

## The International Center for Settlement of Investment Disputes Agreement and the Energy Sector: Implications for Investment and Dispute Settlement



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Submission date: 18/04/2023 Acceptance date: 29/05/2023 Publication date: 04/06/2023

**Abstract:** *The International Center for Settlement of Investment Disputes (ICSID) Agreement is an important tool for investment protection and dispute settlement in the energy sector. This paper examines the implications of the ICSID Agreement for investment and dispute settlement in the energy sector. The paper first provides an overview of the ICSID Agreement and its role in investment protection and dispute settlement. The paper then analyzes the implications of the ICSID Agreement for the energy sector, including the benefits and challenges of using the ICSID system for investment protection and dispute settlement. The paper also examines recent cases in the energy sector that have been brought before the ICSID, highlighting the legal issues and outcomes of these cases. The paper concludes that the ICSID system offers important benefits for investment protection and dispute settlement in the energy sector, but also poses challenges, including the cost and complexity of the arbitration process.*

**Keywords:** *ICSID Agreement, investment protection, dispute settlement, energy sector, arbitration, legal issues, outcomes, benefits, challenges, cost, complexity.*

**ملخص:** اتفاقية المركز الدولي لتسوية منازعات الاستثمار (ICSID) هي أداة مهمة لحماية الاستثمار وتسوية المنازعات في قطاع الطاقة. تبحث هذه الورقة في الآثار المترتبة على اتفاقية ICSID للاستثمار وتسوية المنازعات في قطاع الطاقة. الورقة تقدم أولاً لمحة عامة عن اتفاقية تسوية منازعات الاستثمار ودورها في حماية الاستثمار وتسوية المنازعات. ثم تحلل الورقة الآثار المترتبة على اتفاق ICSID لقطاع الطاقة ، بما في ذلك فوائد وتحديات استخدام نظام ICSID لحماية الاستثمار وتسوية المنازعات. تبحث الورقة أيضاً في القضايا الأخيرة في قطاع الطاقة التي تم عرضها على

المركز الدولي لتسوية منازعات الاستثمار ، مع إبراز القضايا القانونية ونتائج هذه القضايا. وتخلص الورقة إلى أن نظام المركز الدولي لتسوية منازعات الاستثمار يقدم فوائد مهمة لحماية الاستثمار وتسوية المنازعات في قطاع الطاقة ، ولكنه يطرح أيضًا تحديات ، بما في ذلك تكلفة وتعقيد عملية التحكيم.

الكلمات المفتاحية: اتفاقية ICSID ، حماية الاستثمار ، تسوية المنازعات ، قطاع الطاقة ، التحكيم ، القضايا القانونية ، النتائج ، الفوائد ، التحديات ، التكلفة ، التعقيد.

## **.Introduction:**

The International Centre for Settlement of Investment Disputes (ICSID) is an independent organization established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in 1966 (the ICSID Convention). The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the World Bank to further the Bank's objective of promoting international investment (Kryvoi, 1976). ICSID is an independent, depoliticized and effective dispute-settlement institution. Its availability to investors and States helps to promote international investment by providing confidence in the dispute resolution process (Grabowski, 2014). It is also available for state-state disputes under investment treaties and free trade agreements, and as an administrative registry (Antonietti, 2006). ICSID provides a forum for resolving investment disputes between investors and host countries. With the increasing demand for energy resources worldwide, the energy sector has become an area of significant investment and has seen an increase in investment disputes (McArthur & Ormachea, 2009).

ICSID provides for settlement of disputes by conciliation, mediation, arbitration or fact-finding. The ICSID process is designed to take account of the special characteristics of international investment disputes and the parties involved, maintaining a careful balance between the interests of investors and host States (Whitsitt & Bankes, 2013). Each case is considered by an independent Conciliation Commission or Arbitral Tribunal, after hearing evidence and legal arguments from the parties. A dedicated ICSID case team is assigned to each case and provides expert assistance throughout the process; More than 900 such cases have been administered by ICSID to date (Grabowski, 2014).

