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SETTLEMENT OF INVESTMENT DISPUTES

2.2 Selecting the Appropriate Forum



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NOTE

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

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OVERVIEW

This Module gives an overview of the most important legal questions concerning the selection of the appropriate forum for investment disputes between States and private parties. In this context arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention) is just one alternative.

An important aspect of the efficiency of any dispute settlement mechanism lies in its ability to avoid uncertainties concerning the appropriate forum where a dispute is to be resolved. Thus, a duplication or multiplication of available fora for the settlement of a particular dispute may lead to protracted litigation before the merits of a dispute are even touched.

This is also true for the settlement of investment disputes where a whole range of dispute settlement forums are potentially available, among them national courts, ad hoc or various institutional kinds of arbitration or conciliation, ICSID conciliation or ICSID arbitration, Additional Facility conciliation or arbitration and, to some extent also, diplomatic protection, ultimately leading to international courts or tribunals.

Past practice before ICSID (International Centre for Settlement of Investment Disputes) panels has sometimes involved complex disputes over jurisdictional issues. Although the majority of these jurisdictional disputes did not directly concern choice-of-forum issues, it is highly advisable to draft dispute settlement clauses as precisely and unambiguously as possible in order to avoid time-consuming disputes over the appropriate dispute settlement forum.

This Module will illustrate the main types of forums available and shortly describe their main advantages and disadvantages in order to assist in assessing the most appropriate forum for a particular dispute.

OBJECTIVES

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

- Appreciate the limited usefulness of domestic courts for investment disputes.
- Compare the characteristics of conciliation and arbitration.
- Explain the difference between ad hoc and ICSID arbitration.
- Describe the advantages of ICSID arbitration.
- Delineate the availability of ICSID arbitration.
- Define the function of the Additional Facility.
- Explain the nature and function of diplomatic protection.
- Discuss the role of international courts and tribunals other than ICSID in investment disputes.

INTRODUCTION

Proliferation of dispute settlement mechanisms

An important aspect of the efficiency of any dispute settlement system lies in its ability to avoid uncertainties concerning the appropriate forum in which a dispute is to be resolved. Thus, a duplication or multiplication of available forums for the settlement of a particular dispute may lead to protracted litigation over jurisdiction before the merits of a dispute are even touched.

In the case of investment disputes a whole range of dispute settlement mechanisms is potentially available. Among them are national courts, ad hoc or institutional arbitration, ICSID conciliation or arbitration, ICSID Additional Facility conciliation or arbitration and, to some extent also, diplomatic protection possibly leading to inter-State dispute settlement forums of last resort, such as the International Court of Justice (ICJ).

Imprecise dispute settlement provisions

Unfortunately, States are often deliberately vague in consenting to dispute settlement. It is thus quite common that national investment legislation or bilateral investment treaties (BITs), through which States can make a valid offer to consent to ICSID arbitration under Art. 25 of the ICSID Convention¹, contemplate domestic courts, International Chamber of Commerce (ICC)², the United Nations Commission on International Trade Law (UNCITRAL)³ or ad hoc arbitration as alternatives to ICSID disputes settlement without making a clear choice.

Alternative dispute settlement in BITs

The dispute settlement clauses in many BITs refer to ICSID as one of several possibilities. Some of these composite settlement clauses require a subsequent agreement of the parties to select one of these procedures. Others contain the State's advance consent to all of them, thereby giving the parties a choice. A relatively simple example of this technique may be found in some Swiss BITs. For instance, the Switzerland-Ghana BIT of 1991 provides in its Art. 12:

- (2) *If such disputes cannot be settled according to the provisions of paragraph (1) of this article within a period of six months from the date either party to the dispute requested amicable settlement, the dispute shall be submitted to international arbitration or conciliation.*
- (3) *Where the dispute is referred to international arbitration or conciliation, the aggrieved party may refer the dispute either to:*
 - (a) *the International Centre for the Settlement of Investment Disputes ...; or*
 - (b) *an international arbitrator or an ad hoc arbitration tribunal to be appointed by a special agreement or established under the arbitration rules of the United Nations Commission on International Trade Law.*

¹ See Module 2.3 on Consent to Arbitration.

² International Chamber of Commerce.

³ United Nations Commission on International Trade Law.

(4) *Each Contracting Party hereby consents to the submission of an investment dispute to international arbitration or conciliation.*

**Importance of an
express choice-of-
forum selection**

Parties to an investment agreement may help avoiding these uncertainties by expressly designating a specific competent forum for the settlement of their disputes. Ideally, such a choice-of-forum should form part of the initial investment agreement but it can also be included in a subsequent agreement.

Summary:

- **The proliferation of dispute settlement mechanisms may lead to protracted litigation over jurisdiction.**
- **Investment disputes may be settled before national courts, ad hoc, ICSID, or ICSID Additional Facility conciliation or arbitration, as well as diplomatic protection possibly leading to inter-State arbitration or to the International Court of Justice.**
- **ICSID conciliation or arbitration is just one option among many.**
- **Dispute settlement provisions in the investment field are frequently imprecise.**
- **An express choice-of-forum selection helps to avoid jurisdictional uncertainties.**

1. SPECIAL NATURE OF INVESTMENT DISPUTES

Mixed nature of investment disputes involving States and private parties

While commercial disputes between private parties are usually settled before national courts or arbitral panels, disputes of an economic character between States may fall under the jurisdiction of the International Court of Justice or other (specialized or regional) judicial dispute settlement systems. In the past, mixed disputes, i.e. disputes between States and private parties, in particular those relating to investments, were mostly settled either before national courts or through ad hoc arbitration⁴ both of which have serious disadvantages. For such disputes no appropriate forum seemed to be generally available.

Purpose of ICSID

It was one of the main purposes of the ICSID Convention to close this gap in available procedures.

Different forums for investment disputes

As will be explained in this Module, dispute settlement through ICSID arbitration is the most appropriate form of settlement for investment disputes. Still, it would be incorrect to maintain that other forms of dispute settlement including national and international courts, other (non-ICSID) arbitration or conciliation, would not be available for investment disputes as a matter of principle. In fact, there is a substantial jurisdictional overlap, i.e. situations where one and the same dispute may be settled in different forums.

Summary:

- **Commercial disputes between private parties are normally settled before national courts or by arbitration.**
- **Economic disputes between States are normally settled before international tribunals or by inter-State arbitration.**
- **Mixed disputes, i.e. disputes between States and private parties, in particular those relating to investments, may be settled before a variety of forums.**
- **ICSID was expressly designed to provide a forum for the settlement of such mixed disputes.**

⁴ See infra Sections 1 and 5.

2. NATIONAL COURTS

National courts as “subsidiary” forum

In the absence of any specific agreement, investment disputes between States and private parties would normally fall under the jurisdiction of national courts,⁵ most likely those in the host State of an investment. The courts of which particular State will have jurisdiction is a question of conflict of laws rules. They will normally point to the national courts of the host State.

Consent to ICSID arbitration excludes national courts

The ICSID Convention does not exclude access to national courts as such. In other words, States parties and nationals of States parties to the Convention are not automatically prevented from litigating before their own or foreign national courts. However, once they have both consented to ICSID arbitration, such consent, in principle, excludes any other remedy including national courts.

Art. 26, first sentence of the ICSID Convention provides:

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.

