Investment Disputes

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A. Concept

1. Definition

1 In the context of international law, investment disputes arise from investments made by foreigners, ie nationals of States other than the host State (→ *Investments, International Protection*). A dispute is 'a disagreement on a point of law or fact, a conflict of legal views or interests between parties' (*Case concerning East Timor [Portugal v Australia]* [1995] ICJ Rep 89, 99) or a 'present divergence of interests and opposition of legal views' (*Texaco Overseas Petroleum Company and California Asiatic Oil Company v Libyan Arab Republic [Preliminary Award]* 53 ILR 389, 416; → *Peaceful Settlement of International Disputes*).

2. Parties to Dispute

2 In public international law, the parties to an investment dispute are either two States or the host State and the foreign investor. Disputes between private parties arising from investments are not discussed here.

3 Under the traditional system of → *diplomatic protection* the investor's State of → *nationality* would espouse the claim of its national and pursue it in its own name on the international plane against the host State. This system carries serious disadvantages for the protected investor. Diplomatic protection is discretionary, ie the investor has no right to it. Under international law the investor's State of nationality may refuse to pursue the claim or may abandon it at any stage. In addition, diplomatic protection requires the exhaustion of local remedies in the host State (→ *Local Remedies, Exhaustion of*). Diplomatic protection on behalf of investors also carries important disadvantages for the States concerned. It can constitute a serious strain on their relations. Developing countries in particular resent pressure from capital exporting countries whether it is exercised bilaterally or in multilateral forums.

4 Nowadays, investors often have direct access to international methods of dispute settlement, thus obviating the need for diplomatic protection. This improves the investor's legal position and contributes to a good investment climate in the host State. At the same time investment disputes are depoliticized and removed as a potential irritant from the relations between the States concerned.

5 In the vast majority of contemporary investment disputes the investor has party status and access to a direct remedy. This party status may be based on a contractual arrangement between the investor and the host State (→ *Contracts between States and Foreign Private Law Persons*), on a treaty between the investor's State of nationality and the host State, or on a national investment code (→ *Investment Codes*). Therefore, most of the recent investment disputes are mixed, involving a State on one side and a foreign investor on the other. The → *International Centre for Settlement of Investment Disputes (ICSID)* based on a multilateral treaty provides a detailed institutional and procedural framework for the settlement of these disputes.

6 In some cases it is not the State as such that deals with a foreign investor but a territorial subdivision such as a province or municipality or a State-controlled entity. Under the rules of → *State responsibility*, acts of these entities will usually be attributed to the State. Alternatively, the subdivision or entity may receive party status in investment disputes. Art. 25 (1) and (3) Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention') provides for the possibility that a constituent subdivision or agency of the host State may become a party to proceedings.

B. Subject-Matter of Disputes

7 The subject-matter of investment disputes has shifted somewhat over time. The classical issue in investment disputes is expropriation and the resulting duty of the expropriating State to pay → *compensation* (→ *Property, Right to, International Protection*). The international minimum standard for the treatment of foreigners under → *customary international law* also provides an important normative test.

8 More recently, additional standards of treatment have gained in importance. These are mostly contained in treaties, especially in bilateral investment treaties ('BITs'; → *Investments, Bilateral Treaties*). Some multilateral treaties such as the → *North American Free Trade Agreement (1992)* ('NAFTA') and the Energy Charter Treaty also contain these standards. These standards include fair and equitable treatment, full protection and security, protection against arbitrary and discriminatory treatment, national treatment and most favoured nation ('MFN') treatment (→ *Most-Favoured-Nation Clause*; → *National Treatment, Principle*).

9 The general trend is away from successful claims concerning expropriation and towards claims concerning these treaty standards. The reason is twofold. First, direct and explicit expropriations have become rare since most States try not to be associated with such drastic measures. Although the existence of indirect expropriations and of measures tantamount to expropriations is recognized in principle, it is often difficult for claimants to prove the expropriatory nature of measures affecting their investments. Second, the right of States to exercise regulatory powers in the public interest is increasingly recognized even where this right affects assets of foreign investors. As a consequence, claims based on alleged expropriation have become less promising than, for instance, claims arguing a violation of the fair and equitable treatment standard (see also → *Equity in International Law*).

10 Arbitral practice has adopted a differentiation between treaty claims and contract claims. The issue has arisen in cases where the investment is governed by a contract between the investor and the host State or one of its entities and there is also a treaty, most often a BIT, protecting the investment. Not infrequently, the contract contains a domestic forum selection clause while the treaty offers international investment → *arbitration*. International tribunals have held in a number of cases that they have jurisdiction for claims based on treaty breaches while disputes based on contract would have to be brought before the domestic court or tribunal (→ *International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications*).

