International Dispute Settlement

Topic 5

Jurisdiction and Admissibility

Jurisdiction before ICSID

- Background
  - Moves towards providing standards set of rules that would be available to states to apply to arbitrations.
  - Different rules available for states to use for arbitration. E.g.
    - Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) ('ICSID Convention')
    - UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
    - Permanent Court of Arbitration Rules 2012
- **Jurisdiction under ICSID Convention**
  - Article 25 (1):
  - *The jurisdiction of the Centre shall extend to <u>any legal dispute arising directly out of an investment</u>, between a <u>Contracting State</u> (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) <u>and a national of another Contracting State</u>, which the parties to the dispute <u>consent in writing</u> to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*
- **Key terms**
  - ***'an investment':*** Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3 and Christopher Schreuer*:*
    - *"the basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host state's development"*
  - ***'contracting state':*** a party to the ICSID Convention
  - **'National of a Contracting State'**
    - See article 25(2)
    - Natural persons: nationality as determined under domestic law
    - Juridical persons: usually place of incorporation
      - But note 'foreign control' in Art 25(2)
- **Consent to Jurisdiction**
  - Being a party to the ICSID Convention is just the start
  - Most commonly, states evidence additional consent through the inclusion of a dispute settlement clause in a BIT e.g.: Australia / Argentina BIT
    - Article 13: *In the case of international arbitration, the dispute shall be submitted, at the investor's choice, either:*
    - *(a) to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as "the Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature in Washington on 18 March 1965 (hereinafter referred to as "the*

Convention"),[1] provided that the Contracting Parties are both parties to the Convention; or

- Note that conditions may be attached
- The national of the Contracting State must also consent by sending written notice to ICSID

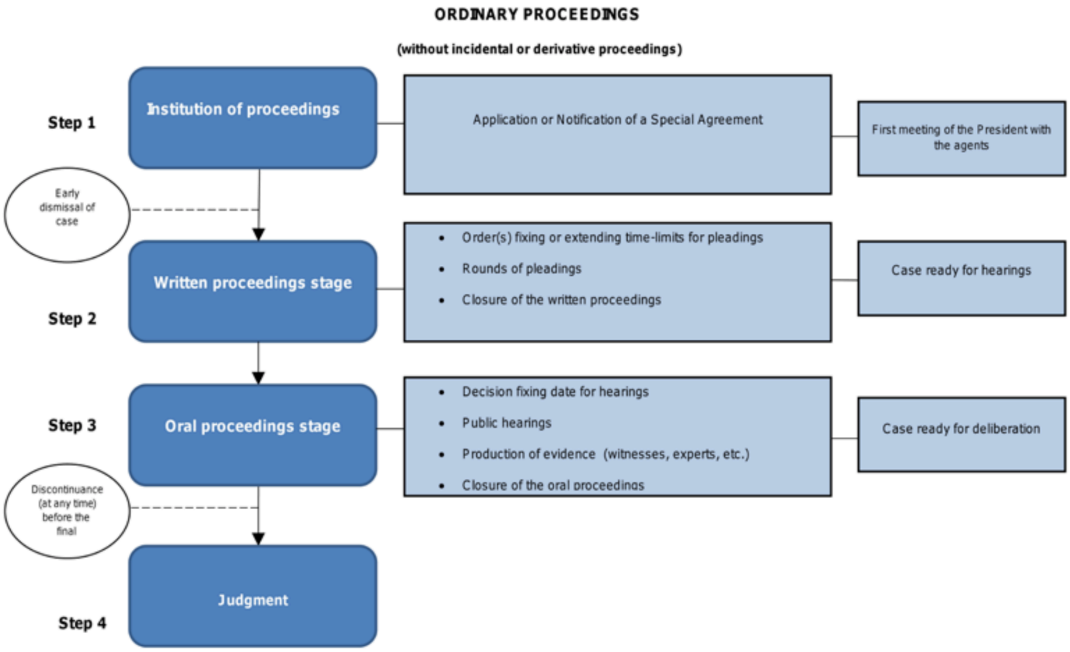
- **Tobacco Plain Packaging**
  - Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia, PCA Case 2012-12
  - Background:
    - *JT International SA v Cth*; *British Amercian Tobacco Australia & Ors v Cth* [2012] HCA 43
- **Agreement between Aust & HK**
  - *Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments (Hong Kong, 15 September 1993)*
  - Article 10: *A dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment of the former in the area of the latter which has not been settled amicably, shall, after a period of three months from written notification of the claim, be submitted to such procedures for settlement as may be agreed between the parties to the dispute. If no such procedures have been agreed within that three month period, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The arbitral tribunal shall have power to award interest. The parties may agree in writing to modify those Rules.*
- **Phillip Morris v Australia**
  - Phillip Morris Asia Pacific incorporated in Switzerland, then moved to Hong Kong
  - Bifurcate proceedings → jurisdiction, then merits
  - Decision on jurisdiction in 2015, available online
  - Award on costs (see Topic 11 – Reparations)
- **Investor State Dispute Settlement (ISDS)**
  - Is there a bilateral treaty or other treaty that has ISDS clause between the investor and the host state?
  - Are there any preconditions that need to be undertaken prior to arbitration e.g. negotiation?
  - Look to the relevant treaty e.g. ICSID Convention:
    - Nationality of the individual or corporation
    - Whether there is an 'investment'
  - Any issues of admissibility?