Exhaustion of local remedies

A limited exception may apply in cases where the State has given its consent to arbitration under the condition of the exhaustion of local remedies. Art. 26, second sentence of the ICSID Convention provides:

A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

Only a few States have conditioned their consent to ICSID jurisdiction on the prior exhaustion of local remedies. A relatively small number of bilateral investment treaties and a few investment agreements with investors contain such a condition.

a) Courts of the Host State

Closest connexion to host State

Because of the specific nature of investment relations between a private party and a State it is likely that these relations will be held to have their closest connection to the State where the investment is made, i.e. the host State. Thus, most applicable jurisdictional rules will point to the domestic courts of that State as competent forums for the settlement of any disputes arising from an investment.

Consequences of host State forum

Such a forum will usually entail a number of specific consequences that will be viewed differently by the parties involved.

Application of mandatory host State law

As far as the applicable law is concerned, courts of host States of investments

⁵ Cf. Preambular paragraph 3 to the ICSID Convention recognizes “national legal processes” as the usual method of dispute settlement.

– like any national courts – will be guided by their own domestic rules of private international law/conflict of laws. This implies that even if they – as a general principle – respect the parties’ choice-of-law, they will demand the application of non-derogable norms under the law of the host State, which may, in particular, relate to the law of foreign investments.

Preference for national over international law

Further, depending on the forum State’s legal approach towards the incorporation of international law into the domestic legal order, national courts may give automatic preference to the application of national over international law even if the former clearly contradicts the latter.

Actual or perceived inequality

In addition to these objective technical difficulties, actual or perceived partiality, prejudice, and/or lack of expertise on the part of national judges may prevent the parties from litigating on an equal footing. These consequences usually make national courts unattractive for investors.

b) Courts of the Home State of Investors and Courts of Third States

Choice-of-forum clauses

The courts of host countries may be avoided by express choice-of-forum clauses or agreements opting for other national courts, such as the courts in the home State of the investor or courts in third States. Courts in the home State of the investor are unlikely to be accepted by the host State in the case of traditional investment agreements. However, this is not uncommon in the case of loan contracts. Opting for courts in third States is common in international commercial disputes settlement, e.g. a sales contract between a US buyer and an Indian seller providing for the jurisdiction of Swiss courts. But it is an unlikely choice for investment disputes.

State immunity

Dispute settlement before the courts of home States of investors or of third States may be impracticable in the context of investment disputes because it involves sovereign States in an area where they frequently act not only commercially (*jure gestionis*), but also in the exercise of their sovereignty (*jure imperii*). Thus, even in jurisdictions following a restrictive concept of State/sovereign immunity, actions brought by private parties against host States of investments would face major procedural obstacles, in particular, a high likelihood that the courts would regard such actions inadmissible. This is especially true in the case of outright expropriations or regulatory action which may amount to an expropriation (“constructive takings” or “*de facto* expropriations”).

Waiver of immunity

As a consequence, parties considering a stipulation according to which the courts of the home State of investors or of a third State should be competent to decide any future investment dispute between them, should be aware of the risk of inadmissibility of litigation as a result of sovereign immunity and, take the necessary precautionary steps, e.g. by including an express waiver of immunity.

Act-of-State doctrine or non-justiciability

One should be aware, however, that such precaution does not eliminate the risk that some national courts, in particular those following the Anglo-American tradition of the act-of-State doctrine might abstain from questioning the legality of sovereign acts of the host State taken within the territory of that State. The justiciability of investment disputes may also be questionable in other domestic legal systems. The legality of expropriations or the validity of national legislation affecting foreign investments will frequently give rise to questions of a political nature and therefore be considered inappropriate for judicial dispute settlement.

Sabbatino Case

The *Sabbatino*⁶ decision of the United States Supreme Court is one of the leading cases on the act-of-State doctrine. On its face, the dispute between the Cuban National Bank and a court-appointed receiver of an American-owned company which had been expropriated by the Cuban Government concerned the entitlement to the proceeds of sugar sales on the United States market. In essence, however, it was about the legality of the Cuban expropriations in the early 1960s. On appeal, the United States Supreme Court held that

*[...] the Judicial Branch will not examine the validity of a taking of property within its own territory of a foreign sovereign government, [...] even if the complaint alleges that the taking violates customary international law.*⁷

As a result the American courts upheld the effectiveness of the Cuban expropriations, irrespective of their legality under international law.⁸

Chilean Copper Nationalization Cases

The 1971 nationalization measures of the Government of Chile equally led to litigation in foreign domestic courts. One of the affected United States companies brought actions in French and German courts asserting its continuing property rights in imported Chilean copper. It argued that the Chilean expropriations were illegal because they were discriminatory and not accompanied by compensation and should thus not be recognized in France or Germany. Both a court in Paris⁹ and one in Hamburg¹⁰ rejected the immunity defense raised by a Chilean state-owned export/import enterprise because of the “commercial activity” of its trading business. However, on the merits, they both refused to rule on the validity of the Chilean expropriation measures – although they expressed severe doubts whether the nationalizations were in conformity with the requirements of public international law – on rather technical grounds. They reasoned that under the “territoriality principle” expropriations which do not cover property located outside the borders of the

⁶ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); 3 ILM (1964) 381-416.

⁷ 376 U.S. 398 (1964) at 428.

⁸ See also *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

⁹ *Corporación del Cobre c. Société Braden Copper Corporation et Société le Groupement d'Importation des Métaux*, *Tribunal de grande instance de Paris*, 29 November 1972; 12 ILM 182-189 (1973).

¹⁰ *Chile-Kupfer-Streit*, *Landgericht Hamburg*, 22 January 1973; 12 ILM (1973) 251-289, 13 ILM 1115-1125 (1974).

expropriating State “must in principle be recognized as formally valid.” In addition, the Hamburg court stated that a "de-recognition" of the Chilean expropriation measures – as a result of being contrary to the German “ordre public” – were only possible “if the German legal system [were] substantially affected by the violation of public policy and thus a close relationship between what [had] been done and German interests [were] created.”

No immunity, act-of-State or non-justiciability risk in ICSID

All these risks can be avoided by choosing ICSID arbitration which does not contain any limitation relating to State immunity, act-of-State and justiciability.

Summary:

- **National courts are available forums, in principle, for the settlement of investment disputes.**
- **Only consent to arbitration, not ratification of the ICSID Convention excludes national courts from the settlement of investment disputes.**
- **Domestic courts of host States of investments are likely to favour the application of their own national law over foreign law and international law.**
- **Litigation before domestic courts of the home State of investors or of third States may be inconvenient or outright impossible because of State immunity, act-of-State or non-justiciability.**

3. ICSID CONCILIATION

ICSID conciliation rare

The ICSID Convention itself offers both conciliation and arbitration (Art. 1 para. 2) and treats both methods of dispute settlement in an equal manner. In practice, however, ICSID conciliation has been relatively infrequently resorted to,¹¹ while ICSID arbitration has become a very significant and successful method of settling international investment disputes.

a) Conciliation or Arbitration?

Ambiguous ICSID clauses

The parties may have consented to both conciliation and arbitration without specifying any preference. This is reinforced by the fact that Art. 25 of the ICSID Convention speaking of the “jurisdiction of the Centre” does not differentiate between the two dispute settlement techniques. An unspecified submission under the Centre’s jurisdiction will be ambiguous and may lead to a dispute about the appropriate method of dispute settlement.

