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CHAPTER 18

METHODS OF DISPUTE RESOLUTION

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(1) **National Courts** 694

(2) **The ICSID System** 698
- (a) ICSID Arbitration 698
- (b) ICSID Conciliation 702
- (c) ICSID Additional Facility 704

(3) **Other Institutional and Ad hoc Arbitration** 707
- (a) Institutionally Supported Arbitration other than ICSID or Additional Facility 708
- (b) The Permanent Court of Arbitration 709
- (c) Ad hoc Arbitration 710

(4) **Diplomatic Protection** 712

(5) **International Courts and Tribunals** 714
- (a) The International Court of Justice 715
- (b) Iran–US Claims Tribunal 717
- (c) Inter-State Investment Arbitration 718

Concluding Remarks 719

WHILE commercial disputes between private parties are usually settled before national courts or arbitral panels, contentious matters between States may fall under the jurisdiction of the International Court of Justice or other (specialized or regional) judicial dispute settlement systems. As to mixed disputes, that is, disputes between States and private parties, in particular those relating to investments, in the past, these were mostly settled either before national courts or through ad hoc arbitration. Individual claimants had very little chance of success if they intended to bring claims against States or State entities. A State could espouse a claim of one of its nationals, but—short of this right of diplomatic protection—there was no direct right of recourse by foreign nationals against States for violations of their rights and no appropriate forum seemed to be generally available for this type of disputes.

Matters changed significantly with the adoption of the ICSID Convention in 1965.[1] Through the system created by the ICSID Convention, private investors can now escape the traditional scheme of diplomatic protection, avoid national jurisdictions, and act directly against a State where an investment was made. It was one of the main purposes of the ICSID Convention to close this gap in available procedures.

Dispute settlement through ICSID arbitration may well be the most appropriate method for investment disputes. The system has known tremendous success, particularly over the last ten years, and is likely to grow further due to the increase in the number of Bilateral Investment Treaties ('BITs') all over the world. However, in spite of ICSID's achievements, it would be inaccurate to disregard other methods of settlement of investment disputes, including national and international courts and other (non-ICSID) arbitration or conciliation. In fact, a substantial jurisdictional overlap between these competing jurisdictions potentially exists, that is, situations where one and the same dispute may be settled by different fora.

With such a variety of dispute settlement mechanisms potentially available to claimants in the case of investment disputes, it is not surprising that confusions may arise in practice. The situation is not improved by the fact that States can be deliberately vague in consenting to dispute settlement. It is indeed quite common for national investment legislation or BITs—through which States can make a valid offer to consent to ICSID arbitration under Article 25 of the ICSID Convention—contemplate domestic courts, ICC, UNCITRAL, or ad hoc arbitration as alternatives to ICSID dispute settlement, without making a clear choice.

The wide range of different dispute settlement methods is reflected in the so-called multi-tiered dispute settlement clauses, that is, provisions that refer to ICSID as only one of several dispute resolution possibilities, and which may require

[1] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), signed on 18 March 1965, 575 UNTS 159, ILM 4 (1965) 532; see also ICSID Convention, Regulations and Rules, ICSID/15/Rev.1, January 2003, available at <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>.

the agreement of the parties to select a particular procedure. This is the case with the most recent model BIT adopted by the USA which provides for a period of six months before a claim can be submitted to arbitration and states that the claimant can submit its claim to arbitration under the ICSID Convention or under the UNCITRAL Arbitration Rules[2] or to any other institution, provided that both parties agree. Article 24 paragraph 3 of the US Model BIT provides:

> Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:
> (a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;
> (b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;
> (c) under the UNCITRAL Arbitration Rules; or
> (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.[3]

In this kind of provision, when a dispute settlement forum is selected, this choice is made to the exclusion of any other (*electa una via, non datur recursus ad alteram*).

An important aspect of the efficiency of any dispute settlement system lies in its ability to avoid uncertainties concerning the appropriate jurisdiction which will be competent to hear a particular dispute. Thus, when a dispute resolution clause is ambiguously drafted, or when it foresees a duplication or multiplication of available fora for dispute settlement purposes, the inevitable result would be that parties will raise jurisdictional objections before the merits of a dispute are even touched. As a consequence, more often than not, ICSID tribunals and the parties appearing before them are involved in protracted discussions over jurisdictional issues. Although the majority of these disputes do not directly concern choice-of-forum issues, it is unquestionable that dispute settlement clauses should offer precise and clear alternatives in that respect in order to avoid time-consuming differences between the parties.

Obviously, any uncertainties as to the choice of forum may be avoided to the extent that parties expressly designate only one specific jurisdiction competent 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. This chapter reviews the different options available for the settlement of investment disputes, describing their main advantages and disadvantages.

[2] UNCITRAL Arbitration Rules 1976, adopted by UN General Assembly Resolution 31/98, 15 December 1976, 15 ILM 701 (1976), available at <http://www.uncitral.org/english/texts/arbitration/arb-rules.htm>.

[3] Art 24 para 3 Treaty between the Government of the US and the Government of... Concerning the Encouragement and Reciprocal Protection of Investment, 2004 US Model BIT, available at <http://www.state.gov/documents/organization/38710.pdf>.

(1) National Courts

In the absence of a specific agreement, investment disputes between States and private parties would normally fall under the jurisdiction of national courts,[4] most likely those of the host State where an investment is made. The ICSID Convention does not rule out access to national courts *per se*. 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 the parties have consented to ICSID arbitration, such consent, in principle, excludes any other remedy, including the resort to domestic courts.

Article 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.

A limited exception may apply in cases where the State has given its consent to arbitration under the condition of the prior exhaustion of local remedies, as provided for by the second sentence of Article 26 of the ICSID Convention, which reads as follows:

> 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.[5]

Ordinarily, in the absence of any specific choice-of-forum clauses in investor–State agreements or of dispute settlement provisions in BITs or multilateral investment treaties, national courts will be competent to decide investment disputes. However, even where there are no explicit provisions concerning the role of domestic courts, cases of jurisdictional overlap between national courts and international investment dispute settlement mechanisms may occur.[6]

The potential, and actual, overlap between national courts and ICSID tribunals became apparent in the two *SGS* cases. They arose from similar pre-shipment inspection agreements with Pakistan and the Philippines, according to which the Swiss company SGS would have performed various services in connection with the classification and verification of imported goods. Since the investor in both cases alleged that these agreements had been unlawfully terminated/breached by

[4] Para 3 of the Preamble to the ICSID Convention recognizes 'national legal processes' as the usual method of dispute settlement.

[5] C Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) Art 26, at para 99.