Topic 8

Contentious Proceedings

Procedure before the ICJ

- Relevant documents
  - Statute of the ICJ: http://www.icj-cij.org/en/statute
  - Rules of Court (ICJ): http://www.icj-cij.org/en/rules
  - Practice Directions of the ICJ: http://www.icj-cij.org/en/practice-directions



- Initiating proceedings
  - Article 40(1), ICJ Statute: either by the notification of the special agreement or by a written application addressed to the Registrar
  - Remember jurisdiction (Art 36, ICJ):
    - Special agreement
    - Treaties or Conventions (including those with compromissory clauses)
    - Forum prorogatum
    - Acceptance of jurisdiction under the optional clause (Article 36(2))
  - Communicated to all other states
  - Article 38(1) and (2) Rules of the Court: An application must include:
    1. The party making the application
    2. The State against which the claim is brought
    3. The subject of the dispute (factual or factual/legal) e.g. *Serbia v NATO states* 'the bombing of the territory of the Federal Republic of Yugoslavia' c.f. *Anglo Norwegian Fisheries Case* 'the subject of the dispute is the validity or otherwise under international law of the lines of delimitation of the Norwegian Fisheries Zone… which is situated northward of 66°28.8' north latitude.'
    4. Specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based
    5. The precise nature of the claim

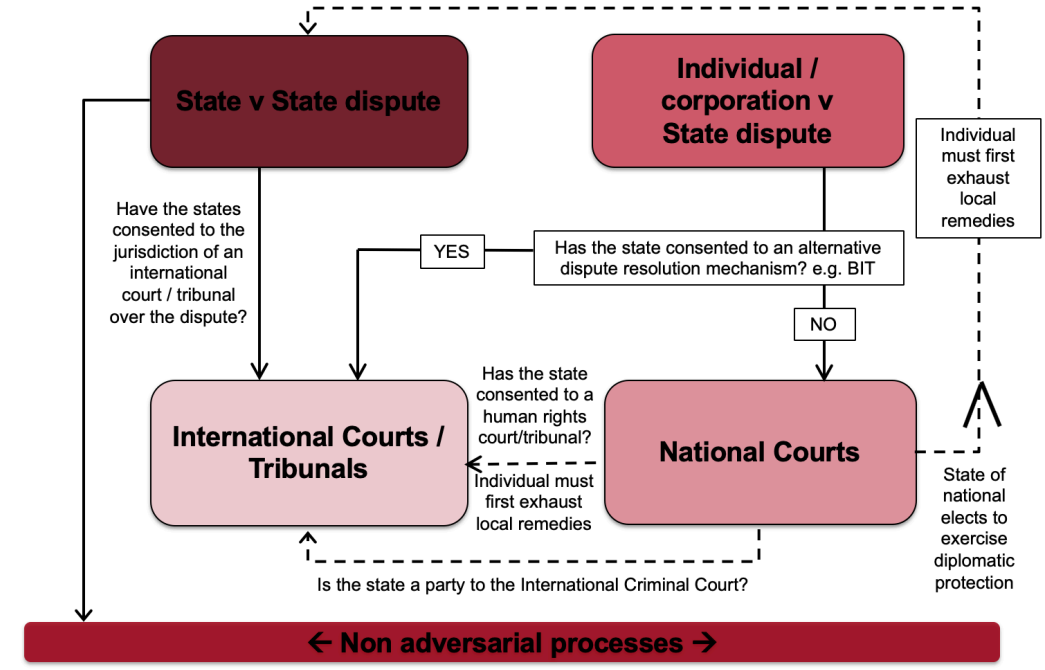
6. A succinct statement of the facts and grounds on which the claim is based
   - Article 39: Application needs to be made in English and French
- **Whaling Case – application**
  - Australia's application in Whaling case: http://www.icj-cij.org/files/case-related/148/15951.pdf
- **Conducting litigation**
  - Phases of a case:
    1. Provisional measures phase;
    2. Jurisdiction and admissibility phase;
    3. Counter-claims phase;
    4. Intervention phase (whether under Article 62 or under Article 63 of the Statute);
    5. Merits; and
    6. Reparations phase.
- **Written stage**
  - *The provisions of the Statute and Rules of Court concerning the presentation of pleadings and evidence are designed to secure a proper administration of justice, and a fair and equal opportunity for each party to comment on its opponent's contentions. (Nicaragua, Merits, Judgment of 27 June 1986, ICJ Rep. 1986, p. 26, para. 32)*
  - Article 43(2) of the Statute:
    - *The written proceedings shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also all papers and documents in support.*
  - Order of pleadings:
    - Memorial (applicant)
    - Counter-Memorial (respondent)
    - Reply (applicant)
    - Rejoinder (respondent)
  - Article 49(1) of the Rules of Court. The memorial needs to have:
    - statement of the relevant facts,
    - a statement of law,
    - and the submissions.
  - Australia's memorial in the Whaling Case: http://www.icj-cij.org/files/case-related/148/17382.pdf
  - Article 49(2). The Counter-Memorial shall contain:
    - an admission or denial of the facts stated in the Memorial;
    - any additional facts, if necessary;
    - observations concerning the statement of law in the Memorial; a statement of law in answer thereto; and
    - the submissions.
  - Japan's counter memorial in the Whaling Case: http://www.icj-cij.org/files/case-related/148/17384.pdf

