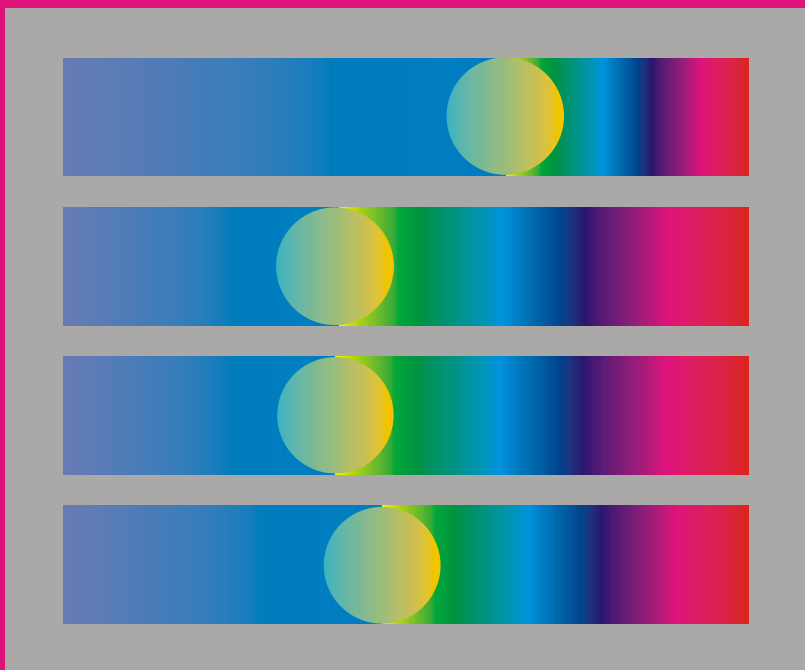


UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

DISPUTE SETTLEMENT: INVESTOR-STATE

UNCTAD Series
on issues in international investment agreements



UNITED NATIONS

NOTE

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

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

The following symbols have been used in the tables:

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

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

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

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

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

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

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

The material contained in this study may be freely quoted provided appropriate acknowledgement is made.

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IIA Issues Paper Series

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

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Preface

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

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

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

Geneva, May 2003

Rubens Ricupero
Secretary-General of UNCTAD

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

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

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

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

Table of contents

	Page
Preface.....	iv
Acknowledgements.....	v
Executive summary.....	1
INTRODUCTION.....	5
I. EXPLANATION OF THE ISSUE	11
II. STOCKTAKING AND ANALYSIS	23
A. Encouragement of informal, negotiated settlement.....	23
B. Venue	26
1. National dispute settlement in the host country	26
2. International dispute settlement	34
a. <i>Ad hoc</i> dispute settlement.....	34
b. Institutional dispute settlement.....	35
c. Choice of venue clauses	37
C. Determination of procedural issues.....	44
1. Procedure for the initiation of a claim	45
2. Establishment and composition of the arbitral tribunal	46
a. Admissibility <i>ratione materiae</i>	48
b. Admissibility <i>ratione personae</i>	51
c. Admissibility <i>ratione temporis</i>	54
4. Applicable law	54
a. Applicable procedural law.....	55
b. Applicable substantive law	55
5. Finality of awards	58
6. Enforcement of awards	62
7. Costs	64

**III. INTERACTION WITH OTHER ISSUES
AND CONCEPTS 69**

**CONCLUSION: ECONOMIC AND DEVELOPMENT
IMPLICATIONS AND POLICY OPTIONS 79**

A.	No reference to investor-State dispute settlement in an agreement	80
B.	Reference to investor-State dispute settlement in an agreement	81
1.	Choice of venue	81
2.	Choice of procedure and procedural rules	86
a.	Choice of dispute-settlement method	86
b.	Procedure for initiating a claim	86
c.	Establishment and composition of the arbitral tribunal.....	87
d.	Admissibility	88
e.	Applicable law.....	89
f.	Finality of awards.....	89
g.	Enforcement of awards.....	90
h.	Costs	91

References 95

**Selected UNCTAD publications on transnational
corporations and foreign direct investment..... 105**

Questionnaire 123

Table

1.	Interaction across issues and concepts	69
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Executive summary

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

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

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