[6] See van Haesolte-van Hof and Hoffmann, ch 24 below.

the respective host States and had instituted ICSID arbitrations, the issue to be addressed was whether and to what extent contractual claims may be adjudicated by ICSID tribunals, an issue that involved the dichotomy between 'contract claims' and 'treaty claims'.[7] In *SGS v Pakistan*,[8] an ICSID tribunal held that it lacked jurisdiction to adjudicate on mere contract claims, although it based its decision on a BIT which broadly provided for settlement of 'disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party'.[9] In the tribunal's view, that phrase:

> ...while descriptive of the *factual subject matter* of the disputes, does not relate to the *legal basis* of the claims, or the *cause of action* asserted in the claims. In other words, from that description alone, without more, we believe that no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9.[10]

This reasoning was openly rejected by another ICSID tribunal in *SGS v Philippines*.[11] The dispute settlement provision in the Swiss–Philippines BIT, equally applicable to 'disputes with respect to investments', was interpreted as comprising both treaty and contractual claims.[12] The panel contrasted this broad language with the narrower dispute settlement provisions contained in other BITs referring to 'disputes regarding the interpretation or application of the provisions of this Agreement' which—in the tribunal's view—would limit 'arbitration to claims concerning breaches of the substantive standards contained in the BIT'.[13]

In *SGS v Pakistan*, the matter was further complicated by the fact that, before resorting to ICSID arbitration, SGS had already instituted proceedings against Pakistan before Swiss courts for unlawful termination of contract. These law-suits failed as a result of the defendant's sovereign immunity.[14] Subsequently, the Supreme Court of Pakistan issued an order restraining SGS to pursue ICSID arbitration and referred the parties to arbitration according to the Pakistani Arbitration Act as was provided for in the pre-shipment inspection agreement.[15]

[7] See Stanimir Alexandrov, 'Breaches of Contract and Breaches of Treaty', 5 JWIT 556 (2004).

[8] *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, 18 ICSID Review 301 (2003); 42 ILM 1290 (2003); see also *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction, 6 August 2004, 44 ILM 73 (2005) at para 81.

[9] Article 9 para 1 Switzerland–Pakistan BIT.

[10] *SGS v Pakistan*, above n 8 at para 161; emphasis in original.

[11] *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 515.

[12] *SGS v Philippines*, ibid at para 131 ff.

[13] Ibid at para 132.

[14] *SGS Société Générale de Surveillance Holding SA v République Islamique du Pakistan*, 4C.250/2000, Swiss Federal Court, 23 November 2000, available at <http://www.bger.ch>.

[15] *Islamic Republic of Pakistan, Through Secretary, Ministry of Finance v Société Générale de Surveillance SA*, Supreme Court of Pakistan, 3 July 2002, 8 ICSID Reports 356.

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, that is, the host State. Thus, most applicable jurisdictional rules will point to the domestic courts of the host State as the competent forum for the settlement of any disputes arising from an investment. Such a forum will usually entail a number of specific consequences that will be viewed differently by the parties involved.

As far as the applicable law is concerned, the courts of the host States—like any domestic jurisdiction—will be guided by their own rules of private international law/conflict of laws. In any event, even if national courts—as a general principle—respect the parties' choice of law, if the parties have expressly indicated that a specific law will apply to their dispute, they will demand the application of mandatory norms under the law of the host State, which may, in particular, relate to the law of foreign investments. Further, depending on the host State's legal approach towards the incorporation of international law into its 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.

In addition to these objective technical difficulties, other factors preventing parties from litigating on an equal footing include: actual or perceived partiality, prejudice, the impact of public opinion and various other political implications and/or the lack of expertise on the part of national judges. These aspects often make national courts an unattractive option for investors.

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 investors or courts in third States. Naturally, the former is unlikely to be accepted by the host State in the case of traditional investment agreements. However, it is not infrequent in the case of loan contracts. The latter option is common in international commercial dispute settlement, for example, a sales contract between a US buyer and an Indian seller providing for the jurisdiction of Swiss courts.

Dispute settlement before the courts of home States of investors or of third States may be impracticable 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 which endorse a restrictive concept of sovereign immunity, actions brought by private parties against host States may face major procedural hurdles, and ultimately carry the risk that national courts would dismiss the case. This is especially true in the event of outright expropriations or regulatory activities which may amount to an expropriation ('constructive takings' or '*de facto* expropriations').[16] 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

[16] See Reinisch, ch 11 above.

should be aware of the risk of inadmissibility of litigation as a result of sovereign immunity and might have to take the necessary precautionary steps, for example, by including an express waiver of immunity. One should be aware, however, that such precautions do not eliminate the risk that some national courts, in particular those following the Anglo-American act-of-State doctrine, may abstain from questioning the legality of sovereign acts of the host State taken within the territory of that State.[17] Moreover, in certain domestic jurisdictions, any waiver of immunity may represent a violation of public policy rules and, as such, may not be enforceable.

The justiciability of investment disputes may also be questionable in some 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. The US Supreme Court's Judgment in the *Sabbatino*[18] case is one of the leading precedents on the act-of-State doctrine.[19] On its face, the dispute between the Cuban National Bank and a court-appointed receiver of a US-owned company which had been expropriated by the Castro government concerned the entitlement to the proceeds of sugar sales on the US market. In essence, however, the dispute concerned the legality of the Cuban expropriations that occurred in the early 1960s. On appeal, the US 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.[20]

As a result, the US Supreme Court upheld the effectiveness of the Cuban expropriations, irrespective of their legality under international law, as acts carried out by 'a foreign sovereign government' on its own territory.[21]

The 1971 nationalization measures of the Allende Government in Chile equally led to litigation in foreign domestic courts. One of the affected US companies brought actions in French and German courts asserting its continuing property rights in imported Chilean copper. The US company 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. Two

[17] 'The courts in one country will not sit in judgment on the acts of another done within its territory.' *Underhill v Hernandez*, 168 US 250 (1897). See also J-P Fonteyne, 'Acts of State', in I *EPIL* 17 (1992).

[18] *Banco Nacional de Cuba v Sabbatino*, 376 US 398 (1964), 3 ILM 381 (1964).

[19] Though with the 1964 Second Hickenlooper Amendment (para 620(e)(2) of the Foreign Assistance Act of 1961, as amended, 22 USC para 2370(e)(2)) and the adoption of the Foreign Sovereign Immunities Act in 1976, 15 ILM 1388 (1976), the application of the act of State doctrine in expropriation cases has been considerably limited.

[20] 376 US 398 (1964) at 428.

[21] See also *First National City Bank v Banco Nacional de Cuba*, 406 US 759 (1972), 66 ILR 102.

separate domestic jurisdictions, a court in Paris[22] and one in Hamburg,[23] rejected the immunity defence raised by a Chilean State-owned export/import enterprise because of the 'commercial activity' of its trading business. However, on the merits, both national courts—while expressing severe doubts as to whether the nationalizations were in conformity with the requirements of public international law—refused to rule on the validity of the Chilean expropriation measures on rather technical grounds. Both the French and German courts reasoned that, under the 'territoriality principle', expropriations which do not cover property located outside the borders of the 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'—was 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'.[24]

(2) The ICSID System

(a) ICSID Arbitration

The ICSID Convention provides the benefit of a fixed set of rules and the support of an experienced arbitral institution, coupled with the flexibility and autonomy usually associated with the advantages of arbitration.

