisdiction may be given in one of several ways. Consent may be contained in a direct agreement between the investor and the host State (see Art. 25, paras. 382–391). Alternatively, consent may be contained in a standing offer by the host State which may be accepted by the investor in appropriate form. Such a standing offer may be contained in the host State’s legislation (see Art. 25, paras. 392–426). A standing offer may also be contained in a treaty to which the host State and the investor’s State of nationality are parties (see Art. 25, paras. 427–467). More recently, the vast majority of cases that have come before ICSID were not based on consent through direct agreement between the parties but on consent through a general offer by the host State which is later accepted by the investor most often simply through instituting proceedings. **36**

## Article 1

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**(1) There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre).**

**(2) The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.**

### OUTLINE

	<i>Paragraphs</i>
1. Establishment and Name of the Centre	2
2. Purpose of the Centre	3–7

**1** Art. 1 is part of the Convention's Chapter I dealing with the organizational structure of the International Centre for Settlement of Investment Disputes (ICSID, the Centre). Subsequent Articles deal with the Centre's seat, its organs, its financing and its status, immunities and privileges.

#### *1. Establishment and Name of the Centre*

**2** During the Convention's drafting, there was never any doubt that there would be a permanent administrative entity to facilitate the Convention's application (History, Vol. I, pp. 22, 24). There was some debate about the name of this entity (History, Vol. II, pp. 55, 76, 97, 111, 247, 381, 677, 681). Earlier drafts foresaw "International Conciliation and Arbitration Center". This was changed into "International Center for the Settlement of Investment Disputes" (History, Vol. I, pp. 22, 24; Vol. II, p. 750). Eventually, the word "the" was removed from the name and the spelling "Centre" was adopted (at p. 943).

#### *2. Purpose of the Centre*

**3** During the Convention's drafting, it was repeatedly emphasized that the Centre's purpose would be to facilitate conciliation and arbitration but that it would not undertake these activities itself. In other words, the Centre's task would be administrative rather than judicial (History, Vol. II, pp. 103, 104/5, 109–111, 113, 121, 129, 241, 953).<sup>1</sup> There were suggestions to add an advisory function to the purpose of the Centre (at pp. 472/3, 541, 544, 656). The First Draft contained

<sup>1</sup> See also Report of the Executive Directors on the Convention, para. 15, 1 ICSID Reports 26.