Topic 9

Interaction with National Courts

Overview

- Introduction
- Exhaustion of local remedies
- Consequences of multiple courts exercising jurisdiction
- Interaction of national and international courts: international criminal responsibility
- Issue: ***when*** *can national or international courts and tribunals exercise jurisdiction?*



This diagram provides a general visual overview of relationships in international dispute settlement. It does not conclusively address all situations in international dispute settlement or address complex questions of jurisdiction and admissibility

Note that each court or tribunal has its own rules on jurisdiction, admissibility and procedure

- Corporation → if a corporation has been injured by a state, breach of IL, country of nationality of the corporation can bring the case on behalf of the corp by exercising diplomatic protection
  - E.g. Guinea v DRC

Exhaustion of local remedies

- National courts are an expression of state sovereignty
- Proceedings before national courts with an international character are usually from an individual or corporation against the state
- Exception to the rule
  - If the State has consented to an alternative mechanism of dispute resolution in international law e.g. free trade agreement, bilateral agreement
- The right of diplomatic protection
  - *"A State should be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before its international responsibility can be called into question*." Cançado Trindade, The Application

of the Rule of Exhaustion of Local Remedies in International Law, CUP, 1983, p.1.

- The purpose of the doctrine
  - State sovereignty → state should first be able to have the chance to address the complaint regarding their compliance and obligations in IL in its own forum before an international forum
  - Complement national legal systems → international systems only step in if the obligation remains unfulfilled
  - More expeditious
  - Prevents proliferation of small claims in international forums
  - Allows for multiple parties which isn't always available at the international level
- *Interhandel Case* (Switz. v. US), 1959 ICJ 6
  - **Facts:**
  - During WW2 US put trade restrictions on other countries and froze assets
  - Treaty between US and Switzerland, 1931
  - Washington Accord, 1946
    - Between the Allies
    - Treaty that provided US would unfreeze Swiss assets in the US
  - US refused to unfreeze the assets of IG Faben, which it believed was a German company. IG Faben was known to have produced chemicals used by the Nazis
  - Interhandel commenced proceedings in the national courts but ran into an issue with document review
  - Switzerland on behalf of Interhandel sought to bring the dispute before international mediation or conciliation under a separate treaty which concerned general dispute resolution → US refused
  - Switzerland brought a claim under the ICJ
  - **Issue:**
  - Was Swiss claim admissible before ICJ? Had Interhandel exhausted local remedies?
  - **Held:**
  - Exhaustion of local remedies is customary international law
  - Country should be able to consider the dispute in its own forum first
  - Switzerland had not exhausted local remedies
  - *"Before the tribunals of the respondent State have handed down its final decision, the State may not be considered liable internationally because and for the simple and good reason that the damage has not as yet been consummated. This principle informs all systems of law-civil as well as criminal, local as well as international. A State may not even exercise its diplomatic protection, and much less resort to any kind of international procedure of redress, unless its subject has previously exhausted the legal remedies offered him by the State of whose action he complains". Sep Opinion, Judge Cordova, page 46.*