In 1965, the Washington Convention established the International Centre for Settlement of Investment Disputes ('ICSID' or 'the Centre') endowed with separate international legal personality.[25] However, it is not the Centre itself which engages in arbitration. Rather, the Centre 'provides facilities' for the arbitration of investment disputes[26] which include: keeping lists ('panels') of possible arbitrators;[27] screening and registering arbitration requests;[28] assisting in the constitution of arbitral

[22] *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 (1973).

[23] *Superior Court of Hamburg Decision Denying Third Party Attachment of Copper Sold by the Chilean Copper Corporation*, Landgericht Hamburg, 22 January 1973, 12 ILM 251 (1973); *Decision in Case Concerning Chilean Nationalization of El Teniente Mine*, Landgericht Hamburg, 13 March 1974, 13 ILM 1115 (1973).

[24] Landgericht Hamburg, 22 January 1973, 12 ILM 251 (1973) at 279.

[25] Arts 1 and 18 ICSID Convention.

[26] Art 1 ICSID Convention.

[27] Arts 12 ff ICSID Convention.

[28] Art 36 para 3 ICSID Convention.

tribunals and the conduct of proceedings;[29] adopting rules and regulations;[30] and drafting model clauses for investment agreements.

ICSID arbitration is not compulsory for States and investors from other States merely because both States are contracting parties to the Convention. Arbitration becomes binding only upon the written consent of the parties contained either in an investment agreement or otherwise.[31] 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, ...

ICSID arbitration is designed to prevent a potential danger inherent in many arbitration systems, that is, the risk that one party having previously consented to arbitration obstructs the arbitration proceedings by its refusal to cooperate. With this overriding purpose in mind, the Convention provides that consent, once given, may not be unilaterally withdrawn,[32] that arbitral tribunals have the exclusive competence to decide on their own jurisdiction,[33] that awards are binding and enforceable,[34] and may not be disregarded or challenged on the ground of nullity except under the Convention's own annulment procedure.[35] 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.[36] Generally, it assures that lack of cooperation by any party will not prevent continuation of the proceedings.[37]

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 Article 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*). According to Article 25 of the Convention, the subject-matter jurisdiction of the Centre is limited to 'legal disputes' arising 'directly' out of an 'investment'. The Centre's jurisdiction *ratione personae* 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.

[29] Art 38 ICSID Convention.

[30] Art 6 para 1 ICSID Convention.

[31] See Schreuer, 'Consent to Arbitration', ch 21 below.

[32] Art 25 para 1 ICSID Convention.

[33] Art 41 para 1 ICSID Convention.

[34] Arts 53 and 54 ICSID Convention.

[35] Art 52 ICSID Convention.

[36] Art 38 ICSID Convention.

[37] Art 45 ICSID Convention.

These are objective jurisdictional requirements which cannot be replaced by an agreement between 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.[38] This limit to the jurisdiction of ICSID was one of the main 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.

Another special feature of ICSID arbitration is its relative insulation from interference and review by national courts. According to Article 54 paragraph 1 of the ICSID Convention, ICSID awards are final and binding and have to be recognized in all contracting State parties to the Convention like final judgments of their domestic courts. This treaty provision largely excludes the danger of setting aside or non-recognition proceedings before national courts known in ordinary commercial arbitration as well as in investment arbitration governed by the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention').[39]

Instead of the residual supervisory powers of national courts under their national arbitration laws and permitted by the New York Convention, the ICSID Convention offers a unique control feature by providing for a special annulment procedure. ICSID awards may be set aside by an ad hoc committee if the tribunal was not properly constituted; the tribunal manifestly exceeded its powers; there was corruption on the part of a member of the tribunal; there was a serious departure from a fundamental rule of procedure; or the award failed to state the reasons on which it was based.[40] The rather broad scope of review exercised by the first two ad hoc committees[41] provoked substantial criticism.[42] It has been narrowed down, however, in subsequent cases.[43] Nevertheless, the increased number of ICSID cases since the late 1990s has led to new annulment proceedings.[44] In 2004–5 there were also discussions

[38] See Schlemmer, ch 2 above.

[39] UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 38, 7 ILM 1046 (1968). See Balaš, Ch 27 below.

[40] Art 52 para 1 ICSID Convention.

[41] *Klöckner v Cameroon*, ICSID Case No. ARB/81/2, Ad hoc Committee decision, 3 May 1985, 2 ICSID Reports 95; *Amco Asia v Indonesia*, ICSID Case No. ARB/81/1, Ad hoc Committee decision, 16 May 1986, 1 ICSID Reports 509, 25 ILM 1441 (1986).

[42] WM Reisman, 'The Breakdown of the Control Mechanism in ICSID Arbitration' 4 DLJ 739 (1989); David Caron, 'Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal' 7 ICSID Rev 21 (1992).

[43] *MINE v Guinea*, ICSID Case No. ARB/84/4, Ad hoc Committee decision, 22 December 1989, 4 ICSID Reports 79.

[44] See the recent decisions in *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Ad hoc Committee decision, 5 February 2002, 41 ILM 933 (2002) (annulment rejected); *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*, ICSID Case No. ARB/97/3, Ad hoc Committee decision of 3 July 2002, 41 ILM 1135 (2002) (partial annulment). The decisions of the Ad hoc Committees in *Consortium RFCC v Kingdom of Morocco*, ICSID Case No. ARB/00/6, of 18 January 2006 and *CDC Group plc v Republic of Seychelles*, ICSID Case No. ARB/02/14 of 29 June 2005 are not publicly available.

aimed at introducing a true appellate system within ICSID, possibly similar to the one available under the WTO Dispute Settlement Understanding. However, it currently appears unlikely that these plans will be further pursued.[45]

ICSID arbitration offers a number of advantages to investors which can be summarized as follows:

- It provides investors with direct access to a form of settlement of a dispute they may have with a host State.
- It extends the possibility of dispute settlement beyond the realm of 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 final ICSID awards will be effectively enforceable.

Host States may also benefit in various ways from the availability of ICSID arbitration, such as:

- 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.

However, 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 'exclusive jurisdiction' requirement contained in Article 26 of the Convention attaches only once the parties have consented to ICSID arbitration. With the exercise of such consent, however, the parties lose their right to avail themselves of other—international or national—fora since they have consented to ICSID arbitration 'to the exclusion of any other remedy'. The decision in *Attorney-General v Mobil Oil NZ Ltd*[46] 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 Article 26 of the ICSID Convention, the New Zealand High

[45] See Qureshi, ch 28 below.

