

International Centre for Settlement of Investment Disputes (ICSID)

by

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The Author

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List of Abbreviations

Additional Facility	ICSID Additional Facility
Arbitration Rules	ICSID Arbitration Rules
BIT	Bilateral Investment Treaty
CAFTA	Central America-United States Free Trade Agreement
Centre	International Centre for Settlement of Investment Disputes
Conciliation Rules	ICSID Conciliation Rules
Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1966
DCF	Discounted Cash Flow
DR-CAFTA	Dominican Republic-Central American Free Trade Agreement
ECHR	European Convention on Human Rights
FDI	Foreign Direct Investment
History of the Convention	Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IBA	International Bar Association
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
IFC	International Finance Corporation
ILC	International Law Commission
ILC Articles	International Law Commission Articles on State Responsibility

List of Abbreviations

ILM	International Legal Materials
IMF	International Monetary Fund
Institution Rules	ICSID Convention Institution Rules
IUSCT	Iran-United States Claims Tribunal
LCIA	London Court of International Arbitration
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North American Free Trade Agreement, 1994
NGO	Non-governmental Organization
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
SCC	Stockholm Chamber of Commerce
The New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
The Singapore Convention on Mediation	The United Nations Convention on International Settlement Agreements Resulting from Mediation (2018)
UN	United Nations Organization
UNCAC	UN Convention against Corruption
UNCTAD	United Nations Commission on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties, 1969
World Bank	International Bank for Reconstruction and Development
World Bank Guidelines	The World Bank Guidelines on the Treatment of Foreign Direct Investment

Preface

The International Centre for Settlement of Investment Disputes is an intergovernmental organization at the core of the system of investor-state dispute settlement (ISDS). Today ICSID is busier than ever with the number of cases pending at its historical maximum. However, the legitimacy of the system of ISDS recently moved into the focus of a number of states and international organizations. ICSID initiated reform of its rules to address concerns of its users. The United Nations Commission on International Trade Law (UNCITRAL) established a special working group to study and reform the system of investor-state disputes.

Against this background, states increasingly reform their international investment agreements, and in particular provisions dealing with ISDS. While the vast majority of states still support the idea of the investment arbitration as the most appropriate method of dispute resolution, some decided to avoid it altogether in their treaties or favour the idea of a permanent investment court. All these developments make it increasingly important to understand the law and practice of ICSID, an institution which dominates the system of ISDS.

This fourth edition of the ICSID monograph has significantly expanded, not only as a result of updating the existing sections but also because of addition of several sections, important for better understanding of the process of dispute resolution such as dealing with evidence and damages, costs and fees. In addition, a separate chapter deals with non-investment obligations in international arbitration related to human rights and environment.

This edition also pays more attention to concerns, expressed by states, investors and the civil society in relation to ICSID and ISDS. These include inconsistent decision-making, high costs of ICSID proceedings, the negative impact on sovereignty, contributing to an imbalance between the Global North and South, limited transparency and access to participation in proceedings by the third parties.

This monograph also lays the foundation and is on the recommended reading list of a new online course on International Investment Law and Dispute Resolution recently launched by the British Institute of International and Comparative Law.¹ This and other useful online resources are included in the updated weblinks section of this monograph.

1. British Institute of International and Comparative Law, International Investment Law and Dispute Resolution (Online Course), available at <https://biicl.org/isds> (accessed on 1 Jul. 2020).

Preface

The monograph has greatly benefited from my interactions with the members of the Investment Treaty Forum of the British Institute of International and Comparative Law. It also benefited from my work on advising states on the reform of their international investment agreements and improving the outcomes of investor-state disputes. I would also like to thank my research assistants, in particular Shaun Matos, Lizaveta Trakhalina, Sofia Roveta and Ruihan Liu for their help.

Professor Yarik Kryvoi
July 2020
British Institute of International and Comparative Law

Part I. Development and Structure of ICSID

Chapter 1. Introduction

1. The International Centre for Settlement of Investment Disputes (ICSID) is an independent international organization and a leading international arbitration institution in the field of investor-state dispute settlement (ISDS). It was established in 1966 as a part of the World Bank pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

2. ICSID has undoubtedly become the central institution in the world of international investment law. As of 2019, 154 states were Contracting States to the ICSID Convention, and 306 cases were administered by ICSID in that year alone.² Given the clear importance of ICSID in the international investment law regime, it is important to understand how the institution is structured, how decisions are made and how it is financed. Without such information, parties could quickly lose faith in it as a neutral forum in which to settle investment disputes. Further, despite the dominance of ICSID, it does not exist in isolation. A number of other institutions also play a role in the international investment law regime. This chapter will examine the efforts that have been made to build relationships between ICSID and these other entities.

3. The Convention sought to remove major impediments and risks to foreign direct investments (FDIs) in the absence of specialized facilities for investment dispute settlement. It created the Centre for Settlement of Investment Disputes as an impartial international forum providing facilities for the resolution of international investment disputes. The Centre facilitates resolution of disputes between foreign investors and states through conciliation or arbitration procedures. Recourse to the ICSID facilities is always voluntary and subject to the parties' consent.

4. ICSID also acts as an appointing authority for investor-state arbitrations under other procedural rules. The Centre also provides administrative assistance to arbitrations conducted under ad hoc rules, such as the United Nations Commission on International Trade Law (UNCITRAL). The Centre's support includes organization of hearings and administrative services similar to those provided in ICSID cases.

2. ICSID, 2019 Annual Report, 11, 19.

ICSID Secretariat also acts as appointing authority and decides upon proposals to disqualify arbitrators. The Centre assisted with proceedings under the auspices of International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), Permanent Court of Arbitration (PCA) and other institutions.³

3. ICSID, The ICSID Caseload Statistics Issue 2012-2, 9.

Chapter 2. ICSID and Investor-State Disputes

5. Prior to studying the ICSID in detail, it is necessary to look into the economic and legal context that determined the need for establishing the ICSID. The main factors were the rise of cross-border foreign investments and the increasing number of bilateral and multilateral investment treaties setting the legal standards of treatment of foreign investors.

6. Before the modern system of direct investor-state dispute resolution emerged, disputes were resolved via diplomatic channels or, at times, by the threat or actual use of military force.⁴ Since at least the late eighteenth century states began to systematically address injuries suffered by foreigners on their territory, largely through so-called claims commissions.⁵ These commissions often emerged in response to wars or civil insurrections that impacted the property of foreigners, companies or private individuals. Individuals could not directly confront the foreign state for mistreatment; instead, their home states would take up their citizens' claims as their own.

7. Several fundamental changes in the legal landscape have occurred since the constitution of the early compensation commissions of the eighteenth century eventually leading to the modern system of resolution of investor-state disputes.⁶ First, a growing number of multinational enterprises operating globally have become major actors on the international public law plain, in areas that in the past were reserved only for states. Second, international organizations and other non-state actors have dramatically strengthened their influence with efficient international arbitration institutions dominating the system of investor-state dispute resolution after the end of the Cold War.

8. The methods for resolving investor-state disputes have evolved primarily from ad hoc politically dominated commissions to creating specialized institutionalized forms such as ICSID.⁷ While early commissioners relied on their subjective understanding of justice and fairness, today the expectation is applying agreed set of rules, so that failure to do so may result in annulment of the award.

9. Investors often want to avoid poorly functional and biased domestic dispute resolution systems. The availability of arbitration as an option for investors influences the entire format of investor-state dialogue and dispute resolution practice. Under the ICSID system, investors can initiate claims directly against states, which is rather unusual for public international law.⁸

4. See Andrew Paul Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 9 (Kluwer Law International 2009).

5. See more Yarik Kryvoi, *The Path of Investor-State Disputes: From Compensation Commissions to Arbitral Institutions*, 33(3) ICSID Rev. - FILJ 743-765 (2018).

6. *Ibid.*

7. *Ibid.*

8. Private parties can also submit claims against states to the European Court of Human Rights.

10. Foreign investments dramatically grew in the twentieth century and facilitated globalization. There is an almost universal consensus that cross-border investment flows are beneficial for foreign investors and host countries. Cross-border investment flows improve the long-term efficiency of the host country by providing greater competition, transferring capital, technology and managerial skills, enhancing market access and expanding the volume of international trade. Foreign investors also benefit from their access to new markets, cheaper natural resources and an expanded labour force; they also create new jobs and provide new technologies for the host countries.

11. International investment treaties are meant to facilitate foreign investments. According to the United Nations Commission on Trade and Development (UNCTAD), as of 2019, over 2,650 international investment treaties were in force, most of which are bilateral investment treaties (BITs),⁹ a large number of preferential free trade and investment agreements, as well as numerous regional and multilateral agreements that regulate foreign investments.

12. Investment laws and BITs reflect the modern trend of investment regulation liberalization and increasingly protective standards of the treatment of foreign investment.¹⁰ On the domestic level, governments across the globe adopt very similar approaches to the legal regulation of the treatment of private foreign investment. The standards include rules of entry, guarantees against expropriation, general standards of treatment and procedures for the settlement of disputes.

13. The World Bank and other United Nations (UN) agencies, such as UNCTAD, work on creation of favourable investment climates in various countries. The World Bank publishes an annual *Doing Business Report* aimed at creating more favourable business climates in various countries; the Multilateral Investment Guarantee Agency (MIGA) is in charge of insuring investment risks. UNCTAD monitors FDI flows, publishes BITs and promotes more predictable investment environments.

14. But despite all those efforts by international organizations and national governments, doing business in foreign countries, especially where the rule of law is weak and the political situation is unstable, may be quite risky. The likely risks include expropriation of investor's property without adequate compensation, governmental interference short of expropriation, a government's non-observance of contractual obligations, discrimination and unfair treatment. Thus, there was a growing need for an impartial dispute resolution body, such as ICSID, specializing in investment disputes.

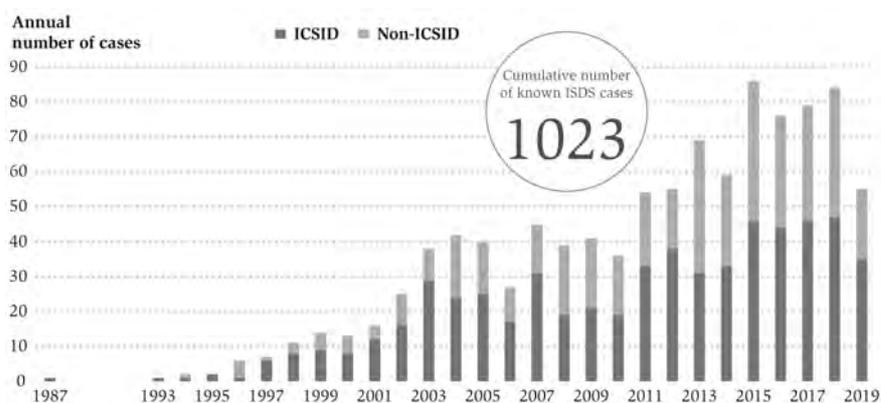
9. UNCTAD, Taking Stock of IIA Reform: Recent Developments, June 2019, available at https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5_en.pdf (accessed on 1 May 2020). See also UNCTAD International Investment Agreements Navigator, available <https://investmentpolicy.unctad.org/international-investment-agreements> (accessed on 1 May 2020).

10. See Antonio Parra, Provisions on the Settlement of Investment Disputes, 12 ICSID Rev. - FILJ 297 (1997).

15. According to the World Bank Guidelines on the Treatment of Foreign Direct Investments, disputes between private foreign investors and the host state are normally settled through negotiations between them or, failing this, through national courts or other mechanisms, including conciliation and binding independent arbitration.¹¹ The World Bank encourages states to accept investment dispute settlements through arbitration under the ICSID Convention or through the ‘ICSID Additional Facility’ if a state is not a party to the Convention.¹²

16. The Centre’s large membership base, its rising caseload and the numerous references to its arbitration facilities in investment treaties and laws is evidence of its increasing significance. ICSID plays a central role in the development of the body of international investment law and dominates the system of investor-state disputes: for example, as shown in Figure 1, according to UNCTAD between 1987 and 2018, 55% of all ISDS cases were brought under the ICSID Convention with further 6% under the ICSID Additional Facility Rules, compared to 31% under UNCITRAL Rules, and 8% under all other rules combined.¹³

Figure 1 Known Investment Treaty Arbitrations (Cumulative and Newly Instituted Cases), 1987–2019



Source: UNCTAD, ISDS Navigator.

17. A growing number of international investment treaties, which provided ICSID arbitration as a method of resolving disputes, explain the dramatic increase in disputes arbitrated at ICSID. Following the collapse of the Soviet Union in the early 1990s, the Eastern Bloc countries began liberalizing their economies and

11. See World Bank Guidelines, para. V(1).

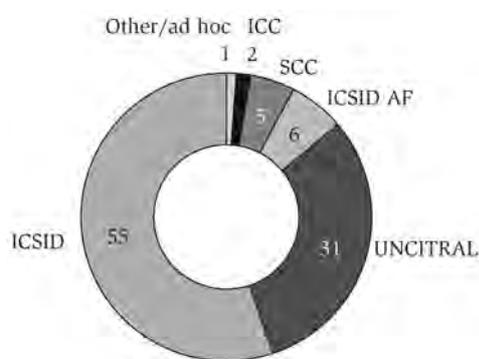
12. *Ibid.*, para. V(3).

13. UNCTAD, Investor-State Dispute Settlement: Review of Developments in 2014, No. 2, May 2015, 4.

encouraging FDI by means of international investment treaties with ICSID dispute resolution clauses. Successful and highly publicized arbitral awards also contributed to investors' willingness to put forward their international claims in ICSID.

18. Almost all BITs provide for arbitration to resolve investment disputes. Typically, investors are given a choice between submitting disputes to ICSID or to an ad hoc tribunal established under the rules of the UNCITRAL. However, disputes may also be brought before other arbitral bodies, such as the ICC, the Stockholm Chamber of Commerce (SCC) in Paris and the LCIA (*see* Figure 2).¹⁴

Figure 2 Disputes by Forum of Arbitration



Source: UNCTAD (2018).

19. Multilateral investment treaties, such as the North American Free Trade Agreement (NAFTA), also have contributed to the increased number of international investment disputes. NAFTA is the most well-known treaty between the United States, Canada and Mexico. Chapter 11 of the treaty permits investors of these countries to initiate arbitration under the UNCITRAL Rules or ICSID Additional Facility Rules. In 2012, the first ever arbitration before ICSID brought under the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA) reached the merits stage.¹⁵

20. The number of international investment disputes, that is, disputes between foreign investors and host states, has grown tremendously in the past decade. Although agreements, which provided for the protection of investments and arbitration of investor-state disputes, existed for many decades, the first investor-state

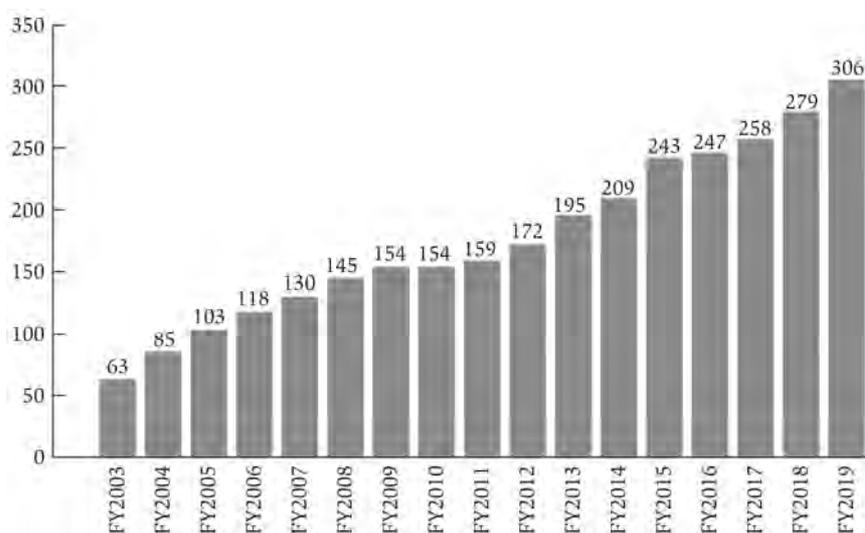
14. For an overview of other arbitration *fora*, *see* Jan Paulsson et al., *The Freshfields Guide to Arbitration and ADR* (Kluwer Law International 1999).

15. *Railroad Development Corp. (RDC) v. Guatemala* (ICSID Case No. ARB/07/23), Award of 29 June 2012.

dispute based on BITs was registered at ICSID in 1987, and as of April 1998, ICSID had considered only fourteen cases.¹⁶ In recent years, the number of investor-state arbitrations has dramatically increased as demonstrated in Figure 1. At the end of 2019 the total number of all known investor-state disputes exceeded 1,000.¹⁷ The largest number of disputes was initiated against states from Eastern Europe and Central Asia and the smallest from North America.¹⁸

21. The number of cases ICSID is administering is constantly growing as shown in Figure 3. In 2019 financial year, ICSID administered a record of 306 cases, a substantial increase compared with 279 the previous fiscal year. Since its first case in 1972, ICSID has administered 728 cases under the ICSID Convention and Additional Facility Rules.

Figure 3 ICSID Administered Cases by Fiscal Year



Source: ICSID 2019.

22. Based on the information about registered ICSID cases, their distribution is uneven as demonstrated in Figure 4. In recent years, there was a notable increase in the number of cases brought against states in Eastern Europe and Central Asia, which constitute the largest regional group with over 25% of all pending cases. The second-largest group accounts for the cases coming from Latin America.

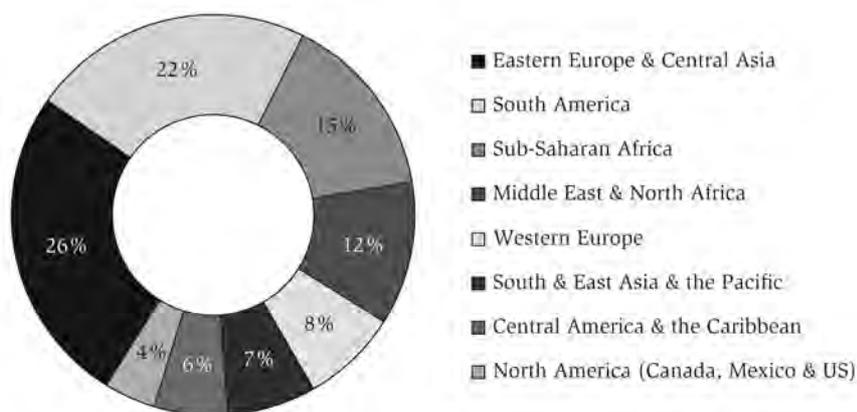
16. See the ICSID website, available at <http://www.icsid.worldbank.org> (accessed on 1 Dec. 2019).

17. UNCTAD, Latest Developments in Investor-State Dispute Settlement, No. 2, May 2015.

18. See ICSID, 2019 Annual Report, 24.

23. In mid-2000s, there was a sharp growth of cases brought against European Union Member States. In 2003, for example, there were around twenty known investor-state arbitrations and in 2013 the number was around 120.¹⁹ This is likely to change in the light of the policy of the European Union to abolish intra-EU investor-state disputes.²⁰ Other cases involve countries of South and East Asia, the Middle East, North Africa, sub-Saharan Africa and North America (*see* Figure 4). ICSID distribution of cases by economic sector reveals some interesting trends. The largest group of cases represents mining (25%), which is followed by electric power and energy disputes (13%) and transportation (11%). Other sectors such as finance, communication, construction account for less than 10% each.²¹

Figure 4 Geographic Distribution of All ICSID and ICDID Additional Facility Cases by State Party Involved



Source: ICSID (2019).

19. UNCTAD, Investor-State Dispute Settlement, An Information Note on the United States and the European Union, No. 2, June 2014, 6.

20. *See* Part III, Chapter 9, §3 below.

21. *See* ICSID, The ICSID Caseload Statistics Issue 2012-2, 12.

