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Investor-State Disputes and Alternative Dispute Resolution

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## 1. **Introduction**

Arbitration under bilateral investment treaties (BITs) and free trade agreements (FTAs) is the main modern mechanism for resolving investor-state disputes. It has a number of advantages compared with previous methods that relied on the intervention of the investor's home state or recourse to national courts. However, in recent years, concerns have been raised about the appropriateness of arbitration in light of the public policy issues involved in investment disputes.

This paper evaluates various methods of alternative dispute resolution in investor-state disputes. It examines the development and advantages of investor-state arbitration and outlines its main features. It then canvasses the criticisms made of arbitration of investment disputes, before examining other methods of alternative dispute resolution, such as conciliation. Ultimately, however, it will be concluded that some of these alternative dispute resolution methods raise more problems than they solve.

## 2. **The rationale and development of investor-state arbitration**

Investor-state arbitration is a new area of so-called "international arbitration", although of course it is not really arbitration in the pure sense, because it lacks the fundamental element, common to both domestic and international arbitrations, of agreement between two parties to submit their disputes to a binding mechanism of dispute resolution. Rather, investor-state arbitration arises from the pursuit of claims by individuals against states in the context of BITs and FTAs.

Foreign investment, particularly in developing countries, can leave investors vulnerable to events such as nationalisations, tax increases and changes in legislation, with no recourse against the state. BITs and free trade agreements are the modern means of protecting foreign investors and thus stimulating foreign investment.<sup>1</sup> BITs typically contain certain guarantees, including transfer of proceeds, protection from expropriation and, importantly, dispute resolution mechanisms, which usually provide for arbitration. The first BIT was concluded between Germany and Pakistan in 1959, and they have flourished since the 1980s. They are increasingly being used, not only between capital-exporting and capital-importing countries but also between developing countries.

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<sup>1</sup> J Lew et al, *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague, 2003, at 766.

A crucial aspect of BITs is the dispute resolution mechanisms contained therein, which will have a considerable effect on whether or not foreign investment is encouraged. The right of individuals to proceed directly against states is a relatively new concept. Up until the mid-1980s, dispute resolution took place on a state-to-state level only. The conventional way this occurred was through diplomatic protection, that is, the state of the investor pursued the investor's case with the host state, on the grounds that a wrong done to a citizen is a wrong done to the state itself. Exercising the right of diplomatic protection could only occur once the investor had exhausted the remedies available to it in the host country. After those remedies had been exhausted, the state of the investor could then take up the dispute on an international level, either through arbitration, international courts or diplomacy. This system operated as a disincentive to foreign investment, as foreign investors could be hesitant to rely upon the local legal systems of developing countries to protect them against the state. Moreover, there are disadvantages to state-to-state dispute resolution, including politicisation of the dispute, importation of state power differences into the dispute and the complete discretion of the state over the manner of pursuing (or abandoning) the investor's claim.<sup>2</sup> The requirement to exhaust local remedies before commencing arbitration also negated many of the benefits of arbitration, including its flexibility.

As a result of these problems, BITs and free trade agreements have generally allowed for direct investor-state arbitration. This permits investors who feel that they have been poorly treated by states, or by state emanations, to take these up these issues by means of a mechanism which uses the **procedures** of international arbitration, such as arbitration rules or international bodies created specifically to deal with such disputes (the best known of which is the International Centre for the Settlement of Investment Disputes (ICSID)). Arbitration is usually the preferred mechanism in BITs, as states will often be unwilling to submit to the courts of another state, and foreign investors may be reluctant to settle disputes in the state's own courts. There are, however, complex issues peculiar to investor-state arbitration, such as whether the individual may be classified as an "investor" for the purposes of the agreement, whether the individual's rights have been affected, whether the local remedies of the host country must first be exhausted before the dispute may be arbitrated under the agreement or whether the two processes may proceed in parallel, and so forth.

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<sup>2</sup> *Documents Concerning the Origin and Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Vol II, Pt 1, 1968, quoted in N Gallagher and L Shore, "Bilateral Investment Treaties: Options and Drawbacks" (2004) 7(2) *International Arbitration Law Review* 49, at 49; WS Dodge, "Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement" (2006) 39 *Vanderbilt Journal of Transnational Law* 1, at 8.

Nonetheless, the popularity of such arbitrations appears to be steadily on the rise. In Australia, there are a number of agreements which provide for investor-state arbitration, including twenty BITs and two FTAs.<sup>3</sup> The capacity to use these agreements, and the potential impact of such use on the practice of international arbitration and the enforcement of rights is potentially huge, as the increase in such arbitrations in Europe and North America is already beginning to indicate.

However, recent developments have demonstrated the importance of the status of the states involved in dispute resolution procedures in investment agreements. Free trade agreements between developed nations have highlighted that the primacy of investor-state arbitration as a method of dispute resolution has been based on the fact that the investment situation was not reciprocal. The practical context of BITs is investment flowing from a developed nation into a developing one. This meant that the only claims that were made were against the **developing** state. Therefore, when the North American Free Trade Agreement (NAFTA) was concluded between the United States, Canada and Mexico, and included a dispute resolution mechanism modelled on its BITs which allowed investors to bring claims directly against a state party, Canada and the United States were for the first time permitting investors to make claims against them.<sup>4</sup>

The negative experience of this aspect of NAFTA and the claims it produced is one reason for the different dispute resolution process in the Australia-United States Free Trade Agreement (AUSFTA).<sup>5</sup> In contrast to modern developments, AUSFTA does not allow direct investor-state claims, but only state-to-state settlements. In these and other free trade agreements the United States has concluded, the choice of whether to allow direct investor-state arbitration has been determined by the level of investment of the developing country in the developed one, and thus the risk of claims against it.<sup>6</sup> Moreover, NAFTA and AUSFTA prohibit domestic courts from hearing claims under the agreement itself, representing a return to diplomatic protection as a means of resolving disputes, at least for developed countries with high levels of reciprocal investment.<sup>7</sup> Nonetheless, for most BITs and FTAs where only one party is developed, direct investor-state arbitration is burgeoning. For example, arbitrations conducted by ICSID continue to rise, with a new record of 118 cases administered in the 2006 financial

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<sup>3</sup> See Appendix for a list of free trade agreements, bilateral investment treaties and multilateral investment treaties and to which Australia is currently a party.

<sup>4</sup> WS Dodge, "Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement" (2006) 39 *Vanderbilt Journal of Transnational Law* 1, at 16.

<sup>5</sup> [2005] ATS 1; WS Dodge, above n 6, at 22.

<sup>6</sup> WS Dodge, above n 6, at 23-24.

<sup>7</sup> WS Dodge, above n 6, at 25-26.

year,<sup>8</sup> increasing from 103 in 2005<sup>9</sup> and 85 in 2004.<sup>10</sup> Of the 26 new arbitrations registered in 2006, 21 were based on BITs or multilateral investment treaties.<sup>11</sup>

### 3. **Arbitration under BITs and FTAs**

The development of bilateral and multilateral investment treaties and free trade agreements worldwide has been largely motivated by a desire to protect and promote foreign investment. It should therefore come as no surprise that the ability to resolve investment disputes with ease and certainty is a matter of considerable importance in such agreements.

#### 3.1 *Variations between agreements*

However, while arbitration has proved to be the preferred method of resolving such disputes, the conduct of arbitrations under the various agreements is far from uniform. Typically, the investment agreements to which Australia is a party provide that where a dispute arises, parties should first seek to resolve it by consultation and negotiations. Failing that, the dispute resolution clause will provide the parties with a number of options.

Perhaps one of the key differences between investor-state arbitration and arbitration (properly so called) therefore, is the freedom of the parties to choose between the various institutions and rules which will govern their dispute. As mentioned above, arbitration properly so called is based entirely upon the consensus of the parties, and the parties have complete freedom to determine the way in which it is to be conducted. In contrast, investor-state arbitration may set limits on the freedom of parties to determine these procedures, either expressly or by implication.

For example, many BITs and FTAs provide the parties with considerable choice as to the rules of procedure by which their arbitration shall be governed. However, this choice may be affected by the way in which the various options are framed. For instance, where rules are expressly referred to, the parties may be more likely to select them over others to which no reference is made. Further, some investment agreements limit the choices of the parties either expressly, or by providing that in the event of a failure to agree to an alternative procedure within a specified timeframe, particular rules will apply. Such limitations on the freedom of

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<sup>8</sup> *ICSID Annual Report 2006*, p5; available at [http://worldbank.org/icsid/pubs/1998ar/ICSID\\_AR\\_06\\_ENG\\_CRA2.pdf](http://worldbank.org/icsid/pubs/1998ar/ICSID_AR_06_ENG_CRA2.pdf).

<sup>9</sup> *ICSID Annual Report 2005*, p5; available at [http://worldbank.org/icsid/pubs/1998ar/ICSID\\_AR\\_05\\_ENG.pdf](http://worldbank.org/icsid/pubs/1998ar/ICSID_AR_05_ENG.pdf).

