Part I. Development and Structure of ICSID

Chapter 1. Introduction

1. The International Centre for Settlement of Investment Disputes (ICSID) is an independent international organization and a leading international arbitration institution in the field of investor-state dispute settlement (ISDS). It was established in 1966 as a part of the World Bank pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

2. ICSID has undoubtedly become the central institution in the world of international investment law. As of 2019, 154 states were Contracting States to the ICSID Convention, and 306 cases were administered by ICSID in that year alone.[2] Given the clear importance of ICSID in the international investment law regime, it is important to understand how the institution is structured, how decisions are made and how it is financed. Without such information, parties could quickly lose faith in it as a neutral forum in which to settle investment disputes. Further, despite the dominance of ICSID, it does not exist in isolation. A number of other institutions also play a role in the international investment law regime. This chapter will examine the efforts that have been made to build relationships between ICSID and these other entities.

3. The Convention sought to remove major impediments and risks to foreign direct investments (FDIs) in the absence of specialized facilities for investment dispute settlement. It created the Centre for Settlement of Investment Disputes as an impartial international forum providing facilities for the resolution of international investment disputes. The Centre facilitates resolution of disputes between foreign investors and states through conciliation or arbitration procedures. Recourse to the ICSID facilities is always voluntary and subject to the parties' consent.

4. ICSID also acts as an appointing authority for investor-state arbitrations under other procedural rules. The Centre also provides administrative assistance to arbitrations conducted under ad hoc rules, such as the United Nations Commission on International Trade Law (UNCITRAL). The Centre's support includes organization of hearings and administrative services similar to those provided in ICSID cases.

2. ICSID, 2019 Annual Report, 11, 19.

ICSID Secretariat also acts as appointing authority and decides upon proposals to disqualify arbitrators. The Centre assisted with proceedings under the auspices of International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), Permanent Court of Arbitration (PCA) and other institutions.[3]

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3. ICSID, The ICSID Caseload Statistics Issue 2012-2, 9.

Chapter 2. ICSID and Investor-State Disputes

5. Prior to studying the ICSID in detail, it is necessary to look into the economic and legal context that determined the need for establishing the ICSID. The main factors were the rise of cross-border foreign investments and the increasing number of bilateral and multilateral investment treaties setting the legal standards of treatment of foreign investors.

6. Before the modern system of direct investor-state dispute resolution emerged, disputes were resolved via diplomatic channels or, at times, by the threat or actual use of military force.[4] Since at least the late eighteenth century states began to systematically address injuries suffered by foreigners on their territory, largely through so-called claims commissions.[5] These commissions often emerged in response to wars or civil insurrections that impacted the property of foreigners, companies or private individuals. Individuals could not directly confront the foreign state for mistreatment; instead, their home states would take up their citizens' claims as their own.

7. Several fundamental changes in the legal landscape have occurred since the constitution of the early compensation commissions of the eighteenth century eventually leading to the modern system of resolution of investor-state disputes.[6] First, a growing number of multinational enterprises operating globally have become major actors on the international public law plain, in areas that in the past were reserved only for states. Second, international organizations and other non-state actors have dramatically strengthened their influence with efficient international arbitration institutions dominating the system of investor-state dispute resolution after the end of the Cold War.

8. The methods for resolving investor-state disputes have evolved primarily from ad hoc politically dominated commissions to creating specialized institutionalized forms such as ICSID.[7] While early commissioners relied on their subjective understanding of justice and fairness, today the expectation is applying agreed set of rules, so that failure to do so may result in annulment of the award.

9. Investors often want to avoid poorly functional and biased domestic dispute resolution systems. The availability of arbitration as an option for investors influences the entire format of investor-state dialogue and dispute resolution practice. Under the ICSID system, investors can initiate claims directly against states, which is rather unusual for public international law.[8]

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4. *See* Andrew Paul Newcombe and Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 9 (Kluwer Law International 2009).
5. *See more* Yarik Kryvoi, The Path of Investor-State Disputes: From Compensation Commissions to Arbitral Institutions, 33(3) ICSID Rev. - FILJ 743–765 (2018).
6. *Ibid.*
7. *Ibid.*
8. Private parties can also submit claims against states to the European Court of Human Rights.

10. Foreign investments dramatically grew in the twentieth century and facilitated globalization. There is an almost universal consensus that cross-border investment flows are beneficial for foreign investors and host countries. Cross-border investment flows improve the long-term efficiency of the host country by providing greater competition, transferring capital, technology and managerial skills, enhancing market access and expanding the volume of international trade. Foreign investors also benefit from their access to new markets, cheaper natural resources and an expanded labour force; they also create new jobs and provide new technologies for the host countries.