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

Court, however, stayed the proceedings until the ICSID Tribunal had determined its jurisdiction in *Mobil Oil v New Zealand*.[47] Also in the protracted litigation of MINE against Guinea, Belgian[48] and Swiss[49] courts refused to exercise their jurisdiction to provide interim remedies on the basis of Article 26 of the ICSID Convention because ICSID proceedings were pending. The ICSID Tribunal in *Maritime International Nominees Establishment (MINE) v Guinea*[50] strongly affirmed the exclusivity of ICSID arbitration *vis-à-vis* national court proceedings. These national cases contrast with the Supreme Court of Pakistan's approach in the *SGS* case, ordering the investor to refrain from pursuing ICSID arbitration.[51]

(b) ICSID Conciliation

Of the two mechanisms established under the aegis of ICSID, conciliation and arbitration,[52] the former has been relatively infrequently resorted to[53] while the latter has become an increasingly significant and successful method of settling international investment disputes.

It should be noted that Article 25 of the ICSID Convention refers to the 'jurisdiction of the Centre' and does not differentiate between arbitration and conciliation as separate dispute settlement techniques. This could lead to serious problems since an unspecified or ambiguous submission regarding the Centre's jurisdiction may result in differences between the parties as to the appropriate method of dispute settlement and lead to inevitable procedural delays. 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 generally been treated as leaving the choice to the party instituting proceedings. This view was most clearly expressed by the ICSID Tribunal in *SPP v Egypt*, where jurisdiction was based on Article 8 of Egypt's Law No. 43 of 1974, which

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

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

[49] *Maritime International Nominees Establishment (MINE) v Guinea*, Tribunal de 1ere instance, Geneva, 13 March 1986; 4 ICSID Reports 41; 1 ICSID Review 383 (1986).

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

[51] See above text at nn 14–15.

[52] Art 1 para 2 ICSID Convention. The ICSID Rules of Procedure for Conciliation Proceedings (Conciliation Rules) were adopted at the same time as the ICSID Arbitration Rules, in 1967. The Additional Facility Conciliation Rules were adopted in 1978.

[53] As of 2005 only five requests for conciliation have been filed. Cf the ICSID homepage at <http://www.worldbank.org/icsid/cases/cases.htm> and Uche Onwuamaegbu, 'The Role of ADR in Investor–State Dispute Settlement: The ICSID Experience' 22(2) News from ICSID (2005) at 12–14.

provided for the settlement of disputes 'within the framework of the Convention', without specifying the preferred dispute settlement method. 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.[54]

An indeterminate submission to the jurisdiction of the Centre may nonetheless lead to problems if one party opts for conciliation since in such a case the other party is prevented from instituting arbitral proceedings unless it is clearly provided that unsuccessful conciliation may be 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 remain available—to spell out clearly which party may choose and whether conciliation should be followed, if necessary, by arbitration.[55]

Like other forms of conciliation, ICSID conciliation is a highly flexible and informal method of dispute settlement involving a third neutral party that assists the parties 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 the agreement of both parties and leads to a non-binding result. A conciliator or conciliation commission may suggest a solution[56] to the parties in order to 'bring about agreement between them upon mutually acceptable terms'.[57] Such a solution can never be imposed on the parties against their will. Conciliation is generally considered to be less expensive than arbitration. Further, the fact that ultimately any settlement remains in the hands of the parties prevents excessive antagonisms. Given its consensual nature, conciliation may be particularly useful in case of disputes where the parties have ongoing business relations or intend to continue their investment cooperation. Recently, ICSID has started to remind parties of the availability of the conciliation mechanism, particularly for long-term projects, involving significant costs, such as oil and gas exploration projects.[58]

As with conciliation in general, ICSID conciliation does not stand for independent third-party dispute settlement resolution. Thus, a certain degree of cooperation between the parties is an important element of a successful conciliation, since either

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

[55] Cf 1993 ICSID Model Clauses, 4 ICSID Reports 357.

[56] According to Art 34 para 1 ICSID Convention, a Conciliation Commission may 'recommend terms of settlement'.

[57] Art 34 para 1 ICSID Convention.

[58] Onwuamaegbu, above n 53 at 13.

party to the dispute can always block a solution at any given moment. This is probably also the main weakness of conciliation.

(c) ICSID Additional Facility

As mentioned above, access to ICSID conciliation and arbitration does not only depend upon the consent of the parties involved, but 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. Consequently, 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. This situation was—at least partially—remedied by the adoption of the Additional Facility Rules in 1978[59] which opened access to the Centre in a number of additional cases. These are laid down in Article 2 of the Additional Facility Rules and can be categorized into 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.

Article 2 paragraph (b) of the Additional Facility Rules extends the ICSID Convention's rather limited subject-matter jurisdiction over 'investment disputes' to disputes 'not directly aris[ing] out of an investment'. This provision must be read in conjunction with Article 4 paragraph 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 Article 2 paragraph (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. Interestingly, the Centre appears to follow an even broader approach in practice—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.[60] 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

[59] Additional Facility Rules 1978, ICSID/11/Rev 1, January 2003; also available at <http://www.worldbank.org/icsid/facility/facility.htm>.

[60] Cf Schreuer, above n 5 Art 25 at para 111.

practically relevant. Additional Facility arbitration has become very important in the context of NAFTA (North American Free Trade Agreement)[61] since only the USA is a party to the ICSID Convention and both Canada and Mexico are not.[62]

Article 1120 in NAFTA's Chapter 11 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
   (b) the UNCITRAL Arbitration Rules.

Further, Article 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 USA is a party to the Convention, ICSID Additional Facility arbitration is available between US investors and Canada or Mexico and between Canadian or Mexican investors and the USA, though it is also possible to opt for UNCITRAL arbitration. 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.

Since the entry into force of the NAFTA, a number of cases have been decided pursuant to the Additional Facility Rules.[63] One of the more controversial NAFTA

[61] 32 ILM 605 (1993).

[62] However, Canada signed the Convention on 15 December 2006 and ratified it in March 2008.

[63] Eg *ADF Group Inc v United States of America*, 9 January 2003, Case No. ARB(AF)/00/1, 6 ICSID Rep 470 (2004); *Robert Azinian and others v United Mexican States*, 1 November 2000, Case No. ARB(AF)/97/2, 39 ILM 537 (2000); 5 ICSID Rep 272 (2002); *Marvin Roy Feldman Karpa v United Mexican States*, 16 December 2002, Case No. ARB(AF)/99/1, 42 ILM 625 (2003); 7 ICSID Rep 341 (2005); *The Loewen Group, Inc and Raymond L. Loewen v United States of America*, 26 June 2003, Case No. ARB(AF)/98/3, 42 ILM 811 (2003), 7 ICSID Rep. 442 (2005); *Mondev International Ltd v United States of America*, 11 October 2002, Case No. ARB(AF)/99/2, 42 ILM 85 (2003); 6 ICSID Rep 192 (2004); *Técnicas Medioambientales Tecmed, SA v United Mexican States*, 29 May 2003, Case No. ARB(AF)/00/2, 43 ILM 133 (2004); *Waste Management, Inc v United Mexican States*, 2 June 2000, Case No. ARB(AF)/98/2, 15 ICSID Review 214 (2000), 40 ILM 56 (2001).

investment cases rendered under the Additional Facility is *Metalclad v Mexico*,[64] which raised considerable concern among environmentalists. This Additional Facility award held that Mexico, through actions of a local municipality, had effectively expropriated a US investor which had previously obtained all required (federal) permits to operate a hazardous waste facility.