<sup>10</sup> *ICSID Annual Report 2004*, p4; available at [http://www.worldbank.org/icsid/pubs/1998ar/2004\\_icsid\\_ar\\_en.pdf](http://www.worldbank.org/icsid/pubs/1998ar/2004_icsid_ar_en.pdf).

<sup>11</sup> Above n 10, p5.

parties to determine the conduct of their dispute illustrate that investor-state arbitration is a new creature which may require a variation of approach by parties and arbitrators alike.

Commonly (but not always), investor-state arbitration clauses will involve a choice between reference of the dispute to *ad hoc* arbitration under the UNCITRAL Arbitration Rules, or to the arbitration procedures of ICSID. However, the formulation of this choice varies from treaty to treaty.<sup>12</sup>

For example, Article XI of the Australia-Indonesia BIT of 1993 provides that an investor may choose to submit the dispute to ICSID. The parties may then agree between themselves as to whether the conciliation or arbitration mechanism of the centre is most suited to their dispute. If they cannot agree, the investor may choose. If both parties to the dispute are not also parties to the ICSID Convention at the relevant time, they may agree on the dispute resolution procedure to be applied, failing which agreement the parties are bound to submit the dispute to arbitration under the UNCITRAL Rules, modified by the written agreement of the parties if they so choose.

The BIT between Australia and the People's Republic of China of 1988<sup>13</sup> provides that, where the parties agree or where the dispute relates to the payment of compensation for expropriation, either the state or the investor may submit an investment dispute to arbitration as provided for in Annex A of the treaty. Annex A sets out the procedure to be followed for the constitution of the arbitral tribunal, and provides that the tribunal must determine its procedure by reference to the ICSID Convention, subject to the provisions of any agreement between the parties. No specific mention is made of the UNCITRAL Rules.

Conversely, article 10 of the Australia-Hong Kong BIT of 1993<sup>14</sup> binds parties to arbitration under the UNCITRAL Rules in the event of a failure to agree, but does not specifically provide for the submission of disputes to ICSID.

Interestingly, the Australia-India treaty of 2000 provides first that parties unable to settle an investment dispute amicably may agree to submit the dispute to international **conciliation** under the UNCITRAL Conciliation Rules. Where the parties do not so agree, or where

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<sup>12</sup> It should be noted here that the dispute resolution clauses of BITs and FTAs also allow parties to submit the dispute to the competent judicial or administrative bodies of the host country (or sometimes of the disputing party). However, for the purposes of this paper, only those options providing for alternative dispute resolution mechanisms will be discussed here.

<sup>13</sup> *Agreement with the People's Republic of China on the Reciprocal Encouragement and Protection of Investments*, opened for signature 11 July 1988, [1988] ATS 14 (entered into force 11 July 1988).

<sup>14</sup> *Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments*, opened for signature 15 September 1993, [1993] ATS 30 (entered into force 15 October 1993).

conciliation is unsuccessful, the parties may then refer the dispute to arbitration. Article 12 sets out the arbitral procedure, providing that where both parties are also parties to the ICSID Convention they may agree to refer the dispute to ICSID under the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings. Alternatively, they may agree to submit the dispute to *ad hoc* arbitration under the UNCITRAL Rules, subject to the provisions set out in Article 12(3)(c).

The FTAs to which Australia is a party contain similar variations. For instance, the Singapore-Australia FTA of 2003<sup>15</sup> (SAFTA) allows either party to submit investment disputes to ICSID for conciliation or arbitration, or to arbitration under the UNCITRAL Arbitration Rules. The Australia-Thailand FTA of 2005, on the other hand, provides for the resolution of investment disputes by an *ad hoc* arbitral tribunal under the UNCITRAL Rules, but not under the ICSID Convention.

### 3.2 *ICSID Arbitrations*

ICSID was established in 1966 under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*<sup>16</sup> (the ICSID Convention) for the specific purpose of dealing with investment disputes arising between host states and investors. The Administrative Council of the Centre is chaired by the President of the World Bank, and is made up of a representative from each ratifying state. It is an independent body with close ties to the World Bank.

The ICSID Convention provides for the conciliation and arbitration of investment disputes, based on agreement by the parties to submit their dispute to the Centre. Once parties have so agreed, they may not unilaterally withdraw their consent.<sup>17</sup>

Where parties agree to submit their dispute to ICSID arbitration, the ICSID Convention provides that their consent is deemed to be consent to arbitration to the exclusion of any other remedy.<sup>18</sup> It is for this reason that some states party to the Convention may require the exhaustion of local remedies prior to referral of the dispute to ICSID arbitration.

Subject to issues of jurisdiction, parties to the ICSID Convention may institute conciliation or arbitration proceedings by means of a request to the Secretary-General. Conciliation and

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<sup>15</sup> *Singapore-Australia Free Trade Agreement*, opened for signature 17 February 2003, [2003] ATS 16 (entered into force 28 July 2003).

<sup>16</sup> *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, [1991] ATS 23 (entered into force 14 October 1966).

<sup>17</sup> ICSID Convention, Article 25(1).

<sup>18</sup> ICSID Convention, Article 26.

arbitration proceedings are to be conducted under the Convention and the ICSID Rules of Procedure for Conciliation Proceedings (ICSID Conciliation Rules) or the ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules) as the case may be,<sup>19</sup> except where the parties agree otherwise.

Arbitration under ICSID has a number of unique characteristics. Under Article 53 of the ICSID Convention, an arbitral award under the Convention is binding on the parties and may not be subject to any appeal or other remedy except as provided for in the Convention. This means that breach of an award will also be a breach of a contractual duty arising from the arbitration agreement, and a breach of a treaty obligation.<sup>20</sup>

An ICSID arbitration is a pure example of delocalised arbitration, since there is a total exclusion of national law from the control of the proceedings, which is expressly provided for in the ICSID Convention concerning the challenge, recognition and enforcement of an ICSID award.

The award may be enforced in every contracting state, as if it were a court judgment of that state.<sup>21</sup> All contracting states have an obligation to enforce pecuniary obligations of awards in this way, and non-pecuniary obligations must be enforced under the New York Convention or the law of the state of enforcement.<sup>22</sup>

### 3.3 *Comparative assessment of ICSID and UNCITRAL Arbitration Rules*

The arbitration rules most commonly provided for in those agreements to which Australia is a party are the ICSID Arbitration Rules<sup>23</sup> and the UNCITRAL Arbitration Rules.<sup>24</sup> The content of the various arbitration rules is similar, but any differences can have significant practical implications for the parties to a dispute. It is worthwhile, therefore, examining briefly some of the key features of, and differences between, these two sets of rules.

#### (a) Independence and Impartiality of Arbitrators

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<sup>19</sup> As amended and effective April 10, 2006; available at <<http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>>. The ICSID Conciliation and Arbitration Rules contain procedural rules which reflect the ICSID Convention, and form part of the ICSID Basic Documents.

<sup>20</sup> J Lew et al, above n 2, at 791.

<sup>21</sup> ICSID Convention, Article 54.

<sup>22</sup> J Lew et al, above n 2, at 801.

<sup>23</sup> Referred to in this section simply as 'the ICSID Rules'.

<sup>24</sup> Referred to in this section simply as 'the UNCITRAL Rules'.

Both sets of rules include mechanisms to ensure the independence and impartiality of the arbitrators. The ICSID Rules contain a declaration which each arbitrator must sign before the end of the first session of the tribunal which affirms, *inter alia*, the following:

"I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding,

...

I shall judge fairly as between the parties, according to the applicable law,

...

A statement of my past and present professional, business and other relationships (if any) with the parties is attached hereto".<sup>25</sup>

Any arbitrator who fails to sign this declaration by the end of the first session shall be deemed to have resigned from the ICSID arbitral tribunal. These rules are to be read and followed in light of the ICSID Convention, which requires that anyone designated to serve on the Panels of Arbitrators or Panel of Conciliators "shall be persons of high moral character and recognised competence...who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators".<sup>26</sup>

The UNCITRAL Rules allow for the removal or rejection of arbitrators in circumstances where there are "justifiable doubts" as to their impartiality or independence.<sup>27</sup>

(b) Challenge to Arbitrators

Both rules contain some mechanism for challenging the appointment of a particular arbitrator. Under the UNCITRAL Rules, notice of the challenge must be sent within 15 days<sup>28</sup> of appointment, or when the circumstances which give rise to justifiable doubts regarding impartiality or independence become known. If the other party disagrees with the challenge and the arbitrator does not wish to withdraw him or herself, and there was an appointing

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<sup>25</sup> ICSID Arbitration Rules, Rule 6(2).

<sup>26</sup> ICSID Convention, Article 14(1).