Chapter 3. The ICSID Convention

§1. GENESIS

24. The World Bank Group, which facilitated drafting of the ICSID Convention, was appropriately positioned to serve as a core of the newly created international dispute resolution mechanism. It is one of the largest multilateral financial institutions supplying capital to developing countries. The organization is directly concerned with capital flows from the developed to the developing nations, including private funds made directly available for projects in the developing world.

25. The World Bank Group emerged in 1945 as a result of the international Bretton Woods Agreements reached at the UN Monetary and Financial Conference in July 1944.²² The Group currently consists of the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), MIGA and ICSID. IBRD provides loans and development assistance to middle-income countries in Latin America, Asia, Africa and Eastern Europe. IDA's support is focused on the poorest countries, to which it provides interest-free loans and grants. IFC promotes growth in the developing world by financing private-sector investments and providing technical support and advice to governments and businesses. MIGA encourages foreign investment in developing countries by providing guarantees to foreign investors against loss caused by non-commercial risks. And, finally, ICSID – established in 1966 – provides facilities for settling investment disputes between foreign investors and their host countries.

26. ICSID became the realization of the World Bank's idea to provide institutional facilities and procedures promoting voluntary resolution of investment disputes. In the absence of any international instruments between the foreign investor and the host government, foreign investors resolved the disputes through the domestic courts under national procedural laws. The only other option available to investors was to invoke diplomatic protections of the home state to support the case and to initiate proceedings before an international tribunal. Thus, the investor was unable to proceed with an international claim against a foreign government directly.

27. Moreover, investors often found that their governments refused to proceed with even a meritorious claim, fearing that this would be regarded as an unfriendly act towards the host country.²³ It had been a well-established principle of international law at that time that a wrong done to a national of one state, for which another state was intentionally responsible, was actionable not by the injured national, but

22. See Harold James, *International Monetary Cooperation since Bretton Woods* (Oxford University Press 1996). See also, Christopher Gilbert & David Vines (eds), *The World Bank: Structure and Policies* (Global Economic Institutions 2000).

23. *History of the Convention*, Vol. II, 372.

by his or her state.²⁴ If it was unclear whether the case had merits, the home government was even less likely to proceed against another government. As a result, foreign investors were often deprived of an opportunity to have redress at an impartial tribunal.

28. In the late 1960s, the World Bank decided to conduct a detailed study on appropriateness of a new dispute resolution mechanism. The study concluded that such mechanism was desirable to reduce the likelihood of unresolved conflicts and eliminating the risk of confrontation between the host country and the investor's state.²⁵

29. As a specialized investment forum, the ICSID was initially established by the administrative action of the World Bank without any separate intergovernmental agreement. However, a number of legal issues required the adoption of a special convention. These issues included regulation of consent by sovereigns, enforcement of awards and exhaustion of local remedies.²⁶ The most important justification for the need for a special convention was to empower a private individual to file claims against the state without recourse to diplomatic protection.

§2. HISTORY OF DRAFTING AND ADOPTION

30. Work on the creation of a special investment dispute forum started after the General Counsel of the World Bank circulated a memorandum in 1961. The memorandum urged to tackle unfavourable investment conditions from the procedural angle by creating a forum of experts who would consider investment disputes voluntarily submitted to arbitration. In the course of drafting, two main proposals were considered. One proposal advanced the creation of a permanent tribunal staffed by arbitrators, elected and appointed for a fixed period, and operating under established rules of procedure. The other proposal suggested offering a panel of names, either submitted by the state parties to the tribunal or designated by some other authority, from which the arbitrators would be selected.²⁷ Eventually, the latter approach prevailed.

31. In the process of drafting the Convention, the World Bank followed the approach used in creating the IFC in 1956. The staff prepared drafts and working papers for the consideration of the Executive Directors, a policy-making body representing the World Bank's member countries. The Convention was to serve the following goals:

24. *Ibid.*

25. Aron Broches, *Selected Essays: World Bank, ICSID and Other Subjects of Public and Private International Law*, 193 (Springer 1995).

26. *Ibid.*

27. See note by Aron Broches, "Transmitted to the Executive Directors: "Settlement of Disputes between Governments and Private Parties"", in *History of the Convention*, Vol. II, 1.

- (a) a recognition by the states of the possibility of direct access by private individuals and corporations to an international tribunal in the field of financial and economic disputes with governments;
- (b) a recognition by the states that agreements made by them with private individuals and corporations to submit such disputes to arbitration are binding international undertakings;
- (c) provision of international machinery for the conduct of arbitration, including the availability of arbitrators, methods for their selection and rules for the conduct of the arbitral proceedings;
- (d) provision for conciliation as an alternative for arbitration.²⁸

32. In 1963, the World Bank Executive Directors authorized the President of the World Bank to convene regional meetings of experts to work out various technical questions related to drafting the Convention. On the basis of the Bank's General Counsel and the expert meetings' reports, the Executive Directors concluded that a convention was negotiable. The Board of Governors of the World Bank at an Annual Meeting assigned the Executive Directors the task of drafting the Convention dealing with settlement of investment disputes, which would be acceptable to the largest number of participants.²⁹

33. Sixty-one member countries met in Washington, DC, at the Bank's headquarters to discuss the Convention and a specially designated Legal Committee was appointed. The Executive Directors used the 'no-formal-vote-system', under which they tried to achieve consensus instead of resorting to a formal vote.³⁰ On 18 March 1965, the Executive Directors of the World Bank approved the text of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States for signature and ratification of member governments.³¹ According to Article 67 of the Convention, it is open for signature on behalf of Member States of the World Bank, as well as any other state, which is a party to the Statute of the International Court of Justice (ICJ).

34. Today, ICSID provides an effective organizational and procedural framework for the settlement of international investment disputes between foreign investors and governments. The Convention established the Centre and provides for procedures of conciliation and arbitration, to which foreign investors and governments submit their disputes on the basis of consent.

28. History of the Convention, Vol. II, 2.

29. Executive Directors' Report.

30. Aron Broches, Selected Essays: World Bank, ICSID and Other Subjects of Public and Private International Law, 196 (Springer 1995).

31. *Ibid.*

§3. THE STRUCTURE OF THE CONVENTION

35. Established and administered by an intergovernmental organization, ICSID operates under a special international treaty. The Centre constitutes an integral part of the World Bank Group charged with the resolution of international investment disputes.

36. The Convention gives the parties great autonomy, and allows to tailor arbitration proceedings to their particular needs. The parties are free to choose the law governing their dispute, the venue of arbitration, the procedural rules, the language and other aspects of arbitration. However, the arbitration is autonomous, which is achieved by the elimination of the need to obtain additional approvals from domestic courts to enforce the award and the ability of the Centre to order provisional measures and handle a dispute even when one party decides not to honour the commitments it has taken.

37. One of the most distinct provisions of the Convention compared to other dispute resolution conventions deals with enforceability of awards in the territories of the Contracting States.³² The awards are binding and not subject to appeal or to any other remedy, other than those explicitly provided for in the Convention. The awards should be treated as though they were final judgments of national courts. This is meant to eliminate obstacles that often stood in the way of enforcement of foreign arbitral awards.

38. The drafters of the Convention tried to create a balanced instrument, serving both the interests of investors and the interests of the host governments. The Convention stresses the voluntary nature of its dispute resolution machinery. The Preamble emphasizes that the mere fact of ratification, acceptance or approval of the Convention does not create an obligation of a government to submit any particular dispute to conciliation or arbitration. Thus, there is no violation of the principle of sovereignty as both the state and the investor are required to give written consent to arbitration.

39. The most remarkable feature of the Convention is that it firmly establishes the capacity of private entities – either individuals or corporations – to submit a claim against a state without intervention of their respective national governments. This has changed investment disputes from purely political issues into international law issues, which generally facilitates faster and more efficient resolution of disputes. Up to this day, the Convention is regarded as one of the most important treaties to recognize individuals as subjects of international law.³³ Once the parties agree to arbitrate and fulfil the requirements of the Convention, the ICSID has jurisdiction. Consent may not be unilaterally withdrawn by either party, which ensures that the parties' agreement to arbitrate is binding.

32. See s. 6 of the Convention.

33. Ignaz Seidl-Hohenveldern, *International Economic Law*, 10 (Kluwer Law International 1999).

40. Most systems of arbitration are subject to domestic laws and control of courts of the place of arbitration, which recognize and enforce awards. Dispute resolution under the Convention is outside the control of national legal systems. The awards are not subject to any remedy other than internal remedies provided by the Convention itself.

41. The Convention is structured as follows.

<i>Chapter</i>	<i>Section</i>	<i>Content</i>	<i>Articles</i>
I		International Centre for Settlement of Investment Disputes	1–24
	1	Establishment and Organization	1–3
	2	The Administrative Council	4–8
	3	The Secretariat	9–11
	4	The Panels	12–16
	5	Financing the Centre	17
	6	Status, Immunities and Privileges	18–24
II		Jurisdiction of the Centre	25–27
III		Conciliation	28–35
	1	Request for Conciliation	28
	2	Constitution of the Conciliation Commission	29–31
	3	Conciliation Proceedings	32–35
IV		Arbitration	36–55
	1	Request for Arbitration	36
	2	Constitution of the Tribunal	37–40
	3	Powers and Functions of the Tribunal	41–47
	4	The Award	48–49
	5	Interpretation, Revision and Annulment of the Award	50–52
	6	Recognition and Enforcement of the Award	53–55
V		Replacement and Disqualification of Conciliators and Arbitrators	56–58
VI		Cost of Proceedings	59–61

<i>Chapter</i>	<i>Section</i>	<i>Content</i>	<i>Articles</i>
VII		Place of Proceedings	62–63
VIII		Disputes between Contracting States	64
IX		Amendment	65–66
X		Final Provisions	67–75

42. The Convention entered into force on 14 September 1966, after the twentieth ratification instrument was deposited. As of June 2020, there were 163 signatory states to the Convention.³⁴ Of these, 154 states have also deposited their instruments of ratification, acceptance or approval of the Convention to become ICSID Contracting States. Recent membership developments include ratification of the Convention by Canada in 2013, Iraq in 2015, Mexico in 2018 and Djibouti in 2020. Three countries subsequently withdrew from the ICSID Convention: Bolivia in 2007, Ecuador in 2009 and Venezuela in 2012. A complete list of Contracting States and other signatories of the Convention is available in Part VI of this monograph.

34. See the ICSID website, *supra* note 15.

Chapter 4. ICSID Institutional Framework

43. ICSID is a part of the World Bank Group and has a simple organizational structure consisting of the Administrative Council and the Secretariat. The Administrative Council deals with broader overarching institutional questions, and the Secretariat is involved in the day-to-day business of managing ICSID cases. The President of the World Bank serves as the chair of the Administrative Council without a right to vote.

§1. ICSID ADMINISTRATIVE COUNCIL

44. The Administrative Council (‘the Council’) plays no role in managing individual cases, and instead deals with structural matters relating to ICSID’s framework. The main role of the Council is to adopt the rules of procedure for arbitration and conciliation. It also adopts administrative and financial regulations of the Centre; oversees the annual budget of revenues and expenditures; and handles some other administrative issues, as provided by Article 6 of the Convention.

45. The Council is also responsible for approving arrangements with the World Bank for the use of its administrative facilities and services and adopting the annual budget.³⁵ Each member of the Council has one vote and the general rule is that decisions are taken by a simple majority.³⁶ However, a two-thirds majority is required where the Council is adopting administrative and financial regulations, adopting rules of procedure for the institution of proceedings, adopting rules of procedure for proceedings and determining the budget.³⁷

46. The Council has made a number of changes to rules and regulations since the birth of ICSID.³⁸ In 1975, for example, the Council approved changes to ICSID Administrative and Financial Regulation 14 concerning the fees paid to arbitrators. In 2006, the Council amended Rule 41 of the Arbitration Rules to create a procedure by which tribunals could dismiss patently unmeritorious claims, and also made suspension of proceedings on the merits upon the raising of a jurisdictional objection discretionary rather than automatic. This addresses the growing number of cases ICSID administers.

47. Since 2017, ICSID has also been consulting on the latest round of reforms to its arbitration rules, including the disclosure of third-party funding and increased transparency. It is anticipated that these new reforms will be submitted to the Council for approval in 2020.³⁹ The Council meets once a year, but additional meetings

35. Article 6(1) of the Convention.

36. Article 7(2) of the Convention.

37. Article 6(1) of the Convention.

38. *See generally* Antonio Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, 41 *International Lawyer* 47 (2007).

39. ICSID, 2019 Annual Report, 1, 8, 9.

may also be held as determined by the Council, convened by the Chairman or by the Secretary-General at the request of at least five members of the Council.⁴⁰ A quorum is a majority of members, but the Council may establish a procedure by a two-thirds vote whereby the Chairman seeks a vote without convening a meeting.⁴¹

48. The Council consists of one representative of each Contracting State, and in his absence, an alternate can be appointed.⁴² If a state fails to make a designation ‘each governor and alternative governor of the [World] Bank appointed by a Contracting State shall be ex officio its representative and its alternative respectively’.⁴³ Meetings at the Council are chaired by the President of the World Bank⁴⁴ who also has additional powers including to designate ten individuals to each of the ICSID Panels,⁴⁵ appoint ad hoc committees for annulment proceedings⁴⁶ and, in some circumstances, decide on applications to disqualify an arbitrator from a tribunal.⁴⁷ However the Chairman has no vote in the Council.⁴⁸

49. The current President of the World Bank, and hence Administrative Council Chairman, is David Malpass, who took over from Kristalina Georgieva in 2019. Georgieva was merely an acting President since the resignation of Jim Yong Kim.⁴⁹ It should be noted that all ‘full’ Presidents of the World Bank have been United States citizens. Finally, although members of the Council and the Chairman receive no remuneration from the Centre⁵⁰ they will generally be funded through their state or, in the case of the Chairman, other positions.

§2. ICSID SECRETARIAT

50. The other major entity which makes up ICSID is the Secretariat. The main functions of the Secretariat include providing institutional support for the initiation and conduct of ICSID proceedings, administering the proceedings and finances of each case, and assisting in the constitution of conciliation commissions, arbitral tribunals and ad hoc committees.

51. The Secretariat is composed of around seventy staff, divided into several teams.⁵¹ The first team is the case management team, further divided into sub-teams

40. Article 7(1) of the Convention.

41. Article 7(3) and (4) of the Convention.

42. Article 4 of the Convention.

43. *Ibid.*

44. Article 5 of the Convention.

45. Article 14 of the Convention.

46. Article 52 of the Convention.

47. Article 58 of the Convention, Art. 15 of the Additional Facility Rules and Art. 15 of the Conciliation (Additional Facility) Rules.

48. Article 5 of the Convention.

49. ICSID, 2019 Annual Report, 47.

50. Article 8 of the Convention.

51. See generally ICSID, Secretariat, available at <https://icsid.worldbank.org/en/Pages/about/Secretariat.aspx> (accessed on 1 May 2020).

organized by working language. Such teams consist of legal counsel who act as secretaries to tribunals and ad hoc committees, and paralegals and legal assistants who assist the legal counsel in their work. These teams may also assist tribunals and committees with issues of procedure, hearings and provide general administrative support.

52. The general administrative and financial team manages all financial elements of a case and the ICSID budget, while the front office manages ICSID publications and deals with all issues relating to participation of ICSID Member States and Panels of Conciliators and Arbitrators. In other words, the Secretariat is always involved in an ICSID case, whether organizing hearings or providing administrative support. The Secretariat may also play a role in non-ICSID proceedings: from the full services given in ICSID cases, to more general administrative and financial work.

53. Although the Secretariat has no formal role in the adoption and amendment of rules and regulations, practice shows that it is often the Secretariat that conducts research and formulates proposals. For example, it is the Secretariat that convened the consultations on the new rules reforms mentioned above.⁵² The Council largely appears to accept or reject the Secretariat's work.⁵³

54. The Secretary-General and Deputy Secretaries-General lead the Secretariat. The Secretary-General is the official legal representative and principal office of ICSID and is ultimately responsible for all administrative matters.⁵⁴ The Secretary-General also acts as the registrar with the authority to decide at the initial stage whether a claim is manifestly outside the jurisdiction of the Centre in accordance with Article 36(3) of the Convention. The Secretary-General has the power to appoint arbitrators in the absence of agreement between the parties.

55. The Secretary-General is elected by the Council by a two-thirds majority upon nomination of the Chairman.⁵⁵ The term of service is six years but incumbent candidates can be re-elected.⁵⁶ The current Secretary-General is Meg Kinnear, who was initially elected in 2010 to replace acting Secretary-General Nassib Ziade and re-elected in 2015. The current Deputy Secretaries-General are Gonzalo Flores and Martina Polasek.

56. All members of the Council are immune from legal action in respect of their functions on the Council. Article 20 ICSID Convention further states that 'The Centre, its property and assets shall enjoy immunity from all legal process, except where the Centre waives this immunity'. ICSID Convention also grants immunity to conciliators, arbitrators, members of an Annulment Committee, the officers and

52. ICSID, 2019 Annual Report, 4, 5.

53. See Parra, *supra* note 37.

54. Article 11 of the Convention.

55. Article 10(1) of the Convention.

56. *Ibid.*

employees of the Secretariat and the members of the Council when exercising their functions.⁵⁷ Immunity also extends to cover parties, agents, counsel, advocates, witnesses or experts in ICSID proceedings.⁵⁸

57. The Secretariat is also responsible for ICSID publications, including the ICSID website. The *ICSID Review - Foreign Investment Law Journal*, published by ICSID since 1986, is the major publication in the area of investor-state arbitration law. The *ICSID Review* contains materials on international and domestic law pertinent to investment disputes and foreign investment. It also publishes recent ICSID decisions and awards accompanied by introductory notes prepared by the Centre's staff.

58. The Centre's publications also include two multivolume loose-leaf publications – *Investment Laws of the World* and *Investment Treaties*. *Investment Laws of the World* contains basic investment legislation from more than 130 countries, as well as contact information for the respective national governmental agencies in charge of promoting foreign investment. The ICSID collection of investment treaties comprises more than 1,140 treaties concluded after 1961. From 1984 to 2009, the Secretariat also published a newsletter, titled *News from ICSID*, reporting on current events, including short articles and notes on investment law and arbitration and information about pending ICSID cases.⁵⁹

59. The ICSID Secretariat is located in Washington, DC, which, under the Convention, is also the default venue for ICSID arbitration and conciliation, according to Article 62 of the Convention. Upon agreement between the parties, conciliation and arbitration proceedings can be held at the seat of the PCA or at any other arbitration institution that has made the necessary arrangements with the Centre. Under Article 63 of the Convention, the parties can hold arbitration proceedings at another venue approved by Arbitration Tribunal or Conciliation Commission upon consultation with the Secretary-General. Most of proceedings are held at the Centre's seat in Washington, DC, but several have taken place at venues in Europe and Asia.⁶⁰ In recent years, a large number of ICSID organizational meetings and first sessions have been held by means of video or telephone conference.⁶¹ Electronic submissions and remote hearings have become the norm during the COVID-19 crisis.⁶²

57. Article 21 of the Convention.

58. Article 22 of the Convention.

59. ICSID, News from ICSID, available at <https://icsid.worldbank.org/en/Pages/resources/News-from-ICSID.aspx> (accessed on 1 May 2020).

60. ICSID, 2007 Annual Report, 6.

61. *Ibid.*

62. ICSID, ICSID News Release, Message Regarding COVID-19 (Update), available at <https://icsid.worldbank.org/en/Pages/News.aspx?CID=361> (accessed on 1 May 2020).

§3. ICSID FINANCES

60. The main source of income for ICSID is revenue from arbitration and conciliation proceedings. For example, in 2019 this amounted to around USD 51 million,⁶³ up from USD 50 million in 2018, USD 45 million in 2017 and just under USD 40 million in 2016. Contributions in kind, investment income and sales of publications also represent sources of income for the Centre, but they are much more modest.⁶⁴

61. ICSID has a number of significant expenses. The main category of expense relates to conducting arbitration and conciliation proceedings. In 2019, this amounted to just under USD 38 million.⁶⁵ The second major cost is administration expenses, with amortization expenses and spent investment income representing much smaller costs. Depending on allocation of these expenses, the Centre usually makes either a small profit or loss each year. For example, while the Centre made a profit of around USD 2 million in 2019,⁶⁶ it made a loss of USD 91,723 in 2018.⁶⁷

62. Arbitration and conciliation proceedings have long been the largest sources of income for the Centre, and expenses relating to the provision of such services have always represented the largest expense.