ICSID also promotes greater awareness of international law on foreign investment and the ICSID process, it has an extensive program of publications, including the leading ICSID Review-Foreign Investment Law Journal and it regularly publishes information about its activities and cases (Kazeem, 2020).

The energy sector encompasses various industries, including oil, gas, renewable energy, and nuclear energy (Martin, 2011). Investment in the energy sector involves significant capital expenditures and involves long-term commitments. However, investing in the energy sector is also subject to a range of risks, including political instability, changes in government policies, and fluctuations

in commodity prices, these risks can result in disputes between investors and host countries, leading to a need for a dispute resolution mechanism (Kazeem, 2020). The ICSID Agreement provides an efficient and effective dispute resolution mechanism for investors in the energy sector (Reinisch, 2016). The ICSID process is based on arbitration, which is a private, binding process for resolving disputes between parties. It is also designed to be impartial, transparent, and fair to both parties (Reinisch, 2016).

This paper will explore the implications of the ICSID Agreement for investment and dispute settlement in the energy sector. It will examine the ICSID process and the benefits it offers to investors in the energy sector. Additionally, the paper will examine the challenges and limitations of the ICSID process, including issues of sovereignty, transparency, and legitimacy. Finally, the paper will explore the potential impact of recent developments, including the increasing focus on environmental and social issues in the energy sector, on investment and dispute settlement in the energy sector under the ICSID Agreement.

### **1. Methodology**

The methodology for this paper will involve a comprehensive review of the existing literature on the ICSID Agreement and its implications for investment and dispute settlement in the energy sector. This review will include academic articles, reports, case studies, and legal documents related to the ICSID Agreement and the energy sector.

The review will be conducted using electronic databases such as Google Scholar, JSTOR, and LexisNexis, as well as relevant websites, including the ICSID website and those of other international organizations and energy companies. Keywords such as "ICSID," "energy sector," "investment," and "dispute settlement" will be used to identify relevant sources.

The paper will also include an analysis of relevant case studies to illustrate the practical implications of the ICSID Agreement for investment and dispute settlement in the energy sector. These case studies will be selected based on their relevance and significance to the topic and will be analyzed using a qualitative approach.

Finally, the paper will include an examination of the potential impact of recent developments in the energy sector, including the increasing focus on environmental and social issues, on investment and dispute settlement under the ICSID Agreement. This analysis will draw on the existing literature and will involve a discussion of the potential challenges and opportunities presented by these developments.

The methodology for this paper will involve a comprehensive and interdisciplinary approach to examining the implications of the ICSID Agreement for investment and dispute settlement in the energy sector. The paper

will draw on a range of sources and analytical methods to provide a nuanced and insightful analysis of this important topic.

## **2. Theoretical background**

The International Center for Settlement of Investment Disputes (ICSID) Agreement is a treaty established by the World Bank to provide a mechanism for resolving disputes between investors and host countries. The ICSID process is based on arbitration, which is a private, binding process for resolving disputes between parties (Schreuer, 2010).

The energy sector is a critical sector for investment, involving significant capital expenditures and long-term commitments. Investment in the energy sector is subject to a range of risks, including political instability, changes in government policies, and fluctuations in commodity prices. These risks can lead to disputes between investors and host countries, and the ICSID Agreement provides a mechanism for resolving these disputes (Abdel Wahab, 2019).

The ICSID process is designed to be impartial, transparent, and fair to both parties. It offers a range of benefits to investors in the energy sector, including access to an independent and neutral forum for resolving disputes and a process that is quicker and more cost-effective than traditional litigation (Antonietti, 2006). Additionally, the ICSID process offers enforceability of arbitral awards in over 160 countries through the New York Convention, providing investors with greater certainty and predictability (Goodman, 2007).

However, the ICSID process is not without its challenges and limitations. One challenge is the issue of sovereignty, as some host countries may view the ICSID process as a threat to their sovereignty. Another challenge is the issue of legitimacy, as some critics argue that the ICSID process favors investors over host countries (Ofodile, 2019).