<sup>27</sup> UNCITRAL Arbitration Rules, Articles 9 and 10;

<sup>28</sup> UNCITRAL Arbitration Rules, Articles 9-11.

authority, that authority will decide the outcome of the challenge whether they appointed the arbitrator or not.<sup>29</sup>

Any challenge brought against an arbitrator pursuant to Article 57 of the ICSID Convention, on the basis of there being a "manifest lack of the qualities required by Article 14(1)", must be filed with the Secretary-General. This will either be forwarded to the tribunal or the Chairman, the latter of whom has 30 days from receipt of the proposal to decide whether to disqualify the challenged arbitrator.<sup>30</sup>

(c) Powers of the tribunal

One of the essential concerns for parties to an international commercial arbitration is whether or not they are free to determine the arbitral procedure, or in absence of this, whether the arbitral tribunal will be afforded a discretion to determine the rules of procedure.

The UNCITRAL Rules specify that the tribunal "may conduct the arbitration in such manner as it considers appropriate", without reference to the agreement between the parties.<sup>31</sup> Within an ICSID arbitration, in the absence of an agreement between the parties as to what rules of law are to apply to the arbitration, the Tribunal is required to apply the law of the Contracting State party to the dispute, including its conflict of laws, and international law rules where relevant.<sup>32</sup>

Of course, in the context of investor-state arbitration, the treaty or free trade agreement under which dispute resolution is pursued may itself set out procedural rules pertaining to certain matters such as the appointment of arbitrators.

(d) Hearing

The UNCITRAL Rules allow for the holding of hearings upon the request of either party.<sup>33</sup> Curiously, the ICSID Rules specify that the proceeding will comprise two stages: a written

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<sup>29</sup> UNCITRAL Arbitration Rules, Article 12(1).

<sup>30</sup> ICSID Arbitration Rules, Rule 9(1), (2), and (5).

<sup>31</sup> UNCITRAL Arbitration Rules, Article 15(1).

<sup>32</sup> ICSID Convention, Article 42(1).

<sup>33</sup> UNCITRAL Arbitration Rules, Articles 15(2) and 25.

procedure, to be followed by an oral one.<sup>34</sup> The "oral procedure" consists of the hearing by the tribunal akin to the typical arbitration procedure.<sup>35</sup>

Both sets of rules expressly allow for the hearing of witnesses.<sup>36</sup> The ICSID Rules also permit the questioning of witnesses by the other party,<sup>37</sup> and set out the declaration that each witness must make prior to their giving of evidence.<sup>38</sup> Under the UNCITRAL Rules, details about witnesses must be communicated to the tribunal at least 15 days prior to the hearing,<sup>39</sup>

(e) Documentation

Both rules have a number of requirements in relation to arbitration documentation. These pertain to the type and contents of documentation, and time limits for filing.

Under the UNCITRAL Rules, the statement of claim and statement of defence must be communicated to the other party and each arbitrator, within the time period determined by the tribunal.<sup>40</sup> Further, the tribunal will decide if, and what further documents will be required.<sup>41</sup>

Under the ICSID Rules, this stage of the arbitration forms the "written procedure", whereby the pleadings of the parties are to be filed within a time limit determined by the tribunal, and are to be contained in a "memorial" by the requesting party, and a "counter-memorial" by the other party.<sup>42</sup>

(f) Security and Interim Measures of Protection

The ICSID and UNCITRAL Rules contain provisions which empower the arbitral tribunal to issue interim measures of protection. Their purpose is broadly twofold: to preserve the position of the parties pending resolution of their dispute, and to ensure the enforceability of

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<sup>34</sup> ICSID Arbitration Rules, Rule 29 ("*Normal Procedures*").

<sup>35</sup> ICSID Arbitration Rules, Rule 32.

<sup>36</sup> UNCITRAL Arbitration Rules, Article 25(2), (4) and (5); ICSID Arbitration Rules, Rules 35-36.

<sup>37</sup> ICSID Arbitration Rules, Rules 35(1) and 36(b).

<sup>38</sup> ICSID Arbitration Rules, Rule 35(2).

<sup>39</sup> UNCITRAL Arbitration Rules, Article 25.2.

<sup>40</sup> UNCITRAL Arbitration Rules, Articles 18 and 19.

<sup>41</sup> UNCITRAL Arbitration Rules, Article 22.

<sup>42</sup> ICSID Arbitration Rules, Rule 31. Rule 31(3) specifies that a memorial contain a statement of the relevant facts, a statement of law, and submissions. The counter-memorial will contain an admission or denial of the facts stated, any additional facts if necessary, observations on the statement of law and answer thereto, and the submissions.

the final decision. A broad discretion is left to the arbitral tribunal as to how it should exercise that power.

The UNCITRAL Rules make provision for the ordering of security for the cost of interim measures of protection,<sup>43</sup> and give the arbitral tribunal the power to take any interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or sale of perishable goods. The tribunal may issue such orders in the form of an interim award.

The ICSID Convention and Rules refer to such protection requested by the parties as "provisional measures".<sup>44</sup> The ICSID Rules allow a party to request that provisional measures be recommended by the tribunal, and the tribunal must consider such requests as a priority. The requesting party must specify which measures it recommends the tribunal take. In addition, the tribunal may make its own recommendations. Each party must be given an opportunity to present its observations prior to the making of a recommendation by the tribunal.<sup>45</sup>

(g) Appeal processes

A notable difference between the UNCITRAL and ICSID Rules relates to the avenues available under each for appeal against arbitral awards.

Article 32 of the UNCITRAL Rules provides that any award made by the tribunal shall be final and binding on the parties, who undertake to perform it without delay. However, Article 36 does allow either party, with notice to the other, to request the tribunal to correct any computation, clerical, typographical or similar errors. Alternatively the tribunal may make such corrections of its own volition within 30 days of communicating the award. Article 37 allows the arbitral tribunal to make additional awards at the request of the parties in relation to claims presented during the hearing but omitted in the award. However, such a request will only be complied with if it is made within 30 days of receipt of the award and the tribunal considers that it is justifiable and would not require any further hearings or evidence.

In contrast, under Article 51 of the ICSID Rules, either party may request that an award be revised on the basis of a fact which was unknown at the time of the award, where the applicant's ignorance was not attributable to negligence. Further, the ICSID Rules allow such

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<sup>43</sup> UNCITRAL Arbitration Rules, Article 26

<sup>44</sup> ICSID Convention, Article 47 and ICSID Arbitration Rules, Rule 39.

<sup>45</sup> ICSID Arbitration Rules, Rule 39.

a request to be made within 90 days of discovery of the fact, up to a limit of 3 years after the award was rendered. Interestingly, where the original tribunal is unable to make the revision, a whole new arbitral tribunal can be constituted for this purpose.

Perhaps the most interesting feature of an ICSID arbitration is that, unlike other arbitration systems, an ICSID award may not be reviewed in the courts of the place of arbitration. Neither is there any right to challenge the award in the courts where the award is enforced. The only potential for review is through the ICSID procedure for annulment, recognising the fact of a state party.<sup>46</sup> This review is limited to questions of the decision-making process itself, such as the constitution of the tribunal or corruption of a tribunal member; it does not permit an appeal of the merits of the award.<sup>47</sup>

The issue of annulment of arbitral awards as a remedy available under the ICSID Convention has received much criticism.<sup>48</sup> Effectively, the provision enables an award (or any part of an award) which has been rendered by a tribunal of three arbitrators appointed by or on behalf of the parties, to be set aside by an *ad hoc* committee of arbitrators of equal status. Following an annulment, a **new** tribunal is then established to determine the dispute anew. Notably, the views of the *ad hoc*, "annulling" committee are not binding on the new tribunal. Essentially, criticism has stemmed from the delays caused by repeated requests for annulment, as this can substantially prolong the proceedings.<sup>49</sup> However, Stephen Toope has offered a fairer criticism of the ICSID system:

The substantial effort made by the creators of the ICSID regime to insulate the process from national court review will be rendered almost meaningless if every award can be challenged internally and subject to mere second guessing ... If this unhappy trend were to continue potential parties would be justified in avoiding the ICSID arbitral process.<sup>50</sup>

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<sup>46</sup> ICSID Convention, Article 52. An annulment must be requested by either party within 120 days of the date of the award.

<sup>47</sup> J Lew et al, above n 2, at 794.

<sup>48</sup> See for example, Feldman, "The Annulment proceedings and Finality of ICSID Arbitral Awards" 19 *ICSID Review* 85, at 97.

<sup>49</sup> The case of *Klockner v The United Republic of Cameroon and SOCAMÉ* (1986) 11 YCA 271 illustrates how drawn out the dispute can become following a request for annulment.

<sup>50</sup> S Toope, "Mixed International Arbitration: Studies in Arbitration Between States and Private Persons", Cambridge, Grotius Publications (1990) at 259, cited in A Redfern & M Hunter, *Law and Practice of International Commercial Arbitration* (Third Ed.), London, Sweet & Maxwell (1999) at 57.