11 Some treaties contain so-called *umbrella clauses*. These contain an undertaking by the States to observe any obligation they may have entered into with regard to investments in relation to protected investors. The meaning of these clauses is disputed. One view is that they put undertakings in contracts between the State and the investor under the treaty's protection. This would mean that the breach of a contract amounts to a breach of the treaty containing the umbrella clause. Another view rejects this interpretation as too far-reaching. Arbitral practice on umbrella clauses is sharply divided.

C. Methods of Dispute Settlement

1. Inter-State Disputes

12 Where the investor's State of nationality decides to exercise diplomatic protection, the primary method of dispute settlement is → *negotiation*. If negotiations prove fruitless, the protecting State may resort to international adjudication, including the → *International Court of Justice (ICJ)*. Examples of cases, involving the protection of investors, brought to

the ICJ are the → *Barcelona Traction Case* and the → *Elettronica Sicula Case*. Alternatively, diplomatic protection may lead to arbitration between the two States as exemplified by the → *Martini Case*.

13 The right to exercise diplomatic protection may be curtailed by treaty provisions. Art. 27 (1) ICSID Convention provides that, where consent to arbitration under the convention exists, a contracting State may not give diplomatic protection or bring an international claim. However under Art. 27 (2) ICSID Convention this does not exclude informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

14 Art. 64 ICSID Convention provides that a dispute between parties to the convention concerning its interpretation or application is to be referred to the ICJ unless it can be settled by negotiation or the States concerned agree on another method of settlement (→ *Interpretation in International Law*; → *Judicial Settlement of International Disputes*). The context of this provision and its drafting history make it clear that this procedure is not to be used to interfere in investor—State dispute settlement proceedings.

2. Investor—State Disputes

(a) Action in National Courts

(i) Courts of the Host State

15 Action in the domestic courts of the host State is the traditional way in which investment claims are pursued, at least initially. But the host State's courts are usually seen as an unattractive option by foreign investors. Actual or perceived partiality in favour of the forum State and lack of expertise in the field of investment law are the main arguments against the use of these courts to settle international investment disputes.

16 Art. 26 ICSID Convention provides that consent to investor—State arbitration under the convention will exclude other remedies unless otherwise stated. This covers action in domestic courts. However, a contractual forum selection clause pointing to domestic courts will override the convention's exclusivity.

17 Treaties, especially BITs, offering consent to investor—State arbitration sometimes also refer to action in domestic courts. Some treaties contain *fork in the road* clauses. Under these clauses the investor must choose between the pursuit of its claims in the host State's domestic courts or international arbitration; once made the choice is final. In actual practice, the relevance of clauses of this kind has been minimal. Typically, the causes of action in proceedings before domestic courts and before international tribunals are different. Therefore tribunals have held that the actions before domestic courts concerned different disputes.

18 Other treaties sometimes require that, before investor—State arbitration may be initiated, the claim must be pursued before the host State's domestic courts for a certain period of time, typically 18 months. Clauses of this kind are not helpful since the settlement of a complex investment dispute in a court system offering several tiers of appeal is not realistic in that timeframe. In a number of cases investors were able to avoid the application of clauses of this kind by invoking a MFN clause (→ *Maffezini v Spain Case*).

19 Traditional international law requires the exhaustion of remedies in the local courts before a claim may be presented on the international plane. Art. 26 ICSID Convention indicates that the exhaustion of local remedies is not required, as a rule, before investor—State arbitration may be initiated. States may condition their consent to arbitration on the prior exhaustion of local remedies; in practice this is hardly ever done. BITs and other treaties providing for investor—State arbitration have been interpreted as not requiring the exhaustion of local remedies in non-ICSID arbitration either.

(ii) Courts of Other States

20 Courts of States other than the host State are rarely chosen for the settlement of investment disputes. Exceptionally this is done in loan contracts. The biggest obstacle to using these courts would be → *State immunity*. The host State's actions affecting the investor are likely to be of a sovereign nature (→ *Sovereignty*). Therefore, even in countries following the practice of restrictive immunity, most of these actions would qualify as *acta iure imperii* (sovereign or public acts) or non-commercial activities and would hence be immune. A → *waiver* of immunity on the part of the host State, while possible, would be difficult to obtain. In addition, the application of the → *act of State doctrine* may constitute a serious obstacle to bringing investment disputes to the domestic courts of third States.