11. International investment treaties are meant to facilitate foreign investments. According to the United Nations Commission on Trade and Development (UNCTAD), as of 2019, over 2,650 international investment treaties were in force, most of which are bilateral investment treaties (BITs),[9] a large number of preferential free trade and investment agreements, as well as numerous regional and multilateral agreements that regulate foreign investments.

12. Investment laws and BITs reflect the modern trend of investment regulation liberalization and increasingly protective standards of the treatment of foreign investment.[10] On the domestic level, governments across the globe adopt very similar approaches to the legal regulation of the treatment of private foreign investment. The standards include rules of entry, guarantees against expropriation, general standards of treatment and procedures for the settlement of disputes.

13. The World Bank and other United Nations (UN) agencies, such as UNCTAD, work on creation of favourable investment climates in various countries. The World Bank publishes an annual *Doing Business Report* aimed at creating more favourable business climates in various countries; the Multilateral Investment Guarantee Agency (MIGA) is in charge of insuring investment risks. UNCTAD monitors FDI flows, publishes BITs and promotes more predictable investment environments.

14. But despite all those efforts by international organizations and national governments, doing business in foreign countries, especially where the rule of law is weak and the political situation is unstable, may be quite risky. The likely risks include expropriation of investor's property without adequate compensation, governmental interference short of expropriation, a government's non-observance of contractual obligations, discrimination and unfair treatment. Thus, there was a growing need for an impartial dispute resolution body, such as ICSID, specializing in investment disputes.

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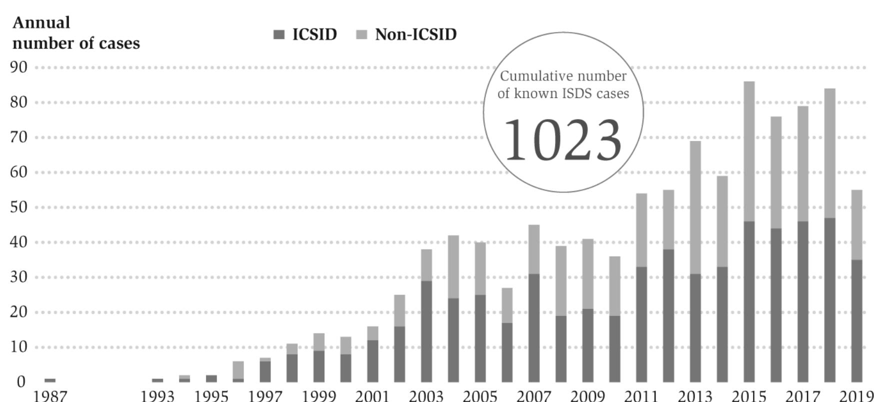
9. UNCTAD, Taking Stock of IIA Reform: Recent Developments, June 2019, available at https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5_en.pdf (accessed on 1 May 2020). *See also* UNCTAD International Investment Agreements Navigator, available https://investmentpolicy.unctad.org/international-investment-agreements (accessed on 1 May 2020).
10. *See* Antonio Parra, Provisions on the Settlement of Investment Disputes, 12 ICSID Rev. - FILJ 297 (1997).

15. According to the World Bank Guidelines on the Treatment of Foreign Direct Investments, disputes between private foreign investors and the host state are normally settled through negotiations between them or, failing this, through national courts or other mechanisms, including conciliation and binding independent arbitration.[11] The World Bank encourages states to accept investment dispute settlements through arbitration under the ICSID Convention or through the 'ICSID Additional Facility' if a state is not a party to the Convention.[12]

16. The Centre's large membership base, its rising caseload and the numerous references to its arbitration facilities in investment treaties and laws is evidence of its increasing significance. ICSID plays a central role in the development of the body of international investment law and dominates the system of investor-state disputes: for example, as shown in Figure 1, according to UNCTAD between 1987 and 2018, 55% of all ISDS cases were brought under the ICSID Convention with further 6% under the ICSID Additional Facility Rules, compared to 31% under UNCITRAL Rules, and 8% under all other rules combined.[13]

Figure 1 Known Investment Treaty Arbitrations (Cumulative and Newly Instituted Cases), 1987–2019



Source: UNCTAD, ISDS Navigator.