Choice of party instituting proceedings

Past practice, however, has not proven very contentious in this respect. Clauses providing for the submission under the jurisdiction of the Centre cumulatively or alternatively envisaging conciliation and/or arbitration have been generally treated as leaving the choice to the party instituting proceedings.

SPP v. Egypt

This view was most clearly expressed by the ICSID Tribunal in *SPP v. Egypt*, where jurisdiction was based on Art. 8 of Egypt’s Law No. 43 of 1974, which provided, in an unspecified fashion, for the settlement of disputes “within the framework of the Convention.” The Tribunal held that the ICSID Convention does not require that:

[...] consent to the Centre’s jurisdiction must specify whether the consent is for purposes of arbitration or conciliation. Once consent has been given “to the jurisdiction of the Centre”, the Convention and its implementing regulations afford the means for making the choice between the two methods of dispute settlement. The Convention leaves that choice to the party instituting the proceedings.¹²

Nevertheless, an indeterminate submission under the jurisdiction of the Centre may lead to problems if one party opts for conciliation. In such a situation the other party is prevented from instituting or ultimately insisting on arbitral proceedings unless it is clearly provided for that unsuccessful conciliation is followed by arbitration at some stage.

It is thus advisable to specify in advance whether the parties’ consent relates to conciliation or arbitration or – if both methods should remain available – to

¹¹ As of December 2001 only three request for conciliation have been filed. Cf. the ICSID homepage at <<http://www.worldbank.org/icsid/cases/cases.htm>>.

¹² *SPP v. Egypt, Decision on Jurisdiction II, 14 April 1988, 3 ICSID Reports 156.*

spell out clearly which party may choose or whether there should be conciliation followed, if necessary, by arbitration.¹³

b) Conciliation as a Method of Dispute Settlement

Consensual nature of conciliation

Like other forms of conciliation, ICSID conciliation is a highly flexible and informal method of dispute settlement involving a third party that assists the disputants in reaching an agreed settlement. Whereas arbitration – like adjudication – follows an adversarial procedure leading to a binding decision by a third party, the outcome of conciliation ultimately requires agreement by both parties. A conciliator or conciliation commission may suggest a solution¹⁴ to the parties in order to “bring about agreement between them upon mutually acceptable terms.”¹⁵ Such a solution can never be imposed on the parties against their will.

c) Pros and Cons of ICSID Conciliation

Advantages

Conciliation offers considerable flexibility and informality. It has generally – and also in the limited ICSID experience – proven to be less expensive than arbitration. Further, the fact that ultimately any settlement remains in the hands of the parties prevents excessive antagonisms. Because of its consensual nature it may be particularly useful in cases of disputes where the parties are willing to continue their investment cooperation.

Disadvantages

As with conciliation in general, ICSID conciliation does not stand for independent third-party dispute settlement resolution. Thus, each party to the dispute can always block a solution. This is generally considered to be the major weakness of conciliation.

Summary:

- **Though the ICSID Convention treats arbitration and conciliation equally, in practice it is nearly always arbitration that is chosen.**
- **If the “consent” of the parties to the jurisdiction of the Centre does not clearly indicate whether arbitration or conciliation should be pursued, the party instituting proceedings may choose between the two.**
- **Conciliation is a highly flexible and informal method of dispute settlement involving a third party that assists the disputants in reaching an agreed settlement.**
- **Where parties intend to continue their investment cooperation the consensual nature of ICSID conciliation may be particularly useful.**
- **Dispute settlement under ICSID conciliation may be obstructed by an uncompromising party.**

¹³ Cf. 1993 ICSID Model Clauses, 4 ICSID Reports 357.

¹⁴ According to Art. 34 (1) ICSID Convention a Conciliation Commission may “recommend terms of settlement.”

¹⁵ Art. 34 (1) ICSID Convention.

4. ICSID ARBITRATION

ICSID Convention as framework

ICSID arbitration is not obligatory for States and investors from other States merely because both States are parties to the Convention. The last paragraph of the preamble to the ICSID Convention provides the following:

Declaring 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,

Rather, the Convention provides them with an option to agree on arbitration. Arbitration becomes binding only upon the written consent of the parties to arbitration either in an investment agreement or otherwise.¹⁶

ICSID arbitration – institutional support and flexibility

The ICSID Convention intends to offer a compromise between a fixed set of rules and the benefits of institutional support on the one hand, and the flexibility and autonomy usually regarded as the advantages of arbitration, on the other.

a) Institutional Support Provided by ICSID

Institutional support by the Centre

The Convention establishes the Centre endowed with separate international legal personality.¹⁷ However, it is not the Centre itself which engages in arbitration. Rather, the Centre provides facilities for the arbitration of investment disputes.¹⁸ This institutional facilitation is manifold and includes:

- keeping lists ("panels") of possible arbitrators;¹⁹
- screening and registering arbitration requests;²⁰
- assisting in the constitution of arbitral tribunals and the conduct of proceedings;²¹
- adopting rules and regulations;²²
- drafting model clauses for investment agreements.

b) An Effectively Functioning System

Non-frustration of proceedings

ICSID arbitration is designed to prevent a potential danger inherent in many arbitration systems, i.e. the risk that one party having previously consented to arbitration obstructs the arbitration proceedings by its refusal to cooperate.

ICSID precautions

With this overriding purpose in mind, the Convention provides that consent, once given, may not be unilaterally withdrawn (Art. 25 para. 1); that arbitral tribunals have the exclusive competence to decide on their own jurisdiction

¹⁶ See Module 2.3 on Consent to Arbitration.

¹⁷ Arts. 1 and 18 ICSID Convention.

¹⁸ Art. 1 ICSID Convention.

¹⁹ Arts. 12 et seq. ICSID Convention.

²⁰ Art. 36 para. 3 ICSID Convention.

²¹ Art. 38 ICSID Convention.

²² Art. 6 para. 1 ICSID Convention.

(Art. 41 para. 1); that awards are binding and enforceable (Arts. 53, 54) and may not be disregarded or challenged on the ground of nullity except under the Convention's own annulment procedure (Art. 52).

The Convention also attempts to foreclose unilateral attempts of obstruction during the proceedings. It specifically provides for the appointment of arbitrators by the Centre in case a party fails to do so (Art. 38) and generally assures that lack of cooperation by any party will not prevent continuation of the proceedings (Art. 45).

c) Which Investment Disputes May be Settled Through ICSID Arbitration?

Jurisdictional requirements for ICSID arbitration

Not all investment disputes may be brought before ICSID arbitration panels. Rather, access to ICSID arbitration depends upon the fulfilment of the jurisdictional requirements provided for in Art. 25 of the Convention. These requirements relate both to the nature of the dispute (*ratione materiae*) and to the parties of the dispute (*ratione personae*).

Ratione materiae and ratione personae requirements

According to Art. 25 of the Convention the subject-matter jurisdiction of the Centre is limited to "legal disputes" arising "directly" out of an "investment."²³ Its personal jurisdiction extends over "Contracting States (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State)", on the one hand, and "nationals of another Contracting State", on the other.²⁴

Objective nature of jurisdictional requirements

These are objective jurisdictional requirements which cannot be replaced by an agreement of the parties. In other words, even if parties to an investment agreement expressly gave their consent to ICSID arbitration, any arbitral panel would have to satisfy itself of the fact that the dispute directly arose from an investment, was of a legal nature and that both the home State of the investor and the host State of the investment were Contracting Parties of the ICSID Convention.

