

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

COURSE ON DISPUTE SETTLEMENT



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UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

COURSE ON DISPUTE SETTLEMENT

INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

2.1 OVERVIEW



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NOTE

The Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of forty modules.

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OVERVIEW

This Module gives a general introduction to the series of Modules dealing with the settlement of international investment disputes at ICSID. It explains the close link between economic development and foreign direct investment. Foreign direct investment depends in large measure on the economic, political and legal conditions prevailing in the host State. Access to an impartial and effective method of dispute settlement is an important element of the legal conditions.

This Module then gives an outline of the various traditional methods for the settlement of disputes between host States and foreign investors and explains the shortcomings of these traditional methods. The idea underlying the ICSID Convention is to close the gaps caused by these shortcomings.

This Module explains the origins and history of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). It also explains why the mechanism created by the ICSID Convention works to the advantage of the investor as well as of the host State.

It also gives a broad description of the leading principles underlying dispute settlement under the ICSID Convention. These include the choice of methods between conciliation and arbitration, the specialization on investment disputes, the substantive law applicable to investment disputes, the mixed nature of proceedings between a State and a foreign investor, the requirement of consent to ICSID's jurisdiction, the institutional support given by the International Centre for Settlement of Investment Disputes (the Centre), the self-contained and automatic nature of proceedings and the overall effectiveness of the system.

At the same time this Module summarizes the most important points that are explained in more detail in the subsequent Modules 2.2 to 2.9. The idea is to offer the reader a broad and general picture before (s)he turns to the specific issues covered in these Modules. Where appropriate, this Module offers references to the Modules which explain these points in more detail.

OBJECTIVES

Upon completion of this Module the reader should be able to:

- Describe the significance of foreign investment for development.
- Appreciate the influence of dispute settlement on a country's investment climate.
- Compare dispute settlement under the ICSID Convention with other methods of dispute settlement.
- Recount the history of the ICSID Convention.
- Identify the institutional framework of ICSID.
- Analyse the object and purpose of the ICSID Convention.
- Define the respective interests of host States and investors in dispute settlement under the ICSID Convention.
- Describe the most important characteristics of dispute settlement under the ICSID Convention.

INTRODUCTION

Investment and development

Foreign direct investment (FDI) plays a pivotal role in economic development. It provides access to a number of economic factors which are indispensable in this context. These include capital, technology and know-how. The volume of capital transfers through FDI is considerably larger than all forms of development aid, bilateral and multilateral. During the 1990s and the first years of the twenty first century, the amount of FDI has grown dramatically.

In addition, FDI facilitates access to world markets, to worldwide distribution channels and other networks. Not infrequently, FDI contributes to the improvement of infrastructures in developing countries like tele-communication systems, roads and airports, to the training of the local workforce and to the development of indigenous industries.

This is not to say that all phenomena associated with FDI and with globalization in general have been welcomed in all quarters. But there is broad consensus, that private investment constitutes the most important factor in economic development. This has led many developing countries to revise their previously reserved attitudes towards FDI and to adopt an open and welcoming attitude towards foreign investors.

Investment climate

The recognition that FDI is an important element in development has led many if not most developing countries to strive to create conditions that are attractive to foreign investors. In fact, nowadays developing countries often compete for FDI.

Economic and political factors

Much of the investment climate in a country will consist of economic and political factors such as market access, the availability and cost of production factors, taxation, the existence of infrastructures, the existence of a functioning public administration, the level of corruption and political stability.

Legal factors

In addition to economic and political factors, the legal framework for FDI is also important in determining its investment climate. This legal environment is, in turn, determined by a number of factors. These include the stability of the legal conditions under which an investor can operate, the quality of the local public administration in applying relevant regulations, the transparency of the system of local regulations and an effective system of dispute settlement.

Investment codes

Many developing countries have attempted to improve their domestic legal framework by passing specialized legislation, often referred to as investment codes. These investment codes are designed to combine clarity with favourable conditions for foreign investments.

BITs

In addition to guarantees contained in domestic law, potential host States to investment also give international legal guarantees to investors. First and foremost among these are bilateral investment treaties (BITs). These contain

substantive as well as procedural guarantees to investors of the respective countries. It is estimated that over 2000 such BITs have been concluded worldwide.

Regional treaties

In a similar vein, regional treaties offer guarantees to investors. These include the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty.

Dispute settlement

A particularly important aspect of the legal protection of foreign investments is the settlement of disputes between host States and foreign investors. Impartial and effective dispute settlement is an essential element in investor protection. This element had serious shortcomings until the creation of the ICSID system.

Summary:

- **Foreign direct investment is widely regarded as the most important factor in economic development.**
- **The investment climate of a country is determined by economic, political and legal factors.**
- **Among the legal factors, an impartial and effective system of dispute settlement is essential.**

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