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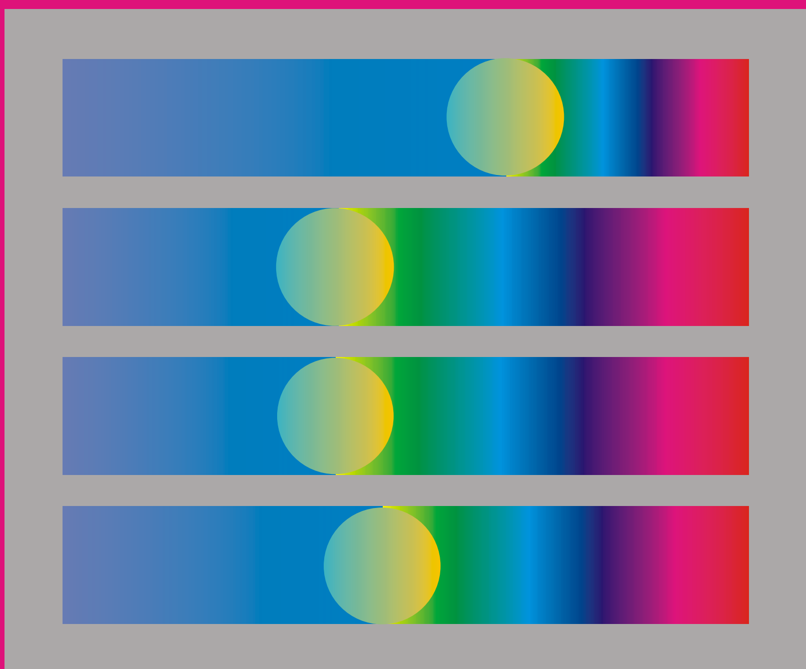
UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

DISPUTE SETTLEMENT: INVESTOR-STATE

UNCTAD Series
on issues in international investment agreements



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NOTE

UNCTAD serves as the focal point within the United Nations Secretariat for all matters related to foreign direct investment and transnational corporations. In the past, the Programme on Transnational Corporations was carried out by the United Nations Centre on Transnational Corporations (1975–1992) and the Transnational Corporations and Management Division of the United Nations Department of Economic and Social Development (1992–1993). In 1993, the Programme was transferred to the United Nations Conference on Trade and Development. UNCTAD seeks to further the understanding of the nature of transnational corporations and their contribution to development and to create an enabling environment for international investment and enterprise development. UNCTAD's work is carried out through intergovernmental deliberations, research and analysis, technical assistance activities, seminars, workshops and conferences.

The term "country" as used in this study also refers, as appropriate, to territories or areas; the designations employed and the presentation of the material do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries. In addition, the designations of country groups are intended solely for statistical or analytical convenience and do not necessarily express a judgement about the stage of development reached by a particular country or area in the development process.

The following symbols have been used in the tables:

Two dots (..) indicate that data are not available or are not separately reported. Rows in tables have been omitted in those cases where no data are available for any of the elements in the row;

A dash (-) indicates that the item is equal to zero or its value is negligible;

A blank in a table indicates that the item is not applicable;

A slash (/) between dates representing years (e.g. 1994/1995) indicates a financial year;

Use of a hyphen (–) between dates representing years (e.g. 1994–1995) signifies the full period involved, including the beginning and end years.

Reference to "dollars" ($) means United States dollars, unless otherwise indicated.

Annual rates of growth or change, unless otherwise stated, refer to annual compound rates.

Because of rounding, details and percentages in tables do not necessarily add to totals.

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The main purpose of the UNCTAD Series on issues in international investment agreements – and other relevant instruments – is to address concepts and issues relevant to international investment agreements and to present them in a manner that is easily accessible to end-users. The series covers the following topics:

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Preface

The secretariat of the United Nations Conference on Trade and Development (UNCTAD) is implementing a work programme on international investment agreements. It seeks to help developing countries to participate as effectively as possible in international investment rule-making at the bilateral, regional, plurilateral and multilateral levels. The programme embraces capacity-building seminars, regional symposia, training courses, dialogues between negotiators and groups of civil society and the preparation of a Series of issues papers.

This paper is part of this Series. It is addressed to Government officials, corporate executives, representatives of non-governmental organizations, officials of international agencies and researchers. The Series seeks to provide balanced analyses of issues that may arise in discussions about international investment agreements. Each study may be read by itself, independently of the others. Since, however, the issues treated closely interact with one another, the studies pay particular attention to such interactions.

The Series is produced by a team led by Karl P. Sauvant and Pedro Roffe. The principal officer responsible for its production is Anna Joubin-Bret, who oversees the development of the papers at various stages. The members of the team include Hélène Dufays-Budhdeo and Jörg Weber. The Series' principal advisors are Arghyrios A. Fatouros, Sanjaya Lall, Peter Muchlinski and Patrick Robinson. The present paper is based on a manuscript prepared by Peter T. Muchlinski and Stephen C. Vasciannie. The final version reflects comments received from Nils Urban Allard, Joachim Karl, Mark Koulen, Ernst-Ulrich Petersmann, Christoph Schreuer and M. Sornarajah.

Rubens Ricupero
Geneva, May 2003 Secretary-General of UNCTAD

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UNCTAD has carried out a number of activities related to the work programme in cooperation with other intergovernmental organizations, including the Secretariat of the Andean Community, l'Agence pour la Francophonie, the Inter-Arab Investment Guarantee Corporation, the League of Arab States, the Organization of American States and the Secretaría de Integración Económica Centroamericana. UNCTAD has also cooperated with non-governmental organizations, including the Centre for Research on Multinational Corporations, the Consumer Unity and Trust Society (India), the Dutch Foundation for Research on Multinationals (SOMO), the Economic Research Forum (Cairo), the European Roundtable of Industrialists, the Friedrich Ebert Foundation, the German Foundation for International Development, the International Confederation of Free Trade Unions, the Labour Resource and Research Institute (LaRRI), Oxfam, the Third World Network and World Wildlife Fund International.

Since 2002, a part of the work programme has been carried out jointly with the World Trade Organization (WTO).

Funds for the work programme have so far been received from Australia, Brazil, Canada, France, Japan, the Netherlands, Norway, Portugal, Sweden, Switzerland, the United Kingdom and the European Commission. Botswana, China, Costa Rica, Croatia, Djibouti, Egypt, Gabon, Germany, Guatemala, India, Indonesia, Jamaica, Malaysia, Morocco, Namibia, Peru, Singapore, South Africa, Sri Lanka, Thailand, Tunisia and Venezuela have also contributed to the work programme by hosting regional symposia, national seminars or training events.

In pursuing this programme of work, UNCTAD has also collaborated closely with a number of international, regional and national organizations, particularly with the Centro de Estudios Interdisciplinarios de Derecho Industrial y Económico (the Universidad de Buenos Aires), the Indian Institute of Foreign Trade, the Legon Center of Accra (Ghana), the Senghor University (Egypt), the University of Dar Es Salaam (Tanzania), the Universidad de los Andes (Colombia), the Universidad del Pacífico (Peru), the Universidade Estadual de Campinas-UNICAMP (Brazil), the University of Pretoria (South Africa), the National University of Singapore, the University of Tunis (Tunisia), the University of Yaoundé (Cameroon) and the University of the West Indies (Jamaica). All of these contributions are gratefully acknowledged.

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Executive summary

The present paper is concerned with the settlement of investment disputes between States, on the one hand, and private parties, on the other. Generally speaking, this is an area of investment practice that has prompted a broad range of legal issues, and a substantial number of approaches to tackle them. While in theory this issue is of importance for both the host State and the foreign investor, in practice it has more significance for the foreign investor. When a foreign investor enters the territory of a host country, that investor is usually inclined to seek protection in the form of specified treatment standards – such as most-favoured-nation treatment, national treatment and fair and equitable treatment – as well as guarantees on matters such as compensation for expropriation and the right to transfer capital, profits and income from the host State. These rights are often embodied in particular provisions of bilateral investment treaties, or in regional or multilateral instruments on particular aspects of investment.

It is evident, however, that treatment standards and guarantees are of limited significance unless they are subject to a dispute-settlement system and, ultimately, to enforcement. Accordingly, the importance of dispute-settlement mechanisms for issues between a host State and an investor is readily discernible. Indeed, this is a point often made by both foreign investors and host countries. For the former, the security of foreign investment will turn not only on specified safeguards, but also on the assurance that these safeguards are available on a non-discriminatory and timely basis to all foreign investors. Conversely, the host country wishes to ensure that, in the event of a dispute with foreign investors, it will have the means to resolve the legal aspects of that dispute expeditiously and taking into account the concerns of the State, as well as those of foreign investors.

Against this background, the present paper examines the main aspects of investor-State dispute settlement from the perspective of both the investor and the host State. Considerable attention is paid to the different venues available for resolving investment disputes. Investors and capital-exporting countries representing them have often maintained that disputes between host States and investors should be resolved in accordance with international third party dispute-settlement procedures. Such procedures are said to encourage investor confidence and security and help to create the appearance and reality of fairness in the dispute-settlement process. In contrast, some capital-importing countries have traditionally maintained that private foreign investors are not entitled to privileged treatment in dispute settlement and should be required to resolve their disputes in the national courts of the host country.

These two basic models suggest that States negotiating investor-State dispute settlement mechanisms have a number of options when considering dispute-settlement provisions in international investment agreements. Reference to dispute-settlement procedures can be omitted from an investment agreement; reference to dispute-settlement procedures can grant exclusive jurisdiction to the courts and tribunals of the host State, or at least state a clear preference for such national approaches; reference to dispute-settlement procedures can be in keeping with the consensual approach which offers the parties a choice between national and international systems and methods of dispute settlement and, in exceptional cases, it can provide for compulsory recourse to international dispute settlement. Each model carries distinct implications for the investor and for the host country. These are considered in Section IV of the paper.

At the procedural level, investor-State dispute settlement raises a number of issues concerning the most appropriate technique for dispute settlement, with an emphasis on the use of the most speedy, informal and effective method; the procedure for the initiation of a claim; the establishment and composition of arbitral tribunals, should this method of dispute settlement be chosen; the admissibility of the claim before such a tribunal; the applicable procedural and substantive law to be applied by such a tribunal to the conduct and resolution of the dispute; the extent to which the award of such a tribunal can be regarded as final; the enforcement of arbitral awards; and the costs of using such dispute settlement mechanisms. With particular reference to international investment agreements, this paper considers these issues in order to highlight the main approaches that are available to host States and investors in the prevailing economic environment. This reference to procedural matters does not imply that such matters are all of equal importance, but the question of how dispute settlement procedures are developed is of significance to the drafting of investor-State dispute settlement clauses.

INTRODUCTION

The growth in international trade and investment as a means of creating new economic opportunities in the global economy, for both developed and developing countries, has led to the rise of specialized international investment agreements (IIAs) that seek to regulate a range of issues related to foreign investment. In this context, special consideration has been given to the concerns of both foreign investors and host countries with respect to dispute-settlement procedures. The vast majority of bilateral investment treaties (BITs) – as well as some regional agreements and other instruments – contain provisions for the settlement of disputes between private parties and the host State, and of disputes between States arising from investment.

The distinction between investor-State and State-to-State disputes is used to provide an ordering principle for the discussion of this extensive topic in the present Series. Thus, two papers – covering, respectively, each set of relationships – are provided. The present paper deals with investor-State disputes only, while a further paper deals with State-to-State dispute settlement (UNCTAD, forthcoming a).

Traditionally, dispute settlement under international law has involved disputes between States. However, the rise of private commercial activity undertaken by individuals and corporations engaged in international trade and/or investment has raised the question whether such actors should be entitled to certain direct rights to resolve disputes with the countries in which they do business. Under customary international law, a foreign investor is required to seek the resolution of such a dispute in the tribunals and/or courts of the country concerned. Should these remedies fail or be ineffective to resolve a dispute – be it that they lack the relevant substantive content, effective enforcement procedures and/or remedies or are the result of denial of justice (see Brownlie, 1998, ch. XXII) –, an investor's main recourse is to seek diplomatic protection from the home country of the individual or corporation concerned. This is explicable on the basis that, by denying proper redress before its national courts, the host State may be committing a breach of international law, where such denial can be shown to amount to a violation of international legal rules.[1] Furthermore, generally only States can bring claims under international law, given that they are the principal subjects of that system. Private non-State actors lack the requisite international legal personality and so must rely on this indirect means for the vindication of their legal rights.

However, the remedy of diplomatic protection has notable deficiencies from an investor's perspective. First, the right of diplomatic protection is held by the home country of the investor and, as a matter of policy, it may decide not to exercise this right in defence of an investor's claim. The home State may choose not to pursue the investor's claim for reasons that have more to do with the broader international relations between the home and host countries than with the validity of the investor's claim. Second, even if the home country successfully pursues an investor's claim, it is not legally obliged to transfer the proceeds of the claim to its national investor (Jennings and Watts, 1992; Brownlie, 1998). Third, in the case of a complex transnational corporation (TNC) with affiliates in numerous countries (each possessing, in all probability, a different legal nationality) and a highly international shareholder profile, it may be difficult, if not impossible, to state accurately what the firm's nationality should be for the purposes of establishing the right of diplomatic protection on the part of a protecting State.[2]

Furthermore, there are practical limitations on the process of diplomatic protection. This system requires even relatively small claims to be pursued through inter-State mechanisms, meaning that investor-State disputes on particular points may be conflated into State-to-State disagreements. As a matter of business strategy, neither the investor nor the host country may wish this to occur, as it could have implications for future economic arrangements among investors, and for relations between the home and host countries concerned – implications that may be quite out of proportion to the claim in issue. Given these difficulties, foreign investors often decline diplomatic protection where they have the option of securing remedies more directly by means of investor-State dispute-settlement mechanisms. In addition, capital-importing countries may wish to avoid the inconvenience of diplomatic protection by investors' home States by agreeing to direct settlement procedures with investors.

The kinds of disputes that may arise between an investor and a host State will often involve disagreements over the interpretation of their respective rights and obligations under the applicable investment agreement. In addition, they may involve allegations unrelated to the contract such as, for example, the failure to provide treatment according to certain standards or failure to provide protection required by treaty or customary law (see generally Sornarajah, 2000). Such disputes rarely lead to full litigation, and normally are settled by mutual and amicable means. Much will depend on the condition of the relationship between the investor and the host State. Where both parties wish the relationship to continue and to develop, the resolution of disputes should prove possible with little recourse to the kinds of systems of dispute settlement provided for in IIAs. Indeed, the existence of an effective third-party settlement procedure may prevent the breakdown of negotiations over a dispute by ensuring that parties do not attempt to get away with unreasonable or inflexible demands. However, in certain cases, disputes may be incapable of mutually satisfactory resolution by way of amicable discussion and negotiation. Where this is the case, the parties have a number of options for dealing with the dispute. These are discussed in Section I below.

Dispute-settlement provisions in IIAs are mainly concerned with providing methods for resolving more serious cases of disagreement. In this context, IIAs may offer an avenue for the resolution of investor-State disputes that allow significant disagreements to be overcome and the investment relationship to survive. Equally, where the disagreement is fundamental and the underlying relationship is at an end, the system offered by an IIA might help to ensure that an adequate remedy is offered to the aggrieved party and that the investment relationship can be unwound with a degree of security and equity, so that the legitimate expectations of both parties can, to some extent, be preserved. IIAs perform an essential risk-reducing function that may allow for more confidence on the part of investors and host States in the conduct of their investment relationships.