Additional Facility as an alternative

This limit to the jurisdiction of ICSID was one of the major reasons for creating the Additional Facility granting access to the Centre's arbitration even in situations where the ICSID Convention's objective jurisdictional requirements are not wholly met.²⁵

d) Advantages of ICSID Arbitration

Advantages for investors

ICSID arbitration offers a number of advantages to investors.

- ICSID arbitration provides investors with direct access to a form of international dispute settlement.

²³ See Module 2.5 on requirements *ratione materiae*.

²⁴ See Module 2.4 on requirements *ratione personae*.

²⁵ See *infra* Section 3.

- Investors are not restricted to national courts in the host State.
- Investors do not depend upon the willingness of their home States to exercise diplomatic protection on their behalf.
- The enforcement provisions of the ICSID Convention make it highly probable that a final ICSID award will be effectively enforceable.²⁶

Advantages for host States

Host States too may benefit in various ways from the availability of ICSID arbitration.

- Legal security for investors attracts investment; it creates a "favourable investment climate". In this respect the mere availability of an effective remedy and not necessarily its ultimate use is likely to be crucial for increasing the respect of investment rules.
- Consent to ICSID arbitration excludes the "harassment" potential of diplomatic protection exercised by the home State of investors against host States.

e) Relation of ICSID Arbitration to Other Dispute Settlement Methods

Exclusivity of ICSID arbitration

ICSID arbitration is one of a number of available forums for the settlement of investment disputes between private parties and States. Even investors from a contracting party of the ICSID Convention in their agreements with host States that are equally contracting parties of the Convention are not obligated to submit to ICSID arbitration. The "exclusivity" provided for in Art. 26 of the Convention operates only once the parties have consented to ICSID arbitration. With such consent, however, they lose their right to avail themselves of other – international or national – forums since they have consented to ICSID arbitration "to the exclusion of any other remedy".

Attorney-General v. Mobil Oil NZ Ltd

The case of *Attorney-General v. Mobil Oil NZ Ltd*.²⁷ provides an example of a domestic court respecting the Centre's exclusive right to determine its own jurisdiction. In this case the New Zealand government instituted parallel proceedings before its own domestic courts in order to obtain an interim injunction seeking to restrain Mobil Oil from continuing the proceedings before ICSID. Basing its decision, inter alia, on Art. 26 of the ICSID Convention, the New Zealand High Court stayed the proceedings until the ICSID Tribunal had determined its jurisdiction in *Mobil Oil v. New Zealand*.²⁸

²⁶ See Module 2.9 on binding force and enforcement.

²⁷ *Attorney-General v. Mobil Oil NZ Ltd.*, High Court, Wellington, 1 July 1987, 4 ICSID Reports 117.

²⁸ *Mobil Oil v. New Zealand, Findings on Liability, Interpretation and Allied Issues*, 4 May 1989, 4 ICSID Reports 140, 164.

MINE v. Guinea

Also in the protracted litigation of *MINE* against *Guinea* Belgian²⁹ and Swiss³⁰ courts refused to exercise their jurisdiction to provide interim remedies on the basis of Art. 26 of the ICSID Convention because ICSID proceedings were pending.

The ICSID Tribunal in *Maritime International Nominees Establishment (MINE) v. Guinea*³¹ strongly affirmed the exclusivity of ICSID arbitration vis-à-vis national court proceedings.

Summary:

- **ICSID arbitration combines the advantages of institutional support and the flexibility and party-autonomy of ad hoc arbitration.**
- **ICSID itself does not serve as an arbitration body.**
- **The Centre provides institutional support of various kinds.**
- **ICSID arbitration is designed to function effectively even if one party fails to cooperate in the proceedings.**
- **ICSID arbitration is available for “legal disputes” arising “directly” out of an “investment” between “Contracting States” and “nationals of another Contracting State”.**
- **ICSID arbitration offers a high level of effectiveness for investors, including direct access to international dispute settlement and increased enforceability of awards.**
- **By creating a “favourable investment climate” ICSID arbitration enhances foreign investment in host States.**
- **ICSID arbitration becomes the “exclusive” remedy for investment disputes only once “consent” has been given.**

²⁹ *Maritime International Nominees Establishment (MINE) v. Guinea, Court of First Instance, Antwerp, 27 September 1985, 4 ICSID Reports 32.*

³⁰ *Maritime International Nominees Establishment (MINE) v. Guinea, Tribunal de 1^{ère} instance, Geneva, 13 March 1986; 4 ICSID Reports 41; 1 ICSID Review 383 (1986).*

³¹ *Maritime International Nominees Establishment (MINE) v. Guinea, ICSID Award, 6 January 1988, 4 ICSID Reports 54, 76.*

5. ICSID ADDITIONAL FACILITY

Jurisdictional limits of ICSID

Access to ICSID conciliation and arbitration does not only depend upon the consent of the parties involved, it also has to meet certain objective jurisdictional requirements, most important among them the requirement that both the host State and the home State of the investor must be contracting parties of the ICSID Convention.³² As a consequence, a number of investment or investment-related disputes between investors and host States may not be brought before the Centre even if both parties were willing to do so.

a) Additional Facility Jurisdiction

Additional Facility Rules

This situation was, at least partially, remedied by adoption of the Additional Facility Rules in 1978. They specifically opened access to the Centre in a number of additional cases. These are laid down in Art. 2 of the Additional Facility Rules and can be categorized in three groups:

- Conciliation or arbitration of investment disputes where only one side is either a party to the ICSID Convention or a national of a party to the ICSID Convention.
- Conciliation or arbitration of legal disputes which do not directly arise out of an investment provided that at least one side is either a party to the ICSID Convention or a national of a party to the ICSID Convention.
- Fact-finding proceedings between a State and a national of another State.

Disputes “indirectly” arising out of an investment

Most interesting is Art. 2 para. b) of the Additional Facility Rules extending the ICSID Convention’s rather limited subject-matter jurisdiction over “investment disputes” to disputes “not directly aris[ing] out of an investment”. This provision has to be read in conjunction with Art. 4 para. 3 of the Additional Facility Rules which makes Additional Facility dispute settlement conditional on the fact “that the underlying transaction has features which distinguish it from an ordinary commercial transaction”. If one reads the “not directly aris[ing] out of an investment”-phrase of Art. 2 para. b) of the Additional Facility Rules as requiring that such disputes do at least “indirectly” arise out of an investment, then this implies that a certain “investment-nexus” remains a precondition for Additional Facility dispute settlement.

Not “ordinary” commercial disputes

Interestingly, the Centre appears to follow an even broader approach, not even requiring an “indirect” link to an investment ,by stressing that the underlying transaction only has to be distinguishable from an ordinary commercial transaction.³³

Additional Facility cases in NAFTA

So far only the first group of cases, where either the host State or the home State of an investor is not a party to the ICSID Convention, has been practically relevant. Additional Facility arbitration has become very important in the

³² See supra Section 2 c).

³³ Cf. Schreuer, *The ICSID Convention: A Commentary* (2001), Article 25, para. 111.

context of NAFTA (North American Free Trade Agreement)³⁴ since only the United States is a party to the ICSID Convention but Canada and Mexico are not.