The issue of sovereignty is one of the main challenges facing the International Center for Settlement of Investment Disputes (ICSID) Agreement in the energy sector (Whitsitt & Bankes, 2013). Some host countries may view the ICSID process as a threat to their sovereignty, as it allows investors to bring claims against them in an international tribunal outside of their domestic courts (Goodman, 2007).

From the perspective of host countries, the ICSID process may be seen as a challenge to their authority over their own legal systems and their ability to make policy decisions without interference from outside parties. Some host countries have even withdrawn from the ICSID Convention or refused to ratify it altogether, citing concerns about sovereignty (Haverbeke & Vandorpe, 2017). Moreover, some host countries argue that the ICSID process is biased in favor of investors, as it allows them to bypass domestic courts and potentially obtain large financial awards that can have significant impacts on their economies. This

may lead to tensions between investors and host countries and may undermine the legitimacy of the ICSID process in the eyes of some (Krajewski, 2011).

To address these concerns, the ICSID has taken steps to ensure that the process is fair and transparent, with clear rules and procedures that apply equally to both investors and host countries. For example, the ICSID process includes provisions for ensuring that arbitrators are independent and impartial, and that the tribunal operates in a transparent and predictable manner (Ofodile, 2019).

The issue of sovereignty is a complex one that requires careful consideration by all parties involved in the ICSID process (Reinisch, 2016). While the ICSID Agreement offers benefits to investors in the energy sector, it is important for host countries to feel that their sovereignty is being respected and that they have a voice in the dispute resolution process. Striking a balance between the interests of investors and host countries is critical for ensuring the long-term viability of the ICSID process in the energy sector (Luttrell, 2019).

The issue of legitimacy is a key concern in The International Center for Settlement of Investment Disputes (ICSID) Agreement in the energy sector; some critics argue that the ICSID process favors investors over host countries, which undermines the legitimacy of the process (McArthur & Ormachea, 2009). One of the main criticisms of the ICSID process is that it is biased in favor of investors, particularly those from developed countries. Critics argue that the process is designed to protect the interests of investors and does not sufficiently take into account the interests of host countries, particularly their social and environmental concerns (Whitsitt & Bankes, 2013).

In addition, some critics argue that the ICSID process lacks transparency and accountability. Host countries have limited input into the selection of arbitrators and the proceedings are often conducted in secret, which can lead to concerns about the fairness and impartiality of the process (De Brabandere, 2014). These criticisms have led some to question the legitimacy of the ICSID process, particularly in cases where large financial awards are granted to investors at the expense of host countries, this has also fueled calls for reform of the ICSID process to make it more transparent and accountable to host countries (Martin, 2011).

To address these concerns, the ICSID has taken steps to increase transparency and accountability in the process. For example, the ICSID has made efforts to ensure that the proceedings are conducted in a transparent manner and that all parties have access to relevant information (Krajewski, 2011). Additionally, the ICSID has made efforts to ensure that arbitrators are independent and impartial and that the process is fair and equitable to both investors and host countries (Schreuer, 2010). The issue of legitimacy is a complex one that requires ongoing efforts to ensure that the ICSID process is transparent and accountable to all parties involved. While the ICSID Agreement offers benefits to investors in the

energy sector, it is important to ensure that the process is fair and equitable to host countries as well (Luttrell, 2019). Striking a balance between the interests of investors and host countries is critical for ensuring the long-term viability and legitimacy of the ICSID process in the energy sector (Reinisch, 2016).

Recent developments in the energy sector, including the increasing focus on environmental and social issues, may have implications for investment and dispute settlement under the ICSID Agreement. These developments may lead to increased scrutiny of investments in the energy sector and may result in more disputes between investors and host countries (Whitsitt & Bankes, 2013; Haverbeke & Vandorpe, 2017).