These functions of investor-State dispute settlement should not be taken as suggesting that this issue is unproblematic. Several areas of controversy exist. First, there is a continuing debate over whether it is appropriate to use international arbitration as a means of dispute settlement where this may weaken national dispute-settlement systems. Second, the application of international minimum standards for the treatment of aliens and their property is by no means universally accepted (Sornarajah, 1994, 2000). Third, not only developing countries but also, it seems, developed countries may view the process of international dispute settlement in this field with some suspicion. This can be seen from, for example, academic, judicial and political criticism of recent North American Free Trade Agreement (NAFTA) arbitration awards (De Palma, 2001; Foy and Deane, 2001) and from the significant disagreements that remained over the form and contents of the investor-State dispute-settlement provisions during the Multilateral Agreement on Investment (MAI) negotiations at the Organisation for Economic Co-operation and Development (OECD) (UNCTAD, 1999c, p. 19).

Notes

1 See *Azanian v. United Mexican States,* International Centre for Settlement of Investment Disputes (ICSID) (ICSID, 1999a).

2 Indeed, under international law, it may not even be acceptable to "lift the corporate veil" and determine the nationality of the corporation by reference to the nationality of its principal controlling shareholders, as opposed to the nationality of its seat or place of incorporation which is the accepted standard; see Barcelona Traction case, International Court of Justice (ICJ) (ICJ, 1970).

Section I

EXPLANATION OF THE ISSUE

At the outset, it is essential to place the issue of investor-State dispute settlement within its wider context. The settlement of any dispute, not just investment disputes, requires the adoption of the most speedy, informal, amicable and inexpensive method available. Hence, in recent years, the stress has been on the use of so-called "alternative dispute-resolution" mechanisms, i.e. those methods of dispute settlement that seek to avoid the use of the procedures provided by the public courts of a country, or, in international law, of an international court. Usually they include direct methods of settlement through negotiation, or informal methods that employ a third party, such as the provision of good offices, mediation or conciliation.[1] Arbitration may also be seen as an alternative dispute-resolution mechanism, although it is arguable that, given the high degree of legal control over the means and modalities of arbitration in municipal and, to a lesser extent, international law, its practical conduct may be only marginally different from that of a court proceeding (Merills, 1998; Asouzu, 2001, pp. 11-26). However, as far as the international settlement of investment disputes is concerned, from an investor's perspective arbitration is a more accessible method of dispute settlement than diplomatic protection, given that their lack of international personality does not bar them from direct participation.[2] Recourse to an international court such as the International Court of Justice (ICJ) is effectively barred, given the lack of standing for non-State actors, although investor-State disputes could be brought before regional courts such as the European Court of Justice or the European Court of Human Rights, where non-State actors have direct rights of audience under the treaties that establish these judicial bodies.

In light of the foregoing discussion, the most important question to make clear is that the first step in the resolution of any investment dispute is the use of direct, bilateral, informal and amicable means of settlement. Only where such informal means fail to resolve a dispute should the parties contemplate informal third-party measures such as good offices, mediation or conciliation. The use of arbitration should only be contemplated where bilateral and third-party informal measures have failed to achieve a negotiated result. Indeed, this gradation of dispute-settlement methods is commonly enshrined in the dispute-settlement provisions of IIAs, as will be demonstrated in Section II of this paper. However, the bulk of the paper will concentrate on the rules and practices surrounding arbitration, as this method of dispute settlement has generated the most detailed international treaty provisions in practice.

The choice of a dispute-settlement method is only one of the choices that an investor and State may have to make when seeking to resolve a dispute. Another central question for consideration concerns the forum for the resolution of such a dispute. In keeping with traditional perspectives, some developing capital-importing countries – particularly some Latin American States – have historically maintained that disputes between an investor and a host State should be settled exclusively before the tribunals and/or courts of the latter (referred to as the Calvo Doctrine; see further Shea, 1955). This viewpoint was manifested not only in the domestic legislation of individual countries; it also prevailed in certain regional agreements that prohibited member States from according foreign investors more favourable treatment than national investors, demonstrating a clear preference for dispute settlement in domestic courts. The United Nations Charter of Economic Rights and Duties of States of 1974[3] also adopted such an approach. However, while this approach remains an important precedent, it will be shown that the practice of developing countries and economies in transition has moved away from it in recent years. Most recent BITs concluded by such States provide for some type of international dispute-settlement mechanism to be used in relation to investment disputes. Nonetheless, this remains a controversial issue for negotiations leading to IIAs, as a balance needs to be struck between host country and international dispute settlement. Local settlement is convenient and there is a continuing need to recognize the validity of properly conceived and drafted national investment laws – and other applicable laws and regulations – as a legitimate and valuable source of rights and obligations in the investment process.

In contrast with the above-mentioned approach, foreign investors have traditionally maintained that, as regards developing countries, investor-State disputes should be resolved by means of internationalized dispute-settlement mechanisms governed by international standards and procedures, with international arbitration at its apex. This position is supported largely by arguments concerning the apparent fairness inherent in relying upon independent international arbitrators, rather than upon national courts that may be subject to the influence of the executive in host countries. Host countries may perceive such an emphasis on internationalized systems of dispute settlement as a sign of little confidence, on the part of investors, in their national laws and procedures, which may or may not be justifiable in a given case. However, the willingness to accept internationalized dispute settlement on the part of the host country may well be motivated by a desire to show commitment to the creation of a good investment climate. This may be of considerable importance where that country has historically followed a restrictive policy on foreign investment and wishes to change that policy for the future. In so doing, the host country can be entitled to expect that the internationalized system is itself impartial and even-handed with both parties to the dispute.[4]

Assuming that the investor and host State choose to adopt an international system of dispute settlement, a series of further choices arise. The first again concerns method. Where the parties have tried and failed to resolve their differences informally and to reach a negotiated settlement, the next choice concerns whether the parties wish to pursue *ad hoc* or institutional arbitration.

Ad hoc arbitration depends upon the initiative of the parties for their success. The parties must make their own arrangements regarding the procedure, the selection of arbitrators and administrative support. The principal advantage of *ad hoc* dispute settlement is that the procedure can be shaped to suit the parties. However, there are numerous problems associated with *ad hoc* arbitration. First, the process is governed by the arbitration agreement between the parties. Its content depends on the relative bargaining power of the parties. The stronger party may therefore obtain an arrangement advantageous to its interests.[5] Second, it may be impossible to agree on the exact nature of the dispute, or on the applicable law. Third, there may be difficulties in selecting acceptable arbitrators who can be relied on to act impartially and not as "advocates" for the side that had selected them. Fourth, the proceedings may be stultified by inordinate delay on the part of one side or both, or through the non-appearance of a party. Finally, there may be a problem in enforcing any award before municipal courts should they decide that the award is tainted with irregularity, or because the State party to the proceedings enjoys immunity from execution under the laws of the forum State. These difficulties – which may be particularly acute in the case of developing country parties to investor-State disputes – have led to the use of institutional systems of arbitration.

An institutional system of arbitration may be a more reliable means of resolving a dispute than an *ad hoc* approach, especially as it is likely to have been devised on a multilateral level and so may show greater sensitivity to the interests of developing countries. Once the parties have consented to its use, they have to abide by the system's procedures. These are designed to ensure that, while the parties retain a large measure of control over the arbitration, they are constrained against any attempt to undermine the proceedings. Furthermore, an award made under the auspices of an institutional system is more likely to be consistent with principles of procedural fairness applicable to that system and so is more likely to be enforceable before municipal courts. Indeed, recognition may be no more than a formality. Two systems in particular appear suitable for use in investment disputes between a host State and a foreign investor: the conciliation and arbitration procedures available under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) and the International Chamber of Commerce (ICC) Court of Arbitration.

The ICSID system is the only institutional system of international conciliation/arbitration specifically designed to deal with investment disputes and will receive closer scrutiny in Section II below. Apart from ICSID, ICC arbitration clauses have been used in IIAs, resulting in ICC arbitration in the event of a dispute. However, one of the criticisms lodged against the ICC Court of Arbitration as a forum for the resolution of foreign investment disputes is that, being primarily a centre for the resolution of commercial disputes between private traders, it has relatively little experience in the complexities of long-term investment agreements involving a State as a party. This may account for the observation that ICC arbitration clauses are used relatively infrequently in international economic development agreements. Nonetheless, the evidence of the actual use of the ICC Court of Arbitration in disputes involving Governments or State-owned enterprises is by no means negligible. Accordingly, this criticism of the ICC should not be overstated (Muchlinski, 1999, p. 539).

In the case of institutional systems, a further distinction should be made between regional and multilateral systems. A number of regional international commercial arbitration centres have been established, especially in developing regions, that may be of value in relation to investor-State disputes. Though these cater mainly to disputes between private parties, and will not therefore be studied in detail, their existence cannot go unnoticed in the present paper, given their potential to develop as possible venues for the settlement of investor-State disputes (Asouzu, 2001, chapters 2-3).

Once the choice between *ad hoc* and institutional arbitration has been made, further issues must be determined, either by the parties to the dispute themselves when *ad hoc* procedures are chosen, or by the constitutive instrument that governs the institutional system chosen by the parties for the resolution of their dispute. In particular, the following matters must be addressed:

- *Procedure for initiating a claim*. Under *ad hoc* procedures, the parties must agree on a method for initiating the claim. An institutional system prescribes a procedure. The principal aim of this procedure is to show that the dispute is submitted with the consent of the parties in accordance with any required procedural rules. It often involves a preliminary examination of the complaint by the secretariat attached to the system concerned, so that it may be assessed for admissibility, although it must be stressed that the tribunal itself is normally the final judge of admissibility.

- *Establishment and composition of the arbitral tribunal.* Clearly, a basic question that needs to be determined is who sits on the tribunal, who is eligible to sit and in what numbers should they sit.

- *Admissibility.* In *ad hoc* procedures, the parties must decide for themselves which claims they submit to the tribunal. In institutional systems, by contrast, there are rules on admissibility. In particular, the dispute must come within the jurisdiction of the tribunal:

    - *ratione materiae* in that it must be one connected with an investment;

    - *ratione personae* in that it is brought by an investor and/or a country that is entitled to use the institutional system concerned against a respondent investor or country that is capable of being sued under such system;

    - *ratione temporis* in that the dispute must have arisen at a time when the parties were legally entitled to have recourse to the system concerned.

- *Applicable law*. In cases of international arbitration, two choice of law questions arise: which law governs the procedure of the tribunal and which substantive law governs the resolution of the dispute. In *ad hoc* procedures, the parties need to determine these issues. These may already have been determined by the investment agreement governing the investor-State relationship, typically reflecting the relative bargaining position of each party. However, such agreements may at times be unclear or even be silent on these important questions, especially where the parties cannot accept each other's preferred governing law or laws. In such cases, the parties need to agree on the choice of law issues in the arbitration agreement that founds the tribunal and its jurisdiction. Much depends again on the relative bargaining positions of the parties, as the choice of a particular procedural or substantive law may confer advantages to one party over another (Sornarajah, 1994, pp. 332-338). By contrast, institutional systems specify rules on the choice of law issue in their constitutive instrument. In the first place, the choice of procedural law is resolved by the applicability of the rules and procedures of the institutional system itself. These can be found in the constitutive instrument and in supplementary rules of procedure produced by that system. As regards the choice of substantive law, preference is usually given to the parties' own choices in these matters, where the investment agreement concerned makes clear what these choices are. Where such clarity is absent, the applicable provision governs the determination of that question. Nonetheless, the main guiding principle concerning applicable law is the principle of party autonomy in choice of law matters, whether under an institutional or *ad hoc* system of arbitration.

- *Finality of the award*. A very important aspect of dispute settlement through third-party adjudication is that the resulting award is the final determination of the issues involved. However, to allow an award to stand where there is evidence of errors on the face of the record, or some suggestion of impropriety, would defeat the very purpose of such a dispute-settlement technique. Accordingly, in the case of *ad hoc* awards, these may be regarded as unenforceable by reason of error of law, or procedural impropriety, under the municipal law of a country that is requested to enforce the award. By contrast, institutional systems of arbitration may provide procedures for the review of an award by another panel of arbitrators. Equally, as is the case with the World Trade Organization's (WTO) State-to-State dispute-settlement mechanism, an appellate body might be set up with the right to review an original decision for errors of law (see Article 17(6) of the Dispute Settlement Understanding of the World Trade Organization (WTO, 1994)). Furthermore, should one party to the dispute fail to take part in the procedure, provisions for default or *ex parte* proceedings may prevent the frustration of the award.

- *Enforcement of awards.* Where a dispute is resolved in national courts, the particular court concerned also has the means to ensure that its decision is executed by agents of the State with respect to persons and property within the State. By contrast, in cases of internationalized *ad hoc* arbitration, the arbitral tribunal has no direct powers of enforcement *vis-à-vis* either the investor or the host country in respect of persons and property in the host country. Naturally, this prompts the need for special award-enforcement mechanisms, which are briefly described in Section II. If such enforcement mechanisms are not in place, or if they are inadequate, then both the investor and the host State may find that a successful claim before an arbitral tribunal could lose its financial significance: there are no means of enforcing the tribunal's decision. In order to remedy this possible outcome, institutional systems of arbitration may provide for the automatic enforcement of awards, made under their auspices, by the courts of all the countries that are parties to the system, subject only to specific rules concerning immunities of sovereign property from attachment in enforcement proceedings.

- *Costs*. A further procedural issue concerns the allocation of costs in a dispute settlement proceeding between an investor and the host State. Generally, the costs of an arbitration are borne by the losing party on the basis of costs agreed by the parties at the outset of the proceeding. On the other hand, where institutional systems of arbitration are used, such costs may be pre-determined by the administrative organs of that system. However, as will be shown in Section II, even under an institutional arrangement the parties concerned can still exercise considerable discretion when allocating costs.

Notes

1 The concept of negotiation as a technique of dispute settlement used directly by each party is self-explanatory and requires no further definition. However, the other terms used in the text have some specialized connotations and may be defined as follows: *good offices* involves the use of a third party to liaise with the disputing parties and to convey to each party the views of the other on the dispute. The third party plays no part in suggesting solutions to the dispute. By contrast *mediation* and *conciliation* involve the third party in a more active role, in that it may intervene with suggestions as to how the dispute might be resolved, thereby helping the disputing parties towards a negotiated settlement. In practice it may be difficult to differentiate between mediation and conciliation on a functional basis and the two terms can be used interchangeably (Asouzu, 2001, p. 20). However, they differ from arbitration in that the third party has no right or authority to determine the resolution/outcome of the dispute independently of the parties.

2 It has also been said that dispute resolution through international arbitration may be preferred by foreign investors due to a possible distrust of the court system of the host State and the choice of a forum in which the investor will feel more comfortable. See further text below and Sornarajah, 2000.

3 Unless otherwise noted, all instruments cited herein may be found in UNCTAD, 1996, 2000a or 2001.

4 Such impartiality has at times been questioned (Dezaly and Garth, 1996).

5 This problem could be mitigated by the use of United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules in *ad hoc* procedures. See further below.