**Arts. 1120 and 1122
NAFTA**

Art. 1120 in NAFTA's Chapter Eleven on Investments provides:

1. *Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:*
 - (a) *the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;*
 - (b) *the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or*
 - (c) *the UNCITRAL Arbitration Rules.*
2. *The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.*

Further, Art. 1122 provides in relevant part:

1. *Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.*
2. *the consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:*
 - (a) *Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;...*

As long as Canada and Mexico are not parties to the ICSID Convention, the NAFTA will not operate to confer jurisdiction under the Convention. Since the United States is a party to the Convention, ICSID Additional Facility arbitration is available between United States investors and Canada or Mexico and between Canadian or Mexican investors and the United States. In disputes between Canadian investors and Mexico or, Mexican investors and Canada, not even the ICSID Additional Facility may be used. In disputes of the latter kind only UNCITRAL arbitration is available.

Metalclad Case

One of the NAFTA investment cases rendered under the Additional Facility is *Metalclad v. Mexico*³⁵ which raised considerable concern among environmentalists. This Additional Facility award held that Mexico, through actions of a local municipality, had effectively expropriated a United States investor which had previously obtained all required permits to operate a hazardous waste facility.

Cartagena Free Trade Agreement

The 1994 Free Trade Agreement between Mexico, Colombia and Venezuela offers another example of consent to ICSID or Additional Facility dispute

³⁴ 32 ILM 605 (1993).

³⁵ *Metalclad Corporation v. The United Mexican States*, 30 August 2000, Case No. ARB(AF)/97/1, 16 ICSID Review 1 (2001); 40 ILM 36 (2001).

settlement by multilateral agreement. Under Arts. 17-18, the investor is given the option to institute ICSID arbitration, Additional Facility arbitration or UNCITRAL arbitration, depending on the state of ratification of the ICSID Convention by the three States.

Energy Charter Treaty

In a similar vein, the 1994 Energy Charter Treaty³⁶ between the European Communities and 49 mostly European States provides in its Art. 26 consent to ICSID's jurisdiction by the States parties in relation to investors of all other States parties. The Treaty contains an unconditional consent to ICSID and to the Additional Facility, whichever may be available. The Article specifically requires consent in writing also on the part of the investor. Apart from the ICSID Convention or the Additional Facility, the investor is given the choice of the courts and administrative tribunals of the host State, previously agreed procedures, UNCITRAL arbitration and arbitration in the framework of the Arbitration Institute of the Stockholm Chamber of Commerce.

b) Nature of Additional Facility Dispute Settlement

Institutional support of the Centre for Additional Facility

Dispute settlement initiated under the Additional Facility is not ICSID conciliation or arbitration but rather Additional Facility conciliation or arbitration. This means that such proceedings may be administered by the Secretariat of the Centre and thus benefit from the institutional support and expertise provided by the Centre. However, since Additional Facility proceedings are by definition outside the jurisdiction of the Centre, the ICSID Convention does not apply to proceedings, recommendations, awards, or reports under the Additional Facility (Art. 3 Additional Facility Rules).

Recognition and enforcement to be governed by New York Convention

This implies, in particular, that the ICSID Convention's rules on recognition and enforcement of arbitral awards are not applicable to awards rendered under the Additional Facility. In order to secure the effectiveness of such awards, Art. 20 of the Arbitration (Additional Facility) Rules provide that arbitral proceedings must be held only in States that are parties of the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).³⁷

Metalclad Case

In *Metalclad v. Mexico*³⁸ the Additional Facility arbitral tribunal determined the place of arbitration to be Vancouver, Canada, in order to comply with this requirement which is also expressed in Art. 1130 NAFTA.

³⁶ 34 ILM 360 (1995).

³⁷ 330 UNTS 38; 7 ILM 1046 (1968).

³⁸ *Metalclad Corporation v. The United Mexican States*, 30 August 2000, Case No. ARB(AF)/97/1, 16 ICSID Review 1 (2001).

c) Pros and Cons of Additional Facility Dispute Settlement

The Additional Facility provides dispute settlement similar to proceedings under the ICSID Convention in situations which are not strictly covered by the Convention.

However, the enforcement provision of Art. 54 of the ICSID Convention does not apply because the Convention as such is not applicable to Additional Facility dispute settlement (Art. 3 Additional Facility Rules).

d) Relation of Additional Facility Dispute Settlement to Other Dispute Settlement Methods

Subsidiarity towards ICSID

Additional Facility conciliation or arbitration may be used as an alternative to dispute settlement before national courts, ad hoc arbitration, or diplomatic protection. It is not available, however, when the Centre has jurisdiction under Art. 25 of the ICSID Convention.³⁹

Waste Management Case

In *Waste Management*⁴⁰ an Additional Facility arbitral panel has also held that it lacked jurisdiction to decide a dispute under Chapter XI of NAFTA where the waiver required by Art. 1121 NAFTA as a condition precedent to submit a claim was not sufficiently unambiguous. Art. 1121 para. 1, subsection (b) NAFTA provides that:

A disputing investor may submit a claim under Article 1116 to arbitration only if:

...

(b) the investor [...] waive[s] [his] right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

Waste Management had qualified its waiver by exempting dispute settlement involving claims based on the municipal law of Mexico and had actually instituted proceedings before Mexican courts. The Additional Facility tribunal justified its denial of jurisdiction by stating that

[i]t is possible to consider that proceedings instituted in a national forum may exist which do not relate to those measures alleged to be in violation of the NAFTA by a member state of the NAFTA, in which case it would be feasible that such proceedings could coexist simultaneously with an

³⁹ Schreuer, *Commentary, Article 25, para. 136.*

⁴⁰ *Waste Management, Inc. v. United Mexican States, 2 June 2000, Case No. ARB(AF)/98/2, 15 ICSID Review 214 (2000).*

arbitration proceeding under the NAFTA. However, when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the double benefit in its claim for damages. This is precisely what NAFTA Article 1121 seeks to avoid.⁴¹

Summary:

- **Disputes that do not meet the *ratione materiae* and/or *ratione personae* requirements under the ICSID Convention cannot be brought before ICSID for conciliation or arbitration.**
- **Some of these disputes may be settled under the Additional Facility Rules in the case of**
 1. **Investment disputes where only one side is either a party to the ICSID Convention or a national of a party to the ICSID Convention;**
 2. **Legal disputes which do not directly arise out of an investment provided that at least one side is either a party to the ICSID Convention or a national of a party to the ICSID Convention;**
 3. **Fact-finding proceedings between a State and a national of another State.**
- **Additional Facility dispute settlement is not dispute settlement under the ICSID Convention. Thus, the Convention's rules on recognition and enforcement of arbitral awards do not apply to Additional Facility arbitration.**
- **Additional Facility dispute settlement is excluded if the Centre has jurisdiction over an investment dispute under the ICSID Convention.**

⁴¹ 15 ICSID Review 235/236 (2000).