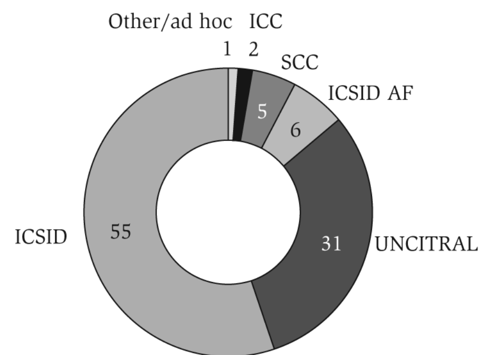
17. A growing number of international investment treaties, which provided ICSID arbitration as a method of resolving disputes, explain the dramatic increase in disputes arbitrated at ICSID. Following the collapse of the Soviet Union in the early 1990s, the Eastern Bloc countries began liberalizing their economies and

11. *See* World Bank Guidelines, para. V(1).
12. *Ibid.*, para. V(3).
13. UNCTAD, Investor-State Dispute Settlement: Review of Developments in 2014, No. 2, May 2015, 4.

encouraging FDI by means of international investment treaties with ICSID dispute resolution clauses. Successful and highly publicized arbitral awards also contributed to investors' willingness to put forward their international claims in ICSID.

18. Almost all BITs provide for arbitration to resolve investment disputes. Typically, investors are given a choice between submitting disputes to ICSID or to an ad hoc tribunal established under the rules of the UNCITRAL. However, disputes may also be brought before other arbitral bodies, such as the ICC, the Stockholm Chamber of Commerce (SCC) in Paris and the LCIA (*see* Figure 2).[14]

Figure 2 Disputes by Forum of Arbitration



Source: UNCTAD (2018).

19. Multilateral investment treaties, such as the North American Free Trade Agreement (NAFTA), also have contributed to the increased number of international investment disputes. NAFTA is the most well-known treaty between the United States, Canada and Mexico. Chapter 11 of the treaty permits investors of these countries to initiate arbitration under the UNCITRAL Rules or ICSID Additional Facility Rules. In 2012, the first ever arbitration before ICSID brought under the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA)reached the merits stage.[15]

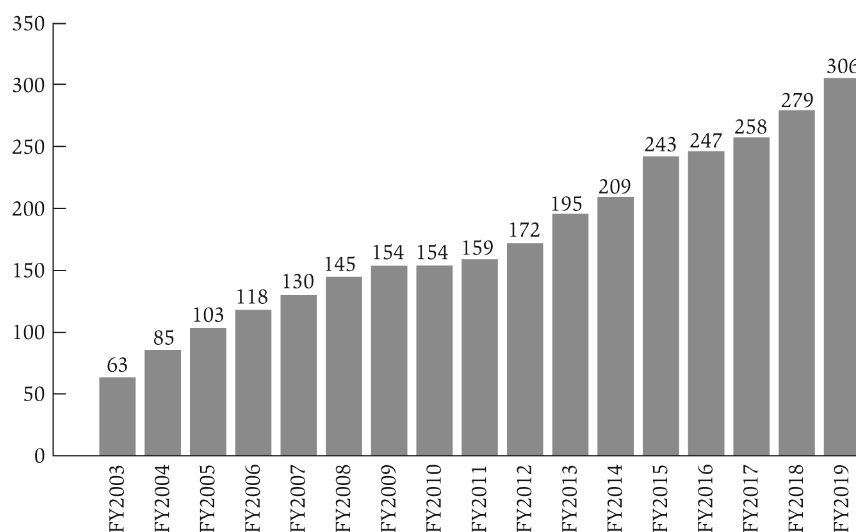
20. The number of international investment disputes, that is, disputes between foreign investors and host states, has grown tremendously in the past decade. Although agreements, which provided for the protection of investments and arbitration of investor-state disputes, existed for many decades, the first investor-state

14. For an overview of other arbitration *fora*, *see* Jan Paulsson et al., The Freshfields Guide to Arbitration and ADR (Kluwer Law International 1999).
15. *Railroad Development Corp. (RDC) v. Guatemala* (ICSID Case No. ARB/07/23), Award of 29 June 2012.

dispute based on BITs was registered at ICSID in 1987, and as of April 1998, ICSID had considered only fourteen cases.[16] In recent years, the number of investor-state arbitrations has dramatically increased as demonstrated in Figure 1. At the end of 2019 the total number of all known investor-state disputes exceeded 1,000.[17] The largest number of disputes was initiated against states from Eastern Europe and Central Asia and the smallest from North America.[18]

21. The number of cases ICSID is administering is constantly growing as shown in Figure 3. In 2019 financial year, ICSID administered a record of 306 cases, a substantial increase compared with 279 the previous fiscal year. Since its first case in 1972, ICSID has administered 728 cases under the ICSID Convention and Additional Facility Rules.