Section II

STOCKTAKING AND ANALYSIS

This section of the paper uses the range of choices discussed in Section I as the basis for a review of the types of dispute-settlement clauses that may be included in IIAs. The structure and content of such clauses will be considered in the context of current and historical practice and in light of their impact on investor-State disputes. From a negotiator's viewpoint, the main concern is the extent to which a dispute-settlement provision preserves or limits party choice in these matters. This depends on a number of policy variables that are discussed more fully in Section IV below. For now, it suffices to indicate examples of clauses and provisions that serve either to preserve or to control party choice in the relevant areas. The discussion will focus in the main on institutional approaches to dispute settlement, rather than on *ad hoc* methods, as the former are referred to in the bulk of international instruments in this field. As noted in Section I, where *ad hoc* arbitration is used the parties themselves determine most of the issues surrounding the process and these determinations are not normally controlled by IIA provisions. Nonetheless, IIAs may offer the parties some guidance on the procedures that can be followed under *ad hoc* arbitration and intergovernmental organizations (most notably UNCITRAL) have offered standardized rules of dispute settlement. Thus, attention will also be paid to these developments where relevant.

A. Encouragement of informal, negotiated settlement

At the outset it should be noted that the majority of dispute-settlement clauses in IIAs relating to investor-State disputes mandate the use of informal methods of dispute settlement in the first instance.

Recourse to informal methods will, hopefully, lead the investor and host State towards an amicable, negotiated settlement of their differences. As was noted in Section I, the requirement for consultation or negotiation is valuable to States not only because it helps to defuse tensions in some instances, but also because it may underline the amicable spirit in which most States hope to conduct their investment relations (UNCTAD, 1998, p. 88). Furthermore, the obligation to negotiate and consult before initiating the other means of dispute settlement is not to be taken lightly: it is an obligation of substance and context. The parties to the dispute must negotiate in good faith.[1]

At the bilateral level, the model BITs of capital-exporting countries such as Germany (1991) (Article 11(1)), Switzerland (1995) (Article 8(1)) and France (1999) (Article 8) all expressly envisage that consultation or negotiation should precede adversarial proceedings.[2] Among capital-importing countries, BITs such as those between China/Viet Nam (1992) (Article 8(1)), Argentina/Bolivia (1994) (Article 9(1)) and Brazil/Chile (1994) (Article VIII(1)) also exemplify this approach. In some instances at the bilateral level, the duty to negotiate or consult is implicit in the dispute settlement provision. For example, Article 8 of the 1991 United Kingdom model BIT stipulates that, if an investor-State dispute should arise and "agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies or otherwise", then conciliation or arbitration may be instituted.

At the interregional level, although some of the earlier efforts of capital-exporting countries to formulate treaties on investment did not refer to amicable settlement (including the Abs-Shawcross and OECD BIT drafts), the draft MAI does (Abs and Shawcross, 1960; UNCTAD, 1999c, p. 19). Specifically, Article V(D)(2) of the draft MAI indicates that each investor-State dispute "should, if possible, be settled by negotiation or consultation", and then envisages other solutions involving judicial settlement. It is arguable that the use of the term "should" – as distinct from "shall" – implies that the duty to negotiate or consult does not rise to the level of a legal obligation**.** However, this may be a matter of little practical significance in most cases, as both parties to a dispute, acting in good faith, will wish to proceed amicably in the first instance. At the regional level, this issue also arises with respect to the NAFTA: Article 1118 of that agreement states, in full, that: "The disputing parties [in an investor-State dispute] should first attempt to settle a claim through consultation or negotiation".

Where provision is made for an amicable settlement of disputes, time limits are often countenanced as a means of facilitating the interests of both protagonists, although time limits are not always specified.[3] Usually, the time limits range from three months[4] to 12 months.[5] More recently, a six-month period appears to have become commonplace, as exemplified by Article 34(2) of the New Zealand/Singapore Economic Partnership Agreement of January 2001.

Finally, it should be noted that the World Bank system of investment dispute settlement, under the 1965 Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), provides for conciliation as well as arbitration. The system offers an international form of third-party, non-binding, dispute settlement, in which the role of the conciliators is "to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms" (Article 34 (1)). If the parties reach agreement, the Conciliation Commission set up under the Convention draws up a report noting the issues in dispute and recording that the parties have reached agreement. If the parties do not agree, the Commission draws up a report recording its failure to bring the parties to agreement (Article 34(2)).[6] Two points should be noted in relation to ICSID conciliation procedures. First, the procedure is not completely informal and parties must follow prescribed rules. Second, it is rarely used. Furthermore, on a more general level, it should be noted that the ICSID Convention's main effect on disputes is to lead to the settlement of most cases that are submitted to arbitration or conciliation (Schreuer, 2001, pp. 811–812).

B. Venue

As noted in Section I, apart from the initial question of whether a dispute can be settled amicably, the first main question that the parties to a dispute must answer concerns venue. In other words, should a dispute be dealt with by national dispute-settlement methods – centred upon the host State party to the dispute and the procedures that it offers – or by an international approach to dispute settlement? In the latter case, there is a choice between *ad hoc* and institutional systems. The implications of these different choices on the content of dispute-settlement clauses deserves consideration and will be done in three stages: first, the possibility of using clauses that restrict party choice to dispute settlement in the host State will be considered; second, the basic features of provisions that offer an internationalized dispute settlement system will be described; and third, the nature and content of choice of venue clauses in IIAs will be mapped out.

1. National dispute settlement in the host country

In accordance with the principle of national sovereignty over activities occurring on the territory of a State, most countries have traditionally maintained that investor-State disputes should be resolved in their national courts. In its strict formulation, this position means that foreign investors ought not, in principle, to have the option to pursue investor-State disputes through internationalized methods of dispute settlement.

This approach has been exemplified in historical practice by the provisions of certain Latin American investment instruments. For example, by Articles 50 and 51 of Decision No. 24 of the Commission of the Cartagena Agreement (1971) pertaining to foreign investment:

> "Article 50. Member countries may not accord to foreign investors treatment more favourable than to national investors.
>
> Article 51. No instrument pertaining to investment or to the transfer of technology may contain a clause removing disputes or conflicts from the national jurisdiction and competence of the recipient country, or permitting subrogation by States of the rights and actions of their national investors".

The rule in Article 51 of Decision No. 24 indicated the Commission's disapproval of internationalized dispute settlement by prohibiting outright legal instruments which allowed access to any form of adjudicatory mechanisms outside the host country. This level of antipathy towards third party dispute settlement was also reflected, for instance, in the national constitutions of some Latin American countries and in the resistance that Latin American countries[7] initially maintained to the consensual approach included in the ICSID Convention (Szasz, 1971).

Beyond Latin America, this perspective also influenced the attitude of other countries during the 1970s. Thus, the United Nations Charter on Economic Rights and Duties of States, which was adopted by the General Assembly on 12 December 1974, emphasises that each State has the right "to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities". It also states that, in the case of disputes concerning compensation as a result of nationalization or expropriation, such disputes should be settled "under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means" (Article 2.2(a) and (c)). The priority of national measures is apparent. However, it should also be noted that States are given the freedom to use other means of resolving compensation disputes. Thus, the Charter certainly cannot be interpreted as prohibiting the use of internationalized measures, merely not advocating them.

Before negotiations on the draft United Nations Code of Conduct on Transnational Corporations were discontinued, the provisions of the Code concerning dispute settlement remained subject to considerable controversy. The influence of the Latin American negotiating perspective – and of some other developing capital-importing countries – was evident in various draft provisions of the Code. For example, one of the later versions of Article 57 stipulated as follows:

> "[Disputes between States and entities of transnational corporations, which are not amicably settled between the parties, shall/should be submitted to competent national courts or authorities in conformity with the principle of paragraph 7. Where the parties so agree, such disputes may be referred to other mutually acceptable dispute settlement procedures.]".

From the perspective of the Group of 77, the group representing the negotiating position of the developing countries, this provision – including the reference to paragraph 7 of the draft Code of Conduct – was meant to reinforce the point that dispute settlement is mainly an issue for national courts. Where there is agreement, other forms of settlement may be acceptable, but the draft Code of Conduct [8] should, in the Group of 77's perspective, emphasize the primacy of national courts (Robinson, 1985, p. 13).

It would be misleading, however, to focus solely on the practice and perspectives of Latin American countries concerning national court jurisdiction in the period leading up to the end of the 1970s. Since that period, Latin American countries have generally reconsidered their approach. Hence, at the bilateral level, Latin American countries that had traditionally eschewed BITs, mainly because of reservations concerning dispute settlement, have become parties to a number of such treaties. Furthermore, on becoming parties to such treaties, Latin American countries have not, as a rule, avoided dispute-settlement provisions that contemplate internationalized dispute settlement (OAS, 1997). In this regard, the 1994 Chilean model BIT provides an important example of this change. Specifically, Article 8 indicates that the investor and host country should enter consultations in respect of any dispute, but, if such consultations fail, the investor may submit the dispute either:

"(a) to the competent tribunal of the Contracting Party in whose territory the investment was made; or

(b) to international arbitration of [ICSID]".

The extent of the change in Latin American perspectives in this area can be seen in a willingness in their relations with each other to accept the *lex specialis* on dispute settlement in BITs. For example, the BITs between Chile and Ecuador (1993) (Article X), Argentina and Bolivia (1994) (Article 9), Colombia and Peru (1994), Ecuador and El Salvador (1994) (Article X) and Brazil and Venezuela (1995) (Article 8) are testimony to the notion that international arbitration is becoming accepted as part of the contents of investor-State dispute settlement clauses. This change of policy is also reflected at the regional level. The States involved in Decision No. 24 of the Commission of the Cartagena Agreement have revised the policy inherent in Articles 50 and 51, quoted above. Now, by virtue of Decision 291 (1991), the members of the Andean Community accept that they shall each apply the provisions of their domestic legislation in settling disputes between foreign investors and the State (Article 10).

Apart from prohibiting international dispute settlement outright, a preference for national dispute settlement in the case of investor-State disputes can be preserved by including dispute-settlement provisions that require local remedies to be exercised before an international claim can be pursued. For example, according to the Caribbean Community (CARICOM) Guidelines for use in the Negotiation of Bilateral Treaties (1984), each CARICOM State, in considering investor-State dispute-settlement provisions, should seek to ensure that "resort to arbitration would only be permitted after all national remedies have been exhausted". Broadly in keeping with this guideline, Article 9 of the (1987) BIT between Jamaica and the United Kingdom contemplates ICSID conciliation or arbitration proceedings for investor-State disputes, but also envisages that local remedies should be exhausted as a precondition for internationalized third party intervention. In its relevant part, Article 9 reads:

> "If any such [investor-State] dispute should arise and agreement cannot be reached between the parties to the dispute through pursuit of local remedies in accordance with international law then, if the national or company affected also consents in writing to submit the dispute to the Centre [ICSID] for settlement by conciliation or arbitration under the [ICSID] Convention, either party may institute proceedings. ...".

It should be noted, however, that Jamaica has moved away from requiring the exhaustion of local remedies as a precondition for resort to arbitration in more recent agreements.[9]

The approach requiring prior exhaustion of local remedies is also taken in other cases. For example, Model B of the Asian-African Legal Consultative Committee Revised Draft of Model Agreements For Promotion and Protection of Investments (1985) reads as follows:

> "If any dispute or difference should arise between a Contracting Party and a national, company or State entity of the other Contracting Party, which cannot be resolved within a period of ________ through negotiations, either party to the dispute may initiate proceedings for conciliation or arbitration *after the local remedies have been exhausted"* (emphasis added).

In some cases, although it is envisaged that local remedies are to be exhausted before external arbitration or conciliation is pursued, time limits are placed on the local remedies requirement (UNCTAD, 1998; Schreuer, 2001, pp. 390-393). Here, then, even if the courts or other tribunals within the host country are still considering a particular dispute, once the fixed term period is reached, the investor may forego the local proceedings. As noted above, time limits tend to range from three months, as suggested in the 1991 United Kingdom model BIT (Preferred Article 8), to eighteen months, as in the 1995 Italy/Jamaica BIT (Article 9(3)). Naturally, the rate at which domestic proceedings are completed varies from country to country, but where the time limit is as short as three months, it can be maintained that the value of the need to exhaust local remedies is undermined: most domestic legal systems require more than three months for judicial processes to be completed.

In several instances, bilateral and regional instruments that include investor-State dispute-settlement provisions remain silent on whether the disputant investor has an obligation to exhaust local remedies. From the numerous examples in this regard, the 1991 German and 1995 Swiss model BITs, NAFTA and the 1967 OECD Draft Convention on the Protection of Foreign Property may be mentioned. For each such agreement that has entered into force, the question is whether one may infer that the investor must exhaust local remedies before proceeding to international third party settlement. Arguably, it should not be possible to exclude so basic a rule of customary international law without express words. Some support for this view may be garnered from the decision of the Chamber of the International Court of Justice in the case concerning *Elettronica Sicula S.p.A.(ELSI) (United States v. Italy)* (ICJ, 1989). In this case, the Chamber of the Court considered, *inter alia*, whether a foreign investor was required to exhaust local remedies before the investor's home country could pursue an international claim with the host country concerning an alleged breach against the investor. The Friendship, Commerce and Navigation Treaty (FCN) in question provided for international arbitration between the two States, but was silent on the need to exhaust local remedies. Did this mean that the local remedies rule was not applicable? The Chamber of the International Court of Justice responded in the negative. The majority judgment maintained:

> "The Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so" (ibid., paragraph 50).

Admittedly, the ELSI case was directly concerned with whether local remedies needed to be exhausted before a State-to-State arbitration could be commenced. But this does not mean that the approach quoted above should be disregarded; there would seem to be no reason in principle to reject the Chamber's pronouncement with respect to investor-State disputes. To support this conclusion, it may also be noted that, although the 1967 OECD Draft Convention was silent on the local remedies rule in investor-State matters, the OECD Commentary (OECD, 1963) on the point treated State-to-State and investor-State disputes in the same way. In Comment No. 9 on Article 7 concerning both types of disputes, the Commentary maintained that:

> "Nothing in the Convention, whether in this or any other Article, affects the normal operation of the Local Remedies' rule. The rule implies that all appropriate legal remedies short of the process provided for in the Convention must be exhausted..." (ibid., p. 261).

The need to observe the local remedies rule may apply at least for IIAs concluded before the establishment of ICSID, in that they would not refer to that system of dispute settlement. The ICSID Convention explicitly excludes the local remedies rule, unless a State contracting party expresses a reservation to preserve the operation of the rule under Article 26 of the Convention. Also, as a matter of policy, there may be some reason for requiring exhaustion of local remedies in investor-State disputes even where the governing instrument makes no express reference to local remedies. Most investor-State disputes are prompted at least in part by issues arising within the host country**.** Where the host country has in place a modern system of law, it may reasonably believe that, where no express provision has been made to override national jurisdiction, such local issues should be determined within the local court system. This approach shows respect for the host country's judicial system.

