ARBITRATION
In Dispute Setlement

Dr. Rudi Natamiharja

Arbitration

- **Arbitration has been used for a long time by states as a method of international dispute settlement.**
- **Arbitration is carried out by an arbitral tribunal set up <u>ad hoc</u> to resolve a specific dispute.**
- **In arbitration, the disputing parties choose the arbitrators, the location and procedure of the tribunal, and determine applicable law. This is done by a special agreement called "compromis".**
- **Arbitral awards are binding for the disputing parties.**
- **The Permanent Court of Arbitration has been set up by the 1899 Hague Convention for the Pacific Settlement of International Disputes.**
- **Recent practice of the Permanent Court of Arbitration has been limited. There were only 43 arbitrations between 1945 and 1990.**

- Mixed arbitrations where a state or state entity is a party, e.g. investment disputes. Main rules applied:
  - ICSID Rules
  - UNCITRAL Rules
  - PCA Rules
    - “Arbitration without privity”

- Inter-state arbitration: border disputes; diplomatic protection disputes; treaty disputes

Advantages of international commercial arbitration

- Finality and binding nature of outcome - in principle
- Enforceability under international conventions
- Neutrality: no involvement of possibly hostile "foreign" judiciary
- Expertise of arbitrators
- Procedural flexibility
- Speed and costs?

Dispute Settlement between Investors and Host States (1)

- The existence of effective and efficient methods for resolving investment disputes: “the ultimate guarantee of protection for foreign investors” (UNCTAD)
- Two methods of dispute settlement in BITs:
  - Investor-State consultation and negotiation
    - Pre-requisite to proceed to an arbitration
  - Investor-State Arbitration

Dispute Settlement between Investors and Host States (2)

- Jurisdictional basis of the investor-State arbitration: “agreement to arbitrate”
  - ICSID Convention Art 25(1):

    The jurisdiction of the Centre shall extend to any legal disputes arising directly out of an investment, between a Contracting State…… and a national of another Contracting State, which <u>the parties to the dispute consent in writing</u> to submit to the Centre.

    ……
  - The investor-State arbitration clause in a BIT functions as a State’s consent to submit certain kinds of investment disputes to an arbitration. It defines the scope and conditions of such consent.