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978-0-521-88559-1 - The Icsid Convention: A Commentary: A Commentary on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States: Second Edition
Christoph H. Schreuer with Loretta Malintoppi, August Reinisch and Anthony Sinclair
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The ICSID Convention: A Commentary

This unique compendium offers an article-by-article commentary to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Providing a comprehensive explanation of the functioning of this important mechanism for the settlement of investor–host State disputes, it incorporates the preparatory work, the Convention’s text, various rules and regulations adopted under the Convention, the practice of arbitral tribunals under the Convention and academic writings on the subject.

The first edition of this work has been relied upon by numerous arbitral tribunals. This second edition follows the same system and approach, but extensive updates reflect the vast increase in arbitral practice since the publication of the first edition. A number of novel issues that have emerged through this practice are now addressed, making this practice-oriented guide an indispensable tool for anyone dealing with the ICSID Convention.

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A Commentary on the Convention on the Settlement of Investment
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SECOND EDITION

CHRISTOPH H. SCHREUER

with

LORETTA MALINTOPPI

AUGUST REINISCH

ANTHONY SINCLAIR



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FOREWORD

by Professor Sir Elihu Lauterpacht, CBE, QC

The idea for the International Convention on the Settlement of Investment Disputes (“the Convention”) was first conceived in 1961 by Aron Broches, then the General Counsel of the World Bank. This initiative carried forward a more general one for the protection of international investment that had begun in the Organisation for European Economic Co-operation (now the Organisation for Economic Co-operation and Development) in the late 1950s and that ended in the production in 1962 of the OECD Draft Convention on the Protection of Foreign Property. The idea prevailed that in the then divided state of opinion the best way to provide satisfactory legal infrastructure for the promotion of international private investment flows would be by providing effective procedures for impartial settlement of disputes rather than by seeking multilateral agreement on the establishment of general substantive standards.

The negotiating procedure initiated by Mr Broches was a novel one aimed at the avoidance of direct confrontation between opposing views in a large-scale international conference. Instead, he submitted the evolving text to a series of regional conferences in Africa, the Americas, Asia and Europe, inviting comments and proposals, but retaining in his own hands the preparation of a final text for submission to the Executive Directors of the Bank.

In 1965 the Convention was opened for signature and ratification. The 20 ratifications required for its entry into force were rapidly achieved and the Convention became operational on 14 October 1966. It soon secured broad support from States in all parts of the world including States newly emerging into independence.

At the time the Convention was concluded, some of its most important features represented significant new developments, though in the light of subsequent advances in international law they now appear almost commonplace. For the first time a system was instituted under which non-State entities – corporations or individuals – could sue States directly; in which State immunity was much restricted; under which international law could be applied directly to the relationship between the investor and the host State; in which the operation of the local remedies rule was excluded; and in which the tribunal’s award would be directly enforceable within the territories of the States parties.

The system was first limited to cases where both the national State of the investor and the State Party to the case were Parties to the Convention. This meant

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Foreword by Professor Sir Elihu Lauterpacht

that if one party to the dispute did not meet this requirement, the matter could not be submitted to ICSID, even if both parties so wished. This problem was solved in 1978 by the creation by the Bank of the “Additional Facility” which permits recourse – albeit imperfect – to the main elements of the ICSID system even if only one party meets the requirement, provided that both have given their consent.

Consent to jurisdiction under the system was originally foreseen as deriving principally from express references to it in the arbitration clauses of investment contracts. However, the sources of consent have been significantly widened by the development of recourse to ICSID on the basis of legislation and provisions in inter-State bilateral investment treaties as well as by multilateral arrangements such as the North American Free Trade Agreement and the Energy Charter Treaty. Nowadays the vast majority of cases are brought to ICSID on the basis of offers of consent in treaties which are accepted by investors, typically at the time of the institution of proceedings.

The development of the ICSID system has generated a significant number of studies and articles. These are amply represented in the bibliography of the present work. For some time that literature did not include a dedicated series of reports of decisions nor a systematic and comprehensive analysis of the Convention making full use of the *travaux préparatoires*. In 1993 the Research Centre for International Law in the University of Cambridge (as it was then called) introduced the *ICSID Reports* which seek to publish all available reports of ICSID decisions, together with a detailed and valuable index.

Soon after the work on the *Reports* was begun, the Research Centre was fortunate in persuading Professor Schreuer to undertake the complementary task of preparing this much-needed systematic Commentary, the first edition of which was published in 2001. This ground-breaking and exemplary effort has since received much acclaim by academic international lawyers and by arbitration professionals.

The time since the publication of the first edition of this work has seen an enormous increase in the number of cases before ICSID tribunals. This Commentary has become a daily staple for all those who work on these cases and who write about them. This work has become the most widely quoted source of reference on the ICSID Convention for academics and professionals alike.