6. OTHER INSTITUTIONAL AND AD HOC ARBITRATION

Like commercial disputes, investment disputes may be settled by various types of institutionally supported or ad hoc arbitration. The specific nature of one of the parties as a State or State agency, instrumentality or other State-related entity is no obstacle to arbitration. Such arbitration may, but does not need to be, “mixed” dispute settlement.⁴²

a) Institutionally Supported Arbitration other than ICSID or Additional Facility

ICC, LCIA, AAA

Most of the major arbitration institutions, such as the International Court of Arbitration of the International Chamber of Commerce (ICC) established in 1923, the London Court of International Arbitration (LCIA) set up in 1892 or the American Arbitration Association (AAA) founded in 1926, focus on international commercial arbitration, i.e. arbitration between private parties. Similar to ICSID they do not arbitrate disputes themselves but support the arbitral processes conducted under their auspices by rendering various administrative services, such as providing lists of arbitrators or participating in the process of their appointment, calculating fees, etc.

Parties are free, however, to submit also investment disputes to these institutionally supported arbitration facilities.

MINE v. Guinea

Before turning to ICSID arbitration to settle its investment dispute with Guinea, as originally stipulated, MINE had recourse to AAA arbitration. In the ensuing ICSID arbitration the AAA proceedings, including a 1980 award, were held to be in violation of the exclusivity provision of Art. 26 of the ICSID Convention.⁴³

SPP v. Egypt

In *SPP v. Egypt* the foreign investor had already secured an ICC arbitral award before turning to ICSID arbitration. However, a tribunal constituted under the ICSID rules did not exercise jurisdiction until the previous ICC award had been annulled. The tribunal reasoned:

“When the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction. However, in the interest of international judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal.”⁴⁴

⁴² *Inter-State arbitration as a result of the “espousal” of a private party’s claim will be dealt with in Section 5 infra.*

⁴³ *Maritime International Nominees Establishment (MINE) v. Guinea, ICSID Award, 6 January 1988, 4 ICSID Reports 76.*

⁴⁴ *Decision on Jurisdiction I, 27 November 1985, 3 ICSID Reports 121, 129.*

b) Ad hoc Arbitration as a Primary “Fall-Back” Option for Settling Investment Disputes

Subsidiarity of ad hoc arbitration

In the context of investment disputes ad hoc arbitration is of high practical value as a potential fall-back option if ICSID or Additional Facility dispute settlement are not available.

NAFTA

This may be the case where neither the host State nor the home State of the investor is a party to the ICSID Convention. An example where only ad hoc arbitration according to the UNCITRAL Arbitration Rules is currently available are investment disputes between Canadian investors and Mexico and Mexican investors and Canada under NAFTA’s Chapter Eleven on Investments.⁴⁵

Cartagena Free Trade Agreement

Also under the 1994 Free Trade Agreement between Mexico, Colombia and Venezuela Arbitration under the UNCITRAL Arbitration Rules, depending on the ICSID Convention’s state of ratification by the three States, may be the only available option.

Inter-State and private disputes

Ad hoc arbitration is also a settlement option for disputes not of a “mixed” character, e.g. between the host State and the home State of an investor or between a private investor and another private entity.

c) Flexible Rules

Flexibility

Ad hoc arbitration may take place according to rules agreed upon by the parties to the dispute. The parties may adopt existing rules, such as the UNCITRAL Arbitration Rules, or they may leave it to the arbitrators to adopt their own rules of procedure.

AMINOIL Case

In accordance with the ad hoc arbitration agreement between the US oil company Aminoil and Kuwait, the arbitral tribunal in the *Aminoil* case⁴⁶ adopted its own rules of procedure “on the basis of natural justice and of such principles of transnational arbitration procedure as it may find applicable.”

Adoption of ICSID rules

It is within the discretion of the parties to designate the Secretary-General of ICSID as the appointing authority of the arbitrator(s) and they may even adopt procedural rules by reference to the ICSID Convention and its rules and regulations. In such a situation, however, the Convention and, in particular, its rules on enforcement do not apply. Still, the actual arbitration would largely resemble ICSID arbitration.⁴⁷

⁴⁵ See supra Section 4 a).

⁴⁶ Award in the Matter of an Arbitration between Kuwait and the American Independent Oil Company (Aminoil), 24 March 1982; 21 ILM 976-1053 (1982).

⁴⁷ Cf. Schreuer, *Commentary, Article 25, para. 140*.

d) Disadvantages of Ad hoc Arbitration

No institutional support, enforcement problems

As opposed to ICSID and ICC or LCIA arbitration, ad hoc arbitration lacks any institutional support. It is equally deprived of a strong enforcement mechanism. Thus, enforcement of awards rendered by ad hoc arbitration tribunals will be greatly facilitated by the applicability of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁴⁸

e) Widespread Practice of Ad hoc Arbitration in the Field of Investment Disputes

Libyan expropriation cases

Many major investment disputes were settled through ad hoc arbitration in the past, among them the Libyan expropriation cases, *British Petroleum v. Libya*,⁴⁹ *Liamco v. Libya*,⁵⁰ and *Texaco/Calasiatic v. Libya*.⁵¹

Summary:

- **Ad hoc arbitration is an important subsidiary remedy in cases where ICSID or Additional Facility dispute settlement is not available.**
- **Ad hoc arbitration is provided for in a number of bi- and multilateral agreements including NAFTA and the Cartagena Protocol.**
- **Ad hoc arbitration provides the most flexible way of conducting arbitral proceedings.**
- **Ad hoc arbitration of investment was widely used before the creation of the ICSID system.**

⁴⁸ 330 UNTS 38; 7 ILM 1046 (1968).

⁴⁹ *British Petroleum v. Libya*, 10 October 1973; 53 ILR (1979) 297-388.

⁵⁰ *Libyan American Oil Company (Liamco) v. Libya*, 12 April 1977; 20 ILM 1-87 (1981).

⁵¹ *Texaco Overseas Petroleum Company/California Asiatic (Calasiatic) Oil Company v. Libya*, 19 January 1977; 17 ILM 1-37 (1978).

7. DIPLOMATIC PROTECTION

Frequent use for investment disputes in the past

Diplomatic protection is the traditional technique for settling international disputes originating from disagreements between States and private parties. In the past many expropriation and compensation claims, typical core aspects of investment disputes, were settled by this method.

Nature of diplomatic protection

Its broad availability stems from the fact that diplomatic protection does not require any advance agreement between disputing parties. It is in principle always within the discretion of the home State of a (natural or legal) person to take up this private party's claim ("espousal of claims") and to make it the home State's own against the State allegedly having harmed its national.

Procedural requirements

The only procedural preconditions under traditional (customary) international law are the continuous nationality of the injured private party ("continuity of claims") and the exhaustion of local remedies.

Discretion of home State

International law conceives diplomatic protection as a right of the home State, not of its national. This implies that investors are wholly dependent upon the willingness of their home States to "espouse" their claims. International law never, and national law only rarely, provide for such a right of the investor vis-à-vis his or her own home State. The willingness of home States of investors to espouse such claims will be influenced by various political considerations and thus, ultimately, remains unpredictable. Further, they always have the possibility to waive "espoused" claims as a whole or in part.

Barcelona Traction Case

In the *Barcelona Traction Case*⁵² the ICJ characterized diplomatic protection in the following words:

... within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress.

The Court continued by stating that

[t]he State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.

⁵² Case concerning the Barcelona Traction, Light and Power Company, Limited (*Belgium v. Spain*), (New Application 1962), ICJ Reports (1970) 3-357.