(b) Arbitration

21 The shortcomings and gaps left by the other methods have made arbitration between the investor and the host State the preferred method of settlement in investment disputes. Arbitration provides a depoliticized international forum that is independent of the host State's judicial system. It may be initiated by the investor regardless of any political decision of its State of nationality. Other advantages include the parties' freedom to choose arbitrators who have expertise in the field and the relative cost effectiveness of the process.

(i) Consent to Arbitration

22 Investment arbitration, like all arbitration, is based on an agreement between the parties. In practice, consent is given in one of three ways. One is a consent clause in a contract between the investor and the host State. Another method to give consent is through a treaty between the host State and the investor's State of nationality. Most BITs and a number of regional multilateral treaties such as NAFTA and the Energy Charter Treaty—but not the ICSID Convention—contain offers of consent to arbitration by the States parties to the treaties to the nationals of the other States parties to the treaties. The treaty is not the arbitration agreement but merely offers arbitration to eligible nationals. The consent agreement is perfected through the acceptance of the offer by the investor. The third method to give consent is through a provision in the host State's legislation. Such a provision offers arbitration to investors who must accept the offer in order to perfect consent. The acceptance may be made simply by instituting proceedings. In practice, consent given on the basis of a treaty is the most frequently used method.

23 Once perfected, a consent agreement is binding and may not be revoked unilaterally (→ *Unilateral Acts of States in International Law*). A mere offer of consent may be withdrawn until it has been accepted. Therefore, it may be wise for the investor to accept the offer by making a reciprocal declaration of consent (→ *Reciprocity*). This applies, in particular, to offers contained in legislation which may be repealed at any time. Acceptance may be perfected by a simple letter addressed to the State. Once the consent agreement has been perfected it has an independent contractual existence even if the treaty or legislation underlying it has been terminated.

24 Consent to arbitration may be broad and general or may be limited to certain categories of disputes. Consent clauses in contracts with States typically refer to disputes under the respective agreements. Offers of consent contained in BITs are usually broad and refer to any legal dispute concerning an investment. At times consent may be restricted to disputes concerning alleged violations of the treaty. Some BITs circumscribe consent narrowly, limiting it to the amount of compensation in the case of an expropriation. Offers of consent in national legislation may also be limited in a number of ways.

25 Offers of consent to arbitration contained in treaties are sometimes subject to certain procedural conditions. A requirement to exhaust local remedies in the host State is rarely imposed as a condition for arbitration. A common requirement is an attempt to reach an amicable settlement through consultations or negotiations for a certain period of time, often for six months (→ *Consultation*). Another condition, contained in some BITs, is an attempt, for a certain period of time, to obtain redress in the host State's domestic courts.

(ii) Nationality of the Investor

26 The nationality of the investor is important for several purposes. In order to benefit from a treaty of the host State offering consent to arbitration the investor must have the nationality of a State that is a party to the treaty. In the case of a BIT, the nationals of one State party to the treaty will enjoy its benefits, including the offer of arbitration, vis-à-vis the other State party. In the case of a multilateral treaty the host State as well as the State of the investor's nationality must be parties to the treaty. Another relevant aspect of nationality is that an investor wishing to institute ICSID arbitration must have the nationality of a State that is a party to the ICSID Convention. In addition, it must not have the nationality of the host State.

27 An individual's nationality is determined by the law of the State whose nationality is claimed. An investment tribunal need not unquestioningly accept a passport or certificate of nationality as proof of nationality (→ *Passports*). A claimant may have lost his nationality without the knowledge of the respective State's authorities. Also, it is doubtful whether a nationality of convenience without a genuine link will be accepted (→ *Nottebohm Case*). The statement of a nationality in an agreement between the investor and the host State will create a presumption as to the existence of that nationality but cannot establish a nationality that does not exist objectively.

28 For juridical persons the decisive criterion to determine nationality is the place of incorporation or registration (see also → *Corporations in International Law*). The place of the *siège social* (corporation's seat) may also be relevant to

determine its nationality. Control of the company, for instance through majority ownership, is relevant only in exceptional circumstances. This would be the case if the relevant treaty requires effective control over the corporation by nationals of the State whose nationality is claimed or a genuine economic activity in that State.

29 Nationality planning through the establishment of a corporation in a State that has favourable treaty relations with the host State is possible and accepted, in principle. Some States counteract practices of this kind through so-called *denial of benefits clauses* such as Art. 17 (1) Energy Charter Treaty. Under such a clause the States reserve the right to deny the benefits of the treaty to a company that does not have an economic connection to the State on whose nationality it relies. The economic connection would consist in control by nationals of the State of nationality or in substantial business activities in that State.