On the other hand, as far as investor-State dispute settlement is concerned, the understanding of many negotiators is that the formulations used in BITs, unless otherwise explicitly expressed, normally imply that the contracting States have dispensed with the requirement that local remedies must be exhausted (Schreuer, 2001, pp. 390-396; Peters, 1997, pp. 233-243).[10] This view is confirmed by the provisions of Article 26 of the ICSID Convention, which is discussed in detail in the next sub-section. Furthermore, the FCN Treaty between the United States and Italy, which was at issue in the ELSI case, did not contain an investor-State dispute settlement clause providing for direct investor access to international arbitration, effectively dispensing with the requirement to exhaust local remedies. Given that many of today's IIAs contain both State-to-State and investor-State dispute settlement clauses and that the latter routinely provide for direct access by the investor to international arbitration, it may be open to question whether the interpretation applied by the ICJ to the FCN treaty would stand in relation to contemporary forms of investment agreements. The distinction between an agreement providing for direct investor access to international arbitration and one without such a provision, was not taken by the ICJ in that case. Yet it may be a significant difference affecting the proper approach to the local remedies rule where an agreement is silent on this issue, but provides for such direct investor access to international arbitration.

2. International dispute settlement

a. *Ad hoc* dispute settlement

Ad hoc forms of dispute settlement have been used relatively little in recent years. Nonetheless, certain developments under the auspices of UNCITRAL and the Permanent Court of Arbitration deserve brief mention.

Although the UNCITRAL Arbitration Rules (1976) do not constitute an institutional system for international dispute settlement, they can be viewed as a possible improvement to *ad hoc* international arbitration and may be of some value in disputes between foreign investors and host States. Their primary aim is to harmonize the rules used in commercial arbitration, providing an optional and generally acceptable system of procedural norms for the conduct of such arbitrations. In relation to foreign investment disputes, although the UNCITRAL Arbitration Rules do not provide the institutional back-up available under the ICC and ICSID systems, they can remove some of the difficulties associated with *ad hoc* arbitration by basing it on internationally acceptable procedures.

The Permanent Court of Arbitration has also produced Optional Rules for Arbitrating Disputes Between two Parties of which only one is a State. These Rules, which are similar in structure and content to the UNCITRAL Rules, provide a framework for the conduct of an arbitration between a State and a private party with the assistance of the International Bureau of the Permanent Court. They are not limited to any particular type of dispute and so could be used in relation to investment disputes. They are entirely voluntary in character, with the International Bureau acting purely as an administrative aid to the arbitration. The Rules are thus not a fully-fledged institutional system of arbitration, but offer parties to an *ad hoc* arbitration a model to use as the arbitration agreement between them. The Optional Rules cover all the important procedural questions that need to be addressed by the parties when establishing an arbitral tribunal, the conduct of its proceedings and for the making and enforcement of an award.

b. Institutional dispute settlement

It was mentioned in Section I that the only system of institutional dispute settlement specifically designed to deal with investor-State disputes is that provided for under the auspices of the World Bank, the ICSID. The specific procedural requirements for the use of this system are contained in the ICSID Convention. These will be considered in detail below. For now, the main concern is to describe the provisions used by the ICSID Convention to develop an internationalized model of investor-State dispute settlement.

The international character of ICSID dispute settlement is emphasized by the provisions of Articles 26 and 27 of the ICSID Convention. Article 26 of ICSID Convention states:

> "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."

Two points arise from this provision. First, as soon as the parties give consent to the conduct of an arbitration under the ICSID Convention, that renders any other remedy unavailable. This relates, in particular, to remedies in national law. Thus, ICSID arbitration is an exclusive procedure, subject to the prior consent of the parties, unless otherwise stated. Second, the State party retains a degree of sovereign control over the availability of ICSID arbitration by being able to require the prior exhaustion of local remedies. In effect, this reverses the rule of customary international law, in that the inapplicability of that rule is presumed in the absence of an express statement by the State party to the dispute (Schreuer, 1997a, pp. 196-197). Such a statement can be made at any time up to the time that consent to arbitration is perfected as, for example, in a BIT offering consent to ICSID arbitration, in national investment law or in the investment agreement with the investor party to the dispute. The requirement cannot be introduced retroactively once consent to ICSID arbitration has been perfected (Schreuer, 1997a, p. 198). In practice, States almost never insist on the exhaustion of local remedies.[11]

Article 27 of the ICSID Convention addresses the relationship between ICSID Arbitration and the remedy of diplomatic protection:

> "No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute."

This provision ensures that diplomatic protection is excluded as a possible remedy once the parties have both consented to submit the dispute to ICSID. It is insufficient to offer ICSID arbitration through a clause in an IIA for this effect to be achieved. The international character of ICSID arbitration is further emphasized by the Convention's provisions on applicable law, which will be considered in sub-section C (d) below.

c. Choice of venue clauses

As outlined above, certain provisions in international instruments define the kinds of venue that may be chosen in order to resolve international investment disputes. The next question is what type of clause should be used to outline the nature and scope of the choices available to the parties to an IIA? By the 1990s, with changing attitudes to foreign direct investment (FDI), there was a marked shift towards arrangements that accept that foreign investors are entitled to a measure of choice concerning which dispute-settlement procedures to follow should they have a grievance against the host State (Parra, 1997).

This shows a marked contrast to the position prior to the adoption of the ICSID Convention in 1965, when the investor had no right to bring a claim against a host State. Now the investor appears to have such a right, as part of the choice of dispute-settlement means offered to investors in IIAs. However, despite this change, it should be borne in mind that the major principle underlying choice of venue is party autonomy and that this doctrine is followed in IIAs even where investor choice is offered.

For example, at the regional level, under Section V of the draft MAI, a foreign investor was given the choice of submitting disputes to one of following:

- any competent court or administrative tribunal of the host country;
- any dispute settlement procedure agreed upon prior to the dispute arising; or
- by arbitration, under the ICSID Convention; the ICSID Additional Facility; the UNCITRAL Arbitration Rules; the Rules of Arbitration of the ICC.

Two additional features of the draft MAI warrant attention. First, investment disputes would have been subject to time limits. Thus, pursuant to Article V(D)(4), an investor could submit a dispute for resolution under the dispute-settlement procedures at any time 60 days after the date the host country received a notice of intent from the investor, providing this was no later than five years from the date the investor acquired, or should have acquired, knowledge of the events giving rise to the dispute. Second, the draft MAI stipulated, as a general rule, that neither the host country nor the investor could withdraw its consent to international arbitration (Article V(D)(5)). According to the draft MAI, at the time when the host country becomes a party to the MAI, it could indicate that its acceptance was conditional on the investor being unable to pursue the same dispute through both arbitration and other dispute-settlement procedures (Article V(D)(3)(b)).[12]

At the regional level, too, the dominant trend is towards foreign investor choice of venue. For example, NAFTA Article 1120 indicates that foreign investors shall have the right to submit a claim against the host country in one of the following ways:

- under the ICSID Convention, provided that both the disputing State and the home country of the investor are parties to that Convention;

- under the Additional Facility Rules of the ICSID, provided that either the disputing State or the home country of the investor, but not both, is a party to the ICSID Convention; or

- under the UNCITRAL Arbitration Rules.

The claimant must give the host country 90 days notice of its intention to submit a claim (Article 1119). Here, too, except in certain specified instances, the claimant may not insist upon arbitration while pursuing other means of dispute settlement with respect to the same dispute (Article 1121).

This pattern is also evident in the Energy Charter Treaty. Specifically, Article 26 of that treaty allows foreign investors from a contracting party to submit investment disputes for adjudication to any one of the following:

- the courts or administrative tribunals of the host country party to the dispute;

- proceedings in accordance with any applicable, previously agreed dispute-settlement procedure; or

- arbitration under the ICSID Convention; under the ICSID Additional Facility; before a sole arbitrator or *ad hoc* arbitration tribunal established under UNCITRAL Arbitration Rules; or under the Arbitration Institute of the Stockholm Chamber of Commerce (Articles 26(2) to (5)).

All parties to the Energy Charter Treaty accept the basic dispute-settlement requirements, but the treaty also allows States to make access to arbitration conditional upon the termination of all other dispute-settlement proceedings (Article 26(3)(b) and Annex ID). States may also opt to exclude a general commitment to observe their contractual obligations from the ambit of arbitral proceedings (Article 26(3)(c) and Annex IA).

Some BITs also offer foreign investors the choice of venue in instances of a dispute. Though their actual provisions on this issue vary on points of detail, the basic thrust is for host countries to guarantee third-party settlement as one option available to foreign investors in their territory. Thus, by way of example, the model BITs of Germany (1991), the United Kingdom (1991), the United States (1994 as revised 1998), Switzerland (1995) and France (1999) – as well as actual treaties completed by these countries with developing countries[13] – include provisions allowing for the arbitration of investor-State disputes as a matter of course. Equally, the model agreements of certain developing countries and economies in transition follow this approach.[14]

On the other hand, free investor choice may be accompanied by an equivalent freedom of choice for the host country party to the investment dispute. Thus, by Article 12(2) of the Iranian model BIT:

> "In the event that the host Contracting Party and the investor(s) can not agree within six months from the date of notification of the claim by one party to the other, either of them may refer the dispute to the competent courts of the host Contracting Party or with due regard to their own laws and regulations to an arbitral tribunal of three members. …"

The arbitral tribunal in question is of an *ad hoc* nature, with each party selecting an arbitrator, who will then select the umpire of the tribunal. The arbitration will be conducted in accordance with UNCITRAL rules (Article 12(5) and (6)). The Peru model agreement, Article 8, also provides for either the investor from the other contracting party or the host contracting party to submit the dispute to a competent tribunal of the host contracting party or to ICSID, should settlement of the dispute in a friendly manner prove impossible after six months. Once that choice has been made it cannot be undone by either party.[15]

The broad impact of BITs in this area is also evident in the fact that a significant proportion of the 2,099 BITs concluded as of 1 January 2002 provide for arbitration (UNCTAD, 2002). So, for example, in one survey of 335 BITs in force at the beginning of 1992, it was found that 334 contained provisions for arbitration (Khalil, 1992). Of the treaties surveyed, 212 required arbitration under ICSID procedures either as the only, or as one of the methods of dispute settlement. This pattern has continued, so that today many BITs establish that the foreign investor shall have the option to use ICSID procedures or another form of internationalized arbitration, for the settlement of investment disputes.

Finally, brief attention should be given to some common formulations in BITs on the issue of dispute settlement. As noted, many of these instruments contemplate arbitration by ICSID, under the ICSID Additional Facility, or on an *ad hoc* basis. Not all references to ICSID arbitration necessarily mean that ICSID will have jurisdiction in particular cases**.** This is so because the ICSID Convention grants jurisdiction to that arbitral mechanism only where the parties to the particular dispute give their consent in writing to ICSID arbitration.[16] The question, therefore, is whether certain formulations used in BITs give rise to ICSID jurisdiction (Sornarajah, 1986).

Some of the formulations often encountered in this regard include:

- *Type 1*. Cases where the dispute-settlement provision seeks to create a unilateral offer of consent of the host country to ICSID adjudication in anticipation of any future dispute. It is exemplified by the Preferred Article 8 (1) in the 1991 model BIT of the United Kingdom:

  > "Each Contracting Party hereby consents to submit to the International Centre for the [sic] Settlement of Investment Disputes […] for settlement by conciliation or arbitration under the Convention […] any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former".[17]

- *Type 2.* Cases where the BIT establishes an obligation on the part of both State parties to accept ICSID jurisdiction once requested to do so by the investor from the other contracting State party. One example of this type is to be found in Article XII of the

Agreement on Economic Cooperation signed between the Netherlands and Uganda in 1970, which stipulated that:

> "The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall assent to any demand on the part of such national to submit, for conciliation or arbitration, to [the ICSID], any dispute that may arise in connection with the investment".

Although this provision never entered into force, in that the 1970 agreement itself never entered into force, it offers an interesting formulation that could be considered in the drafting of BITs.

- *Type 3*. Cases where the mandatory "shall" is used in a manner that indicates that disputes are to be subject to ICSID jurisdiction, but where this result is not necessarily achieved. In this category, the contracting parties typically agree that any investor-State dispute "shall, upon agreement between both parties, be submitted for arbitration by [ICSID]" (1979 Sweden/Malaysia BIT, Article 6). This provision acknowledges the possibility that the parties to the dispute might eventually conclude agreements accepting ICSID jurisdiction, but it does not, by itself, constitute that acceptance (Dolzer and Stevens, 1995, p. 132).

- *Type 4*. A number of BITs, particularly some concluded by the Netherlands, rely on the following form of words: "The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall give sympathetic consideration to a request on the part of such national to submit for conciliation or arbitration, to [ICSID],…" (1979 Netherlands/Kenya BIT, Article XI).

Clearly, although this type of provision may have some moral authority, it does not constitute consent to ICSID arbitration. However, it may imply "an obligation not to withhold consent unreasonably" (Broches, 1982, p. 67).

C. Determination of procedural issues

Assuming that the parties elect international arbitration, this raises a number of further procedural questions. As already noted, where *ad hoc* procedures are chosen the parties themselves must agree on these issues. Some guidance may be obtained from the use of standard model rules outlined above, should the parties wish to use them. By comparison, the ICSID Convention lays down a comprehensive international system for investor-State dispute settlement through the establishment and operation of ICSID. Given its prominence as a precedent, most of the issues raised in this section will be discussed with reference to the provisions of that Convention, though reference is also made to the provisions of the UNCITRAL Arbitration Rules and the Permanent Court of Arbitration Optional Rules for arbitrating disputes between a private and a State party. Finally, it should be stressed that not all of the ensuing issues are of equal importance. They are presented here in a sequence that reflects the order in which these issues are often laid out in international instruments dealing with arbitration. In particular, it should be emphasized that questions relating to the applicable law not only affect the procedure of the tribunal in question, but also impact upon the content of the substantive law used by the tribunal to resolve the dispute.

1. Procedure for the initiation of a claim

The first step in commencing an arbitration procedure is the initiation of a claim by the complaining party. Under the ICSID Convention, this is done by the notifying the Secretary-General of ICSID of a request for arbitration, who thereupon sends a copy of the request to the respondent party. The request must contain information on the issues in dispute, the identity of the parties and evidence of their consent to ICSID arbitration in accordance with the rules of admissibility (on which see below). The Secretary-General is empowered to make a preliminary examination of the request to ensure that it is *prima facie* admissible, though the final right of decision on this question rests with the arbitral panel. Provided that the request is admissible, the Secretary-General will then register the request, notifying the parties the same day. Proceedings are deemed to have commenced from the date of registration (Article 36, ICSID Convention).

By contrast, the procedure under the UNCITRAL Arbitration Rules is a bilateral process. Proceedings are initiated by the claimant through a notice of arbitration to the respondent. Arbitral proceedings are deemed to commence on the date on which the notice of arbitration is received by the respondent (Article 3). The notice must comply with the content requirements contained in Article 3 of the UNCITRAL Arbitration Rules. The provisions of the Permanent Court of Arbitration Optional Rules for arbitrating disputes between a private and a State party are identical in these requirements to the UNCITRAL Arbitration Rules. It should be noted, however, that both sets of Rules make clear that when a State party agrees to arbitration under the Rules, this constitutes a waiver of sovereign immunity – though a waiver of immunity relating to the execution of an award must be explicitly expressed (Permanent Court of Arbitration Optional Rules, Article 1(2)).

2. Establishment and composition of the arbitral tribunal

The usual practice in international arbitrations is for the parties to choose between a sole arbitrator or an arbitration panel of uneven number, usually three. One problem with *ad hoc* procedures has been the inability of the parties to agree on a number or on a selection of arbitrators. Accordingly, the UNCITRAL Arbitration Rules and the Permanent Court of Arbitration Optional Rules provide procedures for the appointment of arbitrators in the absence of agreement between the parties after the lapse of a specified time period (see Articles 5-8 of each instrument). Given that each arbitrator is selected by a party, the other party retains rights of challenge (see Articles 9-12 of each instrument). Provision is also made for replacement of arbitrators and for a repeat of hearings where this is required (Article 14 of each instrument).