§4. OUTREACH AND COOPERATION WITH OTHER ORGANIZATIONS

63. While ICSID is perhaps the dominant entity in international investment law, it is not the only one. ICSID makes attempts to engage with them as well as with the wider legal profession and public, and ensure that young lawyers continue to be interested in, and engaged with, the Centre's work.

64. For example, ICSID cooperates with other arbitral institutions. Although ICSID remains the institution of choice for the majority of investor-state disputes, a number of other arbitral institutions also administer such disputes and are keen to increase their expertise in this area, and ICSID concluded special agreements with such institutions. In 2019 alone, ICSID entered into agreements with the Casablanca International Mediation and Arbitration Centre, the Kigali International Arbitration Centre, the Madrid Court of Arbitration, and the Qatar International Court and Dispute Resolution Centre, bringing the number of cooperation agreements with other institutions to twenty-three.⁶⁸

63. ICSID, 2019 Annual Report, 51.

64. *Ibid.*

65. *Ibid.*

66. *Ibid.*

67. *Ibid.*

68. *Ibid.*, 32.

65. The second group of entities with which ICSID has relations are other international organizations. These organizations vary widely in function and character, so it will only be possible to give a brief overview here. One organization which is particularly close to the arbitral world is the UNCITRAL. In 2017–2018, for example, ICSID participated in meetings of UNCITRAL Working Group III established to examine problems in the international investment law and formulate appropriate reforms.⁶⁹ The Secretary-General attended a UNCITRAL expert group meeting discussing the establishment of a multilateral investment dispute settlement system,⁷⁰ and ICSID counsel took part in discussions held by UNCITRAL Working Group II on arbitration and conciliation.⁷¹

66. A further example of an organization with which ICSID has closely worked is the Organisation for Economic Co-operation and Development (OECD). The OECD has a much broader mandate than more specialist organizations such as UNCITRAL, but still plays a role in the field of FDI. For instance, the OECD's Code of Liberalisation of Capital Movements aims to provide general rules and guidance for countries which seek to attract foreign investment. Also relevant is the OECD Guidelines for Multinational Enterprises, which lays out standards of behaviour multinationals, should follow when operating in foreign countries. In 2017, ICSID contributed to an OECD consultation on appointing authorities in international investment law,⁷² and the ICSID Deputy Secretary-General contributed to an OECD roundtable discussion on the evaluation of outcomes of investment treaties.⁷³

67. Finally, ICSID has close relations with other organizations which make up the World Bank. These include the IBRD, the IDA, the IFC and the MIGA. ICSID is unique among these organizations as it is the only dispute settlement organization; the other four are financial organizations.

68. MIGA, for example, provides guarantees to investors operating in countries with a deficient legal system where non-commercial risks are particularly severe,⁷⁴ so long as investors follow certain rules. The IFC plays a different role providing direct funding to foreign investors who might otherwise be unwilling to take the risk of operating in a given state. Finally, the IBRD and the IDA focus their attention on host state governments.

69. The IBRD lends money to middle-income and creditworthy low-income countries, while the IDA provides free loans and grants to the poorest countries, with the aim of stimulating development. These entities do play a significantly different role in foreign investment and development to that of ICSID, but their activities are complementary. ICSID has therefore made considerable efforts through

69. ICSID, 2018 Annual Report, 43.

70. ICSID, 2017 Annual Report, 45.

71. ICSID, 2014 Annual Report, 36.

72. ICSID, 2018 Annual Report, 44.

73. ICSID, 2017 Annual Report, 45.

74. But note not all risks are covered, *see* Art. 12 of the MIGA Convention.

events, conferences and briefing documents to maintain knowledge and understanding of ICSID in the other parts of the Bank. In 2018, ICSID also updated the Bank's Executive Directors on rule amendments.⁷⁵

70. In 2012, to facilitate development of young talent, ICSID has created 'Young ICSID', a network to encourage the professional development of young lawyers and a forum to encourage networking and the sharing of ideas.⁷⁶ The network holds a number of events around the world and online, and in 2017 launched a book series.⁷⁷ Recent events include book launches,⁷⁸ panel event on how young lawyers can advance their careers and the opportunities available to them,⁷⁹ and panel events on trends and upcoming issues in arbitration.⁸⁰

71. Finally, ICSID also organizes and participates in a range of general events and conferences, many of which are online. Some of these events are training courses aimed at and driven by Member States. These types of events seek to improve understanding of ICSID in particular and ISDS more generally so that states can more effectively participate in proceedings and defend their interests.

72. In 2017, for example, two ICSID Deputy Secretaries-General provided training in Myanmar, Thailand and Vietnam.⁸¹ Other events aim to increase awareness of, and stimulate dialogue around, specific issues in international investment law. In 2018, the Secretary-General participated in an event discussing the reform of substantive obligations in international investment law, and conditions of access to investment arbitration.⁸² In the same year, ICSID partnered with the AAA/ICDR and the ICC to host the 35th Annual Joint Colloquium on International Arbitration.⁸³ ICSID also engaged with the British Institute of International and Comparative Law and the School of International Arbitration (SIA) of Queen Mary University of London to discuss the revision of ICSID Rules with key stakeholders in London.⁸⁴

73. This review suggests that ICSID is aware that it is not the only institution in the field of international investment law, and has made a sustained effort to work with and learn from them.

75. ICSID, 2018 Annual Report, ii.

76. Young ICSID, available at <https://icsid.worldbank.org/en/Pages/about/Young-ICSID.aspx> (accessed on 1 May 2020).

77. ICSID, 2018 Annual Report, 55.

78. ICSID, 2019 Annual Report, 42.

79. *Ibid.*; ICSID, 2018 Annual Report, 55.

80. ICSID, 2019 Annual Report, 42.

81. ICSID, 2017 Annual Report, 60.

82. ICSID, 2018 Annual Report, 47.

83. ICSID, 2019 Annual Report, 40, 41.

84. British Institute of International and Comparative Law. ICSID-SIA-BIICL Conference on Proposed Revision of ICSID Rules, available at <https://www.biicl.org/events/1340/icsid-sia-biicl-conference-on-proposed-revision-of-icsid-rules> (accessed on 1 May 2020).

Part II. ICSID Conciliation and Mediation

Chapter 1. ICSID as Facilitator of Mediation and Conciliation

74. ICSID is primarily known for its arbitration process, but arbitration is often an expensive and time-consuming process. The adversarial nature of many arbitral proceedings can threaten the ongoing working relationship between the investor and the state.

75. The advantages of settling disputes through conciliation or mediation,⁸⁵ include non-confrontational format, avoiding the uncertainty that comes from a third party deciding a dispute, and the fact that it allows the state to ‘save face’ by not being ordered to do something by an external body.⁸⁶ It is therefore unsurprising that settling disputes through mediation and conciliation attracts more attention, particularly in the light of the 2018 Singapore Convention on Mediation.

76. This chapter will first distinguish mediation from conciliation, before considering the role that ICSID can play in these proceedings. It will then examine some of the current issues in mediation and conciliation and give a brief overview of some previous conciliation proceedings. Finally, it will consider the impact of the recently negotiated Singapore Convention.

77. Mediation and conciliation differ from arbitration in various ways.⁸⁷ Unlike arbitration, neither is a formal adjudicatory process; there is no final decision from a third-party adjudicator. Instead, both processes seek to help the parties to reach a mutually acceptable settlement. The main difference between conciliation and mediation relates to the role of the third party. Whereas in conciliation proceeding the conciliator plays an active role, making suggestions and recommendations to the

85. Christine Sim, Ideas for ICSID Amendments in 2017, available at <https://icsid.worldbank.org/en/amendments/Documents/6.%20Christine%20Sim.pdf> (accessed on 1 May 2020); Yarik Kryvoi and Dmitry Davydenko, Consent Awards in International Arbitration: From Settlement to Enforcement, 40 *Brooklyn Journal of International Law* 827 (2015).

86. *See generally* Special Focus Issue on Alternative Dispute Resolution in Investment Disputes, 29(1) *ICSID Rev.* (2014); Catharine Titi and Katia Fach Gomez (eds), *Mediation in International Commercial and Investment Disputes* (Oxford University Press 2019).

87. ICSID, Overview of Conciliation under the ICSID Convention, available at <https://icsid.worldbank.org/en/Pages/process/ICSID-Convention-Conciliation.aspx> (accessed on 1 May 2020); ICSID, Investor-State Mediation, available at <https://icsid.worldbank.org/en/Pages/process/adr-mechanisms--mediation.aspx> (accessed on 1 May 2020).

parties, the role of a mediator is much more passive. Although mediators will communicate in a similar way as conciliators, they normally do not make formal proposals and limit themselves to helping the parties to seek agreement on their own terms.

78. The adoption of the Singapore Convention on Mediation in 2018 sparked increased interest in mediation. Its main innovations are providing for the enforcement of settlement agreements which have resulted from a process of mediation. The obligation to enforce a settlement does not apply in some circumstances, for example when the settlement agreement:

Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought ...⁸⁸

However, such exceptions are only likely to operate in rare circumstances. The Convention therefore has the potential to avoid all the issues of enforceability and multiple proceedings addressed above. One uncertainty is whether the Convention also applies to settlements which have been reached through conciliation. Mediation is defined in the following way in the Convention:

Mediation means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ... lacking the authority to impose a solution upon the parties to the dispute.⁸⁹

79. As conciliators do not have the ability to impose a solution on the parties, conciliation arguably falls within this definition. Further, as a settlement agreement reached through conciliation itself is not a judgment of a court or an arbitral award, it is not covered by the exclusionary provisions.⁹⁰

80. The ultimate potential of the Convention rests with the political issue of how many states sign and ratify it. Almost one year after the Singapore Convention was adopted, fifty-two states have signed it. However, only four states (Fiji, Saudi Arabia, Singapore and Qatar) ratified it.⁹¹ In accordance with its provisions, the Convention will come into force on 12 September 2020.

81. While arbitration remains available as a last resort for the settlement of investment disputes, mediation and conciliation offer different ways of settling a

88. Article 5(1)(b)(i) of the Singapore Convention on Mediation.

89. Article 2(3) of the Singapore Convention on Mediation.

90. Article 1 of the Singapore Convention on Mediation.

91. United Nations Treaty Collection, United Nations Convention on International Settlement Agreements Resulting from Mediation, New York, 20 December 2018, available at <https://treaties.un.org> (accessed on 6 Jun. 2020).

dispute amicably. Given ICSID's experience in investor-state arbitrations, it would be natural for it to support investor-state mediation and conciliation proceedings.

82. ICSID can support mediation and conciliation proceedings in different ways.⁹² The first is the provision of facilities and administrative services. The ICSID Secretariat's proficiency in providing administrative support is well known, and ICSID is particularly well placed to offer facilities due to its ability to use World Bank facilities around the world. ICSID already provides this support in relation to conciliation proceedings, but the organization's willingness to provide this kind of support in relation to mediation will be key if mediation is to become a viable alternative.

83. ICSID can also help develop a pool of talented individuals who are able to fill key roles. This pool arguably already exists in conciliation proceedings given that ICSID has considerable experience in offering these services. However, the pool is less developed with regard to mediation. ICSID is already well connected to a group of arbitrators, counsel and government officials who have strong knowledge of investment law, and is consequently in a good position to train such individuals to play a role in mediation proceedings.

84. ICSID's role and collective experience in investment law means that it is able to work with mediators established in other areas of law so that they are also able to mediate investment disputes. ICSID has already taken steps in this direction. For example, it offered training courses on investment law and mediation.⁹³

85. Finally, ICSID can establish a framework under which mediation proceedings can operate. Again, such a framework already exists with regard to conciliation, as ICSID has a well-established set of Conciliation Rules. Mediation is slightly behind in this respect. Nevertheless, a draft set of rules was drawn up in 2018, and substantial progress has been made towards revising and submitting the rules for final adoption.⁹⁴

92. For an overview, *see* Frauke Nitschke, ICSID's Role in Advancing Investor-State Mediation, available at <https://icsid.worldbank.org/en/Pages/resources/ICSID%E2%80%99s-Role-in-Advancing-Investor-State-Mediation.aspx> (accessed on 1 May 2020).

93. ICSID, 2019 Annual Report, 35, 38.

94. *Ibid.*, 1.

Chapter 2. ICSID Conciliation Mechanism

86. Conciliation is a method of dispute resolution in which a neutral third party facilitates communication in an attempt to help disputing parties settle their disagreements. Any Contracting State or a national of a Contracting State can initiate conciliation or arbitration by sending a written request to the Secretary-General, who in turn sends a copy of the request to the other party. The request should contain information concerning the issues in question, the identity of the parties and the indication of consent to conciliation in accordance with the rules of procedure.⁹⁵

87. Conciliation and arbitration follow the same procedure of institution,⁹⁶ set by the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the Institution Rules) adopted by the Administrative Council.

88. The Secretary-General reviews the request and registers it, unless he or she finds it to be manifestly outside the Centre's jurisdiction. According to Rule 8, the requesting party may, by written notice to the Secretary-General, withdraw the request before it has been registered.

89. The Conciliation Commission's main goal is to make recommendations to the parties, which would resolve the dispute. The Committee proposes specific terms of settlement, advises about specific acts that would aggravate the dispute, and points out advantages of the solution proposed.⁹⁷ The parties are required to cooperate with the Commission in good faith, in particular by furnishing the necessary documents, information and explanations.⁹⁸ The parties may request that the Commission hear the witnesses and experts whose evidence the party considers relevant. The Commission may also make arrangements for the evidence to be given as a written deposition or taken by examination elsewhere.⁹⁹

90. If the parties have not agreed on the composition of the Conciliation Commission, they follow the procedure provided by Rule 2 of Conciliation Rules. First, the requesting party proposes either a sole conciliator or a specified uneven number of conciliators and specifies the method proposed for their appointment. Second, the other party may either request such proposals or make other proposals regarding the number of conciliators and the method of their appointment. Third, the requesting party either accepts or rejects this proposal. Each of these steps should be made within twenty days.

91. If no agreement between the parties is reached within sixty days, the Secretary-General appoints conciliators in accordance with Article 26(b) of the Convention. The Conciliation Rules provide for procedures in situations of incapacity,

95. Article 28(2) of the Convention.

96. Institution Rules 1–7.

97. Conciliation Rule 22.

98. Conciliation Rule 23.

99. Conciliation Rule 28.

resignation, disqualification of conciliators, as well when vacancies arise on the Commission.¹⁰⁰ Decisions of the Conciliation Commission are made by majority vote, and abstentions qualify as a negative vote.¹⁰¹ It is permitted to make decisions by correspondence, provided that all members of the Commission are consulted and the president of the Commission certifies the decision.¹⁰²

92. On completion of conciliation proceedings, the Conciliation Commission prepares and delivers a report in accordance with Conciliation Rules 30–33. If the parties managed to reach an agreement, the report describes the issues in dispute and records the agreement the parties have reached. If an agreement is unlikely, the final report records this as well. If either party fails to appear or participate in the proceedings, the Conciliation Commission closes the proceedings and reports the party's failure to appear or participate. The offers made as well as the views and admissions expressed during the process of conciliation cannot be used in any other proceedings, regardless of whether at arbitration or litigation.

93. As explained above, mediation is in its infancy at ICSID, however ICSID has had the infrastructure to support conciliation proceedings for some time. Limited information about such proceedings is available, but there are some interesting features to note.¹⁰³ First, as of 2019 there have only been twelve sets of conciliation proceedings, three of which are pending. While this supports the view that parties have usually been suspicious of conciliation proceedings, the fact that a quarter of all conciliation proceedings are currently pending suggests that this may be changing.

94. Second, over half of these disputes are in some way connected to the energy industry. This could simply be because a large number of investment projects are connected to the energy industry. However, given the long period of time for which such projects last, it could be due to a desire to preserve the working relationship of the parties. Third, the average length of the concluded proceedings was around fifteen months. This is considerably shorter than the average length of arbitration proceedings (which takes years) making it likely that costs will be much lower. Finally, there is one case in which the host state is the claimant.¹⁰⁴ This suggests that some of the non-investment obligations imposed on investors, mentioned elsewhere in this monograph, may be starting to have real teeth.

100. Conciliation Rules 8–12.

101. Conciliation Rule 16.

102. *Ibid.*

103. See ICSID Case Advanced Search, available at <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx> (accessed on 1 May 2020).

104. *Republic of Equatorial Guinea v. CMS Energy Corporation* (ICSID Case No. CONC(AF)/12/2).

Chapter 3. Challenges Facing Mediation and Conciliation

95. Despite the attractive features of mediation and conciliation, a number of challenges remain. One challenge is persuading parties to use these procedures in the first place.¹⁰⁵ Although a significant proportion of investment disputes end in settlement, anecdotal evidence suggests that very few parties actually go through conciliation or mediation.¹⁰⁶ This may suggest that mediation and conciliation are not in fact needed in order to get parties to settle, but the other view is that this shows that a significant proportion of cases did not need to go to arbitration in the first place.

96. A major reason for this may be that parties view conciliation or mediation as a delaying tactic. There are a number of ways this could be dealt with.¹⁰⁷ The first is to ensure that any proceedings held before arbitration are time-limited. The second proposed reform is to structure proceedings so that mediation or conciliation can be used during the arbitration. This would mean that as the arbitration plays out and the parties have a better sense of the likely outcome there is a structured process by which they can reach a settlement which they are happiest with. A further innovation would be to provide independently calculated costs estimates to the parties, to encourage parties to make a cost-benefit analysis of proceeding to arbitration over finding an agreed settlement. Finally, an independent third party could provide an early evaluation of the merits of each side's case. This would remove some of the temptation to test a case before a tribunal, and incentivize early settlement.

97. The second challenge concerns the individuals involved.¹⁰⁸ An arbitrator in a dispute which has gone to mediation seems well placed to be the mediator or conciliator, and vice versa. However, this creates serious issues of independence and impartiality. It is easy to see how in the course of acting as a mediator, for example, an individual might develop a particular view of the case or the parties which colour his or her later deliberations as an arbitrator. Further, parties may feel obliged to make compromises in the course of a mediation for fear of the mediator/arbitrator developing a negative view of them. Hence, the International Bar Association (IBA) and other international professional organizations have stated that arbitrators and mediators/conciliators should generally not stray into one another's territory.¹⁰⁹

98. Where the parties request the same person to act as both conciliator and arbitrator, they may be seen as waiving their right to an independent and impartial arbitrator, and may be estopped from later challenging them. Yet even here the picture is further complicated. First, the IBA recommends that even where requested by the

105. Stephen Schwebel, *Is Mediation of Foreign Investment Disputes Plausible?*, 22(2) ICSID Rev. 237 (2007).

106. *Ibid.*

107. Sim, *supra* note 84.

108. Kryvoi and Davydenko, *supra* note 84.

109. There are, however, differences between approaches of common law and civil law jurisdictions to this. *Ibid.*

parties to act in both roles, an arbitrator must resign their role if, through acting in the course of mediation, they develop doubts about their ability to remain impartial or independent in the future course of proceedings.¹¹⁰ More notably, however, in some jurisdictions the waiver of the right to procedural fairness is seen as contrary to public policy, and hence would provide a reason not to enforce the award.¹¹¹ Therefore, while mediation and arbitration have a close relationship, they must be clearly demarcated in order to ensure the integrity of each set of proceedings.

99. The final challenge is securing the enforcement of a settlement.¹¹² The parties can ask the tribunal to endorse the agreement through a consent order, and in most cases the tribunal will comply. However the enforceability of this consent award may depend on the applicable law; it may be the case that if one party does not comply with the settlement the other will have to commence litigation or arbitration.