<u>Lump-sum agreements</u>	In case of widespread expropriations, e.g. in case entire industrial sectors are nationalized, the home States of affected investors have frequently been content to conclude lump-sum agreements with the expropriating State by which they accept a portion of the total outstanding claims as a global settlement payment. Injured private parties have no entitlement under international law to receive the proceeds of such agreements from their home States. As a rule, however, national legislation will provide for the proportionate distribution of the lump-sum payment to them.
<u>Freedom of means to exercise diplomatic protection</u>	States are relatively free in their choice of means when exercising diplomatic protection. They may avail themselves of any lawful, but unfriendly measures (retorsions). They may also adopt certain otherwise wrongful measures as long as such measures may be justified as proportionate reprisals or countermeasures.
<u>Limits to the exercise of diplomatic protection</u>	Today, the customary international law prohibition of the use of force clearly limits the range of available reprisals/ countermeasures. This principle has a prominent precursor in the 1907 Drago-Porter Convention ⁵³ which restricted the means available for the exercise of diplomatic protection on behalf of loan creditors vis-à-vis debtor States.
<u>Exclusivity of ICSID only after “consent”</u>	Parties to the ICSID Convention are not automatically prevented from exercising diplomatic protection over investment disputes involving their own nationals vis-à-vis other Contracting Parties. However, they are prevented from doing so in cases where the disputing parties have consented to or have actually started arbitration under the Convention.
	Art. 27 of the ICSID Convention provides:
	<p>(1) <i>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 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.</i></p> <p>(2) <i>Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.</i></p>
<u>Preference for diplomatic protection</u>	Since consent to ICSID arbitration need not be expressed in a single instrument, but may also result from an investor “accepting” a host State’s “offer” contained in national investment legislation or in a BIT by instituting proceedings, ⁵⁴ a private party retains its option to ask for diplomatic protection even where it could already demand arbitration. ⁵⁵

⁵³ *Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts*, 2 *AJIL Supp.* 81 (1908).

⁵⁴ See Module 2.3 on consent.

⁵⁵ See also Schreuer, *Commentary, Article 27, para. 28*.

Revival of diplomatic protection

Further, even in situations covered by Art. 27 of the ICSID Convention the right to exercise diplomatic protection will revive if the host State fails to comply with an ICSID award.

Summary:

- **Diplomatic protection was frequently exercised with regard to expropriation and compensation claims in the past.**
- **Exercising diplomatic protection requires the continuous nationality of the injured private party ("continuity of claims") and the exhaustion of local remedies.**
- **Diplomatic protection is a discretionary right of the home State of investors.**
- **Claims have frequently been settled by lump-sum agreements at a reduced value.**
- **Diplomatic protection must not be exercised with regard to claims submitted to ICSID arbitration.**

8. INTERNATIONAL COURTS OR TRIBUNALS

<u>Investment disputes as “mixed” disputes</u>	Investment disputes are normally of a “mixed character”, i.e. they regularly involve a State and a private party. This does not, however, exclude the possibility that they may either successively or concurrently turn into international disputes of an inter-State character.
<u>Transformation into inter-State disputes</u>	Investment disputes between a State and a private party may become inter-State disputes if the home State of the private party “espouses” the latter’s claim.
<u>International arbitration and adjudication</u>	In such a situation the two States are in general free to use any peaceful means of dispute settlement as contained in Art. 33 of the UN Charter, including arbitration and adjudication.
<u>Jurisdiction of international courts and tribunals</u>	Since investment disputes are usually not only “legal disputes”, but also involve legal issues of a public international law nature they are likely to give rise to the jurisdiction of international courts or tribunals.
<u>State behaviour as treaty violation</u>	Independent of a potential “espousal” of a private party’s claim an investment dispute may also lead to an inter-State dispute if the State behaviour involved does not only affect the private investor’s legal position but may be characterised as a violation of rules of international law. This is regularly the case with regard to bi- or multilateral investment protection treaties. In fact many BITs contain arbitration clauses for the settlement of disputes between the States parties in addition to ICSID and other arbitration between the investor and the host State.

a) Iran-United States Claims Tribunal

<u>Iran-United States Claims Tribunal</u>	Already in the past, states have repeatedly resorted to quasi-institutionalized arbitration by setting up bilateral “Mixed Claims Commissions” to adjudicate claims by nationals of one State against the other State. A recent example in this tradition is the Iran-United States Claims Tribunal, established by the so-called Algiers Accord in 1981, ⁵⁶ with the express mandate to adjudicate disputes arising out of alleged property rights violations in the aftermath of the Iranian revolution and the Tehran hostage crisis.
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b) International Court of Justice

<u>Broad jurisdiction <i>ratione materiae</i></u>	Among the permanently established international tribunals the International Court of Justice is undoubtedly the most prominent option for settling investment disputes between States. Its personal jurisdiction is expressly limited
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⁵⁶ *Claims Settlement Declaration of Algiers, 19 January 1981, 20 ILM 223 (1981).*

to States while its jurisdiction *ratione materiae* is very widely drawn encompassing any legal dispute over the application or interpretation of international law.

In the past, a number of investment disputes were brought via espousal of claims before the ICJ and its predecessor, the Permanent Court of International Justice (PCIJ). Many of these actions, however, did not reach the merits because the plaintiff States failed to overcome jurisdictional hurdles.

Anglo-Iranian Oil Co. Case

The *Anglo-Iranian Oil Co. Case*⁵⁷ arose from Iranian nationalization measures and the subsequent refusal of the Iranian Government to proceed to arbitration in accordance with a 1933 concession agreement. British efforts to exercise diplomatic protection vis-à-vis Iran, ultimately by instituting proceedings before the ICJ, failed because the Court declined to exercise jurisdiction. The ICJ had to interpret an ambiguously worded unilateral declaration of Iran from 1932 by which it had accepted the Court's jurisdiction according to Art 36 para. 2 PCIJ Statute. In a majority opinion the ICJ held that this acceptance did not extend to disputes arising under treaties which had entered into force before the declaration was made. Since the treaties invoked by the United Kingdom dated from 1857 and 1903 it found that it had no jurisdiction.

Barcelona Traction Case

The best-known investment dispute ever brought before the ICJ is the *Barcelona Traction Case*⁵⁸ where the Court held that Belgium could not bring proceedings against Spain for injury caused to a corporation, incorporated and having its headquarters in Canada, although a majority of the shareholders were Belgian nationals.

In substance, the dispute concerned the issue whether certain measures by Spanish authorities in the context of insolvency proceedings constituted expropriatory action. The Court, however, did not reach these merits because it found that Belgium did not have standing to exercise diplomatic protection. In this respect the Court noted that

*[t]he traditional rule attributes the right to diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments.*⁵⁹

The Court also accepted that some States in addition required a company's actual seat (*siège social*) or management or centre of control

⁵⁷ Anglo-Iranian Oil Co. Case (*UK v. Iran*), *Judgment (Preliminary Objections)*, ICJ Reports (1952) 93-171.

⁵⁸ Case concerning the Barcelona Traction Light & Power Company (*Belgium v. Spain*), ICJ Reports (1970) 3.

⁵⁹ ICJ Reports (1970) 42.

within their territories or national ownership in order to exercise diplomatic protection. However, it rejected ownership or control as sole connecting factors entitling a State to exercise diplomatic protection.

The Court considers that the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations.⁶⁰

ELSI Case

The *Elettronica Sicula Case*⁶¹ is the most recent example of an investment dispute brought before the ICJ as the ultimate form of exercising diplomatic protection on behalf of an investor.