The ICSID Convention provisions offer a more institutionalized approach (Articles 37-38). While agreement between the parties is still the first principle of procedure, should they fail to agree on the number and appointment of arbitrators, the chairperson of the Administrative Council of ICSID (the President of the World Bank) shall appoint the panel members. Panel members will be appointed from persons nominated by the parties, provided they conform to the qualities listed for members of the ICSID Panel of Arbitrators in Article 14(1) of the ICSID Convention. Where the chairperson makes the nomination, this is limited to the members of the standing Panel of Arbitrators. The majority of the arbitrators shall be nationals of States other than the States or nationals party to the dispute, unless the parties agree otherwise (Article 39, ICSID Convention).

3. Admissibility

In *ad hoc* procedures, the parties must decide for themselves which claims they submit to the tribunal through their statement of claim and defence. The jurisdiction of the tribunal also rests on the terms of the arbitration agreement between them. However, the arbitral tribunal has the power to rule that it is not competent to decide the issue on the basis of the terms of that agreement. This is a preliminary question that must be raised no later than the statement of defence or of counter-claim. This approach is maintained in the UNCITRAL Arbitration Rules and in the Permanent Court of Arbitration Optional Rules (Article 21 of each instrument).

Institutional systems, by contrast, have rules on admissibility. In particular, a dispute must come within the jurisdiction of the arbitral tribunal, as defined in the constitutive instrument setting up the system. In this regard, the ICSID Convention has provisions covering the admissibility of claims – these can be regarded as the cornerstone of this dispute-settlement system. The provisions have been developed through the interpretative jurisprudence of successive ICSID Tribunals into a complex and technical body of procedural law, though it must be stressed that each Tribunal is free to interpret the Convention as it sees fit, there being no doctrine of precedent under the ICSID Convention. However, earlier decisions on admissibility undoubtedly form persuasive precedents upon which the parties and subsequent Tribunals may rely. It is neither possible nor necessary to examine this jurisprudence in detail for the purposes of the present paper, it being sufficient merely to describe the main requirements of admissibility. Nonetheless, it is necessary for any negotiator of an IIA to remember that, in offering ICSID as a dispute-settlement option, the agreement in question automatically applies the procedural law of the ICSID Convention to the disputes covered by the IIA.[18] As noted in Section I, to be admissible a request for arbitration must fulfil the following requirements: it must be admissible as regards subject matter (jurisdiction *ratione materiae*); the parties to the dispute must be entitled to use ICSID procedures and have the standing to answer claims under these procedures (jurisdiction *ratione personae*); and the request must be admissible at the time it is made (jurisdiction *ratione temporis*).

a. Admissibility *ratione materiae*

Before the provisions of the ICSID Convention are considered, it is necessary briefly to review practice in other IIAs. The most common approach in this regard is for the relevant treaty to stipulate that the dispute must be a legal dispute, that it must concern an investment issue and arise from it. A typical form of words can be found in Article 9 of the 1994 BIT between Lithuania and the Netherlands (UNCTAD, 1998), which reads in the relevant part:

> "Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party to the International Centre for the [sic] Settlement of Investment Disputes ..."

Here the connection established is that the dispute must be one "concerning an investment", but other formulations are commonplace (UNCTAD, 1998, p. 91). For instance, BITs may provide that the dispute in question must be "relating to" an investment (1995 BIT between Australia and the People Democratic Republic of Laos), "in connection with" an investment (1992 China-Viet Nam BIT), "with respect to" an investment (1995 Swiss model BIT), or "regarding" an investment (1994 Chilean model BIT). The Asian-African Legal Consultative Committee Revised Draft of Model Agreements for

Promotion and Protection of Investments can be placed in this category as well; these instruments provide for dispute settlement for "any dispute or difference that may arise out of or in relation to investments made" in the host country's territory by a foreign investor (models A and B).

In some cases, an IIA that gives rise to the jurisdiction of the relevant tribunal contemplates both disputes arising under the agreement itself, and disputes arising under other specified agreements or in other specified circumstances. Thus, the draft MAI included two different types of investor-State disputes for settlement – namely, disputes arising under the MAI itself (Article V(D)(1)(a)) and disputes arising under either an investment authorization or a written agreement between a host country and an investor (Article V(D)(1)(b)(i) and (ii)). This is also the approach taken in United States' BITs. Article IX of the 1994 United States model BIT (as revised in 1998), which sets out the pertinent rules for "investment disputes", indicates that:

> "For purposes of this Treaty, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to an investment authorization, an investment agreement or an alleged breach of any right conferred, created or recognized by this Treaty with respect to a covered investment."

The ICSID Convention applies the following formulation in Article 25(1):

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in

> writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

The dispute must be "legal" and must arise directly out of the "investment". The first requirement seeks to differentiate between a conflict of interests and a conflict of rights. Only the latter comes within the jurisdiction of the Centre. Thus, the parties must show that the dispute relates to the scope of a legal right or obligation, or the nature of reparation to be paid for breach of a legal obligation (Schreuer, 1996, p. 339). In general, this requirement has not caused many problems before ICSID Tribunals.[19]

The second requirement has been defined broadly so that "investment" includes, in essence, any outlay of capital by at least one party. Furthermore, it is not limited to FDI in cases where the treaty involved provides that portfolio investment is covered by the definition of investment (ICSID, 1998). Whether the subject matter of the dispute arises out of an "investment" is a matter to be decided on a case-by-case basis and the views of the parties are not decisive. Equally, if jurisdiction is based on an arbitration clause referring to ICSID, the definition of "investment" in that agreement will not be binding on the ICSID Tribunal, as it reflects the specific agreement of the parties, although it is likely that the definitions in the BITs will meet the Convention's objective requirements (Schreuer, 1996, pp. 362-363). As to the requirement that a dispute "arises directly" out of an investment, this is also a matter for decision on the facts of each case. It introduces a requirement that the dispute has a clear and real connection to the investment and is not an unrelated ancillary transaction. In practice, this may be a hard distinction to draw, as an investment relationship typically gives rise to many transactions, some of which are closely related in an economic sense to the main investment agreement while others are rather more remote from it.[20]

b. Admissibility *ratione personae*

This question does not arise in relation to *ad hoc* internationalized arbitration as the parties themselves define the tribunal's personal jurisdiction by agreeing to submit to the proceeding. However, in relation to institutional arbitration (or indeed conciliation), it is a central issue. Thus, with respect to the ICSID Convention, as noted above, Article 25(1) requires:

- *first*, that the parties be State contracting parties to the ICSID Convention and the national of another State contracting party (see further Schreuer, 2001, pp. 141-168, 265-334; Asouzu, 2001, chapter 9; Amerasinghe, 1974); and

- *second*, that they both consent to ICSID jurisdiction (see further Schreuer, 1996, pp. 422-492; Asouzu, 2001, chapter 10).

As to the nature of the parties to the dispute, the State contracting party can appear in person or can designate any governmental agency or constituent sub-division to appear as parties in their own right. It must be a party to the Convention at the time the dispute is submitted to the Secretary-General of ICSID (ICSID Convention, Articles 68, 70, 73). As for the other party to a dispute, it must be a national of a contracting State party other than the host State party to a dispute. It can be a natural or juridical person. A natural person must possess the nationality of a contracting State party on the date on which the parties consent to submit the dispute to ICSID and on the date the dispute is registered by the Secretary-General.

The nationality requirements of a juridical person are not as strict. Under Article 25 (2)(b) of the ICSID Convention, "national of another Contracting State" means:

> "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

The first case covers a juridical person possessing a nationality other than that of the contracting State party to the dispute. The second case deals with the common situation in which the locally incorporated affiliate of a foreign parent company is a party to a dispute with the contracting State in which it is incorporated. Given that the affiliate possesses the nationality of the respondent host State, it would be easy for the latter, in the absence of Article 25(2)(b), to avoid jurisdiction before ICSID by invoking that fact. Thus, the ICSID Convention allows the locally incorporated affiliate to assert foreign control, in order to satisfy the nationality requirements needed for ICSID juristiction to apply. However, to do so the affiliate must show that the host contracting State agreed that it should be treated as a national of another contracting State – for example, by specifically recognizing its foreign ownership and control in an investment authorization and confirming that actual foreign control exists (ICSID, 1994; Schreuer, 2001, pp. 292-324; and Asouzu, 2001, pp. 273-300).[21]

As to consent to ICSID jurisdiction, the State party to the ICSID Convention and the foreign investor must provide written consent that they each submit to the jurisdiction of ICSID. Being a State party to the Convention is not sufficient for the Centre to have jurisdiction; for ICSID jurisdiction, an additional, voluntary, submission must be made to the Centre. At the time that the ICSID Convention was being negotiated, capital-importing countries were not generally prepared to accept compulsory jurisdiction for investor-State disputes, so the ICSID approach represents an attempt to balance the divergent perspectives of these countries and those of capital-exporting countries (Schwarzenberger, 1969).

Other ICSID provisions underline the consensual character of this Convention. So, for example:

- Article 25(4) allows each State party to notify ICSID of the class or classes of disputes that it "…would or would not consider submitting to the jurisdiction of the Centre. …";

- the seventh preambular paragraph of the Convention declares 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"; and

- Articles 28 and 36 respectively require that requests for conciliation or for arbitration shall expressly indicate that the relevant parties have given consent for those procedures.

Offers of consent (if not, indeed, actual consent, depending on the terms of the instrument in question) may be found in a number of sources. These include: the terms of the dispute-settlement clause in the master investment contract itself; in a series of documents constituting the legal basis of the investment relationship in cases in which more than a single document exists; in the national legislation of the host contracting State; and in BITs (see further Schreuer, 1996, pp. 422-492; Asouzu, 2001, chapter 10). For present purposes, it is enough to recall the types of formulations mentioned above which are commonly found in BITs and relate to the choice of venue for dispute settlement.[22]

Consent to submission to international arbitration was unconditional for contracting Parties to the draft MAI, reflecting the practice of many other treaties. Together with the submission of the dispute by the investor to ICSID arbitration – or to other systems of arbitration mentioned in the investor-State dispute settlement provisions of the draft MAI – this constituted the consent required to establish jurisdiction over the dispute in question.

c. Admissibility *ratione temporis*

This requirement is again mainly relevant to institutional systems of arbitration or conciliation. In *ad hoc* procedures, there may be time limits laid down for submission of claims and defences, but these are not bound by any law that limits action – unless the parties decide to apply such a law, or stipulate that time is of the essence regarding a submission's admissibility.

In relation to ICSID proceedings, as noted above, the parties to a dispute must be legally entitled to have recourse to that system on the grounds that the dispute was registered at a date when both parties were, respectively, a contracting State party and a national of another contracting State.

4. Applicable law

As noted in Section I, in an international arbitration two choice of law questions arise: which law is to govern the procedure of the tribunal and which substantive law will govern the resolution of the dispute.

a. Applicable procedural law

In *ad hoc* procedures, the parties need to determine these issues. These may already have been determined by the investment agreement governing the investor-State relationship. However, such agreements may at times be unclear or even be silent on these important questions, especially in cases in which the parties cannot accept each other's preferred governing law or laws. In such cases, the parties need to agree the choice of law issues in the arbitration agreement that founds the tribunal and its jurisdiction. One solution here is for the parties to adopt standard rules for the conduct of international arbitration, such as those provided for in the UNCITRAL Arbitration Rules or the similar rules adopted by the Permanent Court of Arbitration Optional Rules. These Rules become the "procedural law" of the arbitration, though they remain subject to any rules of law applicable to the arbitration from which the parties cannot derogate. In this way, *ad hoc* arbitration can come closer to institutional systems, where the choice of procedural law is resolved by the applicability of the rules and procedures of the institutional system itself. Thus, in relation to ICSID, these are found in the constitutive instrument and the supplementary rules of procedure produced by ICSID to govern conciliation and arbitration proceedings.

b. Applicable substantive law

As regards the choice of substantive law, preference is usually given in both *ad hoc* and institutional systems to the parties' own choices in these matters, where such choices are clear from the investment agreement concerned. However, where such clarity is absent, *ad hoc* and institutional systems may take different paths.

In the case of *ad hoc* arbitration, standardized rules of arbitration include an applicable law clause. Thus, Article 33 of the

UNCITRAL Arbitration Rules and Article 33 of the Permanent Court of Arbitration Optional Rules both state:

> "1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
>
> 2. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.
>
> 3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This provision re-emphasizes party control over choice of substantive law and the governing force of the contract between them in its commercial context. It also reflects arbitral practice by allowing the tribunal to apply relevant conflict-of-laws rules to decide on the applicable law in the absence of party consent, or to decide without reference to a specific system of law where the parties have authorized a decision on the basis of the principles stated in paragraph 2. Where the latter option arises, the arbitration is decided on the basis of what the tribunal considers fair and equitable in the circumstances of the case, paying regard to the contract and to the laws and practices to which it is most closely associated.

As regards institutional systems of arbitration, Article 42(1) of the ICSID Convention deals with the applicable substantive law as follows:

> "(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

This provision establishes an order of preference as to the applicable law. First, the Tribunal will apply the rules of law agreed by the parties. In the absence of such agreement, the law of the contracting State party to the dispute – including its conflict-of-laws rules (which may, in turn, point to the law of another State as the applicable law) will be applied. Finally, the Tribunal will turn to any applicable rules of international law. This reference to international law has been interpreted by subsequent ICSID Tribunals to mean that the law of the contracting State party to a dispute will apply so long as it is consistent with rules of international law (Shihata and Parra, 1994). Similarly, where the parties make an express choice of a national law as the applicable law, this too will be subject to review in accordance with applicable rules of international law (Schreuer, 1997b, pp. 473-487; Muchlinski, 1999, pp. 549-551). Where the applicable national law is consistent with international law an ICSID Tribunal can decide the case by reference to that domestic law alone (ICSID, 1987). By contrast, a tribunal acting under Chapter 11 of NAFTA is bound to apply the provisions of NAFTA, the applicable rules of international law and interpretations of the NAFTA Free Trade Commission (Article 1131 NAFTA). A NAFTA tribunal would exceed its jurisdiction if it decided a claim solely on the basis of domestic law (Foy and Deane, 2001, pp. 306-307).

5. Finality of awards

As is the case with any third-party adjudication, whether conducted through a court or an arbitral body, international arbitral proceedings must comply with certain basic procedural requirements that ensure a full and fair hearing of each party's case, a properly reasoned award that is correct in both factual and legal analysis and a hearing that is conducted by a professionally competent and impartial tribunal. Accordingly, both *ad hoc* and institutional systems of arbitration must observe such fundamental requirements of due process and fairness in order to provide effective and legitimate means of dispute settlement.

