UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

DISPUTE SETTLEMENT

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

2.2 Selecting the Appropriate Forum

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NOTE

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

This module has been prepared by Mr. August Reinisch at the request of the United Nations Conference on Trade and Development (UNCTAD).The views and opinions expressed in this module are those of the author and not necessarily those of the United Nations, WTO, WIPO, ICSID, UNCITRAL or the Advisory Centre on WTO Law.

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OVERVIEW

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

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

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

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

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

OBJECTIVES

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

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

INTRODUCTION

Proliferation of dispute settlement mechanisms

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

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

Imprecise dispute settlement provisions

Unfortunately, States are often deliberately vague in consenting to dispute settlement. It is thus quite common that national investment legislation or bilateral investment treaties (BITs), through which States can make a valid offer to consent to ICSID arbitration under Art. 25 of the ICSID Convention[1], contemplate domestic courts, International Chamber of Commerce (ICC)[2], the United Nations Commission on International Trade Law (UNCITRAL)[3] or ad hoc arbitration as alternatives to ICSID disputes settlement without making a clear choice.

Alternative dispute settlement in BITs

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

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

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[1] *See Module 2.3 on Consent to Arbitration.*
[2] *International Chamber of Commerce.*
[3] *United Nations Commission on International Trade Law.*

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

Importance of an express choice-of-forum selection

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

Summary:

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

1. SPECIAL NATURE OF INVESTMENT DISPUTES

Mixed nature of investment disputes involving States and private parties

While commercial disputes between private parties are usually settled before national courts or arbitral panels, disputes of an economic character between States may fall under the jurisdiction of the International Court of Justice or other (specialized or regional) judicial dispute settlement systems. In the past, mixed disputes, i.e. disputes between States and private parties, in particular those relating to investments, were mostly settled either before national courts or through ad hoc arbitration[4] both of which have serious disadvantages. For such disputes no appropriate forum seemed to be generally available.

Purpose of ICSID

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

Different forums for investment disputes

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

Summary:

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