Despite this, it appears that confidence in the ICSID system has returned, as the steady increase in the Centre's case load indicates.<sup>51</sup>

#### 4. **Criticisms of arbitration under investment treaties**

Although popular, treaty-based investment arbitration has raised concerns in some quarters for resolving in private disputes about public issues which may have significant economic and political ramifications. In this context, it has been suggested that arbitration may be insufficiently transparent and may produce inconsistent decisions. Resolution of these criticisms by states would increase investor confidence and bolster the position of states when justifying settlements to citizens.

##### 4.1 *Transparency*

Transparency has a number of dimensions. Broadly speaking, access to information about processes (not limited to arbitration) is a key concern of foreign investors, who may be disadvantaged in the host country because of language barriers and their lower level of knowledge about the host country and its institutions.<sup>52</sup> Such transparency benefits the host country as it leads to higher levels of foreign investment.<sup>53</sup> Similarly, there can be transparency concerns in relation to arbitral institutions, in response to which the London Court of International Arbitration now publishes its decisions on challenges to arbitrators.<sup>54</sup>

The most important transparency issue for investor-state arbitration is that some investment arbitration is conducted in private - non-parties have minimal access to the pleadings, evidence and awards, although awards are increasingly being published.<sup>55</sup> This becomes important when what is occurring has public significance. For example, there was considerable public concern following the first arbitrations under the North American Free Trade Agreement, with fears that the Constitution was being circumvented and that private tribunals were making decisions about expenditure of considerable amounts of taxpayers' dollars.<sup>56</sup>

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<sup>51</sup> For statistics see above, section 2.

<sup>52</sup> Roy Nixon, "Transparency obligations in international investment agreements", Department of the Treasury, at 57, available at < [http://www.treasury.gov.au/documents/876/PDF/International\\_investment\\_agreements.pdf](http://www.treasury.gov.au/documents/876/PDF/International_investment_agreements.pdf)>.

<sup>53</sup> *Ibid.*

<sup>54</sup> *LCIA News* June 2006 11(2) at 1.

<sup>55</sup> Catherine A Rogers, "Transparency in International Commercial Arbitration" (2006) 54 *Kansas Law Review* 1301 at 1319.

<sup>56</sup> *Ibid* at 1323-1324.

As a result of such concerns, there are signs of increased transparency, particularly in the North American context. Canada and the United States have incorporated some elements of transparency in trade agreements and model investment treaties.<sup>57</sup> Firstly, in relation to public access, the United States-Singapore Free Trade Agreement requires documents including awards to be made available to the public, and the arbitral hearings to be open to the public. In contrast, the UNCITRAL and ICSID Rules provide that hearings are to be conducted in private unless the parties consent to public access.<sup>58</sup> Secondly, regarding disclosure of documents, NAFTA parties publish on the internet notices of arbitration, claims and counterclaims, memorials, procedural decisions, substantive decisions and awards.<sup>59</sup> ICSID too has made some changes and since 2005 has included reasons in published awards.<sup>60</sup>

Another way of achieving increased transparency is to allow non-parties to make submissions to the arbitration as *amicus curiae*. For example, the Free Trade Agreement between Chile and the United States authorises the arbitral tribunal to consider *amicus curiae* submissions from non-governmental entities located in the United States and Chile.<sup>61</sup> The ICSID Arbitration Rules are more restrictive, allowing the tribunal to accept and consider submissions from third parties only after consulting with the parties. The tribunal must consider the extent to which:<sup>62</sup>

- the submission would assist the tribunal by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- the submission would address a matter within the scope of the dispute; and
- the intervening party has a significant interest in the proceeding.

However, intervention by *amicus curiae* needs to be carefully managed. Arbitration would become less attractive to investors if *amicus curiae* intervention occurred too frequently, and it

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<sup>57</sup> See for example, Canada's Model Foreign Investment Promotion and Protection Agreement 2004, arts 34-35; United States-Singapore Free Trade Agreement, 6 May 2003, art 15.20, cited in Susan D. Frank, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73 *Fordham Law Review* 1521 at 1545.

<sup>58</sup> UNCITRAL Rules, art 25(4); ICSID Arbitration Rules, Rule 32(2).

<sup>59</sup> UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review*, at 23, available at <[www.unctad.org](http://www.unctad.org)>.

<sup>60</sup> UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review*, at 23, available at <[www.unctad.org](http://www.unctad.org)>.

<sup>61</sup> Article 22.10(1)(d).

<sup>62</sup> ICSID Arbitration Rules, Rule 37(2); ICSID Arbitration (Additional Facility) Rules, Rule 41(3).

does undermine the traditional consent-based nature of arbitration.<sup>63</sup> Further moves to achieve transparency would be most effective if done by amending the rules most commonly referred to in investment treaties, the ICSID and UNCITRAL Rules.<sup>64</sup> There is the potential for IPAs to become involved as *amicus curiae*.

#### 4.2 *Consistency*

Inconsistent decisions undesirable in any field of dispute resolution, but are particularly problematic in treaty-based investment arbitration given its economic and political consequences. Inconsistency leads to uncertainty for investors and states, thus thwarting the purpose of investment treaties. Moreover, states are accountable to taxpayers for their financial liabilities, and lose credibility if their liabilities are inconsistent. Inconsistent decisions therefore have the potential to undermine the legitimacy of investment arbitration as a method of dispute resolution. There are three main ways in which inconsistency can arise:<sup>65</sup>

- Different tribunals making different decisions about the same treaty;<sup>66</sup>
- Different tribunals under different treaties making different decisions about similar facts and investment rights.
- Different tribunals under different treaties making different decisions about disputes involving the same facts, as occurred in the high profile *Lauder* and *SGS* arbitrations.<sup>67</sup> Inconsistency can be a problem where a single dispute is covered by more than one investment treaty, so that investors may be motivated to structure investments to gain the benefit of a number of options for arbitration.<sup>68</sup> Treaties often guard against such treaty shopping.<sup>69</sup>

Such problems are compounded by the lack of an established jurisprudence from which arbitrators could draw and the relative newness of many of the legal rights and obligations. On

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<sup>63</sup> Jorge E Vinales, "Amicus Intervention in Investor-State Arbitration" (2006) 61 *Dispute Resolution Journal* 72 at 75.

<sup>64</sup> UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review*, at 56, available at <[www.unctad.org](http://www.unctad.org)>.

<sup>65</sup> Susan D. Frank, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73 *Fordham Law Review* 1521, at 1545-1546.

<sup>66</sup> NAFTA avoids this by providing for tribunals to consolidate cases based on the same set of facts: arts 1126 and 1117.3.

<sup>67</sup> See discussion of these cases in Frank, above n 57, at 1559-1574.

<sup>68</sup> *Ibid* at 1535.

<sup>69</sup> See for example NAFTA art 1113.2.

the other hand, the occurrence of multiple arbitrations based on the same facts can be reduced if parties agree to consolidation of the actions.<sup>70</sup>

Parties attempting to remedy inconsistent decisions have limited appeal options, as described above,<sup>71</sup> that depend on the rules under which the arbitration was conducted. There is no prospect of an inconsistent decision being corrected under an ICSID arbitration, as awards cannot be reviewed for legal error. Unlike ICSID awards, awards arising from arbitrations conducted under the UNCITRAL Rules may be challenged in the courts of the place of arbitration or at the place where the award is sought to be enforced. However, none of the grounds for not enforcing awards given under the New York Convention would prevent enforcement of an award on the basis of error of law or inconsistency.

A number of solutions to the problem have been proposed, with critics tending to advocate one of the following approaches:<sup>72</sup>

- greater clarity and detail in investment treaties;
- using preconditions to restrict investors' access to arbitration, such as seeking the approval of the investor's own government, where issues of public policy are involved;
- rejecting arbitration altogether in favour of alternative public institutions resolving investment disputes; and
- structural modifications to arbitration, such as amending the institutional rules to provide greater transparency.

However, there are flaws in some of these suggestions. For instance, preconditions involving government approval threaten a return to the previous system of resolving investment disputes on a state-to-state basis, with all the disadvantages that entails. Similarly, recourse to alternative public institutions may provide transparency but suffers from the same limitations of pursuing a state in its own national courts. A solution could be to have an independent,

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<sup>70</sup> UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review*, at 18, available at <[www.unctad.org](http://www.unctad.org)>.

<sup>71</sup> See above, section 3.3(g).

<sup>72</sup> See Frank, above n 57, at 1587-1588 for this categorisation.

permanent appellate body that can review awards rendered under investment treaties.<sup>73</sup> Such a body would built up jurisprudence leading to greater consistency in decisions.

Until this occurs (and there are many practical and political reasons for such a body not to be established), increased publication of awards would provide greater certainty for investors and states who could use them as a guide, as well as assist tribunals in coming to decisions in later cases.

## 5. **Alternative methods of dispute resolution**

Given these problems with treaty-based arbitration, and concern about the way arbitration can suffer from similar time and costs problems as litigation, it is necessary to investigate whether other methods of alternative dispute resolution could be more suitable. There is also a potential role for IPAs to become involved as a third party in these processes.