100. The New York Convention (New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)) neither mentions consent awards nor gives a definition of an arbitral award, so there is some uncertainty as to whether it would apply in such situations. The UNCITRAL Model Law does say that a consent award has the ‘same status and effect’ as ‘normal’ awards, however different jurisdictions take different positions. The situation is more certain when the case involves an ICSID tribunal. Although consent awards are not mentioned in the Convention they are permitted by the arbitral rules, suggesting that they should be treated in the same way as other awards. It should be noted that the Singapore Convention has the potential to largely solve this issue.¹¹³

110. IBA Guidelines on Conflicts of Interest in International Arbitration.

111. Kryvoi and Davydenko, *supra* note 84.

112. *Ibid.*

113. *Ibid.*

Part III. ICSID Arbitration Mechanism

Chapter 1. ICSID Arbitration Mechanism

§1. REQUEST FOR ARBITRATION

101. Unlike conciliation proceedings, which seek to bring parties to agreement, arbitration aims to achieve binding determination of the dispute regardless of whether the parties agree with the outcome.¹¹⁴ The procedure for initiating arbitration at ICSID is similar to the conciliation procedure.¹¹⁵ Any Contracting State or a national of such a state directs a request to institute arbitration proceedings to the Secretary-General, who sends a copy to the other party. As with conciliation, the Secretary-General is obligated to register the request, unless the dispute is manifestly outside of the jurisdiction of the Centre.

102. The screening power of the Secretary-General is designed to prevent unfounded proceedings without obtaining consent with the sole purpose of intimidation. According to the drafting history, this Secretary-General's power should apply 'where there was no slightest doubt that the party was in bad faith or misinformed'.¹¹⁶ An example would be a claim submitted by a national of a state that is not a party to the Convention. Some BITs provide a requirement to pursue litigation before domestic courts as a precondition to submission of claims to arbitration. Some tribunals consider this requirement a mandatory jurisdictional requirement,¹¹⁷ while others took the view that failure to observe this requirement does not deprive investors of the right to resort to arbitration.¹¹⁸

103. An original and five signed copies of the arbitration request need to be provided in one of the ICSID official languages¹¹⁹ – English, French or Spanish.¹²⁰

114. Executive Directors' Report, 46, *supra* note 28.

115. Institution Rules 1–7.

116. History of the Convention, Vol. II, 772.

117. *Impregilo S.p.A. v. Argentina* (ICSID Case No. ARB/07/17), Award of 21 June 2011, para. 94. *See also Hochtief AG v. Argentina* (ICSID Case No. ARB/04/14), Award of 8 December 2008, para. 35.

118. *Abaclat and Others v. Argentina* (ICSID Case No. ARB/07/5), Decision on Jurisdiction of 4 August 2011, para. 590.

119. Institution Rule 4.

120. Administrative and Financial Regulation 34.

From March 2020, ICSID made electronic filing its default procedure.¹²¹ According to Article 36(2) of the Convention, the request for arbitration or conciliation should include information concerning the issues in dispute, the identity of the parties and their consent to arbitration. Institution Rule 2 requires mentioning the date of consent and the nationality of the investor, demonstrating that he or she is a national of a Contracting State. It has been suggested that a claimant also needs to provide a summary of the merits of the case as well as the main legal arguments.¹²²

104. Once the request is registered, it cannot be unilaterally withdrawn.¹²³ According to Arbitration Rule 44, the proceedings may be discontinued only with the other party's agreement. The parties also jointly may seek to discontinue the proceedings in accordance with Arbitration Rule 43.

§2. OVERVIEW OF THE ARBITRATION PROCEDURE

105. Arbitration proceedings ought to be conducted in accordance with section 3 of the Convention, unless the parties have agreed otherwise.¹²⁴ Arbitration procedure is regulated exhaustively by the Convention and by the ICSID Arbitration Rules. Likewise, applicable substantive law does not govern matters related to the tribunal's jurisdiction under Article 25 of the Convention. It is international law, not national procedural laws, that regulates the procedural aspects of ICSID arbitration. The tribunal in *CSOB v. Slovak Republic* held the following with regard to consent to arbitration:

The question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be answered by reference to national law. It is governed by international law as set out in Article 25(1) of ICSID Convention.¹²⁵

106. However, if the parties do not wish to abide by the ICSID Arbitration Rules, they may select any other procedural rules. For example, the Centre agreed to provide administrative services to arbitration proceedings conducted under UNCITRAL Arbitration Rules.¹²⁶ The ICSID Secretary-General also can be requested to act as an authority appointing arbitrators in UNCITRAL proceedings.¹²⁷

121. ICSID, ICSID News Release, ICSID Makes Electronic Filing its Default Procedure (13 Mar. 2020), available at <https://icsid.worldbank.org/en/Pages/News.aspx?CID=359> (accessed on 20 Jun. 2020).

122. John Townsend, *The Initiation of Arbitration Proceedings: 'My Story Had Been Longer'*, 13 ICSID Rev. - FILJ 21, 24 (1998).

123. Institution Rule 8.

124. Article 44 of the Convention.

125. *Ceskoslovenska Obchodni Banka, a.s. v. Slovak Republic* (ICSID Case No. ARB/97/4), Decision on Objections to Jurisdiction of 24 May 1999.

126. *See, e.g.*, ICSID, 2007 Annual Report, 6.

127. *Ibid.*

107. ICSID Rule of Procedure 21(2) refers to organizing a pre-hearing conference held ‘to consider the issues in dispute with a view to reaching an amicable settlement’. It must be noted that a significant part of ICSID disputes ends in settlement. For example, in 2014, 28% of cases ended in a settlement.¹²⁸ In some cases settlements lead to consent awards, which are effectively settlement agreements recorded by arbitration tribunals as awards.¹²⁹

108. Consent awards usually contain statements confirming that the parties do not admit any liability by entering into such awards, denying all liability and wrongdoing in connection with the settled dispute, or discharging and releasing each other from all claims in litigation and arbitration.¹³⁰ If the parties file with the Secretary-General their signed settlement agreement and request the tribunal to embody it in an award, the tribunal may do so.¹³¹ Some consent awards have been published¹³² while other settlements remain confidential.

109. Under the ICSID Convention, the settlement agreement approved by the tribunal in effect transforms it into an award, which according to Article 54(1) has the same status as a final judgment of domestic courts. Therefore, consent awards rendered under the ICSID Arbitration Rules are enforceable in the same way as any other ICSID arbitral award. Failure to enforce the award would be a breach of the Convention and could trigger diplomatic protection under Article 27 of the ICSID Convention. It is interesting to note that under Article 5(1)(e) the award can be annulled if it ‘has failed to state the reasons on which it is based’. However, in the context of consent awards this ground should not apply because the ICSID Arbitration Rules specifically allow consent awards.

110. According to Arbitration Rule 31, the written part of arbitration consists of the following pleadings:

- (a) a memorial by the requesting party;
- (b) a counter-memorial by the other party;

and, if the parties agree or the tribunal deems it necessary:

- (c) a reply by the requesting party; and

128. UNCTAD, *Investor-State Dispute Settlement: Review of Developments in 2014*, No. 2, May 2015, p. 5.

129. Yaroslau Kryvoi and Dmitry Davydenko, *Consent Awards in International Arbitration: From Settlement to Enforcement*, 40 *Brook. J. Int'l L.* 827, 828 (2015).

130. *Ibid.*, 837.

131. Arbitration Rule 43.

132. See, for example, *Antoine Goetz et consorts v. Republic of Burundi* (ICSID Case No. ARB/95/3), Award Embodying the Parties' Settlement Agreement of 10 February 1999; *Joseph C. Lemire v. Ukraine* (ICSID Case No. ARB(AF)/98/1), Award of the Tribunal Embodying the Parties' Settlement Agreement of 18 September 2000; *Trans-Global Petroleum, Inc. v. Jordan* (ICSID Case No. ARB/07/25), Consent Award of 8 April 2009.

(d) a rejoinder by the other party.¹³³

111. A memorial submitted to the ICSID tribunal contains a statement of relevant facts, a statement of law and the submissions. A counter-memorial, reply or rejoinder contains an admission or denial of the facts stated in the most recent previous pleading, any additional facts, observations concerning the statement of law in the most recent previous pleading, a statement of law in answer thereto and the submissions.¹³⁴ Not just one but multiple individuals and organizations can be on the claimants' side and mass claims under the ICSID Convention are permitted.¹³⁵

112. At the oral pleading stage, the parties present their positions and the members of the tribunal may put questions to the parties and ask for explanations.¹³⁶ It is within the tribunal's competence to decide on admissibility of any evidence and its probative value.¹³⁷ The tribunal may call on the parties to produce documents, witnesses and experts and may visit any place connected with the dispute or conduct inquiries there.¹³⁸

113. Under ICSID Rules, disputing parties may hold hearings in any agreed location. ICSID concluded a number of agreements with various arbitration institutions in different parts of the world to complement its ability to hold hearings at the headquarters in Washington, DC.¹³⁹ The Centre also offers parties the option to webcast proceedings.¹⁴⁰ The president of the tribunal conducts its hearings and presides at its deliberations, and a majority of the tribunal's members is required for a quorum.¹⁴¹ As with conciliation, decisions are taken by a majority of the members of the tribunal with abstentions counting as a negative vote.¹⁴² Arbitrators are also permitted to make decisions by correspondence, provided that every arbitrator is consulted and the president of the tribunal certifies the decision itself.¹⁴³

114. The procedure for constituting the tribunal is described in Arbitration Rules 1–6 and is the same as the procedure for appointing conciliators. Once the tribunal is formed, it considers whether it has jurisdiction and whether there are any objections to its jurisdiction. The tribunal may either decide on jurisdiction as a preliminary question or combine it with the decision on the merits of the dispute.

115. According to Article 44 of the Convention, the failure to appear to present a case is not deemed to be an admission of the other party's assertions. The tribunal

133. Arbitration Rule 31.

134. *Ibid.*

135. *Abaclat and Others v. Argentina*, para. 551, *supra* note 117.

136. Arbitration Rule 32.

137. *Ibid.*

138. Arbitration Rule 34.

139. ICSID, 2014 Annual Report, 34.

140. *Ibid.*, 40.

141. Arbitration Rule 14.

142. *Ibid.*

143. Arbitration Rule 16.

may enter a decision even if the party has not appeared at the proceedings. However, in this case it is necessary to notify the absent party and give it a grace period to present its case. Article 56(1) of the Convention provides that once the tribunal has been constituted, the arbitrators shall remain the same. Articles 37–40 of the Convention regulate procedures for replacement of incapacitated or deceased arbitrators, which are the same as the procedures for appointment of new arbitrators. Special rules regulate the replacement of resigned arbitrators.¹⁴⁴

116. According to Article 48 of the Convention, the members of the tribunal who voted for those awards should sign them. The tribunal needs to secure consent of both parties to the dispute to publish the award. The tribunal decides all questions by a simple majority of votes. The Convention requires that every question be addressed and supported by the tribunal's reasoning. As in other types of arbitration, any member of the tribunal may render an individual opinion, whether dissenting or concurring. Arbitrators often sign the award on different dates. No matter when the award was actually signed, it is considered to be rendered on the date of dispatch of certified copies to the parties.

§3. COUNTERCLAIMS

117. Parties to an ICSID dispute may present an incidental claim, an additional claim, or a counterclaim, provided that it arises directly from the subject matter of the dispute and is otherwise within the jurisdiction of the Centre.¹⁴⁵ Timing is important for submission of such claims; an incidental claim or an additional claim can be presented no later than in the reply, and a counterclaim no later than in the counter-memorial. However, the tribunal may allow submission at a later stage in the proceedings.¹⁴⁶

118. Article 46 of the ICSID Convention provides:

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

119. In other words, the ICSID Convention adds three prongs related to jurisdiction over such claims, which should (1) arise directly out of the subject matter of the dispute; (2) be within the scope of the consent of the parties and (3) otherwise

144. See Article 56(3) of the Convention and Arbitration Rule 8(2).

145. Arbitration Rule 40.

146. *Ibid.*

be within the jurisdiction of the Centre. These requirements are in addition to other requirements because the Convention is not an expression of consent but a dispute resolution vehicle.¹⁴⁷

120. The ICSID Convention's drafting history suggests that the reason for inclusion of counterclaims was to eliminate the necessity of separate proceedings.¹⁴⁸ It was emphasized in the course of drafting that counterclaims should be covered by consent of the parties and should not go beyond the tribunal's competence.¹⁴⁹ According to the Report of the Executive Directors of the World Bank, the Convention is meant to be equally adapted to institution of proceedings by investors as well as by host states.¹⁵⁰

121. Until now, most counterclaims by states against foreign investors asserted under ICSID Rules were for costs arising out of non-ICSID proceedings,¹⁵¹ interest payment¹⁵² or taxes.¹⁵³ In a majority of ICSID cases, tribunals asserted jurisdiction over counterclaims but subsequently denied them on the merits.¹⁵⁴ In a few other cases, tribunals agreed with the merits of counterclaims asserted by states.¹⁵⁵ Other commentators also observed that '[d]espite the inherently asymmetrical character of a BIT, BIT tribunals should be able to hear closely connected investment counterclaims arising under the investment contract'.¹⁵⁶

147. Yarik Kryvoi, Counterclaims in Investor-State Disputes: Time for the System to Change?, 8 November 2019, available at <http://kryvoi.net/blog/counterclaims-in-investor-state-disputes-is-it-time-for-the-system-to-change/> (accessed on 1 May 2020).

148. History of the Convention, Vol. II, 270.

149. *Ibid.*, 270, 337, 422.

150. Report of Directors of the International Bank for Reconstruction and Development, 18 Mar. 1965, para. 13.

151. See, for example, *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), Award of 6 January 1988, 4 ICSID Reports 61, 77 (1997).

152. *Benvenuti & Bonfant v. Congo* (ICSID Case No. ARB/77/2), Award of 15 August 1980, 1 ICSID Reports 330, 342, para. 3.5.

153. *Amco v. Indonesia*, Resubmitted Case, Decision on Jurisdiction of 10 May 1988, 1 ICSID Reports 562, 562–564 (1993).

154. See, for example, *Klöckner v. Cameroon* (ICSID Case No. ARB/81/2), Award of 21 October 1983, 2 ICSID Reports 9, 16 (1994); *Alex Genin v. Estonia* (ICSID Case No. ARB/99/2), Award of 25 June 2001, paras 196–201; *S.A.R.L. Benvenuti and Bofant v. The People's Republic of Congo* (ICSID Case No. ARB/77/2), Award of 8 August 1980, paras 4.95–4.96; *Adriano Gardella spa v. Republic of the Ivory Coast* (ICSID Case No. ARB/74/1), Award of 29 August 1977; *Southern Pacific Properties (Middle East) Limited v. Egypt* (ICSID Case No. ARB/84/3), Decision on Jurisdiction of 27 November 1985.

155. See, for example, *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), Award of 6 January 1988, 4 ICSID Reports 61, 77 (1997) (counterclaims dealt with recovery of legal expenses that the government incurred because of the investor's non-compliance with the tribunal's recommendation).

156. James Crawford, Treaty and Contract in Investment Arbitration, 22nd Freshfields Lecture on International Arbitration, London (29 Nov. 2007), available at: https://is.muni.cz/el/1422/podzim2010/MVV61K/um/20201574/Crawford-Treaty_and_Contract-2.pdf (accessed on 15 Jan. 2020).

122. In *Alex Genin v. Republic of Estonia*, the ICSID tribunal extended its jurisdiction over the government's counterclaims and considered the merits of the counterclaim, which requested that the investor return the proceeds of the allegedly illicit transactions.¹⁵⁷ Similarly, in *Benvenuti and Bonfant v. Congo*, another ICSID tribunal invoked its jurisdiction over counterclaims on various counts, including the over-invoicing of raw materials and defects in contract execution.¹⁵⁸ The tribunal concluded that because the counterclaim 'relate[d] directly to the subject-matter of the dispute', it should retain its jurisdiction in accordance with Rule 40 of the ICSID Arbitration Rules.¹⁵⁹ Another example is *Klöckner v. Cameroon*, where the tribunal asserted its jurisdiction and allowed a counterclaim, which involved a locally incorporated subsidiary.¹⁶⁰

123. In *MINE v. Guinea*, Guinea asserted a counterclaim against a foreign investor to recover legal expenses that the government incurred because of the investor's non-compliance with the tribunal's recommendation. Upon consideration of the arguments in the counterclaim, the tribunal awarded Guinea's counterclaim.¹⁶¹

124. In *Roussalis v. Romania*, ICSID tribunal rejected respondent's counterclaim on the basis of absence of investor's consent.¹⁶² The tribunal focused on the dispute resolution clause of the relevant BIT. The tribunal concluded that the language of the BIT in question limited dispute resolution only to obligations owed by the host State to the investor, but not the other way around: 'Accordingly, the BIT does not provide for counterclaims to be introduced by the host state in relation to obligations of the investor.'

125. Identification of investor obligations is crucial to determining the substantive content of the procedural right to counterclaim.¹⁶³ Although investment treaties usually do not provide for investor obligations, such obligations can be found in other sources of law. Counterclaims cannot be based on domestic law obligations of investors unless such obligations were specifically mentioned in the relevant investment treaty or a similar instrument that provides for the tribunal's jurisdiction.¹⁶⁴ Otherwise, violation of purely domestic law obligations is insufficient for an investor-state tribunal to extend its jurisdiction over counterclaims.¹⁶⁵

157. *Alex Genin v. Estonia*, paras 196–201, *supra* note 153.

158. *S.A.R.L. Benvenuti and Bonfant v. The People's Republic of Congo* paras 4.95–4.96, *supra* note 151.

159. *Ibid.*, para. 4.104.

160. *Klöckner v. Cameroon*, *supra* note 153.

161. *Maritime International Nominees Establishment v. Republic of Guinea*, 77, *supra* note 150.

162. *Spyridon Roussalis v. Romania* (ICSID Case No. ARB/06/1), Award of 7 December 2011, paras 864–876.

163. See Yarik Kryvoi, Counterclaims in Investor-State Disputes, 17 *Minn. J. Intl. L.* 209 (2012).

164. *Ibid.*

165. *Ibid.*

126. In *Burlington Resources Inc. v. Ecuador* the tribunal awarded damages against the investor for breach of Ecuadorian environmental law.¹⁶⁶ In *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia v. Argentina*, consented to the tribunal's jurisdiction over counterclaims asserting that the investor had violated international human rights obligations.¹⁶⁷

127. It is important to distinguish between asserting jurisdiction over contractual counterclaims (relatively non-controversial) and treaty counterclaims. Contractual obligations of investors usually do not fall under the jurisdiction of investor-state tribunals with one exception.¹⁶⁸ The state may assert counterclaims under a sufficiently broad investment treaty clause if the investor breached its obligations under the investment contract concluded with the state.¹⁶⁹

128. In the absence of concrete provisions setting out investor obligations in international treaties, general principles of law appear to be an appropriate source of international law to determine such obligations.¹⁷⁰ Case law of other tribunals and scholarly writings can facilitate the determination of investor obligations.¹⁷¹ However, if the treaty contains an offer of jurisdiction only in relation to disputes arising out of obligations, it will be difficult for the tribunal to extend its jurisdiction over counterclaims.¹⁷² That is one of the why success on the merits in treaty counterclaims is difficult.

129. It appears, however, that states are warming up to the idea of changing the treaties to make dispute settlement more symmetric with the greater use of counterclaims in case of investor misconduct.¹⁷³ As we see more investment treaties incorporating obligations of investors on human rights, environmental protection, anti-corruption standards, counterclaims may help to facilitate greater procedural equality between states and investors as well as the judicial economy of not having to resolve issues of investor misconduct in multiple fora.

§4. MASS CLAIMS

130. Mass claims proceedings are gaining an increasing importance in investment arbitration as they favour the access of the 'average man' to the ICSID dispute

166. *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Ecuador's Counterclaims (English) of 7 February 2017.

167. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina* (ICSID Case No. ARB/07/26), Award of 8 December 2016, paras 110-1211.

168. *Ibid.*, 239–242.

169. *Ibid.*

170. *Ibid.*, 248–250.

171. *Ibid.*, 250–251.

172. *Ibid.*, 13–14.