Figure 3 ICSID Administered Cases by Fiscal Year



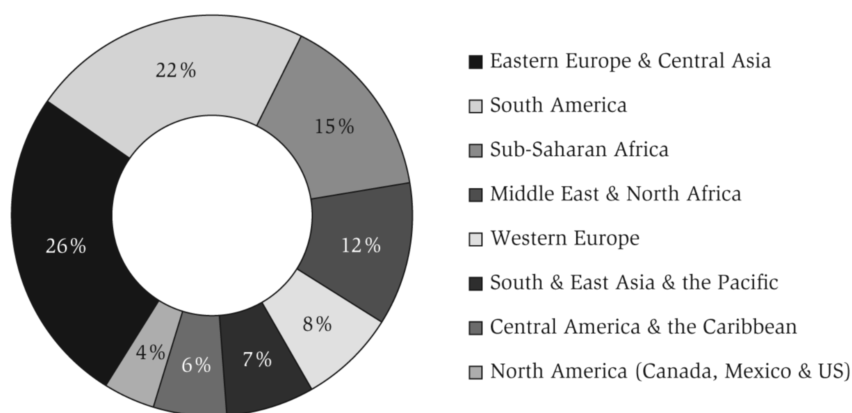
Source: ICSID 2019.

22. Based on the information about registered ICSID cases, their distribution is uneven as demonstrated in Figure 4. In recent years, there was a notable increase in the number of cases brought against states in Eastern Europe and Central Asia, which constitute the largest regional group with over 25% of all pending cases. The second-largest group accounts for the cases coming from Latin America.

16. *See* the ICSID website, available at http://ww.icsid.worldbank.org (accessed on 1 Dec. 2019).
17. UNCTAD, Latest Developments in Investor-State Dispute Settlement, No. 2, May 2015.
18. *See* ICSID, 2019 Annual Report, 24.

23. In mid-2000s, there was a sharp growth of cases brought against European Union Member States. In 2003, for example, there were around twenty known investor-state arbitrations and in 2013 the number was around 120.[19] This is likely to change in the light of the policy of the European Union to abolish intra-EU investor-state disputes.[20] Other cases involve countries of South and East Asia, the Middle East, North Africa, sub-Saharan Africa and North America (*see* Figure 4). ICSID distribution of cases by economic sector reveals some interesting trends. The largest group of cases represents mining (25%), which is followed by electric power and energy disputes (13%) and transportation (11%). Other sectors such as finance, communication, construction account for less than 10% each.[21]

Figure 4 Geographic Distribution of All ICSID and ICDID Additional Facility Cases by State Party Involved



Source: ICSID (2019).

19. UNCTAD, Investor-State Dispute Settlement, An Information Note on the United States and the European Union, No. 2, June 2014, 6.
20. *See* Part III, Chapter 9, §3 below.
21. *See* ICSID, The ICSID Caseload Statistics Issue 2012-2, 12.

Chapter 3. The ICSID Convention

§1. Genesis

24. The World Bank Group, which facilitated drafting of the ICSID Convention, was appropriately positioned to serve as a core of the newly created international dispute resolution mechanism. It is one of the largest multilateral financial institutions supplying capital to developing countries. The organization is directly concerned with capital flows from the developed to the developing nations, including private funds made directly available for projects in the developing world.

25. The World Bank Group emerged in 1945 as a result of the international Bretton Woods Agreements reached at the UN Monetary and Financial Conference in July 1944.[22] The Group currently consists of the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), MIGA and ICSID. IBRD provides loans and development assistance to middle-income countries in Latin America, Asia, Africa and Eastern Europe. IDA's support is focused on the poorest countries, to which it provides interest-free loans and grants. IFC promotes growth in the developing world by financing private-sector investments and providing technical support and advice to governments and businesses. MIGA encourages foreign investment in developing countries by providing guarantees to foreign investors against loss caused by non-commercial risks. And, finally, ICSID – established in 1966 – provides facilities for settling investment disputes between foreign investors and their host countries.

26. ICSID became the realization of the World Bank's idea to provide institutional facilities and procedures promoting voluntary resolution of investment disputes. In the absence of any international instruments between the foreign investor and the host government, foreign investors resolved the disputes through the domestic courts under national procedural laws. The only other option available to investors was to invoke diplomatic protections of the home state to support the case and to initiate proceedings before an international tribunal. Thus, the investor was unable to proceed with an international claim against a foreign government directly.