In relation to *ad hoc* arbitration, failure to observe such requirements may result in the unenforceability of the award under the national laws of States before whose tribunals such enforcement is sought. An international arbitral award that fails to comply with the requirements of fairness and due process will usually be unenforceable, as this would offend against the public policy of the forum State.[23] In some jurisdictions this might lead to the award being annulled.[24] In practice, it may not be easy to ensure that such rights are observed if the parties cannot agree to include certain procedural standards in the arbitration agreement, either by reference to an applicable procedural law or through specific provisions in the agreement itself. In order to avoid this possible problem, the UNCITRAL Arbitration Rules and the Permanent Court of Arbitration Optional Rules set down standardized procedural requirements for the proper conduct of the arbitration and for the making of a fully reasoned award (UNCITRAL Rules 1976 and Permanent Court of Arbitration Optional Rules, Section III Articles 15-30 and Section IV Articles 31-37 (both instruments)). However, both instruments are silent on enforcement, although it is safe to say that, where an award is governed by the provisions of these instruments and the requirements stated therein are followed, that award will almost certainly be accepted as complying with the essential requirements of fairness, due process and reasoned decision making.

The draft MAI included a provision stressing that any award made under its provisions would be final and binding between the parties to the dispute and should be carried out without delay by the party against whom it was issued, subject to the post-award rights granted under the arbitral systems used to make the award (draft MAI, Dispute Settlement, Section D). Thus, the draft MAI envisaged that the issue of finality would be governed by the applicable rules of the arbitration system chosen by the parties for resolving their dispute.

In the case of institutional arbitration, the approach of the ICSID Convention is similar, in that it also contains provisions dealing with the proper conduct of arbitral proceedings (see further ICSID Convention, Chapter IV, Articles 36-49). However, the ICSID Convention goes beyond *ad hoc* systems by including provisions on the interpretation, revision and annulment of the award (see, for a detailed analysis, Schreuer, 2001, pp. 856-1075). These provisions permit either party to request a review of the award of an ICSID Tribunal where:

- a dispute arises between the parties as to the meaning or scope of an award, in which case either party may request an interpretation of the award by the tribunal that rendered it or, if this is not possible, by a new tribunal (ICSID Convention, Article 50);

- new facts arise that decisively affect the award and which were unknown to the tribunal and to the party seeking to introduce the new facts, and that the latter's ignorance was not due to negligence. In such a case, that party can apply within specified time limits to request revision of the award by the tribunal that rendered it or, if this is not possible, by another tribunal (ICSID Convention, Article 51);

- either party feels there are grounds for annulment of the award (ICSID Convention, Article 52).

This last situation calls for further elucidation. By Article 52, either party may request annulment of the award where one or more of the following grounds of annulment are alleged to exist:

(a) that the Tribunal was not properly constituted;

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) that the award has failed to state the reasons on which it is based.

The application must be made within 120 days after the date on which the award was rendered, or within 120 days of the discovery of any alleged corruption and, in any case, within three years of the date of the award (ICSID Convention Article 52 (2)).

The annulment request is made to the Secretary-General of ICSID, who will forward it to the chairperson, who, in turn, will appoint an *ad hoc* committee of three persons to review the award. These persons must be different from the members of the Tribunal that rendered the award, they must not be of the same nationality as any such member or of the State party to the dispute or of the State whose national is a party to the dispute, nor must they have acted as conciliators in the same dispute (ICSID Convention, Article 52(4)). If an award is annulled, either party may request that the dispute be submitted to a new Tribunal.

This procedure is in essence a review procedure, not an appeal procedure (Caron, 1992). An appeal procedure, such as that used under the Dispute Settlement Understanding of the WTO, permits a challenge to an arbitral award on the basis not only of procedural defects, but also as regards the substance of the decision where this shows a defect in law – for example, the evidence was not properly reviewed by the tribunal. While the distinction between a review and an appeal of a decision is at times hard to draw, the main difference lies in the fact that an appellate body can not only nullify an award for procedural defects, but can go further and substitute its own decision for that of the first tribunal. By contrast, the *ad hoc* committee under ICSID rules can only annul the decision of the Tribunal on one or more of the narrow grounds provided for in Article 52, thereby freeing the parties to decide whether either one of them wishes to submit the dispute afresh to a newly constituted Tribunal.[25] In practice this has led to some prolongation of disputes and to calls for a revision of the ICSID Convention in order to ensure greater finality of awards (Feldman, 1987; Redfern, 1987). Finally, it should be noted that, by Article 53 of the ICSID Convention, the award of an ICSID Tribunal is binding on the parties and is not subject to any appeal or to any other remedy, except those provided for in the Convention.

It should also be noted that, under ICSID Convention rules, the delivery of a binding award is not proscribed where a party fails to appear. The ICSID Convention provides for decisions in default of a party appearing, subject to certain procedures aimed at encouraging that party to appear (ICSID Convention Article 45).

6. Enforcement of awards

If an investor-State dispute has been submitted to a local court in a host country for final settlement, then enforcement issues should not raise any special problems. This is so because the local court with jurisdiction over the issue also has enforcement jurisdiction in the normal course of events.

Where, however, an investor-State dispute is submitted to international arbitration, certain issues of enforcement may arise in practice. In the first place, an investor naturally wishes to have the arbitral award enforced to its full extent even though the arbitral tribunal will, in all likelihood, not have the ultimate means of enforcement available to domestic courts. To address this consideration, Article 54(1) of the ICSID Convention stipulates, *inter alia*, that:

> "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. ..."

One result of this provision is that if ICSID arbitration is used, each State party to the ICSID Convention is required to enforce the resulting arbitral award in its territory (Schreuer, 2001, pp. 1098-1140). In some circumstances, however, a party to the ICSID Convention may not carry out enforcement as a result of the interplay between the provisions of Article 54 and Article 55. Article 55 stipulates that:

> "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

Consequently, if a court of the State in which enforcement is sought takes the view that it is being called upon to enforce an award contrary to the principle of sovereign immunity, it may decide against enforcing the award. This is exemplified by the decision of the District Court for the Southern District of New York in *LETCO v. Liberia* (ICSID, 1987), in which the court relied expressly on Article 55 in holding that, on the facts, certain Liberian property was immune from execution (Schreuer, 2001, pp. 1141-1180).

Another well-established method for the enforcement of arbitral awards is through the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Under this Convention, which applies to the recognition and enforcement of awards made in foreign territory, arbitral awards are to be recognized in accordance with the rules and procedures of the State in which enforcement is sought, and under specified terms and conditions. In practice, however, the scope of the New York Convention is limited by the fact that parties to the Convention are often only prepared to enforce arbitral awards made in the territory of other State parties. Article I(3) of the New York Convention entitles parties to follow this course of action.

A second limiting factor to enforcement under the New York Convention is that, in some countries, enforcement against the respondent State may be limited by the Act-of-State doctrine or the plea of sovereign immunity (UNCTAD, 1998). This possibility arises largely because Article V(2)(b) of the New York Convention allows the State in which recognition and enforcement is sought to refuse such recognition and enforcement if this would be "contrary to the public policy of that country". The Act-of-State doctrine, which indicates a policy of judicial self-restraint mainly in the United States, may arguably prompt the view that it is contrary to public policy to exercise enforcement jurisdiction with respect to the actions taken by a foreign

State within its own territory. In similar fashion, it is open to argument that considerations of public policy may prevent a party to the New York Convention from enforcing an arbitral decision against a foreign sovereign without regard to the principle of sovereign immunity.

In the event that a particular country is party to neither the ICSID nor the New York Conventions, then it may not be legally obliged to enforce an award. As a means of addressing this problem, some BITs contain provisions which stipulate that an arbitral award shall be enforceable in the territory of each party to the given bilateral agreement (Article VI, 1992 United States/Russia BIT). Similarly, some BITs provide for mutual enforcement of awards pursuant to the domestic laws of the host State party (Article 7(5), 1992 Lithuania/Sweden), (UNCTAD, 1998).

Each of the possibilities noted in this section – those of the ICSID and New York Conventions and of individual BITs – creates an obligation under international law for the relevant State parties to enforce certain third-party decisions. It should be noted, however, that these possibilities do not necessarily reflect obligations in the national law of the State parties. In some jurisdictions, the treaty obligations of the State automatically become a part of the national law; in such jurisdictions, the enforcement obligations accepted by the State would automatically apply within the State. In other jurisdictions, however, the enforcement obligations derived from relevant treaties need to be expressly incorporated in local legislation in order to be applicable as part of the national law (Jennings and Watts, 1992).

7. Costs

In *ad hoc* arbitration it is usual for the costs to be determined by agreement of the parties or by the arbitral tribunal itself. The

UNCITRAL Arbitration Rules and the Permanent Court of Arbitration Optional Rules both opt for the latter approach, leaving the determination of costs to the tribunal (UNCITRAL Rules Article 38; Permanent Court Rules Article 38). As to the question of which party bears the costs, practice is not uniform. The possible options include: equal sharing of costs, the "loser pays" principle, or apportionment at the discretion of the tribunal. The UNCITRAL Rules and the Permanent Court of Arbitration Optional Rules both follow the "loser pays" approach (UNCITRAL Rules, Article 40; Permanent Court Rules, Article 40), while the ICC Rules of Arbitration 1998 follow the tribunal-discretion approach (Article 31(3), Schreuer, 2001, pp. 1224-1225).

Under institutional systems of arbitration costs are determined in accordance with the applicable procedural rules. Thus, the ICSID Convention leaves the determination of charges for the use of ICSID facilities to the Secretary-General in accordance with the applicable regulations, while each Conciliation Commission or Arbitral Tribunal shall determine the fees and expenses of its members within the limits prescribed by ICSID rules (ICSID Convention, Articles 59-60). However, the parties are not precluded from agreeing in advance with the Commission or Tribunal concerned upon the fees and expenses of its members (ICSID Convention Article 60(2)). As to the apportionment of costs, in conciliation proceedings before ICSID the costs are shared equally between the parties, while in ICSID arbitrations the apportionment of costs are determined by the Tribunal as part of the award, unless the parties otherwise agree (ICSID Convention Article 61). Where the parties decide to reach their own agreement on the apportionment of costs, they cannot reduce or withdraw their overall financial obligation towards ICSID by such agreement (Schreuer, 2001, p. 1222).

Notes

1 In *Tradax Helles SA v. Albania* (ICSID, 1999b) the ICSID Tribunal held that it was not necessary to decide whether a provision in Albanian law for an amicable settlement practice before recourse to a domestic court or administrative tribunal also applied to the procedure for recourse to ICSID arbitration because, in any event, Tradax had made a good faith effort to settle amicably.

2 Unless otherwise indicated, the texts of the BITs mentioned in this paper may be found in the collection of BITs maintained by ICSID (ICSID, 1972).

3 Unless otherwise indicated, the texts of the BITs mentioned in this paper may be found in the collection of BITs maintained by ICSID (ICSID, 1972).

4 See for example the 1993 Denmark/Lithuania BIT Article 8(2) and the 1991 United Kingdom model BIT, Preferred Article 8.

5 As exemplified by the 1994 Indonesia/ Republic of Korea BIT Article 9(2), the 1987 Association of South-East Asian Nations (ASEAN) Treaty Article X(1) and also by the 1991 BIT between Argentina and Chile Article 10(1).

6 For the applicable procedural rules see the ICSID Convention, Chapter IV, and the ICSID Conciliation Rules.

7 On the issue of national laws and disputes-settlement among member States of the Andean Commission, see Wiesner, 1993.

8 Paragraph 7 of the Chairperson's text of the draft Code of Conduct of 1983 reads as follows: "An entity of a transnational cooperation is subject to the jurisdiction, laws, regulations and administrative practices of the country in which it operates" (Robinson, 1985, p. 13).

9 See, for example, the Jamaica-United States Agreement of 1994, ArticleVI.

10 However, some experts would dispute this approach and attach primacy to the local remedies rule and the above interpretation of the ELSI case. See, for example, Sornarajah, 2000.

11 Only one country, Israel, had, at the time of its ratification of the ICSID Convention in 1983, made a notification to ICSID requiring the exhaustion of local administrative or judicial remedies. This reservation was withdrawn in 1991 (Schreuer, 2001, p. 391).

12 A similar approach, which promotes certainty in the dispute-settlement process, is reflected in some bilateral agreements, including the 1994 model BIT of the United States. Article IX(3)(a) of that BIT gives an investor the right to pursue arbitration, provided that the investor has not already submitted the dispute to national courts or administrative tribunals of the host country, or in accordance with any other applicable, previously agreed procedures.

[13] See for example Article 4, Chapter IV, of the United States-Viet Nam Agreement on Trade Relations, 2000.

[14] See for example the Cambodia model agreement, Article VIII and the Croatia model agreement, Article 10.

[15] There is at least one example of a host country bringing a claim against a foreign investor before ICSID: see Gabon v. Société Serete SA (ICSID, 1976). That case was settled by agreement of the parties in 1978.

[16] For this reason, Mann suggests that, if a private investor wishes to be assured of ICSID jurisdiction, that investor should seek to obtain the host country's written submission to ICSID jurisdiction in the agreement inter se (Mann, 1990, p. 244).

[17] A provision of this type was used as the basis for establishing ICSID jurisdiction in the first ICSID arbitration brought pursuant to a BIT in *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, Award of the Tribunal dated 21 June 1990 (ICSID, 1990). For commentary, see Vasciannie, 1992. This formulation is also used in Article XII of the 2000 BIT concluded between the Netherlands and Uganda.

[18] For further analysis of the law of ICSID relating to admissibility of claims, see Schreuer, 1996; Schreuer, 2001, pp. 82-344.; Delaume, 1984; and Amerasinghe, 1974.

[19] See Fedax v. Venezuela (ICSID, 1998).

[20] For example, a dispute with caterers, supplied by the host State, over the supply of food to workers on an investment project is unlikely to "arise directly out of an investment" even though, but for the investment, the contract for the supply of food would not be concluded with the caterers. On the other hand, in some circumstances it might – for example where the investment project is in a remote location that can only be supplied by a host country's military catering unit, without which the workforce would go unfed. For a full discussion, see Schreuer, 1996, pp. 348-355, and Schreuer, 2001, pp. 113-121.

[21] To ensure clarity on this issue, ICSID has drafted its Model Clause 7 which states: "It is hereby agreed that, although the Investor is a national of the Host State, it is controlled by nationals of name(s) of other Contracting State(s) and shall be treated as a national of [that]/[those] State(s) for the purposes of the Convention" (ICSID, 1993).

[22] Such unilateral offers of consent to ICSID procedures on the part of host States parties to the ICSID Convention, and, indeed, under other IIAs as noted above, have led some tribunals and experts to assert that it is now possible to institute arbitration "without privity" that is, without the prior conclusion of a bilateral agreement to submit a specific dispute to ICSID arbitration. See ICSID, 1990, and Paulsson, 1995.

23 See for example New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, Article V, which lists the main grounds for refusal to recognize and enforce an arbitral award, including on public policy grounds. See further next sub-section.

24 See for example Sections 33 and 34 of the Swedish Arbitration Act of 1999 (International Legal Materials, 1999).

25 However, the contrast between review and appeal may be hard to draw even in relation to ICSID procedures, as Article 52(c) allows for annulment on grounds that the Tribunal has manifestly exceeded its powers. This may raise questions about the substance of the decision itself, though in principle excess of powers is a procedural issue.

Section III

INTERACTION WITH OTHER ISSUES AND CONCEPTS

The issue of dispute settlement is fundamental to the balance of the relationship between a foreign investor and a host country. It follows that there is substantial interaction between investor-State dispute settlement and a broad range of other issues and concepts that arise in investment practice. A summary of the extent to which this interaction is likely to occur in practice is set out in table 1.