The 1994 Free Trade Agreement between Mexico, Colombia and Venezuela offers yet another example of consent to ICSID or Additional Facility dispute settlement by multilateral agreement. Under Articles 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.

Since dispute settlement initiated under the Additional Facility is neither ICSID conciliation nor arbitration, it falls by definition outside the jurisdiction of the Centre. This means that—although such proceedings may be administered by the Secretariat of the Centre and thus benefit from the institutional support and expertise provided by the Centre—the ICSID Convention does not apply to proceedings, recommendations, awards, or reports under the Additional Facility.[65] 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, Article 20 of the Arbitration (Additional Facility) Rules provides that arbitral proceedings must be held only in States that are parties of the 1958 New York Convention. In *Metalclad v Mexico*,[66] 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 Article 1130 NAFTA. Accordingly, Canadian courts were also competent to decide challenges to such Additional Facility awards.[67]

It should be stressed that, even though 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 when the Centre has jurisdiction under Article 25 of the ICSID Convention.[68] In *Waste Management v Mexico*,[69] an Additional Facility arbitral panel has held that it lacked jurisdiction

[64] *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).

[65] Art 3 Additional Facility Rules.

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

[67] Cf *The United Mexican States v Metalclad Corporation*, Supreme Court of British Columbia, 2 May 2001, 2001 BCSC 664; 5 ICSID Rep 238 (2002); 31 October 2001, 2001 BCSC 1529; 6 ICSID Rep 53 (2004).

[68] Schreuer, above n 5 Art 25, at para 136.

[69] *Waste Management, Inc v United Mexican States (I)*, 2 June 2000, Case No. ARB(AF)/98/2, 15 ICSID Review 214 (2000), 40 ILM 56 (2001).

to decide a dispute under Chapter XI of NAFTA where the waiver required by Article 1121 NAFTA as a condition precedent to submitting a claim was not sufficiently unambiguous. Article 1121 paragraph 1, subsection (b) NAFTA provides as follows:

> 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 qualified its waiver by exempting dispute settlement involving claims based on the municipal law of Mexico and 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 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.[70]

(3) Other Institutional and Ad hoc Arbitration

Like commercial disputes, investment disputes may be settled by either institutional 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 and can also include State-to-State arbitration.[71]

[70] 15 ICSID Review 235/236 (2000).

[71] Inter-State arbitration as a result of the 'espousal' of a private party's claim will be dealt with in Sect (d) below.

(a) Institutionally Supported Arbitration other than ICSID or Additional Facility

All the main 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, have their main focus on international commercial arbitration, that is, the settlement of business disputes between private parties by arbitration. Like ICSID, these arbitral institutions do not arbitrate disputes themselves but supervise and monitor the arbitral procedures conducted under their auspices. This is done in practice through the rendering of various administrative services, such as providing lists of arbitrators or participating in the process of their appointment, calculating fees, etc. In addition, both the ICC International Court of Arbitration and the LCIA do not decide cases, but ensure the application of the relevant institutional rules. All these arbitral facilities are also well equipped to administer investment disputes and parties are free to submit this kind of dispute to these institutions.

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.[72]

In *Deutsche Schachtbau*,[73] a dispute arising under an oil concession agreement between a foreign investor and a host State was arbitrated according to the ICC Arbitration Rules.[74] Recently, a number of investment arbitrations have taken place under the auspices of the LCIA. A well-known example is the *Occidental* case[75] which has been unsuccessfully challenged before English courts.[76] Like

[72] *SPP v Egypt*, Decision on Jurisdiction I, 27 November 1985, 3 ICSID Reports 121 at 129.

[73] *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v State of R'as Al Khaimah (UAE)*, ICC Case No. 3572 1982, Yearbook of Commercial Arbitration 111 (1989).

[74] Currently, 'ICC Rules of Arbitration 1998' in ICC (ed), *ICC Rules of Arbitration*, Publication No. 808 (2001) at 6, available at <http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_ arb_english. pdf>.

[75] *Occidental Exploration and Production Company v The Republic of Ecuador*, Final Award, 1 July 2004, LCIA Case No. UN3467.

[76] *Occidental Exploration and Production Company v The Republic of Ecuador*, Court of Appeal, 9 September 2005, [2005] EWCA Civ 1116, 45 ILM 249 (2006).

the *EnCana* case,[77] the arbitration was administered by the LCIA, which served as registrar. However, the arbitral proceedings were not conducted according to the LCIA Rules,[78] but rather pursuant to the UNCITRAL Arbitration Rules. Also the Arbitration Rules of the Stockholm Chamber of Commerce[79]—expressly mentioned in the Energy Charter Treaty[80] and in many BITs signed by successor States of the Former Soviet Union—have been used in some recent investment disputes. The *Petrobart*[81] and the *Nykomb* cases[82] are examples of such arbitral proceedings.

(b) The Permanent Court of Arbitration

The Permanent Court of Arbitration ('PCA'), established by the Hague Conventions for the Pacific Settlement of Disputes adopted in 1899 and 1907, has the express task of 'facilitating an immediate recourse to arbitration for international differences' where diplomacy has failed.[83] As it is known, the PCA is not a judicial body, but a list of potential arbitrators and an institution administering arbitration, conciliation, and fact-finding. Each contracting State has the right to nominate four persons to the list of 'Members of the Court' from which arbitrators are chosen in case of disputes between States.

The Hague Convention also set up an International Bureau which serves as the registry for the PCA. In addition, it offers registry and supportive services to ad hoc tribunals. The PCA is frequently chosen as appointing authority in dispute settlement provisions of BITs and may administer investment arbitrations under the UNCITRAL Rules.[84]

[77] *EnCana Corporation v Republic of Ecuador*, 3 February 2006, LCIA Case No. UN3481, available at <http://ita.law.uvic.ca/documents/EncanaAwardEnglish.pdf>.

[78] London Court of International Arbitration, Arbitration Rules 1998, 37 ILM 669 (1998), available at <http://www.lcia-arbitration.com/arb/uk.htm>.

[79] Rules of the Arbitration Institute of the Stockholm Chamber of Commerce 1999, 38 ILM 1674 (1999), available at <http://www.sccinstitute.com/_upload/shared_files/regler/web_A4_vanliga_2004_eng.pdf>.

[80] Energy Charter Treaty, Annex 1 to the Final Act of the European Energy Charter Treaty Conference, 34 ILM 381 (1995).

[81] *Petrobart Limited v Kyrgyz Republic*, Arb. No. 126/2003, Arbitration Institute of the Stockholm Chamber of Commerce, 29 March 2005, available at <http://ita.law.uvic.ca/documents/petrobart_kyrgyz.pdf>.