27. Moreover, investors often found that their governments refused to proceed with even a meritorious claim, fearing that this would be regarded as an unfriendly act towards the host country.[23] It had been a well-established principle of international law at that time that a wrong done to a national of one state, for which another state was intentionally responsible, was actionable not by the injured national, but

22. *See* Harold James, International Monetary Cooperation since Bretton Woods (Oxford University Press 1996). *See also*, Christopher Gilbert & David Vines (eds), The World Bank: Structure and Policies (Global Economic Institutions 2000).
23. History of the Convention, Vol. II, 372.

by his or her state.[24] If it was unclear whether the case had merits, the home government was even less likely to proceed against another government. As a result, foreign investors were often deprived of an opportunity to have redress at an impartial tribunal.

28. In the late 1960s, the World Bank decided to conduct a detailed study on appropriateness of a new dispute resolution mechanism. The study concluded that such mechanism was desirable to reduce the likelihood of unresolved conflicts and eliminating the risk of confrontation between the host country and the investor's state.[25]

29. As a specialized investment forum, the ICSID was initially established by the administrative action of the World Bank without any separate intergovernmental agreement. However, a number of legal issues required the adoption of a special convention. These issues included regulation of consent by sovereigns, enforcement of awards and exhaustion of local remedies.[26] The most important justification for the need for a special convention was to empower a private individual to file claims against the state without recourse to diplomatic protection.

§2. History of Drafting and Adoption

30. Work on the creation of a special investment dispute forum started after the General Counsel of the World Bank circulated a memorandum in 1961. The memorandum urged to tackle unfavourable investment conditions from the procedural angle by creating a forum of experts who would consider investment disputes voluntarily submitted to arbitration. In the course of drafting, two main proposals were considered. One proposal advanced the creation of a permanent tribunal staffed by arbitrators, elected and appointed for a fixed period, and operating under established rules of procedure. The other proposal suggested offering a panel of names, either submitted by the state parties to the tribunal or designated by some other authority, from which the arbitrators would be selected.[27] Eventually, the latter approach prevailed.

31. In the process of drafting the Convention, the World Bank followed the approach used in creating the IFC in 1956. The staff prepared drafts and working papers for the consideration of the Executive Directors, a policy-making body representing the World Bank's member countries. The Convention was to serve the following goals:

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24. *Ibid.*
25. Aron Broches, Selected Essays: World Bank, ICSID and Other Subjects of Public and Private International Law, 193 (Springer 1995).
26. *Ibid.*
27. *See* note by Aron Broches, 'Transmitted to the Executive Directors: "Settlement of Disputes between Governments and Private Parties"', in History of the Convention, Vol. II, 1.

(a) a recognition by the states of the possibility of direct access by private individuals and corporations to an international tribunal in the field of financial and economic disputes with governments;
(b) a recognition by the states that agreements made by them with private individuals and corporations to submit such disputes to arbitration are binding international undertakings;
(c) provision of international machinery for the conduct of arbitration, including the availability of arbitrators, methods for their selection and rules for the conduct of the arbitral proceedings;
(d) provision for conciliation as an alternative for arbitration.[28]

32. In 1963, the World Bank Executive Directors authorized the President of the World Bank to convene regional meetings of experts to work out various technical questions related to drafting the Convention. On the basis of the Bank's General Counsel and the expert meetings' reports, the Executive Directors concluded that a convention was negotiable. The Board of Governors of the World Bank at an Annual Meeting assigned the Executive Directors the task of drafting the Convention dealing with settlement of investment disputes, which would be acceptable to the largest number of participants.[29]

33. Sixty-one member countries met in Washington, DC, at the Bank's headquarters to discuss the Convention and a specially designated Legal Committee was appointed. The Executive Directors used the 'no-formal-vote-system', under which they tried to achieve consensus instead of resorting to a formal vote.[30] On 18 March 1965, the Executive Directors of the World Bank approved the text of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States for signature and ratification of member governments.[31] According to Article 67 of the Convention, it is open for signature on behalf of Member States of the World Bank, as well as any other state, which is a party to the Statute of the International Court of Justice (ICJ).

34. Today, ICSID provides an effective organizational and procedural framework for the settlement of international investment disputes between foreign investors and governments. The Convention established the Centre and provides for procedures of conciliation and arbitration, to which foreign investors and governments submit their disputes on the basis of consent.

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28. History of the Convention, Vol. II, 2.
29. Executive Directors' Report.
30. Aron Broches, Selected Essays: World Bank, ICSID and Other Subjects of Public and Private International Law, 196 (Springer 1995).
31. *Ibid.*