Table 1. Interaction across issues and concepts

Concepts in other papers	Investor-State dispute settlement
Scope and definition	++
Admission and establishment	++
Incentives	+
Investment-related trade measures	+
Most-favoured-nation treatment	+
National treatment	++
Fair and equitable treatment	++
Taxation	+
Transfer pricing	++
Competition	+
Transfer of technology	+
Employment	+
Social responsibility	+
Environment	+
Home country measures	+
Host country operational measures	+
Illicit payments	+
Taking of property	++
State contracts	++
Transfer of funds	+
Transparency	+
Dispute settlement: State-State	++

Source: UNCTAD.

Key:			
	0	=	negligible or no interaction.
	+	=	moderate interaction.
	++	=	extensive interaction.

- **Scope and definition** (UNCTAD, 1999e). IIAs take divergent positions on the actual definition of the terms “investment” and “investor”, as they seek to define forms of investment and the types of investors that are covered by each agreement. Generally, the definition of “investment” depends on the types of assets that could fall within the meaning of the term. However, in some cases it refers mainly to the underlying transaction involving the particular assets. “Investor” is defined in relation to the criteria to be used for determining whether a particular entity is to have rights and duties in an investment agreement.

  As noted in Section II above, some IIAs identify the types of investor-State disputes within their ambit by reference to matters “concerning investment”, matters “in connection with investment” and so forth. At the same time, other IIAs provide for investor-State dispute settlement in respect of disputes under a particular IIA, or in other specified circumstances. In each case, however, there is a link between a particular form of “investment” and the use of dispute-settlement mechanisms, whether through third-party arbitration or otherwise. Accordingly, there is a strong correlation between the definition of the term “investment” and the range of matters that are subject to investor-State dispute settlement. A significant degree of correlation also exists between the definition of “investor” and the circumstances in which investor-State dispute settlement may arise. Specifically, a claimant in an investor-State dispute will, almost certainly, need to satisfy the definition of an investor in the relevant IIA in order to pursue a legal claim against a host country.

  In some cases, an entity may satisfy the definition of an “investor” (or a “national”, or some other entity eligible to make a claim), but the claim may be barred on grounds of nationality. Many IIAs, including NAFTA, the Energy Charter Treaty, and numerous BITs, specify rules concerning the nationality of claimants and the circumstances in which “investors” satisfy the requirements of nationality in order to make a claim. In each particular investor-State dispute, therefore, it must be considered whether a foreign investor meets the nationality criteria in order to bring a valid claim. In the case of corporate entities, factors such as the claimant's country of incorporation or the country where it has its headquarters will be used to determine nationality.

- **Admission and establishment** (UNCTAD, 1999a). Various IIAs specify the circumstances in which foreign investors may become participants in the economy of a host country. The criteria for admission and establishment may include, among other things, minimum capital requirements, reinvestment requirements and/or requirements concerning joint venture participation with locals. Almost invariably, too, an investor is required to comply with the national laws, national security and public policy of the host country as conditions of entry.

  Investor-State dispute-settlement procedures may enhance rights of admission and establishment by providing the mechanism by which investors may challenge a host country's decision concerning which investments are entitled to treaty rights and benefits in that host country. That is the effect of an extension of an IIA to the pre-entry stage of an investment when combined with the investor-State dispute-settlement provision in the agreement. Examples of such an approach include NAFTA and the draft MAI, as well as the Draft Supplementary Treaty to the Energy Charter Treaty.

  In some cases, however, the putative investor may not have access to investor-State dispute-settlement mechanisms because treaty rights are not made applicable to pre-investment activities in the host country. So, for instance, Article 10 of the Asian-African Legal Consultative Committee Revised Draft of Model Agreements for Promotion and Protection of Investments contemplates rights to foreign investors in relation to "investments made in [the host State's] territory". Here, an investor's right to dispute settlement is active only after the time of investment: admission and entry questions are not subject to dispute resolution under the treaty. A similar approach has been adopted in BITs concluded by Canada – for example, the BIT concluded between Canada and Thailand in 1997 (Article II (4)) or the BIT concluded between Canada and Lebanon in 1997 (Article VI of Annex I on Exceptions) (Canada, 2002).

- **National treatment** (UNCTAD, 1999d). The guarantee of national treatment – meaning in this context that a foreign investor is entitled at least to the same level of treatment accorded to national investors in the host country – is an important feature of modern investment treaty practice. In the context of investor-State dispute issues, national treatment means that a foreign investor should have access to the same avenues of dispute settlement available to national investors. Given that host countries are usually willing to have FDI matters considered by local courts, modern treaty practice is furnished with numerous instances in which both national and foreign investors have access to the same domestic jurisdiction. As discussed in Section II above, foreign investors frequently seek access to internationalized means of settlement in the form of arbitration or conciliation that may not be available to national investors. To this extent, an entitlement to investor-State dispute settlement may be regarded as an exception to the notion that foreign investors must be given the same treatment as national investors in all respects. In this case it is better to see the treatment accorded to the foreign investor as being in line with the concept of "no-less-favourable-treatment". Here a host country may give preferential treatment to foreign investors compared to the treatment it accords to comparable national investors, but not less than it affords national investors.

- **Fair and equitable treatment** (UNCTAD, 1999b). Most modern multilateral, regional and bilateral investment instruments contain the assurance that foreign investors shall receive "fair and equitable" treatment with respect to their operations in a host country. There has been some disagreement as to the precise meaning of this assurance. Some suggest that it is equivalent to the international minimum standard, while others argue that it simply means that fairness and equity, in their plain meaning, should be accorded to foreign investors.

  Most treaties that contemplate fair and equitable treatment also provide for third-party settlement of investor-State disputes. Third-party procedures can enhance the fair and equitable standard by allowing investors to have their claims about unfair or inequitable treatment considered by tribunals operating outside the control of the host country. In addition, because disputes about what constitutes fair and equitable treatment may involve the different economic perspectives of a host country and investor, third-party settlement may provide some assurance to investors that their views on fairness and equity will be given due consideration. More generally, if there were to be no dispute-settlement mechanism for investor-State disputes – whether through third-party mechanisms or otherwise – there would be no judicial or independent means by which an investor would be able to have its perspective on fairness and equity assessed.

- **Transfer pricing** (UNCTAD, 1999f). Issues of transfer pricing are essentially concerned with how one may establish prices for goods, services, know-how and intellectual property transferred across borders within the corporate structure of a particular TNC. Where these transfers occur, the pricing of the items transferred is a significant factor in determinating possible tax revenues for the host country. For this reason, host countries have an interest in ascertaining the transfer price used by TNCs, and in ensuring that this price is determined on a reasonable basis. For transfer pricing issues, investor-State dispute-settlement mechanisms provide a host State and foreign investor with some assurance that there is an independent avenue for assessing their divergent viewpoints, should such differences occur. Dispute-settlement provisions are therefore often provided for in bilateral tax treaties.

- **Taking of property** (UNCTAD, 2000b). One of the primary concerns of an investor in a foreign country is the vulnerability of the investment to a "taking" by the host State. Such taking may assume diverse forms, ranging from relatively minor interference by a host country with respect to the investor's assets, to the complete appropriation of such assets, possibly as part of a broad scheme of nationalization of foreign property. In any event, a taking by a host country can give rise to questions of both municipal and international law and sometimes prompts the need for investor-State dispute settlement. Indeed, historically investor-State disputes on this issue have been at the heart of this area of international law. Disputes over whether a taking has occurred or whether sufficient compensation has been paid for a taking generally fall within the scope of typical investor-State dispute settlement provisions. This is true for multilateral, regional and bilateral instruments. Thus, most of the dispute-settlement provisions reviewed in Section II above are fully applicable to questions concerning takings. However, some IIAs also contemplate specific dispute-settlement rules for matters concerning expropriation and compensation. So, for instance, the Asian-African Legal Consultative Committee Revised Draft of Model Agreements for Promotion and Protection of Investments makes provision for investor-State disputes in general in Article 10, but it also expressly stipulates that disputes concerning the "determination of compensation or its payment" shall be referred either to an independent judicial or administrative tribunal under the host country's laws, or in accordance with any agreement between an investor and a host country for third-party arbitration (Article 7). Similarly, the 1994 Chinese model BIT makes general provisions for dispute settlement in the courts of the host country, but it further contemplates that disputes concerning the amount of compensation for expropriation "may be submitted at the request of either party to an *ad hoc* arbitral tribunal". These provisions implicitly acknowledge the important role that dispute-settlement provisions play in the area of takings. Finally, even where there is a general provision on investor-State dispute settlement that is applicable to takings, some BITs also indicate that takings should be assessed in accordance with "due process of law" in the host country. This has been interpreted to mean that the taking and assessment of compensation must be considered by a national tribunal of the host country, as a precondition for submission to third-party arbitration (UNCTAD, 2000b).

- **State contracts** (UNCTAD, forthcoming b). Particularly with respect to large scale projects in the mining and petroleum sector, but also in areas such as telecommunications, transport, power supply and related fields, foreign investors sometimes enter a host country under the terms of a contract between themselves and a host country (UNCTAD, 2000b). Such State contracts normally stipulate matters such as choice of law, the applicable tax regime and the terms and conditions concerning the operations of an investor. In addition, they frequently contain provisions on what should occur in the event of an alleged breach of a contract and, in this regard, the trend is for conflict resolution through arbitration. In some cases, therefore, foreign investors that are parties to a State contract have rights of access to third-party dispute resolution not only by virtue of any relevant treaty instrument, but also under the terms of a State contract (Mann, 1990).

- **Dispute settlement: State-State** (UNCTAD, forthcoming a). Under customary international law, when foreign nationals suffer loss and damage in a host country and receive no adequate remedy from the courts of the host country or otherwise, those foreign nationals may seek diplomatic protection from their home country (Jennings and Watts, 1992). Specifically, an aggrieved national may request the home country to espouse a claim against the host country in respect of the damages originally suffered by the national. If the home country pursues this claim, it will be doing so on its own behalf and international law does not require the home country to transfer any sums received for damages to the aggrieved national (Jennings and Watts, 1992; Brownlie, 1998). Nevertheless, it is clear that, when a State espouses the claim of one of its nationals in this context, the resulting State-to-State dispute-settlement proceedings depend substantially on the particular dispute that the foreign national (the investor) originally had with the host country. Thus, the State-to-State dispute is a derivative of the original investor-State disagreement. In addition, investor-State disputes are sometimes linked to State-to-State disputes by way of subrogation (Dolzer and Stevens, 1995, pp. 156-164). In some home countries, agencies of a State are prepared to grant financial guarantees against non-commercial risks (such as the risk of expropriation) to investors of their nationality who invest in foreign territory. Under the principle of subrogation, if a State agency makes payment to a foreign investor in respect of a foreign investment dispute, the State or agency may then assume the rights of the foreign investor in the dispute with the host country. This principle is recognized in most recent BITs. Finally, some agreements take into account the possibility that the same claim by an investor may constitute the basis for both investor-State and State-to-State dispute-settlement proceedings (UNCTAD, 1998). To avoid this occurrence, some BITs that contain both types of dispute-settlement provisions expressly provide that, if a dispute has been submitted to investor-State mechanisms, then that submission automatically serves as a bar to the same claim being presented for State-to-State resolution. Where, however, the investor-State tribunal finds that it does not have jurisdiction with respect to a particular claim, or where the tribunal's judgement has not been respected by the host country, then, under the terms of some BITs, the claim is not barred from State-to-State procedures – see for example Article 12(4), 1995 Australia/Lao People's Democratic Republic BIT.

CONCLUSION:

ECONOMIC AND DEVELOPMENT IMPLICATIONS AND POLICY OPTIONS

The process of foreign investment can create disagreements and disputes between the various actors involved, and as such there is little doubt that procedures for the settlement of investment disputes are needed. This is so regardless of the level of development of the host country in question. However, there is less of a consensus on the precise nature of those procedures. In this regard, there may be a greater choice of approach (and more flexibility in the alternatives open in relation to procedural detail) than might at first appear. In relation to the economic development process of developing countries, there has been a tendency to polarize choice around two basic models of dispute settlement: national approaches and international approaches. Though much of the practice in IIAs, reviewed in Section II above, echoes this tendency, the present section places these approaches into a wider context of choice and flexibility, illustrating the full range and complexity involved in drafting dispute-settlement clauses in IIAs.

A further issue to be borne in mind, when considering the development implications of dispute-settlement mechanisms, is the need to ensure the primacy of swift, efficient and amicable methods of dispute settlement. These are the best guarantee of long-term stability in investment relations. Therefore, to give primacy to more legalistic and formal third-party methods of dispute settlement may be to limit party flexibility unduly. Nonetheless, it must be stressed that, although the majority of dispute-settlement clauses and systems found in IIAs seem to deal with this type of approach, they do not represent the only alternative. Indeed, such clauses and systems are there to deal with the rare disputes that cannot be easily resolved through amicable means. On the other hand, major disagreements can and do occur. Thus, the proper conduct of more serious investment disputes must be ensured.

The implication is that the dispute settlement system chosen must provide effective means for the resolution of differences between the parties and, crucially, must be fair to both parties and be perceived as such. Investor-State disputes arise between a private commercial party and a State administration or agency and as such include a public interest and policy element. This cannot be wholly disregarded against the commercial interests of the private party, nor, indeed, can the legitimate interests and expectations of the commercial party always take second place to the public interest. The dispute-settlement system must therefore be sensitive to both kinds of interests and to the claims that they might generate in the course of a dispute.

Against this background and in the light of the preceding discussion, a number of policy options can be considered in drafting investor-State dispute settlement clauses in IIAs. These options arise in relation to the major choice that parties to IIAs must make – namely, whether to include dispute-settlement clauses in an agreement or not. Should the former approach be taken, two further choices arise; first, which venue to choose and how far there should be room to choose; second, what types of procedural rules should apply.

A. No reference to investor-State dispute settlement in an agreement

At the most basic level it is possible to decide not to include any reference to dispute settlement in an IIA. This option is not usually found in practice. A central purpose of many IIAs is to place a guarantee of dispute settlement into legally binding terms through the use of such an agreement. The effect is to create an international legal obligation to settle disputes between a host State and investors from other States party to an IIA in accordance with the procedures laid down in that agreement.

On the other hand, when the host country has a developed and generally respected internal legal order, a reference to dispute settlement in an IIA could be thought of as unnecessary (although this has not always dissuaded investor home countries of from insisting that dispute settlement clause be included in an IIA). The internal laws and practices of a host country may be seen as sufficiently protective of the rights and obligations of both a private investor and a host State not to need further determination in an international agreement.

B. Reference to investor-State dispute settlement in an agreement

1. Choice of venue

Here a number of major options present themselves:

Option 1: Exclusivity of national dispute-settlement methods in a host country

This option involves the exclusive jurisdiction of national courts and represents the end of the spectrum that gives greatest control to host countries. From the perspective of foreign investors, this approach suggests possible vulnerability: a host country could modify its rules on investment or a change of government could lead to a change in attitude towards foreign investors. However, a host country may believe that the application of national law is the option that is most compatible with its notions of national interest. In addition, a host country may believe that its national laws are inherently fair and just and that if investors come to the host country, they should be prepared to accept the host country's law, just as much as they accept other aspects of the host country.