[82] *Nykomb Synergistics Technology Holding AB v Latvia*, Arbitration Institute of the Stockholm Chamber of Commerce, 16 December 2003, available at <http://ita.law.uvic.ca/documents/Nykomb-Finalaward.doc>.

[83] Art 41 Hague Convention for the Pacific Settlement of Disputes 1907, reprinted in Permanent Court of Arbitration (ed), *Permanent Court of Arbitration: Basic Documents: Conventions, Rules, Model Clauses and Guidelines* (The Hague, PCA, 1998) at 19.

[84] Eg *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award, 17 March 2006, available at <http://www.pca-cpa.org/ENGLISH/RPC/SAL-CZ%20Partial%20Award%20

While the PCA system had a tentative start, with a mere 20 cases from its creation until 1932, it has experienced a significant growth in its case-load in the 1990s, with the International Bureau acting as Registrar in a number of important cases, mainly State-to-State arbitrations. Following this renaissance, the PCA has modernized its Optional Rules for Arbitrating Disputes between Two States[85] between 1992 and 1996. In 1993, the PCA replaced its 1962 Rules of Arbitration and Conciliation for the Settlement of International Disputes between Two Parties of Which Only One is a State.[86] Parties can either choose any of the sets of rules adopted by the PCA, opt for UNCITRAL Conciliation or Arbitration Rules, or ad hoc rules tailored to the specific needs of a given case.[87] As to the logistical aspects of arbitrations, the PCA can administer investor–State arbitrations and lend its staff and facilities in The Hague to both private parties and States.[88]

(c) Ad hoc Arbitration

In the context of investment disputes, ad hoc arbitration represents a potential fall-back option if ICSID or Additional Facility dispute settlement is not available. This may be the case where neither the host State nor the home State of the investor is a party to the ICSID Convention. Thus, under NAFTA's Chapter 11 on Investments only ad hoc arbitration according to the UNCITRAL Rules is currently available in investment disputes between Canadian investors and Mexico and Mexican investors and Canada.[89] But also in cases involving the USA, which is a party to the ICSID Convention and thus where Additional Facility Rules could apply, parties sometimes opt for arbitration according to UNCITRAL Rules.[90]

170306.pdf>; *Telekom Malaysia Berhad v Government of Ghana*, PCA administered case, see <http://www.pca-cpa.org/ENGLISH/RPC/#A%20Malaysian%20company%20and%20an%20African%20government>.

[85] Optional Rules for Arbitrating Disputes between Two States, reprinted in: Permanent Court of Arbitration (ed), above n 83 at 39.

[86] Rules of Arbitration and Conciliation for the Settlement of International Disputes between Two Parties of Which Only One is a State, reprinted in: Permanent Court of Arbitration (ed), ibid at 67.

[87] See *Reineccius et al v Bank for International Settlements*, PCA Award 19 September 2003, 43 ILM 893 (2004), XXVIII YB Comm Arb 100 (2003) at 102.

[88] The first mixed arbitration administered by the PCA was the case *Turriff Construction (Sudan) Ltd v Government of the Republic of Sudan*, see A Redfern and M Hunter, with N Blackaby and C Partasides, *Law and Practice of International Commercial Arbitration* (London, Sweet & Maxwell, 4th edn, 2004) at 59–60.

[89] See above Sect (b)(iii).

[90] Eg *Gami Investments, Inc v Mexico* (NAFTA), UNCITRAL Final Award 15 November 2004, available at <http://ita.law.uvic.ca/documents/Gami.pdf>; *Methanex Corporation v United States of America* (NAFTA), Final Award, 3 August 2005, available at <http://ita.law.uvic.ca/documents/MethanexFinalAward.pdf>; *International Thunderbird Gaming Corporation v Mexico*, UNCITRAL Arbitral Award, 16 January 2006, available at <http://ita.law.uvic.ca/documents/ThunderbirdAward.pdf>.

Ad hoc arbitration is also a settlement option for disputes not of a 'mixed' character, for example, between the host State and the home State of an investor or between a private investor and another private entity. Furthermore, recourse to ad hoc arbitration may provide a subsidiary remedy in cases otherwise falling under the jurisdiction of ICSID when the private party has been indemnified by a public insurance scheme offered by its home State to which the investor's claim has been subrogated.[91] More generally speaking, ad hoc arbitration is desirable when claimants do not wish to resort to institutionalized arbitration and apply a fixed set of rules, but prefer to adopt procedural rules tailored to their specific needs.

Ad hoc arbitration has the advantage of offering a certain procedural flexibility, as it may take place according to existing rules, such as the UNCITRAL Arbitration Rules which are most widely used in ad hoc investment arbitration,[92] it may be conducted according to rules agreed upon by the parties to the dispute, or established by the arbitral tribunal in consultation with the parties. To give an example of the latter type of situation, in accordance with the ad hoc arbitration agreement between the US oil company Aminoil and Kuwait, the arbitral tribunal in the *Aminoil* case[93] adopted its own rules of procedure 'on the basis of natural justice and of such principles of trans-national arbitration procedure as it may find applicable'. Though this sometimes time-consuming practice has been applied less frequently in the more recent past, there are a few investment cases where arbitral tribunals had to establish their own rules of procedure.[94]

The parties may choose to designate the Secretary-General of ICSID as appointing authority and adopt procedural rules by reference to the ICSID Convention and its Rules and Regulations. Although in such a situation the Convention and, in particular, its provisions governing enforcement of arbitral awards do not apply, the actual arbitral process would largely resemble ICSID arbitration.[95] In contrast to ICSID arbitration, ad hoc arbitration lacks the support of an administrative organization and is equally deprived of a strong enforcement mechanism. Nonetheless, enforcement of awards rendered by ad hoc arbitration tribunals is greatly facilitated

[91] Cf Schreuer, above n 5 Art 25 at paras 232 and 239.

[92] See *Final Award in the Matter of an UNCITRAL Arbitration: Ronald S Lauder v The Czech Republic*, 3 September 2001, 14 *World Trade and Arbitration Materials* (2002), 35; *CME Czech Republic BV v The Czech Republic*, UNCITRAL Partial Award, 13 September 2001, 14 *World Trade and Arbitration Materials*, No. 3 (2002), 109; *CME Czech Republic BV v The Czech Republic*, UNCITRAL Final Award, 14 March 2003, available at <http://ita.law.uvic.ca/documents/CME-2003-Final_002.pdf>.

[93] *Award in the Matter of an Arbitration between Kuwait and the American Independent Oil Company (Aminoil)*, 24 March 1982, 21 ILM 976 (1982), 66 ILR 518 (1984).

[94] *Wintershall AG v Qatar*, Partial Award, 5 February 1988, Final Award, 31 May 1988, 28 ILM 795 (1989); *Eureko BV v Republic of Poland*, Partial Award, 19 August 2005, available at <http://ita.law.uvic.ca/documents/Eureko-PartialAwardandDissentingOpinion.pdf>.