173. For an overview of treaty provisions related to investment obligations, see Andrea Bjorklund, Yarik Kryvoi and Jean-Michel Marcoux, Investment Promotion and Protection in the Canada-UK Trade Relationship (18 Nov. 2019), 24–31, available at <https://ssrn.com/abstract=3312617> (accessed on 1 May 2020).

resolution mechanism. Even if ICSID undertook several reforms to render investment arbitration more efficient, an investor-state claim may still be quite expensive.¹⁷⁴ High procedural costs represent a barrier for small claimants such as retail individual investors. Therefore, mass claims in principle could be a good solution to share costs and overcome this problem.

131. Large-scale multiparty arbitration may contribute to the overall time efficiency and procedural economy of investment arbitration. Indeed, it avoids the multiplication of claims and efforts to resolve common issues consolidating them in a single case.¹⁷⁵ In addition, collective claims can potentially contribute to the coherence and consistency of ICSID jurisprudence.¹⁷⁶ This is important in light of the legitimacy crisis discussed in more detail elsewhere in this monograph.

132. Mass claims are not directly mentioned and regulated by the ICSID normative framework. However, Article 44 ICSID Convention and Arbitration Rule 19 grant the tribunal the power of decision on the procedural issues that are not regulated otherwise.¹⁷⁷ These provisions can serve as a way to introduce mass claims in ICSID arbitration.

133. As a consequence of the absence of normative references to mass claims, it is not easy to draw a uniform definition of them. This is also due to the fact that parties termed these proceedings as ‘collective claims’, ‘mass claims’, ‘collective redress’, ‘collective actions’, ‘multiparty proceedings’, ‘aggregate proceedings’ and ‘class actions’ indistinctively.¹⁷⁸ Tribunals do not treat ‘mass claim’ as a technical term.¹⁷⁹ Instead, mass claims may only be broadly defined as those involving large numbers of claimants who suffered similar injuries stemming from the same factual matrix.¹⁸⁰

134. Some authors made a distinction of collective proceedings. They defined representative claims those where a member of a class or an agent represents the whole class and there is only one claim with a mass of claimants. And aggregate claims those where the same judge hands out the cases, but they are consolidated

174. Jeffrey P. Commission, Kluwer Arbitration Blog, How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years, available at <http://kluwerarbitrationblog.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years/> (accessed on 1 May 2020).

175. Katarzyna Barbara Szczudlik, Mass Claims under ICSID, 4(2) Wrocław Review of Law, Administration & Economics 70, 71 (2014).

176. Ridhi Kabra, Has *Abaclat v Argentina* left the ICSID with a ‘massive problem’?, 31(1) *Arbitration International* 425, 453 (2015).

177. Orlando Federico Cabrera Colorado, The Freedom of Arbitrators to Conduct Collective Proceedings When the Rules Are Silent: Considerations in the Wake of the *Abaclat* Decision, 6(1) *J Int Disp Settlement* 163, 178 (2015).

178. *Ambiente Ufficio S.p.A. and others v. Argentina* (ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility of 8 February 2013, para. 112.

179. *Abaclat and Others v. Argentina*, paras 480–488 *supra* note 117: the tribunal generally characterized mass claims as those having a large number of claimants and presenting mixed features of aggregate procedures and representative claims.

180. Ridhi Kabra, 428, *supra* note 175.

only in a preliminary phase.¹⁸¹ ICSID mass proceedings contain elements of both categories because there is not a representative of all claimants, but at the same time the proceeding is consolidated.

135. Mass claims proceedings mainly trigger issues of consent to jurisdiction and treaty interpretation. The central question is indeed whether the host state's general consent to ICSID jurisdiction encompasses consent to a mass of claims consolidated under a single arbitral proceeding. Typically, investment tribunals did not consider the high number of claimants as a problem for jurisdiction.¹⁸² Indeed, in collective proceedings they usually declined their jurisdiction to hear the cases on other bases.¹⁸³

136. The most prominent example of jurisdictional award addressing the issue of mass proceedings is *Abaclat and Others v. Argentina*.¹⁸⁴ In this dispute, almost 60,000 bondholders claimed that the State violated the 1990 Italy-Argentina BIT as a consequence of the sovereign debt default impacting on their debt instruments.

137. The tribunal interpreted the role of silence of ICSID on the issue of mass claim: it assessed whether it should be considered as a 'qualified silence' that did not allow for the collective proceedings or a simple 'gap' in the system. The tribunal concluded that it had jurisdiction because the absence of a provision dealing with mass claims is simply a gap that it may fill with the powers and within the limits of Article 44.¹⁸⁵ Moreover, the tribunal asserted jurisdiction over the claims of several individual claimants. Therefore, it would be difficult to justify why and how it could be deprived of such jurisdiction where the number of claimants outgrows a certain threshold that is not specified anywhere.¹⁸⁶ Finally, the tribunal argued that the collective nature of proceeding derives primarily from the nature of the financial investment, which is protected by the BIT. Thus, requiring additional consent would frustrate the aim of the investment agreement.¹⁸⁷

138. The majority endorsed the *Abaclat* reasoning in *Ambiente Ufficio v. Argentina*,¹⁸⁸ another case stemming from the failure of Argentina to repay its sovereign

181. Katarzyna Barbara Szczudlik, 71, *supra* note 174.

182. *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. Estonia* (ICSID Case No. ARB/04/6), Award of 19 November 2007; *Bernardus Henricus Funnekotter and others v. Zimbabwe* (ICSID Case No. ARB/05/6), Award of 22 April 2009; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina* (ICSID Case No. ARB/07/26), Award of 8 December 2016; *Champion Trading Company and Ameritrade International, Inc. v. Egypt* (ICSID Case No. ARB/02/9), Decision on Jurisdiction of 1 October 2003.

183. *Alasdair Ross Anderson et al v. Costa Rica* (ICSID Case No. ARB(AF)/07/3), Award of 19 May 2010; *Bayview Irrigation District et al. v. Mexico* (ICSID Case No. ARB(AF)/05/1), Award of 19 June 2007.

184. *Abaclat and Others v. Argentina*, paras 490 and 516–520, *supra* note 117.

185. This means that the tribunal has the power to adapt the existing procedural rules if it does not completely modify them.

186. *Abaclat and Others v. Argentina*, paras 490 and 516–520, *supra* note 117.

187. *Ibid.*

188. *Ambiente v. Argentina*, paras 166–171, *supra* note 177.

debt. In this case, the tribunal also added that the high number of claimants would not render the proceedings ‘unmanageable’ and would not violate due process. Moreover, the tribunal found that silence on mass claims was not an issue because ICSID provisions do not exclude collective arbitrations and are compatible with them.

139. However, both decisions contain strong dissenting opinions arguing that the respondent state did not express the additional or ‘secondary consent’.¹⁸⁹ According to them, such consent would be necessary for this particular type of proceeding since silence would change the nature of ICSID arbitration. Therefore, the tribunal would lack jurisdiction as a consequence of the absence of this special ad hoc consent.

140. A recent case stemming from the Argentinian sovereign debt default is *Alemanni and others v. Argentina*. This tribunal apparently evened out the previous contrasts with a unanimous decision in favour of jurisdiction of the tribunal to hear a mass claim with seventy-four claimants.¹⁹⁰ The tribunal observed that Article 25 ICSID Convention did not establish any staged process by which some kinds of consent are to be established differently from others, and that silence on mass proceedings was irrelevant according to Article 31 VCLT.

141. To sum up, both arbitral tribunals and commentators have debated the consequences of mass claims in terms of the role of state consent. While some authors stood with the conclusion of the majority in *Abaclat* and *Ambiente*,¹⁹¹ other scholars criticize mass claims for several reasons. According to the latter view, mass claims would be incompatible with the ICSID normative framework, thus rendering the award vulnerable to annulment under Article 52(1)(d). Second, they would cause an expensive flood of claims from actors who could not previously access ICSID arbitration because of its high costs. Third, mass claims would place an unfair procedural burden on the state and would cause due process concerns in relation to evidence and possibility to present one’s case.¹⁹²

142. These concerns are not completely unfounded, although sometimes they deliberately ignore the beneficial aspects of mass claims described at the beginning

189. *Abaclat and Others v. Argentina*, Dissenting Opinion of Georges Abi-Saab of 28 October 2011, *supra* note 117; *Ambiente v. Argentina*, Dissenting Opinion of Santiago Torres Bernárdez of 2 May 2013, *supra* note 177.

190. *Giovanni Alemanni and Others v. Argentina* (ICSID Case No. ARB/07/8), Decision on Jurisdiction and Admissibility of 17 November 2014, paras 269 and 323–325.

191. Ridhi Kabra, 438, *supra* note 175 sustains that multiparty proceedings fit into the ICSID arbitration model without requiring any additional consent, and further adds that the notion of ‘secondary consent’ is wide enough to allow a presumption. Manish Aggarwal and Simon Maynard, Investment Treaty Arbitration Post-Abaclat: Towards a Taxonomy of ‘Mass’ Claims, 3 Cambridge J of Int & Comp L 825, 835 (2014). However, both authors criticized the reasoning of the tribunals.

192. The reasoning of both *Abaclat* and *Ambiente Ufficio* is criticized by Katarzyna Barbara Szczudlik, *supra* note 174. However, the author admits that the *Alemanni* reasoning constitutes a step in the right direction.

of this section.¹⁹³ In any case, as a matter of practice on a number of occasions tribunals asserted jurisdiction over mass claims.

§5. PROVISIONAL MEASURES

143. A dramatic increase in the number of investor-state disputes came along with a greater number of applications for provisional measures. Provisional measures usually refer to the decisions of tribunals preserving rights of the parties pending the decision of the arbitration tribunal. According to Article 47 of the Convention, the tribunal may recommend provisional measures to preserve the rights of either party. The purpose of provisional measures is to ensure that a party did not take any action to frustrate a personal award and as far as possible to preserve the status quo at the time when the provisional measures were asked for.¹⁹⁴

144. Arbitration Rule 39 stipulates that the request for provisional measures shall include the rights to be preserved, the measures for which the recommendation is being requested, and the circumstances that require such measures. It is also within the tribunal's competence to recommend provisional measures on its own initiative or measures other than those specified in a request.¹⁹⁵

145. Provisional measures are extraordinary measures that meet the requirements of the necessity of preserving the rights of the party and doing so urgently to avoid an irreparable harm.¹⁹⁶ The Arbitration Rules also make it clear that the parties can request domestic judicial or other authorities to order provisional measures, prior to or following the institution of the proceedings, to preserve their respective rights and interests.¹⁹⁷

146. During the preparation of the Convention, the drafting committee made a deliberate choice in favour of 'recommending' provisional measures rather than 'prescribing' or 'indicating' them. Although concerns were raised that ICSID's inability to render obligatory provisional measures would undermine the prestige of the tribunal, the drafters decided that the power to prescribe provisional measures without being able to enforce them would be inadequate. Indeed, ICSID has no enforcement mechanisms of its own and thus can only recommend measures. However, if recommendations are not carried out, the tribunal will take that fact into account when rendering its award.¹⁹⁸

193. Siegfried Wiessner, *Democratizing International Arbitration? Mass Claims Proceedings in Abaclat v. Argentina*, 1 J of Int and Comp L 55 (2014); Ridhi Kabra, 453, *supra* note 175.

194. *History of the Convention*, Vol. II, 337.

195. Arbitration Rule 39.

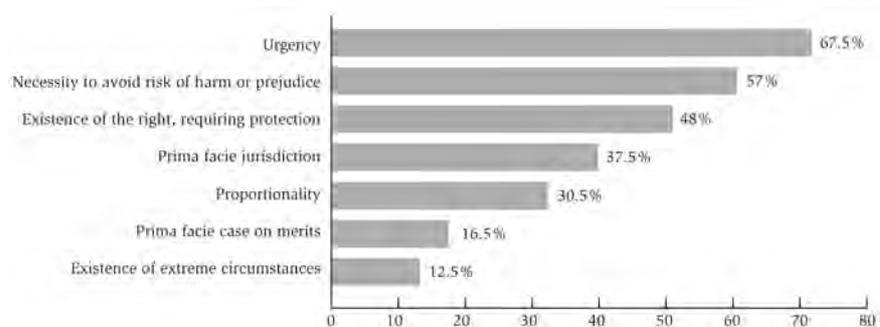
196. *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18), Procedural Order No. 3 of 18 January 2005, para. 8 (internal footnotes omitted); Christoph Schreuer, *The ICSID Convention - A Commentary*, 751–757 (2nd ed., Cambridge University Press 2009).

197. *Ibid.*

198. *History of the Convention*, Vol. II, 815.

147. It is sufficient for the tribunal to establish prima facie jurisdiction to rule on a request for provisional measures, even though the other party may object to the tribunal's jurisdiction.¹⁹⁹ The *Tokios Tokelés* tribunal explained that even if the actions in dispute do not meet the jurisdictional requirements of Article 25 of the Convention, that is, do not arise directly out of an investment, the 'tribunal may order a provisional measure if the actions of the opposing party relate to the subject-matter of the case before the tribunal and not to separate, unrelated issues or extraneous matters'.²⁰⁰

Figure 5 Most Widely Used Criteria for Granting Provisional Measures in Investor-State Disputes



Source: British Institute of International and Comparative Law and White & Case (2019).

148. An empirical study conducted by the British Institute of International and Comparative Law and White & Case on provisional measures suggests that the likelihood of granting or partially granting provisional measures under ICSID Convention and Rules (41.5%) is significantly lower than under UNCITRAL Rules (65%).²⁰¹ Parties most often request tribunals to stop aggravation of the dispute, stay local court proceedings and preserve the investments. When it comes to the criteria, used for granting provisional measures in investor-state disputes, the top three include (1) urgency, (2) necessity to avoid risk of harm or prejudice and (3) existence of the right, requiring protection as demonstrated in Figure 5 above.

199. See *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures of 17 August 2007, para. 55; *Victor Pey Casado and President Allende Foundation v. Chile* (ICSID Case No. ARB/98/2), Decision on Provisional Measures of 25 September 2001, 6 ICSID Reports 375, para. 5 (2004).

200. *Tokios Tokelés v. Ukraine*, para. 7, *supra* note 195.

201. David Goldberg, Yarik Kryvoi & Ivan Philippov. *Provisional Measures in Investor-State Arbitration*, BIICL/White & Case, London, 2019.

149. Without any detailed guidance on the criteria for granting provisional measures under ICSID Rules, the top two criteria which the tribunals rely upon are urgency and necessity. There was little disagreement between various tribunals about the meaning of urgency, the tribunals followed different approaches when looking at necessity, particularly the risk of harm, which justified granting the provisional measure.²⁰²

§6. CONFIDENTIALITY AND TRANSPARENCY

150. Overall, ICSID proceedings are more transparent than commercial arbitration, but confidentiality still plays a significant role in ICSID proceedings.²⁰³ It has been argued that limited transparency is not always suitable for the quasi-public nature of the investment treaty regime, which often involves public interest issues.²⁰⁴

151. ICSID normative instruments do not contain any default rule in favour of complete transparency or complete confidentiality. Therefore, the level of transparency is determined on a case-by-case basis. In this respect, ICSID attributes a central role to consent of the parties, applicable normative instruments and, in the last instance, the decision of the tribunal.²⁰⁵

152. Consent of the parties represents a decisive factor in determining the level of opening of the proceedings. Indeed, the Centre shall not publish arbitral awards without the consent of the parties to an arbitration.²⁰⁶ The same rule also applies to other documents pertaining to the proceeding.²⁰⁷ Moreover, tribunal members and assistants are obliged to keep the content of the award and the information acquired during the proceedings secret.²⁰⁸ In practice, while in NAFTA Chapter 11 arbitrations the disclosure of submissions, procedural orders and decisions is the norm, this is not the case in other ICSID arbitrations.²⁰⁹

202. *Ibid.*

203. *See, for example, Metalclad Corporation v. Mexico* (ICSID Case No. ARB(AF)/97/1), Award of 30 August 2000, para. 13.

204. On this issue, *see* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping The Investment Treaty System*, 107(1) *AJIL* 45–94 (2013). *See also* Nicolas Hachez and Jan Wouters, ‘International Investment Dispute Settlement in the 21st Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model?’, in Freya Baetens (ed.), *Investment Law within International Law. Integrationist Perspectives*, 417–449 (Cambridge University Press 2013).

205. World Bank, *Confidentiality and Transparency - ICSID Convention Arbitration*, available at: <https://icsid.worldbank.org/en/Pages/process/Confidentiality-and-Transparency.aspx> (accessed on 1 May 2020).

206. Article 48(5) of the Convention.

207. Administrative and Financial Regulation 22(2).

208. Arbitration Rules 6(2) and 15.

209. Especially thanks to Art. 1137 and to the NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (31 Jul. 2001). *See* Andrew Newcombe, *Kluwer Arbitration Blog*, *Confidentiality in Investment Treaty Arbitration*, available at <http://kluwerarbitrationblog.com/2010/03/03/confidentiality-in-investment-treaty-arbitration> (accessed on 1 May 2020). For example,

153. In cases like *BSG v. Guinea*, consent of the parties led to the application of the UNCITRAL Rules on Transparency to ICSID arbitration.²¹⁰ The exploitation of these innovative rules resulted in a more transparent approach to publication of case-related information, documents, third-party submissions and hearings.

154. ICSID Arbitration Rules do not automatically prescribe open hearings. Indeed, the participation of external persons²¹¹ was subject until 2006 to the consent of both parties to the proceeding, and after 2006 to the lack of objections by either party.²¹² In the event that the parties allow an open hearing, the tribunal shall take special measures in order to protect proprietary or privileged information. For instance, it may suspend the broadcasting of the hearing for the part when it deals with confidential information.²¹³

155. As observed at the beginning of this section, the treaty, contract or law applicable to the dispute may contain some provisions concerning transparency or confidentiality. If this is the case, the tribunal shall apply these provisions to the proceeding independently from the consent of the parties. An increasing number of recently concluded international investment agreements (IIAs) include transparency provisions that encourage open hearings and public access to case documents,²¹⁴ which contribute to a greater transparency in ICSID arbitration.

156. The recent UNCITRAL Rules on Transparency could have an impact on ICSID arbitration as a matter of applicable law.²¹⁵ In this respect, the 2014 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the Mauritius Convention)²¹⁶ has the potential to further foster the application of the Rules. Indeed, they become applicable to all the investment disputes involving the

the *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Germany* (ICSID Case No. ARB/09/6), non-NAFTA arbitration considerably lacked transparency.

210. *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea* (ICSID Case No. ARB/14/22), Procedural Order No. 2 on Transparency of 17 September 2015, para. 10. A similar UNCITRAL PCA case is *Iberdrola, S.A. and Iberdrola Energia. S.A.U. v. Bolivia* (PCA Case No. 2015-05), Procedural Order No. 1 of 7 August 2015. See Esmé Shirlow, Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration, 31(3) ICSID Rev. 622, 630 (2016). Before the introduction of these Rules, ICSID arbitration was generally more sensible to transparency than UNCITRAL arbitration.

211. Besides the parties, their agents, counsels and advocates, witnesses and experts.

212. Arbitration Rule 32(2).

213. Live webcast has been used by ICSID tribunals to reach the public in several cases: see, for example, *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), *Railroad Development Corporation (RDC) v. Republic of Guatemala* (ICSID Case No. ARB/07/23) and *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (ICSID Case No. ARB/09/17) all applying Art. 10.21.2 DR-CAFTA.

214. UNCTAD, Transparency: UNCTAD Series on Issues in International Investment Agreements II (2012) 37 and following. Some examples include Art. 10.22 Australia-Chile FTA and Article 29 US Model BIT (2004).