In support of such a policy, it might be said, as a political matter, that a foreign investor should be accorded treatment equal to that granted to nationals of the host country (Rogers, 1978); to grant an investor the right to third-party dispute settlement amounts, in effect, to placing the foreign investor in a privileged position *vis-à-vis* national investors. In addition, it might be said that since foreign nationals usually invest in a host country for their own commercial reasons, these investors should be prepared, on the basis of equality with nationals, to accept the national courts of the host country (Shea, 1955). In short, investors should be expected to take the investment climate of the host country as a whole, including its judicial system.

Option 2: International dispute settlement is subject to a requirement of prior exhaustion of local remedies in a host country

This approach allows for some degree of host State control over the process of dispute settlement, in that an investor is not free to pursue internationalized remedies until they have exhausted all local avenues of dispute settlement in a host country. A possible variant could be a requirement to use regional dispute-settlement systems to which the host country is a party, before fully international dispute-settlement systems are followed.

Option 3: Non-binding preference for national dispute settlement

Another approach may be to state a preference for national dispute-settlement in a host country, but to avoid making this preference legally binding on investors. This approach might be useful for countries in which there may be some resistance to international dispute settlement, but where such an option is deemed necessary to attract investors.

Option 4: Choice of national or international dispute settlement

As noted in Section II, choice of venue clauses in IIAs are tending towards an "investor choice model", in that the choice of venue, whether national or international, is offered to investors, coupled with a unilateral offer to respect that choice on the part of the State party to an IIA. This approach is sometimes interpreted as creating a compulsory internationalization of investment disputes at the whim of an investor. In practice, however, investor choice is still bounded by many restrictions. For example, should investors choose host country dispute settlement, they are bound by the rules and practices of the host country's legal system. Should an investor choose international dispute settlement, then the active consent of the host country is still required. In relation to *ad hoc* dispute settlement, no procedure can begin without the agreement of both parties to submit to such methods in an arbitration or conciliation agreement. In relation to institutional systems, the host country party must still consent in accordance with the applicable rules that seek to determine when valid consent has been given. As noted in Section II, in relation to ICSID arbitration or conciliation, the contracting State party to a dispute must agree in writing to the registration of any dispute brought against it by an investor. This may be done in an investment agreement or in national law. In either case, the investor must still accept that offer by requesting those proceedings. Furthermore, the request must come within the terms of the unilateral prior-consent given by the State party.

It should also be borne in mind that, as shown by reference to the Iranian and Peruvian Model BITs in Section II, the choice of dispute settlement method can be extended to the host country party to the dispute. As a matter of principle, offering choice of method to the investor does not exclude the possibility of offering the same choice to the host country. It is up to the host country to decide, when negotiating an investment agreement, whether it wishes to offer free choice of means to the investor alone – by expressing a unilateral commitment to accept the investor's choice in the terms of the agreement – or to reserve similar freedom for itself. Should the latter approach be taken, it would effectively preserve the host country's discretion to impose its method of dispute settlement on the investor, at least where it initiates a claim against the investor.[1] Although this may not be a common occurrence, it does emphasize the possibility that the investor may be a respondent rather than a claimant and that the host country may wish to enjoy the same freedom of choice of dispute-settlement method that current practice offers to the investor.

Option 5: Compulsory international dispute settlement

In principle, it is possible to conclude a dispute-settlement clause that makes international dispute settlement the only available option. However, such clauses are virtually non-existent in current IIA practice in the context of investor-State dispute settlement. Such a clause might be of use in relation to a host country that has no existing means of dispute settlement available at the national level. Thus, its existence would suggest a highly exceptional situation, such as a complete breakdown of internal governance in a host country, resulting from either internal or international conflict. Such an approach is more reminiscent of inter-state mixed claims commissions, which may arise out of such cases and which may be charged with the administration of a State-to-State lump sum settlement agreement. One example may be the Iran-United States Claims Tribunal, which heard *inter alia* claims by United States nationals for compensation against loss of their property during the Iranian revolution. Such examples can be said to fall outside the normal concerns of IIAs, which tend not to cover such cases, even in clauses covering loss due to civil unrest or commotion (UNCTAD, 2000b).

Option 6: Establishment of a specialized dispute settlement body under the investment agreement itself

A further possible alternative is for the parties to an IIA to establish a specialized dispute-settlement body under the agreement, with the purpose of creating a forum for the settlement of investment disputes between investors from States that are contracting parties to the agreement and other contracting parties that are hosts to the investment undertaken by the investor in question. One example of such a body, discussed in Section II, is the NAFTA investor-State dispute-settlement system. In addition to the above-mentioned provisions of NAFTA, it should be added here that the Free Trade Commission established by the NAFTA contracting parties also has a special role to play in the investor-State dispute-settlement system under that Agreement. The Commission is empowered to make "Notes of interpretation" on investment issues arising under Chapter 11 of NAFTA. By Article 1131 (2) of NAFTA, these "Notes" are binding on subsequent arbitral tribunals established in accordance with Section B of Chapter 11. As such, they offer a means of ensuring consistency and clarity of interpretation of Chapter 11 among NAFTA tribunals. However, such an approach can limit the freedom of a tribunal to determine the dispute before it in a manner that it sees fit. Thus, the "Notes of interpretation" system introduces an element of control over the range of admissible interpretations of NAFTA investment provisions that tribunals may use.

2. Choice of procedure and procedural rules

Following the specific issues discussed in Section II, a number of policy options present themselves when drafting the procedural aspects of the investor-State dispute-settlement clause in an IIA.

a. Choice of dispute-settlement method

As stated in both Sections I and II of this paper, it may be essential to prioritize amicable negotiated solutions to disputes between investors and States. Accordingly, the first sentence or paragraph of any dispute-settlement clause should address the desirability of using such methods in the first instance. This may be done through mandatory language, creating an obligation to use such methods before being able to resort to formal, third-party decision-making methods such as arbitration. Alternatively, the parties may be urged to resort to informal methods, but without compulsion. The former approach may be useful to ensure that disputes do not become more serious by requiring negotiation and restraint from the parties in their approach to their dispute. The latter method may offer greater freedom of choice for the parties to go straight to arbitration, with the attendant risk that this might escalate a dispute.

b. Procedure for initiating a claim

Here, the main choice lies between the various methods of dispute settlement available to an investor and a State party under the relevant IIA. As such, it is an issue closely related to the choice-of-venue clause. What needs to be borne in mind is that, where an IIA allows for the choice of a particular dispute-settlement method or system, then the making of that choice implies acceptance of the procedures for initiating a claim under the chosen method or system. Thus, for example, if ICSID arbitration is an option under an IIA, the parties' choice of that system entails the application of ICSID rules concerning the initiation of the claim.

It is possible for the parties to an IIA to include specific rules on the procedure for initiating a claim, such as, for example, the need for written consent. However, the effect of including such rules in an IIA when also including one or more of the existing dispute-settlement methods and systems must be carefully considered, in order to avoid uncertainty. Usually, party choice on procedural issues is respected, but a given system may have certain basic mandatory rules on the initiation of a claim from which the parties cannot derogate. Thus, any specific requirements in an IIA relating to the initiation of a claim should aim to be compatible with any mandatory rules on this matter that exist in the methods and systems listed as available to the parties to the IIA in question.

c. Establishment and composition of the arbitral tribunal

This issue also needs to be considered in the light of applicable rules of any method or system of dispute settlement parties may chose to include in an IIA's dispute-settlement clause. Nonetheless, some basic choices exist in regard to the establishment and composition of the arbitral tribunal. First, the parties to an IIA may wish to allow for full party choice on its establishment and composition, or they may defer to the rules on this matter that apply under any of the methods or systems of dispute settlement included in the dispute-settlement clause. Second, the parties to an IIA may wish to decide whether party choice on the composition of the tribunal should extend to the number, qualifications and nationality of the members, or be subject to certain mandatory rules stated in the dispute-settlement clause in the IIA in question. If the latter approach is taken, then the compatibility of such rules with those of any methods or systems of dispute settlement included in an IIA must be taken into account – although party choice will ususally be respected, as shown in Section II.

d. Admissibility

The terms relating to the admissibility of a dispute are subject to the same caveat as above – namely that there be compatibility with existing rules operating under available methods and systems of dispute settlement mentioned in the dispute-settlement clause. Nonetheless, the following matters may be considered for inclusion in the terms of that clause:

- Whether the subject matter of an admissible dispute will be restricted in any way or whether it will be left open to the parties to submit any dispute. Restrictions on admissibility can be based on specific criteria – such as a requirement that the dispute be a legal dispute arising out of an investment covered by an IIA – or limited to certain classes of investment dispute, such as those arising over compensation in the case of expropriation.

- Whether there should be a restriction as to the persons or parties that may be permitted to bring claims under a dispute-settlement clause of an IIA, or to appear as respondents to those claims – for example, by allowing only States parties to an agreement and nationals of other States parties to the agreement to do so. Such a provision may also require a clarification of who such a party or national is. It may also need to address the standing of indirect third parties, such as parent companies located in a State that is not a party to an IIA, but which own or control affiliates that are incorporated in a host State that is party to the IIA. Similarly, the issue of party consent to the use of a particular method or system of dispute settlement may need to be dealt with by including specific rules on who is able to give such consent.

- Whether to include specific rules covering the time at which a dispute can be brought and the criteria that makes a party eligible to submit a dispute at that time.

e. Applicable law

The parties to an IIA may wish to specify rules on the choice of applicable procedural and substantive laws that should apply to disputes between investors and States, although this is again subject to the same caveat on compatibility that runs through this whole section. The usual approach would be to respect party choice in these matters, although there may be certain mandatory rules that apply in the case of institutional systems. For example, as noted in Section II, in relation to the applicable substantive law ICSID applies the national law of the State party to the dispute on the basis of party choice. In the absence of such choice Article 42(1) of the ICSID Convention is used to determine the choice of law, but that law will be subject to the corrective application of international law should the national law in question be found to diverge from international law. It may not be possible for the parties to an IIA to exclude this approach should they choose to use ICSID arbitration.

f. Finality of awards

The parties to an IIA may wish to determine whether any award made under an IIA will be final or whether it can be the subject of further proceedings. Thus the parties may determine that the award be:

- Final with no possibility of further review at the international level. It should be noted that such a clause would probably be ineffective if it sought to exclude review at the national level by a national court, as clauses that purport to exclude review of arbitral awards at the national level may be regarded as contrary to public policy before the courts of the State in question.

- Subject to review for interpretation, or in light of the discovery of new facts, procedural errors or excess of powers, all of which may lead to annulment of an award. This is the ICSID model of review, and it is incorporated into an IIA that offers party choice of ICSID arbitration.

- Subject to full appeal to an appellate body. This is the WTO model as applicable to inter-State disputes arising out of the WTO Agreement and its Annexes in accordance with the WTO Dispute Settlement Understanding (WTO, 1994).[2] Although no existing agreement contains such an approach, it could be adapted for investor-State disputes in future IIAs.

g. Enforcement of awards

The parties may choose between a number of enforcement approaches, although again much depends on the choice of the dispute-settlement method or system and the specific rules that it provides for in this matter. In essence, the parties may choose between:

- Bilateral enforcement in accordance with the terms of a BIT between them.

- Enforcement in accordance with the New York Convention – which may be termed a "mutual harmonization" approach – whereby the parties agree to leave enforcement of any award made under an IIA to their national courts, which in turn apply the principles of that Convention. This approach assumes that the parties to the IIA are also parties to the New York Convention and that the award is not made under any other institutional system that has its own rules of enforcement, most notably the ICSID system under the ICSID Convention.

- Enforcement under the ICSID system – which may be termed a "mandatory multilateral enforcement" approach – whereby all contracting parties to the ICSID Convention agree to enforce validly-concluded ICSID Tribunal awards without any further review.

However, given that disputes of the kind discussed in the present paper involve a State party, where an award is made against that party, it may still rely on any applicable rules of international law that render sovereign property immune from the satisfaction of any award made against a State. These rights to immunity from execution can, in principle, be waived by a State contracting party within the provisions of an IIA, but this practice very rarely happens (Schreuer, 2001, pp. 1165-1175). Indeed, as noted in Section II, they are expressly preserved in both the New York and ICSID Conventions.

h. Costs

Here the choice is between party determination of costs and determination by a third party, which may be either the arbitral tribunal or, in the case of an institutional system, its administrative organs acting in accordance with pre-determined rules on costs. However, even in an institutional system there may be choice between the applicable institutional rules and party determination.

As to apportionment, the choices are between equal apportionment between the parties, full payment of costs by the losing party or apportionment by discretion of the tribunal. These choices may be particularly significant in relation to developing country parties, which may have limited resources available to satisfy the costs of an international arbitral procedure. Thus, the parties may need to consider carefully the relative ability of each party to bear costs. It should be noted that ICSID fees and expenses are pre-set and so offer a degree of predictability and certainty concerning the ultimate cost of proceedings (Schreuer, 2001, pp. 1212-1215).

Finally, in relation to the costs associated with arbitration under IIAs, countries might wish to consider whether it would be possible to set up a fund to assist developing and in particular least developed countries to meet the costs of such procedures, bearing in mind that the investor may be a TNC with significant resources at its disposal that cannot be matched by the State party for the conduct of a dispute. Such a fund would address an important aspect of procedural due process, which is inherent in any effective dispute-settlement system.

* * *

Given the foregoing considerations, host countries need to consider carefully which of the above-outlined options to pursue. For example, in the highly competitive world market for FDI, countries that seek such investment may be inclined to accept international dispute settlement because this could be perceived as an incentive to attract foreign capital.

However, one needs to keep in mind that the principal determinants in the FDI decision-making process are of an economic nature, once an enabling regulatory environment is in place. Thus, factors such as market size, economic growth, the quality of the infrastructure and the availability of skills typically bear most heavily on the decision (UNCTAD, 1994). For example, China, a host country that ranks highly in a number of these variables, has generally not allowed internationalized third-party adjudication for all investor-State disputes. Rather, China's 1994 model BIT contemplates national court jurisdiction for most disputes, raising the option of internationalized arbitration only in cases concerning compensation for expropriation. Given China's size and economic prospects, China does not feel obliged to comply fully with investor preferences in this area of practice. The approach taken by China illustrates that, although the regulatory framework for FDI (including provisions for dispute settlement) may influence capital flows, it is only one of a number of determinants of foreign investment. These determinants vary significantly from one host country to another, in turn influencing the particular significance that investors may attach to the strength of dispute-settlement procedures.

Furthermore, as the infrastructure of legal systems and dispute-settlement mechanisms evolves and becomes more sophisticated in all countries and regions that seek inward FDI, the availability of good quality localized dispute-settlement mechanisms may encourage their increased use (Asouzu, 2001). However, the most important factor to stress is that investors and the countries in which they operate need to do their utmost to avoid disputes in the first place and, should a dispute arise, use the least confrontational approach possible to arrive at its resolution. To ensure this, the preservation of choice for both parties and the recognition of their legitimate interests and expectations are important. These are the ultimate goals towards which the dispute-settlement provisions of IIAs should strive.

Notes

1 Indeed mutual freedom of choice over dispute-settlement methods can only work where that freedom is reserved for the claimant. Otherwise the agreement would in effect offer a power of veto over the claimant's choice on the part of the respondent, thereby negating the very freedom that is sought to be guaranteed.

2 See further UNCTAD, forthcoming a.

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