The theoretical background of the ICSID Agreement and its implications for investment and dispute settlement in the energy sector involves a complex interplay between the benefits and challenges of the ICSID process, as well as the potential impact of broader trends in the energy sector. A nuanced understanding of these issues is critical for investors and policymakers seeking to navigate this complex landscape.

#### – Case study

The International Center for Settlement of Investment Disputes (ICSID) Agreement has been applied in numerous cases related to investment and dispute settlement in the energy sector. Two relevant case studies that illustrate the practical implications of the ICSID Agreement are the *Chevron v. Ecuador* case and the *Occidental v. Ecuador* case.

In the *Chevron v. Ecuador* case, Chevron initiated arbitration proceedings against Ecuador under the ICSID Agreement over a dispute related to environmental damages in the Amazon rainforest. Chevron argued that the Ecuadorian government had violated the terms of a settlement agreement by failing to prevent the enforcement of a \$9.5 billion judgment against the company in Ecuadorian courts. The ICSID tribunal ultimately ruled in favor of Chevron and ordered Ecuador to pay \$112 million in damages to the company. This case illustrates the practical implications of the ICSID Agreement for investment and dispute settlement in the energy sector, particularly in cases where there are disputes related to environmental damages or violations of settlement agreements.

In the *Occidental v. Ecuador* case, Occidental Petroleum initiated arbitration proceedings against Ecuador under the ICSID Agreement over the revocation of the company's contract to operate an oil field in the country. Occidental argued that the revocation violated the terms of the company's contract and resulted in significant financial losses. The ICSID tribunal ultimately ruled in favor of Occidental and ordered Ecuador to pay \$1.77 billion in damages to the company. This case illustrates the practical implications of the ICSID Agreement for investment and dispute settlement in the energy sector,

particularly in cases where there are disputes related to the revocation of contracts or financial losses.

These case studies illustrate the importance of the ICSID Agreement for investment and dispute settlement in the energy sector, particularly in cases where there are disputes related to environmental damages, contract violations, or financial losses. While the ICSID Agreement offers important protections for investors, it is important to ensure that the process is fair and equitable to host countries as well in order to maintain the legitimacy of the process.

In addition to the *Chevron v. Ecuador* and *Occidental v. Ecuador* cases, there have been several other notable cases that illustrate the practical implications of the ICSID Agreement for investment and dispute settlement in the energy sector. One such case is the *Mobil v. Venezuela* case, in which Mobil (now part of ExxonMobil) initiated arbitration proceedings against Venezuela under the ICSID Agreement over the nationalization of the company's oil assets in the country. Mobil argued that the nationalization violated the terms of the company's contract and resulted in significant financial losses. The ICSID tribunal ultimately ruled in favor of Mobil and ordered Venezuela to pay \$1.6 billion in damages to the company. This case illustrates the practical implications of the ICSID Agreement for investment and dispute settlement in the energy sector, particularly in cases where there are disputes related to the nationalization of assets or financial losses.

Another notable case is the *EDF v. Argentina* case, in which EDF (Electricité de France) initiated arbitration proceedings against Argentina under the ICSID Agreement over a dispute related to the country's energy regulatory framework. EDF argued that changes to the framework resulted in significant financial losses for the company. The ICSID tribunal ultimately ruled in favor of EDF and ordered Argentina to pay \$39 million in damages to the company. This case illustrates the practical implications of the ICSID Agreement for investment and dispute settlement in the energy sector, particularly in cases where there are disputes related to changes in regulatory frameworks or financial losses.

A third notable case is the *ConocoPhillips v. Venezuela* case, in which ConocoPhillips initiated arbitration proceedings against Venezuela under the ICSID Agreement over the nationalization of the company's oil assets in the country. ConocoPhillips argued that the nationalization violated the terms of the company's contract and resulted in significant financial losses. The ICSID tribunal ultimately ruled in favor of ConocoPhillips and ordered Venezuela to pay \$8.7 billion in damages to the company. This case illustrates the practical implications of the ICSID Agreement for investment and dispute settlement in the energy sector, particularly in cases where there are disputes related to the nationalization of assets or significant financial losses.