215. Article 1(9) UNCITRAL Rules on Transparency.

216. Resolution 69/116 adopted by the General Assembly of the United Nations on 10 Dec. 2014.

Contracting Parties commenced after the entry into force of the Convention and based on IIAs concluded before 1 April 2014.²¹⁷

157. If the parties do not agree on the level of transparency and the applicable provisions do not establish relevant rules, the tribunal may issue a provisional measure establishing the level of transparency.²¹⁸ Alternatively, ICSID tribunals also have the power to decide any procedural question that is not otherwise addressed, which includes transparency issues.²¹⁹ In practice, ICSID tribunals tailor confidentiality obligations so as to strike a balance between confidentiality and transparency.²²⁰ The *Abaclat and Others v. Argentina* decision about confidentiality well exemplifies this quest for a balance between opposing interests. Indeed, the tribunal rejected the proposal of the claimant to impose a general duty of confidentiality,²²¹ but it also considered concerns of integrity of arbitration proceedings.

158. The ICSID Additional Facility Rules do not differ much from the Arbitration Rules as far as transparency is concerned. Parties may tailor the level of transparency or confidentiality allowed in the proceeding through an agreement. Open hearings are allowed as long as neither of the parties raises an objection.²²² However, the applicable treaty or law containing consent to Additional Facility proceedings can provide a standard of transparency.

159. Some arbitral tribunals stated that the increased coverage of arbitral proceedings by the media should not hamper the fair and effective unfolding of arbitral proceedings.²²³ In *United Utilities v. Estonia*,²²⁴ the tribunal allowed the parties engaging in public discussion of the dispute. However, it subjected this discussion to the condition that publicity is not used as an instrument to antagonize any party, exacerbate the parties' differences, aggravate the dispute, disrupt the proceedings or unduly pressure any party.

217. However, this impact is currently limited because the Convention entered into force only in Cameroon, Canada, Gambia, the Mauritius and Switzerland.

218. Based on Art. 47 of the Convention and Arbitration Rule 39.

219. Article 44 of the Convention and Arbitration Rule 19.

220. *Biwater Gauff Tanzania Ltd v. Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 3 of 29 September 2006; *Abaclat and Others v. Argentina* (ICSID Case No. ARB/07/05), Procedural Order No. 3 (Confidentiality Order) of 27 January 2010, para. 121.

221. *Ibid.*, *Abaclat and Others v. Argentina*, para. 72. ('Transparency in investment arbitration shall be encouraged as a means to promote good governance of States, the development of a well-grounded and coherent body of case law in international investment law and therewith legal certainty and confidence in the system of investment arbitration.')

222. Article 39(2) of the Additional Facility Rules.

223. Meg Kinnear and Aïssatou Diop, *Use of the Media by Counsel in Investor-State Arbitration*, ICCA Congress Series No. 13, 2006. This coverage also descends from the increased transparency of ICSID arbitration.

224. *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Estonia* (ICSID Case No. ARB/14/24), Decision on Respondent's Application for Provisional Measures of 12 May 2016, para. 112. The tribunal followed the approach promoted by *Abaclat and Others v. Argentina*, paras 109–110, *supra* note 219.

160. In any case, the trend towards the enhancement of transparency in ICSID cases is slowly spreading. Indeed, ICSID has strengthened its commitment to seek the consent of the parties for the publication of awards and other documents connected to concluded and pending disputes. Moreover, the ICSID Secretariat regularly publishes on its website some information from the registers.²²⁵ As explained in more detail elsewhere in this monograph, ICSID has started a new procedure for the amendment of the Arbitration Rules. One of the reform topics will be transparency and participation of non-disputing parties to arbitration.²²⁶

225. Administrative and Financial Regulations 22(1) and 23.

226. Lacey Yong, *Global Arbitration Review*, ICSID to Target 16 Areas for Rule Reform, 8 May 2017.

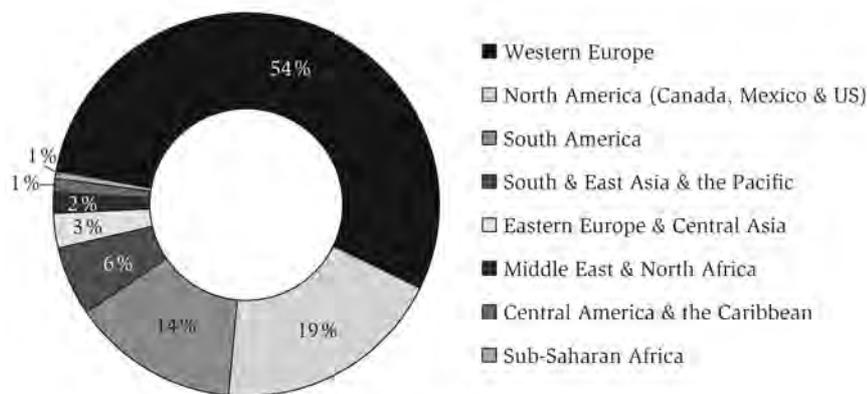
Chapter 2. Arbitration Tribunal

§1. OVERVIEW

161. The arbitration tribunal is constituted as soon as possible after the registration of a request by the Secretary-General. The tribunal usually consists of an uneven number of arbitrators, and the parties may choose to appoint a sole arbitrator. If the parties have not reached any special agreement on appointment of arbitrators, the default procedure is governed by Article 37(2)(b) of the Convention. The tribunal in the case consists of three arbitrators, one appointed by each party and the third (the president) appointed by agreement of the parties.

162. If the tribunal is not constituted within ninety days of the registration of the request for arbitration, on request of either party and after consulting both parties, the Secretary-General appoints arbitrators not yet appointed. The Convention specifies that the arbitrators appointed by means of this procedure should not be nationals of the Contracting State party to the dispute. No matter who appoints the arbitrators, the majority of them shall not be the nationals of the government party or the Contracting State whose national is the party to the dispute.²²⁷ Although most cases involve Latin American, Eastern European and Central Asian states, the vast majority of arbitrators came from Western Europe (particularly France) and North America (see Figure 6).²²⁸ Parties made 76% of all appointments and the Chairman of the ICSID Administrative tribunal appointed the rest.²²⁹

Figure 6 Arbitrators, Conciliators and Ad Hoc Committee Members Appointed in ICSID Cases



Source: ICSID (2019).

227. Arbitration Rule 1.

228. ICSID, 2014 Annual Report, 27.

229. *Ibid.*

163. Any party may propose to disqualify any of its arbitrators based on the arbitrator's manifest lack of qualities required by the Convention or on an arbitrator's ineligibility for appointment in accordance with the Convention.²³⁰ The Chairman of the ICSID Administrative Council laid out requirements, which need to be fulfilled to challenge arbitrators. Arbitrators should be both impartial and independent; independence is characterized by the absence of external control while impartiality means the absence of bias, produce position to a party.²³¹

164. If an arbitrator was exposed in another case to factual evidence that posed a manifest risk of prejudgment, that could lead to a successful challenge of such arbitrator.²³² Conflict of interest may also constitute grounds for disqualification as it may infringe on the Convention's independence. However, the threshold for such disqualification is high. In *Amco v. Indonesia*, an arbitrator was challenged because he had previously advised the claimant's companies on tax issues and because the arbitrator's law firm and the claimant's counsel shared a joint office and profit sharing arrangements for many years.²³³ The other arbitrators concluded that this was not enough for disqualification.

165. In *OPIC Karimum Corp. v. Venezuela*, the panel reviewing the disqualification request first stated that there was a 'relatively high burden for those seeking to challenge ICSID arbitrators'.²³⁴ This means that the lack of independence must be 'manifest' – a requirement, which should be 'clearly and objectively established'. While multiple appointments of the arbitrator by the same law firm 'constitute[d] a consideration that must be carefully considered in the context of a challenge', the panel concluded that in this case multiple appointments alone were not enough to 'demonstrate the manifest lack of qualities necessary for Claimant's proposal to disqualify to succeed'.²³⁵

166. In *Universal Compression Int'l Hld., S.L.U. v. Venezuela*, the issue was whether multiple appointments by the same respondent or law firm, or the prior professional relationship with one of the council, were factors strong enough to fulfil the requirement of ICSID Convention Articles 14(1) and 57. Also important in the

230. See Arts 57 and 59 of the Convention.

231. *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña of 13 December 2013, paras 65–66.

232. *Caratube International Oil Company LLP and Devincci Salah Hourani v. Kazakhstan* (ICSID Case No. ARB/13/13), Decision on the Proposal for Disqualification of Bruno Boesch of 20 March 2014, para. 74.

233. *Amco v. Indonesia* (ICSID Case No. ARB/81/1), Decision on Jurisdiction of 25 September 1983, 1 ICSID Reports 389 (1993).

234. *OPIC Karimum Corp. v. Venezuela* (ICSID Case No. ARB/10/14), Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator of 5 May 2011.

235. *Ibid.*

discussion was the non-disclosure of public information.²³⁶ Having reviewed the relevant appointments and past relationships that could taint the arbitrator's independence, the panel concluded that there was 'no basis to indicate that there is a manifest lack of independence or impartiality'.²³⁷

167. The Centre maintains the Panel of Conciliators and the Panel of Arbitrators, available on the ICSID website. The parties to the dispute are permitted to appoint arbitrators who are not on the list of current members of the ICSID Panels, but the choice of the chair of the Administrative Council is limited to those on the list.

168. According to Article 13 of the ICSID Convention, each Contracting State can designate four persons to each Panel, and the chair of the Administrative Council may designate ten persons to each Panel. The persons, who may serve on either Panel, are expected to be of high moral character and sufficient competence in the fields of law, commerce, industry and finance. The chair of the Administrative Council is charged with ensuring that, in making the designations, due regard be paid to the importance of assuring representation on the Panels of the principal legal systems of the world and the main forms of economic activity.

169. Although the jurisdiction of the Centre is limited to legal disputes, there is no requirement that the members of the Panels be lawyers. The appointed Panel members serve for six years and can be renewed. As was noted in the course of drafting the Convention, non-lawyers' knowledge could be necessary to resolve disputes regarding the facts essential to a determination of legal rights and obligations.²³⁸

170. The ICSID Secretariat maintains a list of current members of the ICSID Panels of Conciliators and of Arbitrators, which consists of two parts. Part I lists designations by the chair of the Administrative Council; Part II lists designations by Contracting States. The list is regularly updated and is available on the ICSID website. An interesting characteristic of the list is that it contains very few individuals from developing countries, which usually prefer to appoint Western-qualified arbitrators.

§2. DIVERSITY OF ARBITRATORS

171. The diversity of arbitrators remains a concern for many stakeholders. If ICSID is to be an effective and popular means for dealing with international investment disputes, it is important that it reflects the diversity of its Member States at all

236. *Universal Compression International Holding v. Venezuela* (ICSID Case No. ARB/10/9), Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators of 20 May 2011.

237. *Ibid.*

238. History of the Convention, Vol. II, 489.

levels. There are mixed results here. For example, while in the financial year ending in 2018 arbitrators and conciliators were from forty-two different countries, only 24% of those appointed were women.²³⁹ Progress here appears to be slow, as only 31% of first time appointments in that year were women.²⁴⁰ In the financial year ending in 2019, the appointment of female arbitrators and conciliators remains at the same level as in 2018, but only thirty-six nationalities were represented in all the appointed individuals.²⁴¹ On the other hand, 75% of the Secretariat are women.²⁴²

172. ICSID has no explicit rules aimed at ensuring equitable representation of states among adjudicators similar to those found at the ICJ or the European Court of Human Rights.²⁴³ In practice, this results in a mismatch between the regions where the parties come from and the appointed adjudicators. For example, in 2019 the largest share of state parties in ICSID disputes comprised states from Eastern Europe and Central Asia (25%) and South America (21%),²⁴⁴ but the vast majority of adjudicators came from Western Europe (47%) and North America (20%).²⁴⁵

173. In the absence of mandatory rules, developing countries tend to appoint arbitrators from rich countries to maximize their chances of winning, even if their appointees know very little about the laws, the culture of doing business, public policies, or the languages of the region. This has become a major concern for a number of States, which point out that the pool of arbitrators is homogenous in terms of arbitrators' origin,²⁴⁶ and scholars, who view the ICSID system as a way to undermine developing countries or as a form of colonialism.²⁴⁷ In the eyes of many developing countries, this undermines the legitimacy or acceptability of the system of investor-state disputes, seen by them as alien.²⁴⁸

174. Individuals from developing countries comprise half of the recent designations by the Chairman of the ICSID Administrative Council to the ICSID Panel of Arbitrators and Conciliators,²⁴⁹ but in practice their appointments still remain rare.

239. ICSID, 2018 Annual Report, 48–49.

240. *Ibid.*

241. ICSID, 2019 Annual Report, 25.

242. *Ibid.*, 4.

243. The sole arbitrator cannot have the nationality of either claimant or respondent, unless both parties agree. *See* Arbitration Rule 1(3).

244. ICSID, 2019 Annual Report, 22.

245. ICSID, The ICSID Caseload Statistics Issue 2019-1.

246. *See* statements of representatives of Colombia, Indonesia and Poland; Anthea Roberts, UNCITRAL and ISDS Reforms: Concerns about Arbitral Appointments, Incentives and Legitimacy, EJIL: Talk!, available at <https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-arbitral-appointments-incentives-and-legitimacy> (accessed on 1 May 2020).

247. *See* Kate Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguard of Capital* (Cambridge University Press 2013).

248. UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fifth Session, Doc. A/CN.9/935, 8–14 (2018), para. 54.

249. ICSID, Members of the Panels of Conciliators and of Arbitrators, available at <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%2010%20-%20Latest.pdf> (accessed on 1 May 2020).

The appointments made by the ICSID Secretariat also favour Western European adjudicators with 44% of all appointments, while representatives of the largest group of respondent states (Eastern Europe and Central Asia) account for only around 2% of all appointments.²⁵⁰ Although parties make most of the ICSID appointments, the ICSID Secretariat can potentially play a bigger role in enhancing the diversity of arbitrators when making appointments.²⁵¹

250. *See* ICSID, The ICSID Caseload Statistics Issue 2019-1.

251. *See* Chiara Giorgetti, Who decides who decides in international investment arbitration?, 35 *University of Pennsylvania Journal of International Law* 431 (2014).

Chapter 3. Jurisdiction (Competence)

§1. OVERVIEW

175. Unlike many other arbitration institutions, ICSID has a specialized subject-matter jurisdiction. Article 25(1) is the cornerstone of ICSID subject-matter jurisdiction:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

176. As a general rule, ICSID tribunals are judges of their own competence.²⁵² However, the Contracting States may notify ICSID about the class or classes of disputes, which it would not submit to the Centre's jurisdiction.²⁵³ In the absence of such notification, the default rules described as follows apply.

177. The drafters of the Convention observed that the term *jurisdiction* did not mean compulsory jurisdiction, but rather the 'outer limits within which use can be made of facilities provided for by the Centre'.²⁵⁴ In the process of preparation of the Convention, Article II referred to both jurisdiction and competence.²⁵⁵ The idea was that the Centre itself would not engage in conciliation or arbitration, like the PCA in the Hague, the Netherlands.

178. Not every dispute is covered by the jurisdiction of the Centre, even if there is consent. The Convention is intended to deal with only investment disputes that involve Contracting States and nationals of other Contracting States.²⁵⁶ ICSID tribunals apply a *prima facie* test to determine whether the merits warrant jurisdiction. This test requires that the facts alleged by the claimant, if established, are capable of forming the basis for a treaty violation.²⁵⁷ Two considerations are important. First is to ensure that tribunals are not flooded with claims that have no chance of success, or may be of abusive nature. Second is that tribunals do not go into the merits of cases without sufficient prior debate.²⁵⁸

179. The Convention sets up a number of conditions for the jurisdiction of the Centre. First, there should be written consent of both parties to submit their dispute

252. Article 41 of the Convention.

253. Article 25(4) of the Convention.

254. History of the Convention, Vol. II, 700.

255. *Ibid.*, at 320.

256. *Ibid.*

257. Christoph Schreuer, 540–541, *supra* note 195.

258. See *Impregilo S.p.A. v. Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction of 22 April 2005, para. 254.

to the Centre. Consent to arbitration is also referred to as a condition *ratione voluntaris*. Second, the dispute must be a legal dispute arising directly from a foreign investment (jurisdiction *ratione materiae*). Third, one of the parties to the dispute should be a national of a Contracting State and the other party should be a state party to the Convention (jurisdiction *ratione personae*). Finally, there is a condition *ratione temporis*, that is, the ICSID Convention must be applicable at the relevant time. The ICSID Convention does not preclude multiple claimants jointly submitting a claim to ICSID.²⁵⁹ Moreover, it does not require a specific or additional consent on the part of the respondent state in addition to the written consent under Article 25(1) of the Convention.²⁶⁰

180. It is important to distinguish between the concepts of jurisdiction and admissibility. If the claim cannot be brought to ICSID tribunals, it is an issue of jurisdiction (e.g., it is not a legal dispute or the state is not a party to the Convention). But if the issue is that the claim should not be heard at all (or at least not yet), then it is an issue of admissibility (e.g., the mandatory conciliation period has not yet passed). This distinction is important because if the tribunal goes beyond its jurisdiction, the award is subject to annulment in accordance with the Convention. However, the decision cannot be annulled even if the tribunal has incorrectly resolved the issue of admissibility.²⁶¹

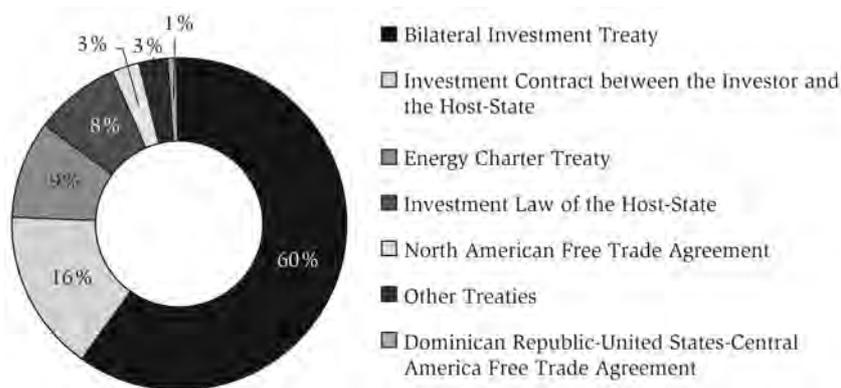
181. Figure 7 demonstrates that BITs serve as the most frequently raised basis for consent in cases registered by ICSID, followed by investment contracts with the host state, the Energy Charter Treaty and domestic law of the host state. As already noted, the Centre has no compulsory jurisdiction and access to it is strictly based on the consent of the parties. This rule also left intact the principle of customary international law pursuant to which claims cannot be brought before an international tribunal until local remedies have been exhausted. The Convention does not address whether exhausting local remedies is desirable.

259. *Ambiente Ufficio*, para. 146, *supra* note 177.

260. *Ibid.*

261. See Jan Paulsson, 'Jurisdiction and Admissibility' in *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner*, 601 (ICC 2005).

Figure 7 Basis of Consent Invoked to Establish ICSID Jurisdiction in Cases Registered by ICSID



Source: ICSID (2019).

182. However, Article 26 states '[a] Contracting State *may* require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention' (emphasis added). To date, only Israel, Costa Rica and Guatemala have made declarations requiring the exhaustion of legal remedies in accordance with Article 26.²⁶² Therefore, unless a special declaration is made, when there is consent to submit a dispute to the Centre, the exhaustion of local remedies shall have been waived.²⁶³ The same position has been reiterated in the Report of the Executive Directors.²⁶⁴

183. Unilateral acceptance of ICSID jurisdiction by a state constitutes an offer, which could be accepted by a foreign investor and become binding on both parties, even if there is no investment agreement with a particular investor.²⁶⁵ Consent may be expressed in different forms. It may be a clause included in an investment agreement, a bilateral treaty or a special compromise regarding the already-arisen dispute. There is no need for the consent of both parties to be expressed in one document.²⁶⁶ Although consent is a necessary prerequisite for the jurisdiction of the Centre, it is not sufficient to bring a dispute within the Centre's jurisdiction.

262. ICSID, The List of Contracting States and Measures Taken by Them for the Purpose of the Convention, 11 (April 2008).