[95] Cf Schreuer, above n 5 Art 25 at para 140.

by the application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[96]

A number of major investment disputes were settled through ad hoc arbitration in the past, among them the Libyan expropriation cases, *British Petroleum v Libya*,[97] *Liamco v Libya*,[98] *Texaco/Calasiatic v Libya*.[99] Also some of the older mixed arbitrations were conducted according to arbitral rules set up ad hoc, such as in the *Lena Goldfields* Arbitration,[100] *Saudi Arabia v Aramco*,[101] and the *Sapphire* case.[102] More recently, there appears to be a tendency by companies and States to increasingly include in their contracts a reference to the ICSID regime, rather than organize the settlement of future disputes on an ad hoc basis.

(4) Diplomatic Protection

As noted above, diplomatic protection is the traditional technique for settling international disputes originating from disagreements between States and private parties. In the past, a number of expropriation and compensation claims, which typically are core aspects of investment disputes, were settled by this method.

Diplomatic protection does not require any advance agreement between disputing parties and thus has the advantage of being an easily available method of resolving disputes involving State 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.[103] The only procedural preconditions under customary international law are the continuous nationality of the injured private party ('continuity of claims') and the exhaustion of local remedies.

[96] 330 UNTS 38, 7 ILM 1046 (1968).

[97] *British Petroleum v Libya*, 10 October 1973, 53 ILR (1979) 297–388.

[98] *Libyan American Oil Company (Liamco) v Libya*, 12 April 1977; 20 ILM (1981) 1–87.

[99] *Texaco Overseas Petroleum Company/California Asiatic (Calasiatic) Oil Company v Libya*, January 1977; 17 ILM (1978) at 1–37.

[100] *Lena Goldfields Company Ltd v Soviet Union*, 2 September 1930, 5 Ann Dig (1929–30) 1, 426; Cornell LQ 36 (1959) 42.

[101] *Saudi Arabia v Aramco*, 23 August 1958, 27 ILR 117.

[102] *Sapphire International Petroleums Ltd v National Iranian Oil Company*, 25 March 1963, 35 ILR 136.

[103] According to Art 1 para 1 of the ILC Draft Articles on Diplomatic Protection, 'diplomatic protection means action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State'. First Report on Diplomatic Protection by the Special Rapporteur, Mr John R. Dugard, UN Doc A/CN.4/506, 2000.

International law conceives of 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, that is, to take up the individual's claims as their own. It is, however, possible, albeit rare, that national laws 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 exercise the right of diplomatic protection may depend upon various political considerations and thus, ultimately, remains unpredictable. Further, States always have the possibility of waiving 'espoused' claims as a whole or in part. In the seminal *Barcelona Traction* case,[104] the International Court of Justice characterized diplomatic protection in the following terms:

> ...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.[105]

The Court continued by stating that:

> The 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.[106]

In case of widespread expropriations, for example, where 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. Sometimes home States will set up national claims commissions, such as the US Foreign Claims Settlement Commission, with the express task of adjudicating individual claims.[107]

States are relatively free in their choice of means when exercising diplomatic protection. They may avail themselves of any lawful, but unfriendly measures (such as retorting or retaliation). They may also adopt certain otherwise wrongful measures as long as they may be justified as proportionate reprisals or countermeasures.

[104] *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, (New Application 1962), ICJ Reports 1970 at 3–357.

[105] Ibid, at para 78.

[106] Ibid, at para 79.

[107] See Richard B Lillich, *International Claims: Their Adjudication by National Commissions* (Syracuse, NY, Syracuse University Press, 1962) at 5–15.

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[108] which restricted the means available for the exercise of diplomatic protection on behalf of loan creditors *vis-à-vis* debtor States.

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 initiated arbitration under the Convention. Article 27 of the ICSID Convention provides:

> (1) 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.
> (2) 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.

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,[109] a private party retains its option to ask for diplomatic protection even where it could already demand arbitration.[110] Further, even in situations covered by Article 27 of the ICSID Convention, the right to exercise diplomatic protection will revive if the host State fails to comply with an ICSID award.

(5) International Courts and Tribunals

The fact that investment disputes are normally of a 'mixed character', that is, they involve a State and a private party, does not altogether exclude the possibility that they may either successively or concurrently turn into international disputes of an inter-State character. For instance, 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. In such a situation, the two States are in general free to

[108] Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, 2 AJIL Supp (1908) at 81–5.
[109] See Schreuer, ch 21 below.
[110] See also Schreuer, above n 5 Art 27 at para 28.

use any peaceful means of dispute settlement. 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's conduct does not only affect the private investor's legal position but may be characterized as a breach of international law. This is regularly the case with regard to bilateral 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.

It should be recalled that, in any event, before resorting to arbitration or judicial settlement of disputes, 'the continuance of which is likely to endanger the maintenance of international peace and security', Article 33 paragraph 1 of the United Nations Charter offers States a series of alternatives, such as negotiation, enquiry, mediation and conciliation. In addition, States can also resort to 'regional agencies or arrangements, or other peaceful means of their own choice'. Aside from these peaceful and non-binding arrangements, if States opt for the arbitral solution for the settlement of their disputes relating to investment issues, three main possible fora should be considered.

(a) The International Court of Justice

Among the permanently established international tribunals, the International Court of Justice is undoubtedly the most prominent option for settling investment disputes between States. While the Court's competence *ratione personae* is expressly limited to States which have accepted its jurisdiction,[111] its jurisdiction *ratione materiae* is very widely drawn to encompass any legal dispute over:

> (a) the interpretation of a treaty;
> (b) any question of international law;
> (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
> (d) the nature or extent of the reparation to be made for the breach of an international obligation.'[112]

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).[113] Many of these actions, however, did not reach the merits because the claimant States failed to overcome jurisdictional hurdles. The *Anglo-Iranian*

[111] Art 34 para 1 Statute of the International Court of Justice.
[112] Art 36 para 2 Statute of the International Court of Justice.
[113] Eg *Oscar Chinn Case* (*UK v Belgium*), 12 December 1934, PCIJ Ser. A/B, No. 63 (1934); *Factory at Chorzów* (*Germany v Poland*), 15 May 1926, PCIJ Ser A, No. 7 (1926); *Mavrommatis Palestine Concessions Case* (*Greece v UK*), 26 March 1925, PCIJ Ser A, No. 5 (1925).

Oil Co case[114] 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 from 1932 by which Iran had accepted the Court's jurisdiction according to Article 36 paragraph 2 of the PCIJ Statute.[115] In a majority opinion, the ICJ held that this acceptance did not extend over disputes arising under treaties which had entered into force before the declaration was made. Since the treaties invoked by the UK dated from 1857 and 1903, the Court held that it had no jurisdiction.

The best-known investment dispute ever brought before the ICJ is the *Barcelona Traction* case,[116] where the Court held that Belgium could not institute 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. The dispute concerned the issue whether certain measures by Spanish authorities in the context of insolvency proceedings constituted expropriation. The Court, however, did not deal with this question 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.[117]

The Court also accepted that some States require that a company has its actual seat (*siège social*) or management or centre of control within their territories or national ownership in order to exercise diplomatic protection. However, the *Barcelona Traction* judgment rejected ownership or control as sole connecting factors entitling a State to exercise diplomatic protection.