The United States espoused the claim of two United States corporations which together owned 100 per cent of the shares of the Italian corporation Elettronica Sicula (ELSI). It argued that a number of judicial and administrative measures taken in connexion with insolvency proceedings before Italian courts had effectively deprived the United States companies of their property in violation of a bilateral 1948 United States-Italian Treaty of Friendship, Commerce and Navigation (FCN Treaty).

In this case the United States successfully invoked the jurisdiction of the ICJ on the basis of the FCN Treaty. In addition the ICJ rejected Italy's jurisdictional challenge that local remedies had not been exhausted by holding that

... the local remedies rule does not, indeed cannot, require that a claim be presented to the municipal courts in a form, and with arguments, suited to an international tribunal, applying different law to different parties: for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as permitted by local law and procedures, and without success.⁶²

On the merits, however, the United States failed to convince the majority on the Court that the Italian measures constituted an expropriation or other measure in violation of the FCN Treaty.

ICJ jurisdiction to interpret the ICSID Convention

Jurisdiction over genuine investment disputes between States should not be confused with the ICJ's jurisdiction over disputes concerning the interpretation or application of the ICSID Convention under Art. 64 of the Convention. No such case has been brought to the ICJ yet.⁶³

⁶⁰ Id., 49.

⁶¹ Case concerning Elettronica Sicula S.p.A. (ELSI) (*United States of America v. Italy*), ICJ Report (1989) 15-121.

⁶² ICJ Report (1989) 46.

⁶³ Schreuer, *Commentary, Article 41, para. 8.*

c) Inter-State Arbitration

Inter-State arbitration as a traditional mechanism to settle investment disputes

With the increased opportunities of investors to bring disputes with host States directly before arbitral panels, resort to inter-State arbitration as an ultimate remedy in the exercise of diplomatic protection has become less important.

In the past, however, a number of investment claims were espoused by the home States of investors and settled by inter-State arbitration with the host States.

Canevaro Arbitration

When a dispute about the repayment on Peruvian Government bonds to Italian nationals, the *Canevaro* claims, could not be settled amicably, Peru and Italy agreed to submit the issue to arbitration under the auspices of the Permanent Court of Arbitration.⁶⁴

Norwegian Shipowners' Claims

A 1917 United States wartime requisition order led to the espousal of the affected *Norwegian Shipowners' Claims*⁶⁵ which were ultimately adjudicated by an inter-State arbitral tribunal making important statements on the law of expropriation.

Martini Case

In the *Martini* case the Italian Government espoused the claim of an Italian company which had been granted a coal mining concession in Venezuela. Ultimately, the two States entered into a *compromis* providing for the establishment of an arbitral tribunal to decide whether the Venezuelan measures negatively affecting the Italian company constituted a denial of justice or a violation of a bilateral commercial treaty.⁶⁶

Summary:

- **Through the “espousal” of a claim a “mixed” investment dispute may be transformed into an inter-State dispute.**
- **If State behaviour vis-à-vis private investors violates rules of customary international law or treaty provisions it may also give rise to an inter-State dispute.**
- **Investment disputes were brought before the International Court of Justice in the past and may come before it also in the future.**
- **Investment disputes may also be brought before inter-State arbitral tribunals.**
- **International courts and inter-State arbitration panels are under an obligation to decline jurisdiction over claims submitted to ICSID arbitration.**

⁶⁴ Canevaro Claims Arbitration (*Italy v. Peru*), 3 May 1912; 11 RIAA (1961) 397-410.

⁶⁵ Norwegian Shipowners' Claims (*Norway v. US*), 13 October 1922; 1 RIAA (1948) 307-346.

⁶⁶ Martini Case (*Italy v. Venezuela*), 3 May 1930; 2 RIAA (1949) 974-1008.

TEST MY UNDERSTANDING

After having studied this Module the reader should be able to answer the following questions. Most answers should go beyond a simple yes/no alternative and would require a brief explanation.

1. What is a “mixed dispute”?
2. Does consent to ICSID arbitration exclude recourse to national courts?
3. Why are national courts other than the courts of host States likely to be unsuited for litigating investment disputes?
4. Does consent to the “jurisdiction of the Centre” mean consent to conciliation or to arbitration?
5. In which situations may conciliation be preferable to arbitration?
6. Does the Centre provide arbitration services?
7. Which elements contribute to the high level of effectiveness of ICSID arbitration?
8. In what way do host States benefit from consenting to ICSID arbitration?
9. Is it legally possible for an investor to agree on ICSID arbitration with a host State which is not a Contracting Party to the ICSID Convention?
10. Which types of cases may be settled under the ICSID Additional Facility?
11. In which context has the ICSID Additional Facility been used most frequently in the past?
12. What do we understand by ad hoc arbitration?
13. May a State exercise diplomatic protection at any time?
14. Which means are available for States in exercising diplomatic protection?
15. Are investors entitled to receive diplomatic protection by their home States?
16. Are Contracting Parties to the ICSID Convention prevented from exercising diplomatic protection?
17. May the ICJ sit in judgment over investment disputes?
18. Does the ICSID Convention provide for the jurisdiction of the ICJ?

HYPOTHETICAL CASE

E-Switch Corp. v. Gloomistan

E-Switch Corp. is an electricity company incorporated and having its registered office in Lightnia. In March 1996 it entered into a long-term energy concession agreement with a group of municipalities in Gloomistan for the provision and supply of electrical energy for a period of 20 years with an optional renewal on demand by the investor for another 10 years. The concession agreement contains an express choice-of-forum clause providing:

“The Parties agree to submit any dispute arising under this agreement to

1. *ICSID arbitration;*
2. *ICSID Additional Facility arbitration;*
3. *Ad hoc arbitration according to the UNCITRAL Arbitration Rules upon a request by either Party.”*

In addition, a 1979 Bilateral Investment Treaty between Lightnia and Gloomistan, which entered into force in July 1981, provides:

“The Contracting Parties are willing to submit any dispute arising from an investment made within their territories by a national of the other Contracting Party to the International Centre for Settlement of Investment Disputes.”

The investment was initiated in February 1997 and already by October 1999 80 per cent of the total energy supply envisaged under the concession agreement was provided for by *E-Switch Corp.* In July 2000 a dispute arose over the rates charged by *E-Switch Corp.* to the municipal distributor undertakings. In October 2000 Gloomistan decided to step in and enacted a decree fixing the rates at a level “required to maintain this service of a general economic importance.”

E-Switch Corp. claims that this regulatory action constitutes a *de facto* expropriation.

Lightnia and Gloomistan are parties to the ICJ Statute and have made unconditional declarations accepting the jurisdiction of the International Court of Justice in 1956 and 1967 respectively. Lightnia and Gloomistan are parties to the Energy Charter Treaty. Lightnia is a Contracting Party to the ICSID Convention since 1973. Gloomistan signed in 1989 but, due to constitutional difficulties, has never ratified it.

1. Can *E-Switch Corp.* force Lightnia to take diplomatic steps on its behalf?
2. Does *E-Switch Corp.* have a possibility to bring its claim before an ICSID panel?
3. In the alternative, are there other arbitration forums available to *E-Switch Corp.*?
4. Is there a possibility to have the ICJ decide the merits of the dispute?

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