263. History of the Convention, Vol. II, 755.

264. Executive Directors' Report, 45, *supra* note 28.

265. History of the Convention, Vol. II, 275.

266. Executive Directors' Report, 43, *supra* note 28.

§2. LEGAL DISPUTE

184. The condition of parties' consent is common to almost all international arbitrations.²⁶⁷ However, the Centre cannot extend its jurisdiction over any dispute provided that the parties agree. Only a legal dispute – not a political controversy or a conflict of interest – can be subject to arbitration by ICSID. According to the *travaux préparatoires* of the Convention, the requirement of legal character is necessary to distinguish the dispute in question from political, economic or purely commercial disputes.²⁶⁸ The Convention's drafting history shows that the concept of legal disputes does not include moral disagreements or dealing with unfairness, poor political judgment, national health, national security and other non-legal disagreements.²⁶⁹

185. In the course of drafting, the issue of justiciability of political questions has been raised on a number of occasions.²⁷⁰ Although the drafters agreed that these questions fall within ICSID jurisdiction,²⁷¹ they did not include this in the Convention's final text. In any event, the disputes are only arbitrable at ICSID if there is consent of the state and if the state would presumably never consent to arbitration of disputes of clearly a not-legal nature.

186. According to the Report of the Executive Directors, the term *legal disputes* was used to make a distinction of conflicts of interest, as opposed to conflicts of rights. The Report further clarifies that 'the dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation'.²⁷² Commentators note that 'the dispute will only qualify as legal if legal remedies such as restitution or damages are sought and the legal rights are based on ... treaties or legislation ... claimed'.²⁷³

187. The issue of the dispute's legal nature had rarely been contested in ICSID proceedings. The tribunal in *AES Corp. v. Argentina* used the definition of legal dispute given in the opinion of the ICJ in the case concerning East Timor, which explained that a legal dispute is 'a disagreement on a point of law or fact, a conflict of legal views or interests between parties'.²⁷⁴

188. Not only should the dispute be legal but also it must arise from lawful and good faith activities. ICSID tribunals ruled that if investment is made in bad faith,

267. See more on consent to arbitrate in general: Gary Born, *International Commercial Arbitration*, 655–694 (Kluwer Law International 2009).

268. History of the Convention, Vol. II, 203.

269. *Ibid.*, at 466.

270. See, for example, *ibid.*, 257, 470.

271. *Ibid.*

272. Executive Directors' Report, para. 26, *supra* note 28.

273. Christoph Schreuer, 105, *supra* note 195.

274. *AES Corporation v. Argentina* (ICSID Case No. ARB/02/17), Decision on Jurisdiction of 26 April 2005, para. 43 (quoting the case concerning *East Timor*, ICJ Reports 89 (1995) para. 99); see also *Mavrommatis Palestine Concessions*, P.C.I.J., Series A, No. 2, 11.

it is not possible for the investor to rely on protections afforded by BITs or the ICSID Convention. In *Inceysa v. Salvador*, the tribunal defined the principle of good faith as ‘the absence of deceit and artifice during the negotiation and execution of instruments that gave rise to the investment’.²⁷⁵ This principle is related to the principle of *nemo auditur propriam turpitudinem allegans* – nobody can benefit from his own wrong. The tribunal in *Inceysa* ruled that this principle requires that an investor may not ‘benefit from an investment effectuated by means of one or several illegal acts’.²⁷⁶ In addition, the tribunal recognized that the rights acquired from illegal acts violate the general international public policy principle of ‘respect for the law’.²⁷⁷

189. In *World Duty Free v. Kenya*, the tribunal concluded that ‘claims based on contracts of corruption or contracts obtained by corruption cannot be upheld by [ICSID] Arbitral tribunal’ as a matter of international public policy.²⁷⁸ Another ICSID tribunal ruled that investment made solely to assert a claim under the BIT cannot be afforded protection under ICSID Convention.²⁷⁹ If the fact that investment is made in violation of the laws of the host state is manifest, this would allow the tribunal to deny its jurisdiction.²⁸⁰ If it is not manifest, then the tribunal may consider it at the merits stage.²⁸¹

190. As a general rule, investment based on fraudulent conduct cannot benefit from investment treaty protection.²⁸² However, ‘not every technical infraction of a State’s regulations associated with an investment deprive[s] the investment of the protection of a Treaty’.²⁸³ According to *Metal-Tech Ltd. v. Republic of Uzbekistan*, compliance with the laws of the host State and respect of good faith usually do not constitute a part of the objective definition of investment under Article 25(1) of the

275. *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award of 2 August 2006, para. 231 (ruling that the tribunal had no jurisdiction over a dispute involving an investment contract obtained in violation of domestic law).

276. *Ibid.*, paras 240–242.

277. *Ibid.*, para. 249.

278. *World Duty Free Company Limited v. Kenya* (ICSID Case No. ARB/00/7), Award of 4 October 2006 (holding that it had no jurisdiction over an investment that involved bribing Kenyan officials).

279. *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5), Award of 15 April 2009, para. 54.

280. See, for example, *Inceysa*, para. 230, *supra* note 274.

281. See *Plama Consortium Limited v. Bulgaria* (ICSID Case No. ARB/03/24), Award of 27 August 2008, paras 138–139 (finding no jurisdiction over a dispute in which the investor failed to provide relevant information concerning the investment and the investor).

282. *David Minnotte & Robert Lewis v. Poland* (ICSID Case No. ARB(AF)/10/1), Award of 16 May 2014, paras 131, 132. See also *Inceysa*, paras 230–244, *supra* note 274. However, there will be no protection only if the ‘fraud is so manifest, and so closely connected to facts (such as making of an investment) which form the basis of a tribunal’s jurisdiction as to warrant a dismissal of claims [...] for want of jurisdiction’.

283. *Hochtief AG v. Argentina* (ICSID Case No. ARB/07/31), Decision on Liability of 29 December 2014, para. 65.

ICSID Convention.²⁸⁴ However, a requirement to implement in accordance with the laws and regulations would be breached by violating anti-corruption legislation depriving tribunal of jurisdiction.²⁸⁵

§3. ARISING DIRECTLY OUT OF AN INVESTMENT

191. Parties to ICSID arbitrations frequently contest the issue of whether the controversy directly arises out of an investment. ‘Arising directly’ refers to the dispute, not to the investment.²⁸⁶ There is an important distinction between rights and obligations of general application that are normally outside of ICSID jurisdiction and those arising directly out of investment.²⁸⁷

192. In the course of drafting the Convention, one of the proposed definitions was ‘any contribution of money or other asset of economic value for an indefinite period or, if the period is not defined, for not less than five years’.²⁸⁸ Another definition was more extensive:

The term ‘investment’ means the acquisition of (i) property rights or contractual rights (including rights under a concession) for the establishment or in the conduct of an industrial, commercial, agricultural, financial or service enterprise; (ii) participations or shares in any such enterprise; or (3) financial obligations of a private or public entity other than obligations arising out of short-term banking or credit facilities.²⁸⁹

193. Eventually, the drafters decided not to provide a definition for the term *investment*. This was done deliberately to enable the parties’ to exclude certain classes of disputes in advance.²⁹⁰

194. The Convention drafters assumed that this aspect of ICSID jurisdiction could be more appropriately controlled by the requirement of consent. It had been noted that ‘the requirement that the dispute must have arisen out of an “investment” may be merged into the requirement of consent to jurisdiction’.²⁹¹ In other words, it is up to the parties to decide what constitutes investment. If the issue regarding the question of the subject-matter jurisdiction does not arise, then it is deemed that the dispute before the tribunal concerns an investment.

284. *Metal-Tech Ltd. v. Uzbekistan* (ICSID Case No. ARB/10/3), Award of 4 October 2013, para. 127 (citing and disagreeing with *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5), Award of 15 April 2009, paras 101 and 114).

285. *Ibid.*, *Metal-Tech Ltd. v. Uzbekistan*, paras 372–374.

286. *Fedax v. Venezuela* (ICSID Case No. ARB/96/3), Decision on Jurisdiction of 11 June 1997.

287. *See, for example, Amco v. Indonesia* (ICSID Case No. ARB/81/1), Resubmitted Case: Decision on Jurisdiction of 10 May 1988, 1 ICSID Reports 543, 565 (1993).

288. History of the Convention, Vol. II, 623.

289. *Ibid.*, at 634.

290. Executive Directors’ Report, 44, *supra* note 28.

291. Aron Broches, The Convention on Settlement of Investment Disputes: Some Observations on Jurisdiction, 5 Colum. J. of Transnatl. L. 263, 268 (1996).

195. The Executive Directors' Report clarified this issue:

No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).

196. There is no *de minimis* requirement of the amount of investment that can give rise to ICSID jurisdiction. This issue arose during the preparation of the Convention, and the prevailing view was that because it was up to the parties to consent to ICSID jurisdiction, they could set up a minimum amount if they needed to do so.²⁹² The requirement of lawful admission of foreign investment often present in investment treaties usually refers to the entry on the market itself, a gateway through which the investor must pass once.²⁹³ In other words, if the treaty requires that the investment should be admitted in accordance with domestic law, this does not mean a requirement of general compliance with the host state's legislation to admit foreign investment.

197. One tribunal emphasized that it is for the states concluding an investor protection treaty to define the scope of the investment that they accept to protect by the treaty.²⁹⁴ However, the definition of investment in the applicable BIT cannot be considered self-sufficient and tribunals usually look at external sources. The most frequently referenced unofficial definition of investment is known as the 'Salini test'. According to this test, the notion of investment implies that the following criteria are met: (a) a contribution of money or other assets of economic value, (b) a certain duration, (c) an element of risk and (d) a contribution to the host state's development.²⁹⁵ Another tribunal emphasized the 'the minimum requirement for an investment includes the trial of contribution, duration and risk'.²⁹⁶

198. *Abaclat and Others v. Argentina* highlighted the controversy around definition of investment. The majority noted that Salini criteria have never been included in the ICSID Convention nor in the treaty relevant to that dispute. The

292. History of the Convention, Vol. II, 497.

293. *Churchil Mining PLC and Planet Mining Pty Ltd v. Indonesia* (ICSID Case No. ARB/12/14 and 12/40), Decision on Jurisdiction of 24 February 2014, paras 290–291.

294. *Philip Morris v. Uruguay* (ICSID Case No. ARB/10/7), Decision on Jurisdiction of 2 July 2013, paras 200–203.

295. *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction of 23 July 2001, s. 52; Recent ICSID cases using the *Salini* test include *Helnan International Hotels A/S v. Egypt* (ICSID Case No. ARB/05/19), Decision on Objection to Jurisdiction of 17 October 2006, s. 77; *Malaysian Historical Salvors SDN, BHD v. Malaysia* (ICSID Case No. ARB/05/10), Award on Jurisdiction of 17 May 2007, paras 73–74.

296. *Nova Scotia Power Incorporated v. Venezuela* (ICSID Case No. ARB(AF)/11/1), Award of 30 April 2014, para. 14.

most important for the tribunal was to verify that ‘Claimants made contributions, which led to the creation of the value that [the Contracting States] intended to protect under the BIT’.²⁹⁷

199. ICSID tribunals developed rich jurisprudence on various aspects of what constitutes investment. In the absence of legally binding definition of what constitutes investment, investment tribunals have considered shares in a company,²⁹⁸ a loan,²⁹⁹ a construction contract,³⁰⁰ a telecommunication licence as such in the past.³⁰¹ ICSID tribunals analyse all relevant circumstances to determine whether there was an investment within the meaning of the Convention and consider the duration of the project, the risks involved and the level of business commitment.³⁰²

200. A UNCITRAL tribunal in *Alps Finance* concluded that a contract itself could qualify as investment. The contract must satisfy certain minimum requirements such as capital contribution, significant duration and sharing of operational risks.³⁰³ The tribunal excluded the applicability of the *Salini* test in the case of arbitration not subject to the ICSID Convention.³⁰⁴

201. In one case the tribunal dealt with was whether securities entitlement (government bonds) acquired outside of the territory of the host state constituted investments ‘made in the territory’ of the host state for purposes of the ICSID Convention. The majority decided that the territorial link was satisfied.³⁰⁵ Another tribunal ruled that an arbitral award may not be considered a ‘protected investment’.³⁰⁶ However, arguably contractual rights crystallized in such awards, are generally capable of being expropriated if the award is final and enforceable as such.³⁰⁷

202. Purely domestic disputes, such as those involving the interpretation of tax regulations, are usually excluded from ICSID jurisdiction. In *Amco v. Indonesia* the

297. *Abaclat and Others v. Argentina*, para. 364, *supra* note 117.

298. For example, *CMS v. Argentina* (ICSID Case No. ARB/01/8), Decision on Objections to Jurisdiction of 17 July 2003, paras 49–64.

299. *CSOB v. Slovak Republic* (ICSID Case No. ARB/97/4), Decision on Jurisdiction of 24 May 1999, 14 ICSID Rev. - FILJ 251, 263–264 (1999).

300. *Salini v. Morocco*, *supra* note 295.

301. *Nagel v. The Czech Republic* (SCC Case No. 49/2002), Final Award of 9 September 2003, 13 ICSID Reports 30, 93 (2008).

302. *See, for example, Salini v. Morocco*, para. 32, *supra* note 295.

303. *Alps Finance and Trade AG v. Slovak Republic* (UNCITRAL), Award of 5 March 2011, para. 231.

304. *White Industries Australia Limited v. India* (UNCITRAL), Final Award of 30 November 2011, para. 7.4.7.

305. *Abaclat and Others v. Argentina*, para. 364, *supra* note 117.

306. *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16), Award of 31 March 2011, para. 162.

307. *See* Yarik Kryvoi, Can an Arbitration Award Be Expropriated? Introductory Note to European Court of Human Rights: *Kin-Stib and Majkic v. Serbia*, 49 ILM 1181 (2010).

ICSID tribunal held that it lacked jurisdiction over tax disputes that were not covered by an investment treaty.³⁰⁸ The tribunal ruled that the claim of tax fraud was beyond its competence and noted that:

It is correct to distinguish between rights and obligations that are applicable to legal or natural persons who are within the reach of a host State's jurisdiction, as a matter of general law; and rights and obligations that are applicable to an investor as a consequence of an investment agreement entered into with that host state. Legal disputes concerning the former in principle fall to be decided by the appropriate procedures in the relevant jurisdiction.³⁰⁹

203. However, if there is a specific provision related to taxes in BIT, it may fall under the ICSID jurisdiction. In *Bauxite v. Jamaica*³¹⁰ the ICSID tribunal ruled that it had jurisdiction over the dispute, which involved an investment agreement with a 'no further tax' clause, pursuant to which Jamaica undertook not to impose any additional royalties or taxes that had not been specifically provided for or referred to in the investment agreement. The *Bauxite* tribunal examined the language of the investment agreement and concluded that it had jurisdiction because the dispute concerned 'the alleged rights and obligations stemming from particular provisions in the agreement between Kaiser and Jamaica'.³¹¹

§4. PARALLEL PROCEEDINGS

204. The increasing number of BITs currently available for investors provide them with a choice to pursue claims for damages in a number of *fora*, under different arbitration rules or in different national courts. The Convention and jurisprudence do not favour parallel proceeding in domestic courts once the parties have consented to ICSID jurisdiction. Article 26 of the Convention provides that because the parties consented to ICSID arbitration, they are precluded from pursuing any other remedy.

205. ICSID Executive Directors pointed out in paragraph 32 of their Report:

It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of local remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy.

206. An important purpose of Article 26 is to secure non-interference with the arbitration process to preserve the self-contained nature of the ICSID proceedings.

308. *Amco Asia Corporation v. Indonesia* (ICSID Case No. ARB/81/1), Decision on Jurisdiction of 25 September 1983, 3 ICSID Rev. 166, 187 (1988).

309. *Ibid.*

310. *Kaiser Bauxite Company v. Jamaica* (ICSID Case No. ARB/74/3), Decision on Jurisdiction and Competence of 6 July 1975, 1 ICSID Reports 296 (1993).

311. *Ibid.*

In other words, from the moment consent to arbitration has been given, the parties have lost their right to seek relief in another forum. In the past, ICSID tribunals upheld the prohibition against parallel proceedings. The ICSID cases discussed later demonstrate that compliance with Article 26 is important for two reasons. First, it ensures that the parties obtain a valid, enforceable award. Second, it allows preserving resources by not having to participate in costly litigation in two *fora*.

207. The ICSID tribunal in *Tokios Tokelés v. Ukraine* summarized the apparent consensus:

ICSID tribunals have repeatedly ruled ... that the parties must withdraw or stay any and all judicial proceedings commenced before national jurisdictions and refrain from commencing any further such proceedings in connection with the dispute before the ICSID tribunal.³¹²

208. The *Tokios Tokelés* tribunal made clear that parallel proceedings might prejudice the rendering or the implementation of the ICSID eventual decision or award or aggravate the existing dispute.³¹³ Similarly, in *Lanco v. Argentina* the ICSID emphasized the importance of non-interference from any other forum with the ICSID arbitration proceeding, once such proceeding has been instituted.³¹⁴

209. Once the ICSID tribunal has resolved the dispute, the parties will need to comply with it, regardless of the findings of domestic courts.³¹⁵ It is a well-settled principle of international law that domestic law cannot serve as justification for non-compliance with international obligations. Although decisions rendered by the domestic courts will not be binding on the relevant tribunal,³¹⁶ they may prejudice the final award and its enforcement. Eventually, the parties will need to comply with the award rendered by ICSID, as required by Article 54 of ICSID. Not only is pursuing parallel proceedings inconsistent with the ICSID Rules and earlier cases but also litigation in two *fora* is a costly endeavour as pointed out by the tribunal in *SGS v. Pakistan*. The tribunal in that case recommended that domestic arbitration between the same parties be stayed:

312. *Tokios Tokelés v. Ukraine*, 2, *supra* note 195.

313. *Ibid.*

314. *Lanco International Inc. v. Argentina* (ICSID Case No. ARB/97/6), Decision of 8 December 1998, 40 ILM 457, 469 (2001).

315. See Robert Jennings & Arthur Watts (eds), *Oppenheim's International Law*, 85 (Oxford University Press 1997). ('[T]he failure of an organ of the state, such as ... a court, to give effect to the international obligations of the state cannot be invoked by it as a justification for failure to meet its international obligations.')

316. *SGS Société Générale de Surveillance S.A. v. Pakistan* (ICSID Case No. ARB/01/13), Procedural Order No. 2 of 16 October 2002, 299 (observing that although a Supreme Court judgment of Pakistan is final as a matter of law of Pakistan, 'as a matter of international law, it does not in any way bind this Tribunal').

until such time, if any, as this Tribunal has issued an award declining jurisdiction over the present dispute and that award is no longer capable of being interpreted, revised or annulled pursuant to the Convention.³¹⁷

317. *Ibid.*, 305.

Chapter 4. Parties in ICSID Arbitration

§1. NATIONAL OF ANOTHER CONTRACTING STATE

I. Natural Persons

210. The definition of a ‘national of another Contracting State’ under the ICSID Convention has a broad meaning. It includes both natural and juridical persons, as well as associations, and is not restricted to privately owned companies. A natural person, who is also a national of the state party to the dispute, would not be eligible to be a party in the proceedings under the auspices of the Centre. As the Report of Executive Directors stresses, that ineligibility is absolute and cannot be cured even if the party in question has had the nationality of the other state or if one of the states gave its consent to initiating the proceedings.³¹⁸

211. A number of ICSID cases involved individual entrepreneurs who sued host states on behalf of their locally incorporated companies. These individuals were nationals of state parties to the Convention.³¹⁹

II. Juridical Persons

212. The main purpose of the Convention is to enable foreign investors to resort to an impartial and independent dispute settlement mechanism outside the jurisdiction of a host state. Therefore, as a general rule, nationals of the host state or companies controlled by domestic investors are barred from resorting to ICSID.

213. Like natural persons, juridical persons who have the same nationality as the state party to the dispute may not be a party to ICSID proceedings. However, this requirement is not absolute; if the home state of the investor agreed to treat the judicial person as a national of another Contracting State, this judicial person would be eligible.³²⁰

214. Article 25 makes it clear that the Convention allows only the nationals of a Contracting State to submit their disputes to ICSID. Many states require that investors incorporate domestic legal entities for purposes of doing business in that state. Therefore, such entities are not eligible to participate in ICSID proceedings.