30 Under Art. 25 (2) (b) ICSID Convention even a company registered in the host State may enjoy the status of a foreign investor and hence access to international arbitration. This is the case where the parties have agreed to treat the local company as a foreign investor because of its foreign control. The agreement to treat the local company as a foreign investor may be made implicitly by inserting an ICSID clause in a contract with that company. But the requirement of foreign control is an objective one and cannot be replaced by an agreement. A complicating factor is the complex nature of foreign control; ownership, including majority ownership, is not necessarily the only decisive factor.

31 The nationality of corporate investors has somewhat lost in importance through the generous granting of standing to shareholders. Arbitral practice on this point is extensive and uniform. The recent practice in this regard represents a certain departure from the principles set out in the *Barcelona Traction Case*. Most investment treaties include shareholding or participation in companies in their definitions of *investment*. In this way, it is not the company that is seen as the investor but the shareholder whose participation in the company becomes the investment. The foreign shareholder may then pursue claims for adverse action by the host State that affects the company's value and profitability. This practice is particularly relevant where the company is incorporated in the host State. But the same technique has been employed where the affected company was incorporated not in the host State but in a third State. The claimant need not control the company; minority shareholders too have been accepted as claimants. Therefore, even if the affected company does not meet the nationality requirements under the relevant treaty, there will be a remedy if the shareholder does.

(iii) Existence of an Investment

32 The existence of an investment is a jurisdictional requirement in international investment arbitration. Consent to jurisdiction is typically restricted to investment disputes. The treaties offering consent to jurisdiction, especially BITs, typically contain very broad definitions of the term *investment*. These definitions include tangible and intangible property, participation in companies, a claim to money or a claim to performance, intellectual property as well as rights conferred by law or contract (→ *Industrial Property, International Protection*; → *Intellectual Property, International Protection*). Art. 1139 NAFTA and Art. 1 (6) Energy Charter Treaty also contain broad definitions.

33 Art. 25 (1) ICSID Convention requires the existence of a dispute arising directly out of an investment as a jurisdictional requirement but does not offer a definition of the term *investment*. Tribunals have identified a number of typical elements to determine the existence of an investment. These include a substantial contribution, certain duration, an element of risk and significance for the host State's development. In arbitrations under the ICSID Convention pursuant to consent offered in a BIT the tribunals have to verify the existence of an investment under both documents. Tribunals have emphasized the unity of the overall investment operation. What matters is not so much ownership of specific assets but rather the combination of rights that is necessary for the economic activity. An investment is typically a complex operation composed of a number of elements each of which on its own may not qualify as an investment.

34 In arbitral practice a large variety of activities have been accepted as investments. In addition to classical investment activities such as extraction of natural resources and the setting up of production facilities, these include infrastructure projects, hotel projects, banking, construction contracts, pre-shipment inspection services as well as loans, bonds and other financial instruments.

35 Shareholding is an important form of investment. Shareholder protection, including minority shareholding, is not restricted to ownership in the shares. It extends to the assets of the company; adverse action by the host State in violation of treaty guarantees affecting the company's value and profitability gives rise to rights of the shareholders.

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In some cases the existence of an investment was denied. These concerned preparatory activities prior to the signing of a binding contract, supply contracts for the sale of goods, and activities that did not serve the host State's economic development.

(iv) Applicable Law

37 International arbitration is governed by procedural and substantive rules. Procedure is governed by the parties' arbitration agreement which usually adopts an existing standard procedure. In the case of ICSID arbitration this would be the convention and the rules and regulations adopted under it. Similar considerations apply to matters of jurisdiction which are governed by the instruments expressing consent.

38 The law applicable to the substance of an investment dispute displays some complexities. Many cases involve issues of national law, usually the host State's law, as well as international law (→ *International Law and Domestic [Municipal] Law*). The parties are free to agree on a choice of law that selects either domestic law or international law or both. Art. 42 (1) ICSID Convention provides that an agreement of the parties on choice of law shall govern; in the absence of such an agreement the tribunal is to apply host State law and applicable rules of international law. The selection of the law of the investor's home State or the law of a third State would be unusual. Exceptionally this is done for loan contracts.

39 Some treaties providing for investment arbitration—including the NAFTA in Art. 1131 (1) and the Energy Charter Treaty in Art. 26 (6)—only foresee the application of international law. Some BITs contain choice of law clauses that refer to the BIT itself, to other applicable treaties, to international law in general, to host State law and to special agreements relating to the investment.

40 Stabilization clauses in agreements between the host State and the investor seek to protect the investor from subsequent changes of the local law. They do not prevent changes to the local law but merely shield the investor against adverse consequences of such changes. Stabilization clauses may be restricted to certain areas of the law such as taxation (→ *Double Taxation*; → *Taxation, International*).