The rapidly increasing practice has necessitated a second edition to keep pace with the ever-growing jurisprudence emanating from numerous tribunals and *ad hoc* committees operating under the Convention. The community of lawyers who work with the ICSID Convention is much indebted to Professor Schreuer and to his associates who have worked on this new edition.

Elihu Lauterpacht

Lauterpacht Centre for International Law
University of Cambridge
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AUTHORS' PREFACE TO THE SECOND EDITION

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) entered into force on 14 October 1966. It provides for the settlement of disputes between host States and foreign investors through arbitration or conciliation. These procedures are administered through the International Centre for Settlement of Investment Disputes (ICSID, or the Centre).

The ICSID Convention was conceived by the Directors of the World Bank as an instrument of international economic development. Dispute settlement under the Convention offers advantages to the host State as well as to the investor.

By offering arbitration, the host State improves its investment climate and is likely to attract more international investment. In addition, by consenting to ICSID arbitration the host State protects itself against other forms of foreign or international litigation. The host State also effectively shields itself against diplomatic protection by the State of the investor's nationality.

The investor gains direct access to an effective international forum should a dispute arise. Thus, the possibility of going to arbitration is an important element of the legal security required for an investment decision.

During its early years the use of the dispute settlement procedure created by the ICSID Convention remained scant. Yet, over the years ICSID's case load has increased dramatically. This has been due particularly to consent to arbitration based on treaties. At the time of writing, ICSID's website listed 153 concluded and 120 pending cases.

More significant than the number of cases is the amount of investment covered. The mere availability of a mechanism for the orderly settlement of disputes is likely to improve a country's investment climate and to have a moderating influence on the parties' conduct. Numerous investment agreements between States and foreign investors contain consent clauses submitting disputes between the parties to the Centre. Hundreds of bilateral investment treaties offer binding dispute settlement under the ICSID Convention to investors from the respective countries. A number of multilateral treaties also offer ICSID dispute settlement to investors. In addition, legislation on foreign investments in a number of countries offers ICSID arbitration and conciliation to foreign investors. In this way, a large portion of world-wide private foreign investment is protected through the Convention's mechanisms.

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The material covered by this Commentary covers the *travaux préparatoires* to the Convention, the case law to the extent that it is accessible, the rules and regulations adopted by the Centre's Administrative Council, Model Clauses published by the Centre, treaty practice and national legislation relevant to the Convention, agreements between host States and investors and a wealth of scholarly writings relating to the Convention.

The idea for this Commentary was first conceived by Professor Sir Elihu Lauterpacht, CBE, QC, the former director of the Research Centre for International Law at the University of Cambridge (now the Lauterpacht Centre for International Law). Professor Schreuer gratefully accepted the invitation to write such a commentary under the auspices of the Research Centre. The current director of the Lauterpacht Centre, Professor James Crawford, has continued to support the project vigorously. He has made numerous helpful suggestions and has played an important role in paving the way for its publication.

The first edition of this Commentary was published in 2001. An earlier version of large portions was published in 8 instalments in the *ICSID Review – Foreign Investment Law Journal* stretching from Volume 11 in 1996 to Volume 15 in 2000. The first edition was well received and has been quoted in numerous decisions of ICSID tribunals and *ad hoc* committees.

After only a few years it became clear that the rapidly growing number of decisions would necessitate a second edition to capture novel developments in both the case law and the scholarly debate surrounding it. It was felt that this task would be best tackled by a small team of experienced experts in the field. Hence, the present edition is the joint product of four authors coordinated by the author of the first edition.

The wealth of ever increasing case law and doctrine, especially in the form of new decisions issued on an almost weekly basis, has necessitated a cut-off point for the inclusion of new material. The authors have endeavoured to cover developments until the beginning of 2008 comprehensively and have selectively included some decisions issued after that date.

Considerable assistance was received from the ICSID Secretariat in preparing the first edition of this work. In this second edition, the authors wish to record that the analysis given and opinions advanced are theirs alone and that they do not reflect the position of ICSID and its staff. All the Commentary's shortcomings are the authors' sole responsibility.

In preparing the first edition the author received much support from Susanne Klozenbücher, Isabelle Talpain-Long, Christian Campbell, Christian Ebner and Daria Maca. In preparing the second edition the authors were greatly assisted by Clara Reiner who gave support in numerous ways and without whose help this endeavour would hardly have been possible. Maureen McGlashan contributed her valuable expertise in preparing the indexes. Johanna Willmann and Nadia Kalb helped with the proofreading.

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ITA: Investment Treaty Arbitration homepage: <http://ita.law.uvic.ca/>

IC: Investment Claims homepage: <http://www.investmentclaims.com/>

NOTE: Bold numbers refer to Articles of the ICSID Convention. Lean numbers refer to paragraphs.

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