Other methods of dispute resolution tend to have a number of common characteristics. They are non-binding, generally voluntary, and usually involve the intervention of a third party. It is misleading to think of these processes as genuine *alternatives* to litigation and arbitration. They are best used in conjunction with formal, binding processes. Thus, if non-binding processes are part of the wider scheme of dispute resolution, the pertinent question is what these processes can add to the dispute resolution process.

Non-binding processes allow parties to share the risk of losing, and to devise outcomes different to those produced by a binding process. The result will inevitably be a compromise, but the important point is that, because the process is voluntary and non-binding, neither party will "lose". The result is a commercially workable solution. It may not be a "win-win" solution. Usually, neither party will be as pleased with the outcome as they would be if they had "won".

It is also important to consider that if a non-binding dispute resolution process is adopted, the disputing parties are able to personally control the dispute resolution process. These processes often produce a quicker solution and help the parties to maintain ongoing investment relations. Clearly then there is a very important role for non-binding processes in the wider context of dispute resolution.

### 5.1 *Facilitated negotiation in its various forms*

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<sup>73</sup> Susan D. Frank, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73 *Fordham Law Review* 1521.

Facilitated negotiation is a process where a third party assists the disputing parties in coming to an agreed resolution of their dispute. The process can be broadly categorised into three types: conciliation; mediation and facilitation.

(i) Conciliation

A neutral third party, free from perceived conflicts of interest, acts to bring disputing parties together for the purpose of settlement of the dispute in an informal process. The role of the conciliator is to assist the parties to agree on a process by which they will attempt to resolve their dispute. A conciliator will not normally involve himself or herself with the substantive issues of the dispute, other than perhaps to identify and clarify the real issues of fact and law.

(ii) Mediation

Conceptually, mediation is similar to conciliation. The two processes are, however, distinguished by the degree of involvement of the neutral third party. A mediator not only chairs the meetings of the parties, as does a conciliator, but also takes an active role in the discussions and negotiations. As such, a mediator has a greater involvement in the substantive issues of the dispute than does a conciliator, sometimes even producing a report.

Although there is a greater degree of involvement, a mediator should not attempt to impose a decision upon the parties, but rather seek to encourage a resolution of the dispute by the parties themselves.

(iii) Facilitation

Facilitation is an extended form of mediation. The facilitator takes an active role in suggesting to the parties a solution rather than them working it out themselves. However, a decision is not imposed upon the parties. Instead, the facilitator is said to inject some lateral thinking into the dispute by suggesting a number of settlement options. A facilitator, like a mediator, may well produce a report at the end of the proceedings.

The distinction between the processes is largely artificial. Facilitated negotiation is a flexible and fluid process that is best tailored to the requirements of the particular dispute.

The value of drawing distinctions between different types of facilitated negotiation is that attention is focussed on the variety of potential techniques, including the level and type of involvement of the third party. However, flexibility is the key and too much technical emphasis on distinctions should be avoided in practice. Ultimately, what needs to be

considered is the context in which the process is operating, the nature of the dispute and the requirements of the parties. There is no "magic" in the name, and thus, for convenience in this paper, the term "conciliation" is used in reference to these three methods collectively.

## 5.2 *What distinguishes conciliation from other processes?*

As mentioned above, a key feature of conciliation is its flexibility. It is this feature that defines the process, and from where many of the distinctive aspects of the process are born. Conciliation may encompass and be interwoven with many different techniques, such as mini-trials, expert appraisals and mediation.

Not only can conciliation be interwoven with other non-binding dispute resolution mechanisms, but it is perfectly suited to operate as a parallel process alongside arbitration or litigation proceedings. It is important to note the way in which some courts have embraced conciliation as a process preliminary to the hearing of litigation, and the way in which the major arbitration institutions have adopted conciliation rules in addition to their arbitral rules. In some institutions, it is a requirement that the parties proceed through a process of conciliation prior to arbitrating the dispute.

Conciliation is a process that can preserve good investment relationships. In contrast, binding determinative processes such as litigation and arbitration are more likely to destroy an investment relationship because they place the parties in opposition to each other. One party will be the winner, one party will be the loser and it is common for the parties to do everything in their power to ensure they prevail. A feature of conciliation is that in order for a conciliation to be successful, parties must eschew this adversarial strategy. Research shows that negotiation is seen by those involved with the process as best suited to preserving or enhancing existing relationships. It is also effective in reducing costs and opening channels of communication.<sup>74</sup>

A conciliated solution will inevitably be a compromise based on knowledge of all the parties' bargaining positions, and what they hope to achieve out of the conciliation. While litigation tends to focus the parties' attention on the *problem*, a successful conciliation will focus the attention of the parties on *solutions*.<sup>75</sup> These solutions can sometimes be unrelated to matters formally in dispute. Conciliation provides the opportunity for one party to tell their side of the story to the other disputing parties and this can dismantle emotional barriers between the

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<sup>74</sup> Peter Trainer has conducted a study into dispute avoidance and resolution in the Australian construction industry. Only 30 per cent of respondents were familiar with the use of DRB in contracts. The results are set out in P Trainer, "Dispute avoidance and resolution in the Australian construction industry - part 1" (1998) 17(1) *Arbitrator* 39.

<sup>75</sup> John Larmer, "Dispute Resolution in a Market Economy" *The Arbitrator* (February) 1998 at 272.

parties and actually improve their relationship.<sup>76</sup> It is a consensual process that continues only as long as the disputing parties wish.

A successful conciliation will give parties real cost and time savings in resolving their dispute. A conciliation can be arranged within days or weeks, and the actual process usually only takes hours or days. Conciliators need to be careful to ensure that the parties have (or develop) an intention to settle and the conciliation is not used as a delaying tactic.

A cornerstone of modern legal systems, and arguably one of the most important aspects of a judicial system is the neutral and impartial judge or arbitrator. The conciliation process embraces the role of the third party neutral and provides the parties with more flexibility. The third party may be chosen by the parties, and can play a more significant and creative role.

An important feature of conciliation is that it necessarily focuses the attention of the parties on the whole of the dispute. The ability of one party to tell their side of the story to the other parties means that the participants can gain a clear understanding of what goals and interests are important to the other parties, and recognise and acknowledge their respective situations. While the courts tend to focus on the legal rights of the parties, conciliation offers a forum where creative solutions can be explored. The important point is that the parties are concerned with trying to find an acceptable and workable solution, whereas during an arbitration or litigation, the parties are pursuing a "victory" within the bounds of the formally defined dispute.

### 5.3 *When is conciliation appropriate?*

Conciliation is appropriate when parties want an informal, objective and analytical assessment of their situation. It is particularly useful when there is a substantial measure of goodwill on both sides and a continuing business relationship.

There are a number of issues to consider. First of all, the parties need to consider whether the conciliation has any prospect of success. In order to do this, it is necessary to take account of the history of negotiations. If the past negotiations have been constructive, conciliation is likely to be of some use. If the negotiations have been blocked, the parties need to consider whether there is any way to improve the relationship between the parties, or whether the prospect of litigation or arbitration may prompt the parties to take their negotiations more seriously, perhaps introducing new more dispassionate players to the process. If, however, the

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<sup>76</sup> George Golvan QC, "Alternative Dispute Resolution Mechanisms" paper presented at Building Dispute Practitioners' Society Inc Seminar - 16 and 17 September 1997.

dispute is one which the parties can predict with reasonably certainty will end up in binding dispute resolution, then it seems sensible to head there straight away.<sup>77</sup>

Some commentators have suggested that conciliation should occur as soon as possible after the dispute has arisen. The fact that conciliation potentially can save the parties the cost of discovery (in a common law context) is a good reason to try to conduct a conciliation as soon as possible. On the other hand it has been suggested that it is only once pleadings and discovery have been completed that the parties properly understand the issues in dispute.<sup>78</sup> The alternative argument is, of course, once embarked upon pleadings and discovery develop a life of their own tending to become an end in themselves, thus obscuring the real issues in dispute between the parties.<sup>79</sup>

Conciliation very much relies for its effectiveness on the wider context of the dispute. It is far more likely to generate a settlement where the failure to settle has serious consequences for both parties.

Conciliation avoids the risk of losing costly binding dispute processes and assists the parties in developing creative solutions. Often, it is not so much the prospect of "winning" the litigation, but the risk of losing, or even the prospect of pursuing the litigation, that motivates the parties to settle.<sup>80</sup> For example, the Australian Commercial Disputes Centre estimates that on average, conciliation will cost a party five per cent of the cost of arbitration or litigation.<sup>81</sup> The irony is that it is often through the costs associated with the preparation for hearing that parties realise the potential benefits of conciliation. It is also this preparation that leads to parties developing unrealistic, entrenched, expectations of their own success which can be a barrier to a conciliated solution. Further, the less efficient the binding dispute resolution is, the greater the motivation to settle, and the more effective the conciliation will be.