Recent developments, including the increasing focus on environmental and social issues in the energy sector, have the potential to impact investment and dispute settlement in the energy sector under the ICSID Agreement. The ICSID Agreement is a treaty that provides a framework for resolving investment disputes between investors and states. It provides for the settlement of disputes through arbitration, which is binding on both parties. The Agreement is widely used in the energy sector, where it is frequently invoked in disputes related to oil and gas exploration and production, renewable energy, and infrastructure development.

One potential impact of the increasing focus on environmental and social issues is that investors may face greater scrutiny over the environmental and social impacts of their investments in the energy sector. This could lead to greater pressure on investors to adopt sustainable and socially responsible investment practices. Investors who fail to do so may face reputational risks, as well as the risk of legal action by affected communities or governments.

In the context of the ICSID Agreement, this could result in an increase in the number of disputes related to environmental and social issues. This could include disputes over the environmental impacts of oil and gas exploration and production, the development of renewable energy projects on indigenous land, or disputes over the compensation of communities affected by energy projects.

Furthermore, the increasing focus on environmental and social issues may also impact the interpretation and application of the ICSID Agreement itself. For example, there may be debates over the meaning of the fair and equitable treatment standard in light of environmental and social considerations. Similarly, there may be debates over the scope of investor protections in the face of legitimate environmental and social regulations (Schreuer, 2010). The increasing focus on environmental and social issues in the energy sector has the potential to impact investment and dispute settlement in the energy sector under the ICSID Agreement in a number of ways (Ofodile, 2019). While it may lead to greater scrutiny of investor practices and an increase in disputes related to environmental and social issues, it may also provide an opportunity for the development of more sustainable and socially responsible investment practices in the sector.

These case studies highlight the importance of the ICSID Agreement for investment and dispute settlement in the energy sector, and the significant financial implications of disputes related to contract violations, nationalization, regulatory frameworks, and environmental damages.

### **3. Results**

The results of the analysis of the ICSID Agreement and the Energy Sector indicate that the Agreement plays a significant role in facilitating investment and dispute settlement in the energy sector. The Agreement provides a framework



for investors to seek recourse in the event of disputes with host countries, and has been used in a number of high-profile cases related to energy investments. However, the analysis also highlights several key issues related to the Agreement, including concerns over sovereignty and legitimacy. Some host countries may view the ICSID process as a threat to their sovereignty, while critics argue that the process favors investors over host countries.

The practical implications of the ICSID Agreement for investment and dispute settlement in the energy sector are significant, and the Agreement remains an important tool for facilitating foreign investment in the sector. However, it is important to continue to address concerns related to sovereignty and legitimacy in order to ensure that the Agreement remains an effective and fair mechanism for resolving disputes in the energy sector.

#### 4. Conclusion

The International Center for Settlement of Investment Disputes (ICSID) Agreement has played a significant role in facilitating investment and dispute settlement in the energy sector. The Agreement provides a framework for investors to seek recourse in the event of disputes with host countries, and has been used in a number of high-profile cases related to energy investments.

However, the issue of sovereignty remains a concern, as some host countries may view the ICSID process as a threat to their sovereignty. Similarly, critics argue that the process favors investors over host countries, raising concerns about the legitimacy of the Agreement.

Despite these issues, the practical implications of the ICSID Agreement for investment and dispute settlement in the energy sector are significant, and the Agreement remains an important tool for facilitating foreign investment in the sector. It is important to continue to address concerns related to sovereignty and legitimacy in order to ensure that the Agreement remains an effective and fair mechanism for resolving disputes in the energy sector.

The ICSID Agreement serves as a crucial instrument in promoting investment in the energy sector while providing a framework for dispute resolution. The Agreement plays a critical role in promoting global economic growth and development by encouraging international investment in the energy sector, and its continued relevance and effectiveness should be a priority for policymakers and industry stakeholders alike.

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