41 Where international law is applicable this covers all → *sources of international law*. Tribunals have applied treaties, customary international law and → *general principles of law*. In addition they have relied on previous judicial decisions and on academic writings.

42 The relationship of international law and domestic law has given rise to some difficulties. ICSID tribunals have described the role of international law in relation to domestic law as corrective and supplemental: in the case of a conflict between the two systems of law international law would prevail; at the same time international law would serve to close gaps in the domestic law.

43 The parties to a dispute may authorize the tribunal to decide → *ex aequo et bono* (on the basis of equity rather than law). Agreements to this effect are rare. In the absence of such an agreement, the tribunal is bound to apply law and may not decide on the basis of equitable principles.

44 A failure to apply the proper law would constitute an excess of powers which is a reason for the annulment of an award (→ *Judicial and Arbitral Decisions, Validity and Nullity*). Tribunals have drawn a distinction between a mere error in the application of the proper law and non-application of the proper law. Only the latter would constitute an excess of powers.

(v) Institutional and Procedural Framework

45 Investor—State arbitration may take place under various institutional and procedural frameworks. Arbitration that is not supported by any of the available arbitral institutions is termed ad hoc arbitration. Even in ad hoc arbitration the parties typically adopt an existing set of rules such as the Arbitration Rules of the → *United Nations Commission on International Trade Law (UNCITRAL)*.

46 Of the various arbitration institutions ICSID is most widely used in investment arbitration. ICSID is specialized in the settlement of disputes between States and foreign investors. It was established by the ICSID Convention of 1965. ICSID offers not only detailed procedural rules but also organizational support. Its proceedings are self-contained and operate independently of domestic courts. It is available for the settlement of investment disputes between States that are parties to the ICSID Convention and foreign investors who are nationals of States that are parties to the ICSID Convention. In addition, both parties to a dispute must have given their consent to ICSID's jurisdiction (Art. 25 (1) ICSID Convention).

47 The Additional Facility was established in 1978 in the framework of ICSID to provide a framework for the settlement of certain disputes that do not meet all jurisdictional requirements under the ICSID Convention. This would be the case if only one of the two relevant States—the host State or the investor's home State—is a party to the ICSID Convention. The use of the Additional Facility in situations of this kind is fairly frequent especially in the framework of the NAFTA. In addition, the Additional Facility would be available where the dispute does not arise directly from an investment or for fact-finding proceedings. The Additional Facility also requires a consent agreement between the parties to the dispute. Additional Facility proceedings are outside the jurisdiction of ICSID and the convention does not apply to them.

48 Other institutions that provide support in investment arbitration are the → *International Chamber of Commerce (ICC)*, the → *Permanent Court of Arbitration (PCA)*, the London Court of International Arbitration and the Arbitration Institute of the Stockholm Chamber of Commerce. These institutions are not specialized in investment disputes but they do not exclude them from their range of activities.

49 Arbitral awards are final and binding. Non-ICSID awards in investment disputes are subject to the same procedures for enforcement as awards in commercial arbitration (→ *Commercial Arbitration, International*). This means that in most cases the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards will be applicable (→ *Recognition and Enforcement of Foreign Arbitral Awards*). ICSID awards are subject to a special enforcement procedure under the convention (Art. 54 ICSID Convention). Under this provision, awards rendered by ICSID tribunals are enforceable in all States parties to the convention like final judgments of courts of these States.

50 Awards are not subject to any appeal. Non-ICSID awards are subject to any setting aside procedures that may be available under the arbitration law of the country where the tribunal had its seat. Under Art. 52 ICSID Convention there is the possibility to seek the annulment of an award by an ad hoc committee for a number of exhaustively listed grounds. Both types of procedures have been used in a number of cases.

(c) Conciliation

51 Another method to settle investment disputes is → *conciliation*. Unlike arbitration, it does not lead to a binding award but results in a proposal that is subject to adoption by the parties. The ICSID Convention treats conciliation as a method of dispute settlement that is equivalent to arbitration. Art. 25 ICSID Convention dealing with jurisdiction covers both methods of dispute settlement. Some submissions to ICSID's jurisdiction do not differentiate between the two methods. Undifferentiated submission clauses of this kind leave the choice to the party instituting proceedings.

52 In practice, conciliation has been used sparingly for the settlement of investment disputes. The vast majority of cases involved arbitration rather than conciliation. This choice reflects the belief of claimants that a non-binding proposal is less likely to bring an end to the dispute than an arbitral award.

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