It is trite to say that the earlier a successful conciliation is conducted, the more the parties will save in terms of legal costs, preparation costs, impact on the project and future investment relations. Ultimately, it becomes a question of what the parties need to know in order to not only arrive at a sensible and workable solution to the problem, but also to have sufficient

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<sup>77</sup> Max McDougall, "Resolving Disputes Effectively, Using the Smorgasbord of Dispute Resolution Methods" Presented in Sydney at a conference titled "Making Construction Projects Work" 12-13 March 1996.

<sup>78</sup> A summary of the various points of view is provided by George Golvan QC, "Alternative Dispute Resolution Mechanisms" paper presented at Building Dispute Practitioners' Society Inc Seminar - 16 and 17 September 1997.

<sup>79</sup> McDougall, above n 29.

<sup>80</sup> G H Golvan QC, "The Use of Mediation in Commercial and Construction Disputes" (1996) 7(3) *ADRJ* 188.

<sup>81</sup> Dr T Sourdin, "Judicial Management and Alternative Dispute Resolution Process Trends" (1996) 14 *Aust Bar Rev* 185.

motivation to conciliate the dispute.<sup>82</sup> At the same time, it is important not to delay proceedings past the "point of no return". In other words, the parties may reach a point when they have expended so much money on the proceedings that they continue to proceed, mainly in the hope that they may receive a costs order in their favour.<sup>83</sup>

It is also important to recognise the potential self interest of advisors in the fees generated by full scale binding dispute resolution. Once recognised, this influence can be minimised.

#### 5.4 *Advantages and disadvantages for investor-state disputes*

There are a number of advantages of conciliation in the context of investor-state disputes. These include:<sup>84</sup>

- Parties have greater control over the process;
- States avoid the creation or application of unfavourable precedent;
- Flexibility;
- Enhanced confidentiality, which may be important in the context of national security issues, for example; and
- Maintaining a good investment relationship.

Some disadvantages include:<sup>85</sup>

- Preventing the development of jurisprudence;
- Lack of pool of conciliators practised in handling investor-state disputes;
- Reduced transparency and public scrutiny;
- Minimises incentive for states to correct behaviour; and
- It is more difficult to justify conciliated settlements than imposed or binding outcomes to shareholders and citizens.

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<sup>82</sup> McDougall, above n 29.

<sup>83</sup> John Tyril, "Practical Commercial Mediation Issues" Presented in Sydney at a conference titled "Making Construction Projects Work" 12-13 March 1996.

<sup>84</sup> See Jack J Coe, Jr., "Toward a Complementary Use of Conciliation in Investor-State Disputes: A Preliminary Sketch" (2005) 12 *U.C. Davis Journal of International Law and Policy* 7 at 22-25.

<sup>85</sup> See *ibid* at 25-32.

## 5.5 *Alternatives to arbitration available at ICSID*

ICSID provides a couple of investment dispute resolution mechanisms other than arbitration. Provisions in investment agreements that mandate amicable settlement<sup>86</sup> could be construed as consent to such procedures, which are often overlooked by parties.

Firstly, ICSID administers conciliations under its Conciliation Rules, adopted at the same time as its Arbitration Rules. The aim of such conciliation is for the parties to reach agreement, and ICSID Conciliation Rule 30 requires the final Report of the Conciliation Commission to record only the issues in dispute and that the parties have reached agreement. This arguably suffers from the same problems of transparency as arbitration. Moreover, the result is non-binding, and given that the process can involve a similar amount of time and cost as a binding arbitration, conciliation has not been as popular with parties.<sup>87</sup> Only one out of 118 cases administered by ICSID in the 2006 financial year was a conciliation.<sup>88</sup> However, it has been argued that there are advantages to ICSID conciliation in certain types of disputes, particularly where the parties wish to avoid arbitration's more adversarial nature.<sup>89</sup>

Secondly, ICSID's Fact-Finding (Additional Facility) Rules provide a process for preventing disputes by impartially assessing factual issues which, if accepted by parties, could head off a legal dispute. Importantly, this process is not restricted to parties to the ICSID Convention and is available to any state or the national of any state, subject to the consent of the parties.<sup>90</sup> The Rules set out the procedure, although the parties may adapt the Rules as they see fit.<sup>91</sup> However, despite being in existence since 1978, no proceedings have been brought under these Rules, perhaps because the result is not binding or because the mechanism is not well-known.<sup>92</sup>

ICSID is considering establishing a mediation mechanism providing for dispute resolution on an informal, voluntary basis. This would essentially aim to facilitate negotiation between the

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<sup>86</sup> For example article 13(1) of the *Agreement between the Government of Australia and the Government of the Republic of the Philippines on the Promotion and Protection of Investments* [1995] ATS 28 refers to "amicable consultations and negotiations" and the *Australia-Thailand Free Trade Agreement* [2005] ATS 2 article 917(1) refers to "consultations ... with a view to resolving the case amicably".

<sup>87</sup> Ucheora Onwuamaegbu, "The Role of ADR in Investor-State Dispute Settlement: The ICSID Experience" (2005) *News from ICSID* 22(2) at 12-13, available at <[www.worldbank.org/icsid/news/news.htm](http://www.worldbank.org/icsid/news/news.htm)>.

<sup>88</sup> *ICSID Annual Report 2006*, p5; available at <[http://worldbank.org/icsid/pubs/1998ar/ICSID\\_AR\\_06\\_ENG\\_CRA2.pdf](http://worldbank.org/icsid/pubs/1998ar/ICSID_AR_06_ENG_CRA2.pdf)>.

<sup>89</sup> Onwuamaegbu, above n 89, at 13.

<sup>90</sup> ICSID Fact-Finding (Additional Facility) Rules, article 1.

<sup>91</sup> ICSID Fact-Finding (Additional Facility) Rules, article 2(2).

<sup>92</sup> Onwuamaegbu, above n 89, at 13.

parties with a reduced risk of losing face, and would be a less rigid process than either arbitration or conciliation.<sup>93</sup>

#### 5.6 *What do Australia's investment agreements provide?*

As noted above, investment agreements to which Australia is a party provide a variety of different formulations of the options for settlement of investment disputes. A number provide for conciliation or alternative dispute resolution mechanisms other than arbitration. For example, Australia's BIT with China provides generally for the submission of disputes to ICSID for resolution, which would enable any of the ICSID mechanisms to be used.<sup>94</sup> Other agreements allow submission of the dispute to ICSID for either conciliation or arbitration.<sup>95</sup> The BIT with India provides that, if parties agree, the dispute may be submitted for conciliation under the UNCITRAL Conciliation Rules, or failing this, arbitration, conciliation or fact-finding under ICSID.<sup>96</sup>

#### 5.7 *The Model Law*

It is worth noting that a Model Law on International Commercial Conciliation was adopted by the General Assembly of the United Nations in November 2002. It was recognised that conciliation was increasingly being used in both domestic and international commercial disputes as an alternative to litigation and arbitration, and that significant commercial benefits would accrue from a more uniform use of conciliation. The aim of the Model Law therefore was to establish model legislation that would be acceptable to states with different legal, social and economic cultures, and in the process would contribute to harmonious international legal and economic relations.<sup>97</sup>

Although the Model Law deals with commercial conciliation, so is not directly relevant to investor-state disputes, it is indicative that the international community is open to conciliation,

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<sup>93</sup> Ibid at 14.

<sup>94</sup> *Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments* [1988] ATS 14, article 12(4).

<sup>95</sup> See for example, *Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investments* [1993] ATS 9, article 8(2); *Agreement between Australia and the Lao People's Democratic Republic on the Reciprocal Promotion and Protection of Investments* [1995] ATS 9 article 12(2); *Agreement between the Government of Australia and the Government of the Republic of the Philippines on the Promotion and Protection of Investments* [1995] ATS 28 article 13(2); *Singapore-Australia Free Trade Agreement* [2003] ATS 16 Part 8 article 14(3)(b); *Agreement between Australia and the Socialist Republic of Vietnam on the Reciprocal Promotion and Protection of Investments* [1991] ATS 36 article 12(2)(b).

<sup>96</sup> *Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments* [2000] ATS 14, article 12(2) and (3).

<sup>97</sup> See generally, Resolution 57/18 adopted by the General Assembly on 19 November 2002, Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law.

and the approach it is taking. Further, the issues it examines are relevant to investor-state conciliation.

Commercial conciliation used both domestically and internationally faces a number of challenges. These challenges include two important categories; enforcing procedure and enforcing the conciliation agreement, and eventually the settlement. The Model Law is an attempt to make more uniform the approach to these challenges, and solve some of them through national legislation.