The *Elettronica Sicula* case[118] is the most recent example of an investment dispute brought before the ICJ as the ultimate form of exercising diplomatic protection on

[114] *Anglo-Iranian Oil Co Case* (*UK v Iran*), Judgment (Preliminary Objections), ICJ Reports 1952 at 93–171.

[115] This provision is identically worded to its successor instrument, the Statute of the International Court of Justice. Art 36 para 2 provides: 'The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes …'.

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

[117] ICJ Reports 1970 at 42.

[118] *Case concerning Elettronica Sicula SpA. (ELSI)* (*United States of America v Italy*), ICJ Reports 1989 at 15–121.

behalf of an investor. In that case, the USA espoused the claim of two US corporations which together owned 100 per cent of the shares of the Italian company Elettronica Sicula (ELSI). The USA argued that a number of judicial and administrative measures taken in connection with insolvency proceedings before Italian courts had effectively deprived the US companies of their property in violation of a bilateral 1948 US–Italian Treaty of Friendship, Commerce, and Navigation (FCN Treaty). In this case, the USA 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.[119]

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

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 according to Article 64 of the Convention. No such case has been brought to the ICJ yet.[120]

(b) Iran–US Claims Tribunal

In the past, States have repeatedly resorted to quasi-institutionalized and semi-permanent arbitration by setting up bilateral 'Mixed Claims Commissions' to adjudicate claims by nationals of one State against the other State. The most innovative and recent example in this tradition is provided by the Iran–US Claims Tribunal, with its seat in The Hague, established by the so-called Algiers Accord in 1981[121] 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. During its over 20 years of existence, the Iran–US Claims Tribunal has considered around 4,000 cases and issued decisions in the field of, *inter alia*, expropriation and other measures affecting property rights, compensation, valuation, etc. Its decisions are public and thus represent major judicial authorities on some of the most

[119] ICJ Report 1989 at 46.

[120] Schreuer, above n 5 Art 41 at para 8.

[121] Claims Settlement Declaration of Algiers, 19 January 1981, 20 ILM 223 (1981).

important issues in investment arbitration. The Tribunal's rules of procedure are based on a variation of the UNCITRAL Rules, modified and adapted to the type of complex and large cases the Tribunal typically handles. The Tribunal's jurisdiction covers three categories of cases:

- claims by nationals against either State and related counter-claims;
- claims by the State parties against each other arising out of contractual arrangements between them for the purchase and sale of services, and
- cases concerning the interpretation and performance of the obligations set forth in the General Declaration or the Algiers Accords.

Perhaps one of the most interesting aspects of the procedure of the Iran–US Claims Tribunal for the purposes of the present chapter concerns the provisions of the Algiers Declaration regarding the applicable law. Article V of the Declaration reveals clearly the 'mixed nature' of the Tribunal, when it stipulates that:

> The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

(c) Inter-State Investment Arbitration

With the growth of opportunities for investors to bring disputes with host States directly before arbitral panels, resort to inter-State arbitration as the ultimate remedy in the exercise of diplomatic protection has become less frequent. The early 20th century witnessed, however, a number of investment disputes which were settled through inter-State arbitration as a result of investors' claims being 'espoused' by their home States. A well-known case is the *Norwegian Shipowners' Claims*[122] dispute which was triggered by a 1917 US wartime requisition order, allegedly constituting an expropriation of foreign property rights. It was ultimately adjudicated by an inter-State arbitral tribunal after Norway had taken up the cause of its nationals. 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.[123]

[122] *Norwegian Shipowners' Claims (Norway v US)*, 13 October 1922, 1 RIAA (1948) at 307–46.
[123] *Martini Case (Italy v Venezuela)*, 3 May 1930, 2 RIAA (1949) at 974–1008.

Concluding Remarks

Although ICSID arbitration has become the predominant method of settling investment disputes between investors and host States over the last decade, it clearly is not the exclusive one. Various other forms of mixed arbitration, as regularly provided for in many BITs, are equally used in order to arrive at binding third-party dispute settlement. The increased arbitral practice under the NAFTA, often leading to proceedings conducted pursuant to either the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules, bears witness to this development. The UNCITRAL Rules have also been applied with increased frequency in a number of recent ad hoc as well as institutionally supported arbitrations under the auspices of the PCA, the LCIA, the Stockholm Chamber of Commerce, and other arbitration institutions.

The alternatives to mixed dispute settlement by arbitration, such as recourse to diplomatic protection, including the institution of proceedings before the ICJ or other inter-State courts or arbitral tribunals, are less often used in recent practice. However, it can be argued that a special form of the exercise of diplomatic protection has ultimately led to the establishment of the Iran–US Claims Tribunal which has produced a vast body of case-law, much of which is highly relevant to investment law.

In general, arbitral awards in investment disputes are complied with. Nevertheless, parties sometimes try to challenge awards, mostly by seeking their annulment in the national courts of the place of the arbitration. Though most of these attempts have remained unsuccessful, the rising tendency of resorting to national courts which can be witnessed in non-ICSID arbitrations demonstrates that ICSID may be a preferable and more efficient solution to the settlement of investment disputes to the extent that it provides a 'closed' system depriving national courts of their supervisory functions and reserving any control power to an ICSID annulment procedure. Although the increase of ICSID proceedings has also led to more frequent attempts to have ICSID awards annulled, it seems that this option has not so far been used excessively.

It is unquestionable that—with the significant growth experienced by investment arbitration over the last two decades—a number of inconsistent and partially conflicting decisions have been produced. Nonetheless, there is reason to believe that in the long run the growing body of arbitral awards in this field will contribute to the progressive formation and harmonisation of investment law.

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CHAPTER 19

PROCEDURAL TRANSPARENCY

JOACHIM DELANEY
DANIEL BARSTOW MAGRAW*

(1) **Background** 725
(a) History: Increasing Use of Arbitration in Investment Disputes 725
(i) State-to-State 726
(ii) Investor-to-State: Arising under International Investment Treaties (IITS) 727
(iii) Investor-to-State: Arising under Host-Government Agreements (HGAs) 728
(b) The Arbitral Process in Investment Arbitrations 728
(c) The Arbitral Rules and Institutions Available in Investment Arbitrations 730
(i) International Centre for Settlement of Investment Disputes (ICSID) 731
(ii) ICSID Additional Facility 734
(iii) United Nations Commission on International Trade Law (UNCITRAL) 735
(iv) International Chamber of Commerce (ICC) 739
(v) London Court of International Arbitration (LCIA) 740
(d) The NAFTA Response 741
(i) Standardized Registration of Claims 742
(ii) Access to Proceedings 743
(iii) Ability to Provide Input to the Tribunal 746
(iv) Access to Awards 750
(v) Conclusions 750

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