The Model Law applies to international commercial conciliation and refers to a process where the parties request a third person(s) to assist them in reaching an amicable settlement of their dispute.<sup>98</sup> A conciliation will commence on the day on which the parties to a dispute agree to engage in conciliation proceedings. If there is no agreement, and one party does not respond to the invitation to conciliate, then the party may elect to treat this as a rejection of the invitation to conciliate.<sup>99</sup>

The Model Law specifies that unless the parties agree otherwise, there is to be one conciliator. The parties are to endeavour to reach agreement on a conciliator unless some other procedure for their appointment has been agreed upon. The parties may also seek the assistance of an institution, or some other person in appointing a conciliator.<sup>100</sup> Importantly, the conciliator is to disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. Similarly, the conciliator is to advise of any circumstances, if and when they arise.<sup>101</sup> Like the ICC and LCIA Rules, the Model Law seeks to guarantee confidentiality and that evidence arising from the conciliation will not be admissible in other proceedings.<sup>102</sup>

Proceedings will be terminated by the conclusion of a settlement agreement; declaration of the conciliator; or declaration of the parties.<sup>103</sup> The conciliator is also not to act as an arbitrator, unless agreed by the parties.<sup>104</sup> Interestingly, the Law does not apply where a judge or

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<sup>98</sup> Model Law, Article 1.

<sup>99</sup> Model Law, Article 4.

<sup>100</sup> Model Law, Article 5.

<sup>101</sup> Model Law, Article 5.

<sup>102</sup> Model Law, Article 10.

<sup>103</sup> Model Law, Article 10.

<sup>104</sup> Model Law, Article 12.

arbitrator, in the course of a court or arbitral proceeding, attempts to facilitate a settlement.<sup>105</sup> Thus, to the horror of some, and the satisfaction of others, the option of mediation/arbitration is still available.

Where the parties have agreed not to resort to arbitral or judicial proceedings until a specified time, or after the completion of an event, then the arbitral tribunal or court is to give effect to these terms.<sup>106</sup> Finally, and importantly, the Model Law provides that if the parties conclude an agreement settling a dispute, then that settlement agreement is binding and enforceable.<sup>107</sup>

Of particular interest is that in interpreting it, the Model Law specifically provides that regard is to be had to its international origin and the need to promote uniformity in its application and the observance of good faith. Further, questions concerning matters governed by the Model Law which are not expressly settled in it are to be settled in conformity with the general principles on which the Model Law is based.<sup>108</sup>

(a) The process

The most pressing challenges appear to be:

- Conflicts of interest;
- Disclosure between parties;
- Duty of confidentiality;
- Admissibility of evidence; and
- Liability of the conciliator

It is possible for many of these issues to be resolved by careful drafting of a conciliation agreement, or the adoption of uniform rules. However, it was felt by UNCITRAL that there were many instances where the parties did not agree upon rules that were appropriate to solve these problems. As a consequence, the Model Law provides non-mandatory legislative provisions that might apply when the parties agree to conciliate but no rules are agreed upon. It was also felt that uniform legislation would provide clarification as to the admissibility of

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<sup>105</sup> Model Law, Article 1.

<sup>106</sup> Model Law, Article 13.

<sup>107</sup> Model Law, Article 14.

<sup>108</sup> Model Law, Article 2.

evidence. This is because in many nations, the conciliation agreement itself cannot make evidence of a conciliation completely inadmissible.

(i) Conflicts of interest

The Model Law deals with conflicts of interest in Article 5. A conciliator must be independent and impartial and must disclose any circumstances likely to give rise to justifiable doubts as to impartiality and independence. The international arbitration experience reveals that difficulties can arise when this clause is applied internationally. It is very much a subjective judgment that the conciliator will have to make. It is suggested that the *IBA Guidelines on Impartiality, Independence and Disclosure in International Commercial Arbitration* adopted in May 2004 may help this section to be uniformly and properly applied.

(ii) Confidentiality

The usefulness of the Model Law provisions on confidentiality is that they acknowledge the dual aspects of the confidentiality problem. That is, confidentiality within the conciliation (parties may agree that confidential information disclosed by one party be kept from the other parties), and confidentiality of the conciliation (information disclosed during a conciliation may not be revealed outside the conciliation). At the same time, the parties retain their autonomy to choose what information they wish to give the character of confidentiality.

It should be noted that the importance of confidentiality in conciliation renders it open to the same criticisms levelled at arbitration in the context of investment disputes. That is, public issues may be resolved in private, away from public scrutiny, and in a way that may produce inconsistencies. Moreover, states may find it harder to justify to citizens negotiated settlements rather than the binding decision of an independent arbitral tribunal.

(iii) Disclosure between parties

Article 8 deals with confidentiality within the conciliation. The article provides that when the conciliator receives information concerning the dispute from one party, the conciliator may disclose the substance of that information to the other party. However, if one party expressly states that the information is confidential, the conciliator will not be disclosed to any other party to the conciliation.

The interesting aspect of this rule is the presumption that information in a conciliation is not confidential between the parties. This reflects the view that it is preferable for there to be an open circulation of information in the conciliation process. The opposite view, to make information confidential unless expressly agreed otherwise may promote greater candour, but would reduce the flexibility of the proceedings.

There appears to be a logical problem with the enforcement of such a provision. If a party alleges that a conciliator gave confidential information to another party, the only way of proving the allegation is by an inquiry into the conciliation process. This would compromise the same confidentiality that the parties are trying to protect. Ultimately, the parties would have to weigh up the advantages of pursuing the conciliator or other party against the value of their information remaining confidential. It is suggested that this provision of the Model Law might prove a useful basis for national standards for conciliators, that operate outside the bounds of civil liability

(iv) General duty of confidentiality

Article 9 deals with confidentiality. It provides that all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required by law. It is suggested that the concept of "all information relating to the conciliation proceedings" has a wide scope. Given the traditional importance placed on confidentiality in conciliation, Article 9 will play a significant role in creating a more uniform conciliation process, and protecting those parties who include no confidentiality clause in their agreement.

(v) Admissibility of evidence

The problem with admissibility of evidence arising out of a conciliation involves balancing the value of maintaining confidentiality, and the public interest in ensuring judicial proceedings are fully informed. Specifically, the Model Law stipulates that there shall not be introduced as evidence in arbitral or judicial proceedings material regarding:

- Willingness to engage in conciliation;
- Views or suggestions expressed during conciliation as to possible settlement;
- Statements or admissions;
- Proposals made by the conciliator;
- Willingness to accept proposals; and
- Documents prepared for conciliation

For nations who enact the Model Law, these provisions will mean that much of what happens in a conciliation will become inadmissible evidence. This will do much to protect the sanctity of conciliation as a confidential process, but possible undermine attempts to encourage parties to court or arbitration proceedings to behave reasonably in approaching settlement (for instance by limited or adverse orders for costs against unreasonable parties).

(vi) Liability of the conciliator

The Model Law does much to resolve some of the challenges that face conciliation in the 21st century. A striking omission however is the issue of the liability of the conciliator. This is a problem that still needs clarification. The conciliator is granted no immunity, and yet the procedure in the Model Law (disregarding confidentiality and conflicts which are well defined) is not sufficiently defined to ground a cause of action against a conciliator. Thus, it appears as if the Model Law has adopted a position in between immunity and liability, but the position is not defined with sufficient clarity.

(b) Enforceability

As non-binding dispute resolution is increasingly used to settle international disputes, the question has arisen as to the enforceability of settlement agreements. Unlike arbitration which is a widely accepted and internationally enforceable method of resolving disputes, there is no international legal structure for the enforcement of ADR clauses and settlements.

On the one hand, those who argue for an international legal structure supporting conciliation draw an analogy with arbitration. These commentators suggest that the main reason international arbitration is an effective international dispute resolution mechanism is because it is supported by a system of conventions and treaties. For example, national courts in signatory countries to the New York Convention are bound to stay court proceedings where an arbitration agreement applies.<sup>109</sup> The relationship between the arbitration tribunals and the courts lends to arbitral proceedings a measure of enforceability.

Advocates for a system that provides for international enforcement of conciliation agreements and settlements argue that it is necessary for conciliation to stand on its own at the international level.<sup>110</sup> The situation at the moment for commercial disputes is such that in their contract, the parties may have agreed to pursue a non-binding process. Its enforceability however, is dependent upon the courts in the country in which litigation has commenced recognising and enforcing the agreement. It is argued that an international system would enforce compliance with an agreement to conciliate, and recognise and enforce the terms at a conciliated settlement. This is already happening to an extent in Singapore. The International Arbitration Act allows a settlement reached through conciliation to be recorded as an arbitral

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<sup>109</sup> New York Convention, Article II.

<sup>110</sup> See for example, B.Wolski, "Recent Developments in International Commercial Dispute Resolution : Expanding the Options" (2001) 13 *Bond LR*.

award on agreed terms. The Singapore Mediation Centre and the Singapore International Arbitration Centre have designed a procedure to facilitate the giving of consent awards.<sup>111</sup>

On the other hand, the critics of an international system for the enforceability of conciliation agreements and settlements reject the connection between conciliation and arbitration. These commentators suggest that arbitration is intrinsically different to conciliation, most notably because arbitration is binding and conciliation is not.

The suggestion is that when parties come to a settlement, it is an agreement that both parties wish to voluntarily enforce. Conciliation is necessarily a consensual process. If one party wishes to challenge the conciliation settlement, then the conclusion is that the parties never really agreed in the first place. To enforce an agreement that is no longer an agreement would run counter to the goals of conciliation. Ultimately, there should be no need to enforce an award because the parties should voluntarily enforce it. This is because there is no winner or loser in the conciliation, the parties undertake conciliation to minimise cost and the risk of losing. The reason arbitral awards need to be internationally enforceable is that the award will ultimately make one party a winner and one party a loser. Of course the losing party, in the absence of a legal framework to enforce the award, would say "no, I don't want to be bound by that". If in conciliation, a party, after agreeing to a settlement, says "no, I don't like the agreement anymore" then a possible solution might be to reform the process so the parties reach an agreement with which they are happy.

A second problem with enforcing agreements to conciliate is that it is futile to force unwilling parties to participate in conciliation as cooperation is unlikely in such circumstances. The flip side is, of course, that a skilful conciliator, when confronted with these problems, will often find a way to resolve them.<sup>112</sup> It is also difficult to establish compliance with the agreement because conciliation is a process characterised by its flexibility. Furthermore, it is always possible for a party to comply with an agreement to conciliate, in form only, as a precedent to litigation. The major institutions are likely to keep their ADR Rules very general so as to guarantee flexibility of the process. It is difficult to imagine how these rules would provide the procedural certainty necessary to properly enforce such a claim. Thus, to compel this party to pursue conciliation when they really have no interest in the process is unlikely to be successful.

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<sup>111</sup> Section 18 of the Singapore *International Arbitration Act* 2002 provides that if the parties to an arbitration agreement reach agreement in settlement of their dispute and the arbitral tribunal has recorded the terms of settlement in the form of an arbitral award, the award shall be treated as an award on an arbitration agreement. Similarly, Rule 28.7 of the SIAC Rules provides that in the event of a settlement, the Tribunal may render a consent award recording the settlement if any party so requests.

<sup>112</sup> Wolski, above n 112 at 255.

One argument may be that because court-ordered conciliation has proved to be successful, enforcing a stay of proceedings when there is a valid conciliation agreement will also be successful. There is a distinction however between court-ordered conciliation and the system proposed by the Model Law. In court-ordered conciliation, the judge will only refer those matters to conciliation which he/she believes are likely to be resolved. The Model Law allows one party to enforce a conciliation agreement regardless of how appropriate the matter is for conciliation. The goal of an international system is to make international conciliation more efficient by forcing parties to pursue conciliation. The system may force matters go to conciliation that would never have a chance of settling, and may leave itself open to procedural abuse.

The only way in which parties might be compelled to take the conciliation process seriously would be to include "hurdles" in the Model Law through which the parties have to leap. One option may be to include a general obligation to negotiate in good faith. This however, would need to be adequately defined, given the different approaches that national courts have taken with respect to the phrase. Another option might be include time limits. This is not an appropriate solution because this would impose a structured a regime on a process that has evolved as something eminently flexible. One must also be careful to suggest increased regulation. After all, the role of the Model Law is to get parties to the negotiating table. Clearly the law should not be a "toothless tiger" but it is not desirable that the Law should spawn a second level of litigation as to whether the conciliation was properly conducted.

Finally, as already discussed, there is an issue as to whether it is appropriate to enforce a settlement agreement from which one party wishes to resile. There is no easy answer to this, and perhaps the best way to make settlement agreements more likely to be enforced is through better education of conciliators; both as to the best way to conduct the conciliation to find a solution with which both parties are happy, and awareness of the "toolbox" of processes so that the conciliator can better tailor the process to the particular dispute at hand.

The arbitration experience shows that it will take many years to get any international conciliation system right. When looking at the Model Law on International Commercial Conciliation, it is instructive to keep front of mind that "conciliation" is a flexible and non-binding procedure. The end result should be an agreement to which the parties *want* to be bound. There is a role for a international framework for commercial conciliation, and its success should be measured by the extent to which it promotes efficiency, and helps parties to achieve a solution to which they want to be bound.

## 6. **Conclusion**

Although the omission of an arbitration clause in the 2005 Australia-United States Free Trade Agreement indicates that investor-state arbitration may not be the preferred method of dispute resolution for agreements between developed nations with high levels of reciprocal investment, investor-state proceedings, whether arbitration under BITs or FTAs, certainly seem to be proliferating. It has become a major growth area in dispute resolution, as evidenced by the increase in the number of cases handled by ICSID.<sup>113</sup> The question is whether its proliferation will lead to its demise, because of the unexpected effect on governments and public concern about transparency, accountability and consistency. Therefore, one can legitimately ask: will states retreat to the days of state protection of investors or is the genie out of the bottle? The answer appears to be that it is unlikely that promotion of trade and the increase in the efficiency of economies will be serviced by a retreat to the past. This is not to say, however, that there should not be attempts to quickly address the justified criticisms of investor-state arbitration. It is a question of tailoring procedures to be more effective in the context of investor-state arbitration, through addressing concerns about transparency and consistency. Moreover, awareness by investor and state communities about relevant processes needs to be enhanced.

Further, the fact that there has been very little uptake for alternative dispute resolution in investor-state matters indicates it is an area where substantial reform is possible. Although there is potential for IPAs to become involved, to be successful such methods have to address the same concerns that face the use of arbitration to resolve investment disputes. Alternative dispute resolution mechanisms will probably only be effective if agreements actually provide for them, because without that the voluntary participation of states in this procedure is unlikely given the accountability problems with resolving these disputes by negotiation behind closed doors.

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<sup>113</sup> See above, section 2.

## Appendix

### BITs and FTAs to which Australia is currently a party<sup>114</sup>

#### Bilateral investment treaties in force

Agreement with Romania on the Reciprocal Promotion and Protection of Investments [1994] ATS 10

Agreement with the Arab Republic of Egypt on the Promotion and Protection of Investments [2002] ATS 19

Agreement between Australia and Uruguay on the Promotion and Protection of Investments [2003] ATS 10

Agreement with the Republic of Chile on the Reciprocal Promotion and Protection of Investments [1999] ATS 37

Agreement with the Republic of the Philippines on the Promotion and Protection of Investments [1995] ATS 28

Agreement with Hong Kong concerning the Promotion and Protection of Investments [1993] ATS 30

Agreement with the Czech Republic on the Reciprocal Promotion and Protection of Investments [1994] ATS 18

Agreement with the Republic of Indonesia concerning the Promotion and Protection of Investments [1993] ATS 19

Agreement with the Republic of India on the Promotion and Protection of Investments [2000] ATS 14

Agreement with the Lao People's Democratic Republic on Reciprocal Promotion and Protection of Investments [1995] ATS 9

Agreement with the Republic of Peru on the Promotion and Protection of Investments [1997] ATS 8

Agreement with the Argentine Republic on the Promotion and Protection of Investments [1997] ATS 4

Agreement with the Independent State of Papua and New Guinea for the Promotion and Protection of Investments [1991] ATS 38

Agreement with the Socialist Republic of Vietnam on the Reciprocal Promotion and Protection of Investments [1991] ATS 36

Agreement with Republic of Poland on the Reciprocal Promotion and Protection of Investments [1992]  
ATS 10

Agreement with the Republic of Hungary on the Reciprocal Promotion and Protection of Investments  
[1992] ATS 19

Agreement with the People's Republic of China on the Reciprocal Encouragement and Protection of  
Investments [1988] ATS 14

Agreement with the Islamic Republic of Pakistan on the Promotion and Protection of Investments [1998]  
ATS 23

Agreement with the Republic of Lithuania on the Promotion and Protection of Investments [2002] ATS 7

Trade and Investment Agreement with the Government of the United Mexican States [1997] ATS 15

*Bilateral investment treaties not yet in force*

Agreement with the Government of the Republic of Turkey on the Reciprocal Promotion and Protection  
of Investments

Agreement with the Government of the United Mexican States on the Promotion and Reciprocal  
Protection of Investments

Agreement with the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of  
Investments

*Free trade agreements*

Australia-US Free Trade Agreement [2005] ATS 1 (NB: no direct investor-state arbitration)

Australia New Zealand Closer Economic Relations - Trade Agreement [1983] ATS 2 (NB: no direct  
investor-state arbitration)

Australia-Thailand Free Trade Agreement [2005] ATS 2

Singapore-Australia Free Trade Agreement [2003] ATS 16

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<sup>114</sup> Available at <<http://www.info.dfat.gov.au/Info/Treaties/Treaties.nsf/HomeForm?OpenForm>>.

*Multilateral treaties*

The Energy Charter Treaty

Convention establishing the Multilateral Investment Guarantee Agency [MIGA] [1998] ATS 24

Convention of Settlement of Investment Disputes between States and Nationals of Other countries  
[ICSID under the auspices of the IBRD] [1991] ATS 23