215. When the state’s consent is offered in BIT or investment legislation, there is no presumption that local companies incorporated by foreign investors can resort to ICSID to resolve disputes. However, because of foreign control, the parties may

318. Executive Directors’ Report, 44, *supra* note 28.

319. *See, for example, Genin and Others v. Estonia* (ICSID Case No. ARB/99/2), Award of 25 June 2001, 17 ICSID Rev. - FILJ 395 (2002); *Bernardus Henricus Funnekotter and Others v. Zimbabwe* (ICSID Case No. ARB/05/6), Award of 22 April 2009.

320. Executive Directors’ Report, 44, *supra* note 28.

agree to treat locally incorporated companies as the nationals of another Contracting State for the purposes of this Convention.³²¹ ICSID tribunals have used a somewhat relaxed test in determining the existence of agreement on a foreign nationality. If there is an agreement with a locally incorporated company controlled by foreign nationals and the host state, it is treated as an implicit consent to arbitrate ICSID disputes.³²²

216. Another important issue is whether ICSID tribunals need to assert jurisdiction only over the corporate entities directly controlled by foreign investors and also over those controlled by their subsidiaries. It is common for foreign investors to operate through locally incorporated groups of companies, and, therefore, this question is of practical importance. Different tribunals have approached this issue from different perspectives.

217. Parties to an investment treaty can agree to treat companies established in the state as nationals of another state if the latter own or control such companies. However, when the factual evidence suggests that the national of the host state ultimately controls the investor, then ICSID tribunals may decide that ‘the foreign control’ requirement in Article 25(2)(b) of the ICSID Convention is not met.³²³ In *Amco v. Indonesia*, a foreign parent company controlled a locally incorporated entity. The ICSID tribunal acknowledged that there was no explicit agreement to treat a local company as a foreign corporation. But the tribunal also noted that the government of Indonesia acknowledged in the agreement the status of the locally incorporated but foreign-controlled corporation. The tribunal ruled that it was enough to constitute an implied agreement for purposes of Article 25 of the Convention and asserted its jurisdiction over the locally incorporated company.³²⁴

218. Similarly, in *Klöckner v. Cameroon* an agreement between a locally incorporated company and the government of Cameroon, containing an ICSID clause, was found to be sufficient to regard the local company as a foreign company and assert jurisdiction *ratione personae*.³²⁵ The literature suggests that equity participation, voting rights and management must be considered when foreign control is being determined.³²⁶ The ICSID tribunal in *Tokios Tokelés v. Ukraine* emphasized that if the Contracting Parties want to impose an ownership or control requirement on the definition of investment, they must do so explicitly.³²⁷ Thus, even a company

321. See Art. 25(2) of the Convention.

322. See *LETCO v. Liberia* (ICSID Case No. ARB/83/2), Decision on Jurisdiction of 24 October 1984, 2 ICSID Reports 346, 351–354 (1994).

323. *National Gas S.A.A. v. Egypt* (ICSID Case No. ARB/II/17), Award of 3 April 2014.

324. *Amco v. Indonesia* (ICSID Case No. ARB/81/1), Decision on Jurisdiction of 25 September 1983, 1 ICSID Reports 389 (1993).

325. *Klöckner v. Cameroon* (ICSID Case No. ARB/81/2), Award of 21 October 1983, 2 ICSID Reports 9, 16 (1994).

326. Christoph Schreuer, 327, *supra* note 195.

327. *Tokios Tokelés v. Ukraine*, para. 36, *supra* note 195.

that has 99% ownership of the nationals of the state against which an ICSID claim is brought could be considered a ‘foreign’ investor, as long as it is incorporated in another Contracting State.

219. In *Vacuum Salt Products Ltd. v. Ghana*, the tribunal denied jurisdiction, ruling that that ‘the reference in Article 25(2)(b) to “foreign control” necessarily sets an objective Convention limit, beyond which ICSID jurisdiction cannot exist’.³²⁸ Despite the existence of an ICSID clause in an agreement between the Ghanaian government and Vacuum Salt containing an ICSID clause, the tribunal noted that only 20% of the shares belonged to foreign investors whereas 80% belonged to the nationals of Ghana. The tribunal also took into consideration that there was little role the foreign investor played in the company’s management and concluded that it had no jurisdiction *ratione personae*.³²⁹

220. In *Amco v. Indonesia*, the ICSID tribunal asserted jurisdiction over a company directly controlled by foreigners, but refused to go beyond the first level of control.³³⁰ In another case, the ICSID tribunal focused on the purpose of the Convention in facilitating foreign investments through locally incorporated companies and went beyond the first layer of control.³³¹

221. Denial of benefits clauses allows the host state to exclude from treaty protections nationals of third states, which seek to benefit from provisions that the treaty did not intend to grant them, for instance through the use of mailbox or shell companies.³³² In one case, the question was whether El Salvador could, pursuant to the —US-Central America Free Trade Agreement (CAFTA), deny its consent to ICSID arbitration after the dispute has arisen.³³³ The tribunal concluded that the denial of benefits clause in CAFTA could be invoked retroactively up to the limit for presenting jurisdictional objections no later than the expiration of the time limit fixed for the filing of the counter-memorial according to ICSID Arbitration Rule 41.

222. Other tribunals, however, followed a different approach regarding the invocation of denial of benefits clauses. For example, in *Plama Consortium Ltd. v. Bulgaria* the tribunal was interpreting such clause under the Energy Charter Treaty.³³⁴ Bulgaria exercised its right under the Energy Charter Treaty to deny the benefits

328. *Vacuum Salt Products Ltd. v. Ghana* (ICSID Case No. ARB/92/1), Award of 16 February 1994, 4 ICSID Reports 329, 342–343 (1997).

329. *Ibid.*, 351.

330. *Amco v. Indonesia* (ICSID Case No. ARB/81/1), Decision on Jurisdiction of 25 September 1983, 1 ICSID Reports 389 (1993).

331. *SOABI v. Senegal* (ICSID Case No. ARB/82/1), Decision on Jurisdiction of 1 August 1984.

332. Lindsay Gastrell and Paul-Jean Le Cannu, Procedural Requirements of ‘Denial-of-Benefits’ Clauses in Investment Treaties: A Review of Arbitral Decisions, 30 ICSID Rev. 78 (2015).

333. *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Award on Jurisdiction of 1 June 2012.

334. *Plama Consortium Limited v. Bulgaria* (ICSID Case No. ARB/03/24), Award on Jurisdiction of 8 February 2005.

under the treaty to the claimant several months after the filing of the request of arbitration. The tribunal explained that the host State must give notice and expressly exercise its right under the Energy Charter Treaty, and such right would only have prospective effect.³³⁵

223. Scholarly opinions are also divided. Some commentators suggest that ICSID tribunals need to look into the formal controllers and exclude companies directly or indirectly controlled by the nationals of non-Contracting States or the nationals of the host State.³³⁶ Others think that the correct approach is to allow the tribunals to look for control by nationals of a Contracting State until jurisdiction *ratione personae* can be established.³³⁷

224. Restructuring investments after the dispute arose only to gain jurisdiction under a BIT is usually seen as an abuse of procedure.³³⁸ The tribunal in *Tidewater v. Venezuela* examined whether the dispute existed at the time of corporate restructuring and whether it was reasonably foreseeable at that time.³³⁹ Another tribunal explained ‘if a company changes its nationality in order to gain it is its jurisdiction at the moment when things have started to deteriorate so the dispute is highly likely’ may be considered abuse of process.³⁴⁰ However, because the state in that case did not raise the abuse of process argument, the tribunal only focused on the fact that the change of nationality had occurred before the dispute arose and asserted its jurisdiction over the dispute.

225. An empirical study conducted by the British Institute of International Law and Baker McKenzie on corporate restructuring in international investment law shows that a majority of tribunals assert jurisdiction despite the respondents’ objections to restructuring.³⁴¹ Respondent states usually rely on traditional jurisdictional grounds, including the definition of ‘investor’ or ‘investment’ to challenge the restructuring. However, these objections rarely succeed. As Figure 8 demonstrates, timing plays a crucial role in decisions on the validity of restructuring with a distinction made between original investment structuring and subsequent restructuring. If restructuring takes place after the dispute becomes foreseeable, in 75% of cases

335. *Liman Caspian Oil v. Kazakhstan* followed similar logic. *Liman Caspian Oil B.V. (the Netherlands) and NCL Dutch Investment B.V. (the Netherlands) v. Kazakhstan* (ICSID Case No. ARB/07/14), Award of 22 June 2010.

336. Christoph Schreuer, 318, *supra* note 195.

337. Chitharanjan Felix Amerasinghe, ‘Interpretation of Article 25(2)(b) of the ICSID Convention’, in *International Arbitration in the 21st Century: Towards ‘Judicialization’ and Uniformity?*, 223, 240 (Richard Lillich and Charles Brower (eds), Transnational Publishers Inc 1994).

338. *See, for example, Tidewater Investment SRL and Tidewater Caribe, C.A. v. Venezuela* (ICSID Case No. ARB/10/5), Decision on Jurisdiction of 8 February 2013, para. 146.

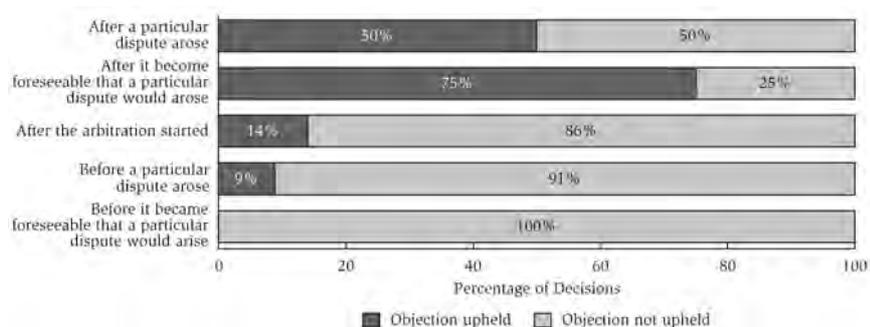
339. *Ibid.*, para. 148.

340. *Lao Holdings N.V. v. Lao People’s Democratic Republic* (ICSID Case No. ARB(AF)/12/6), Decision on Jurisdiction of 21 February 2014, para. 65.

341. Ed Poulton, Yarik Kryvoi, Ekaterina Finkel and Janek Bednarz, *Corporate Restructuring and Investment Treaty Protections*, BIICL/Baker McKenzie, London, 2020, available at www.biicl.org/documents/89_isds-corporate-restructuring.pdf (accessed on 1 May 2020).

the tribunals are likely to reject jurisdiction over such dispute. If the original investor brings the claim, tribunals tend to follow by the strict wording of the treaty. If not, then the tribunals are more likely to apply additional criteria, e.g., considering whether the corporate restructuring was an abuse of process or applying the *Salini* test discussed elsewhere in this monograph.³⁴²

Figure 8 Success Rate of Objections Based on the Finding of the Tribunal on the Timing of Restructuring



Source: British Institute of International and Comparative Law and Baker McKenzie (2020).

226. The empirical study also shows that tribunals examine whether the restructuring was done before or after the dispute arose and whether such dispute was foreseeable to the investor at the time of restructuring.³⁴³ The treaty's scope of application appears critical to the decision on validity of the restructuring. Where tribunals find that the claimant engaged in a genuine economic activity in the respondent state, the investors succeed in overcoming jurisdictional objections in nearly all decisions.

§2. NATIONALS OF NON-CONTRACTING STATES (THE ADDITIONAL FACILITY)

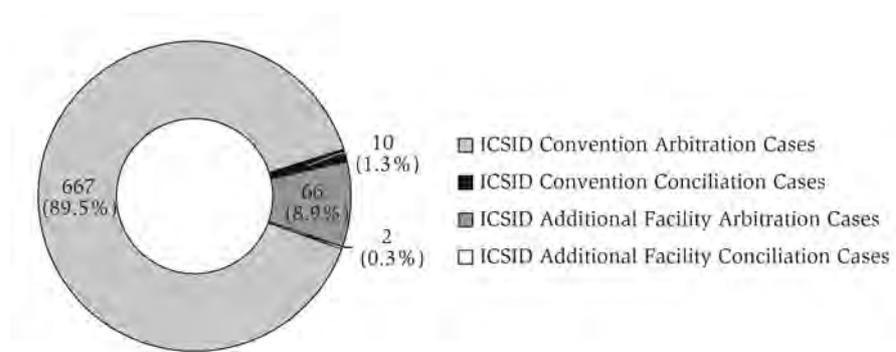
227. In case the ICSID tribunal has jurisdiction *ratione personae* only over one party, it is still possible to resort to its dispute resolution machinery. Article 2 of the Convention provides for the Additional Facility, which enables a non-Contracting State or a national of a non-Contracting State to use ICSID resources. Under the rules of the Additional Facility, only one party must fulfil the requirements of *ratione personae*. Any proceedings conducted under the auspices of the Additional Facility require specific consent of the ICSID Secretary-General, in accordance with Article 4 of the Additional Facility Rules.

342. *Salini*, see *supra* note 295.

343. *Corporate Restructuring and Investment Treaty Protection*, *supra* note 340.

228. As Figure 9 demonstrates, ICSID Additional Facility cases constitute less than 10% of all cases considered by ICSID. The Additional Facility is not a separate institution and is a part of ICSID. The ICSID Secretariat also serves the Additional Facility. Although the Convention is not applicable to the Additional Facility procedures, many of the principles of its functioning are similar. The most notable difference between the rules of the Convention and the rules of the Additional Facility is that the Convention's self-contained provisions on recognition and enforcement of awards are not applicable to Additional Facility awards and are likely to be enforced under the New York Convention.

Figure 9 Types of Cases Registered under the ICSID Convention and Additional Facility Rules



Source: ICSID (2019).

229. The Additional Facility has gained importance because of the three NAFTA countries (Canada, Mexico and the United States), the United States used to be the only ICSID Contracting Party to consent to submit disputes to ICSID. The other two relied on the Additional Facility.³⁴⁴ Currently, sixty-six disputes – pending and concluded – have been submitted under the Rules of the ICSID Additional Facility.³⁴⁵

344. Article 1122 NAFTA.

345. The most cited cases include *Waste Management, Inc. v. Mexico* (ICSID Case No. ARB(AF)/00/3), Decision of the Tribunal on Mexico's Preliminary Objection Concerning the Previous Proceedings of 26 June 2002; *Técnicas Medioambientales Tecmed, S.A. v. Mexico* (ICSID Case No. ARB(AF)/00/2), Award of 29 May 2003; *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award of 26 June 2003.

§3. CONTRACTING STATES

230. A state may become a party to the Convention if it approves, accepts or ratifies the Convention. According to Article 68 of the Convention, the status of a Contracting State is effective thirty days after the deposition of the instrument of ratification. The full list of signatories and parties to the Convention is available in Part IV of this monograph. A Contracting State may act as a party as such or it may be represented by a constituent subdivision or agency of a Contracting State designated to the Centre by that State.

231. Initially, the drafters of the Convention did not provide ‘political subdivisions or instrumentalities’ with the capacity to appear at ICSID. However, during consultations, a point was made that in many countries statutory corporations and public companies, in which the government was a stakeholder, concluded investment agreements.³⁴⁶ Eventually, Article 25(1) was formulated to enable these entities to appear at ICSID. Mere ownership by the government in a public company is not enough to qualify under Article 25(1).

232. The term *constituent subdivisions* includes municipalities and local government bodies, states, provinces and other semi-autonomous bodies in federated or unitary states.³⁴⁷ The drafting history shows that the term *agencies* includes only governmental agencies, which were legally part of and indistinguishable from the central government. Such agencies act on behalf of the state and although they may sometimes have a separate legal personality, they are entrusted with government functions.³⁴⁸

233. The Convention provides for two types of parties on the government’s side. First, a Contracting State itself can be a party in the dispute. Second, any constituent subdivision or agency of a Contracting State designated to the Centre by that State qualifies as a party. As the *travaux préparatoires* of the Convention show, only governmental agencies entrusted with certain public functions and powers can fall under the ‘constituent subdivision or agency’ category.³⁴⁹ Commentators also agree that it is neither control nor ownership, but rather the performance of public functions on behalf of the Contracting State that matters.³⁵⁰

234. In order for a constituent subdivision or an agency to be a party to ICSID proceedings, the state should designate such entity to the Centre in accordance with Article 25(1) of the Convention. In the absence of such designation, ICSID has no

346. History of the Convention, Vol. II, 65–66.

347. Chittharanjan Felix Amerasinghe, Jurisdiction Ratione Personae under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 47 *British Yearbook of International Law* 227, 233 (1975).

348. History of the Convention, Vol. II, 507, 587.

349. *Ibid.*, 503.

350. *Ibid.*

personal jurisdiction over the dispute.³⁵¹ The requirement of designation of the Contracting State is meant to provide a screening process, so that the government can withhold its consent when there is an ordinary company rather than a constituent subdivision or agency.³⁵²

235. A constituent subdivision or agency can also give consent to ICSID dispute resolution. However, in this case it is necessary that the state give approval or notify the Centre that no such approval is required.³⁵³ In *Cable Television v. St. Kitts and Nevis*, a foreign investor entered into an agreement with an administrative body of the host state. Although this agreement contained an ICSID clause, the tribunal found that it had no jurisdiction because there had been no designation or approval required by the Convention.

236. The requirement of designation makes the definition of ‘constituent subdivisions’ and ‘agencies’ less important. If a Contracting State designates such an entity to the Centre, there is a strong presumption that this entity, indeed, satisfies the jurisdictional requirements of the Convention.³⁵⁴ Commentators generally agree that there is no need for a special form of designation and that designation can be made at any time before a request for arbitration or conciliation is made.³⁵⁵

§4. ABSENT PARTIES (DEFAULT PROCEEDINGS)

237. The ICSID Convention and Arbitration Rules provide default rules to tackle the absence of a party from ICSID arbitral proceedings.³⁵⁶ With some exceptions, the absent party is usually the respondent state.³⁵⁷

238. Arbitration Rule 42 deals with default proceedings, that is, when a party fails to appear or to present a case at any stage of the proceeding. Failure of the defaulting party to appear or to present its case is not deemed to be an admission of the assertions made by the other party.³⁵⁸ The other party may at any time before the end of the proceedings request the tribunal to deal with the questions submitted to it and to render an award. The other party is granted a grace period of sixty days

351. See *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of St. Kitts and Nevis* (ICSID Case No. ARB/95/2), Award of 13 January 1997, 13 ICSID Rev. - FILJ 328 (1998) (ruling that an autonomous entity within federation cannot be a proper party to an ICSID dispute absent a designation of the state, which signed an agreement containing an ICSID arbitration clause).

352. History of the Convention, Vol. II, 503.

353. Article 25(3) of the Convention.

354. Amerasinghe, *supra* note 345.

355. *Ibid.*, 236.

356. Article 45 of the Convention and Arbitration Rule 42 govern default proceedings.

357. In *Abaclat and Others v. Argentina*, paras 614–620, *supra* note 117, the request of several claimants to ‘withdraw’ from the arbitration was interpreted as a request for discontinuance of the proceeding rather than an announcement of default.

358. Arbitration Rule 42.

to appear upon the tribunal's notice. If it fails to appear, the tribunal may proceed with the case without the defaulting party.

239. First of all, according to the principle of non-frustration of the active party, the ICSID framework does not regard the default of a party as precluding arbitration. Therefore, if a party fails to appear or to present its case at any stage of the proceeding, the participating party may still request the tribunal to render its award. This is a reflection of the rule according to which consent cannot be unilaterally withdrawn.³⁵⁹

240. If the investor is the cooperating party, it usually requests the tribunal to deliberate on jurisdiction and merits. On the contrary, if only the respondent participates, it often requires the discontinuance of the proceeding. If both parties discontinue participation in proceeding, the tribunal may declare the discontinuance of the proceeding for failure of the parties to act.³⁶⁰

241. However, ICSID provisions also establish a rule of evidence aimed at avoiding a 'punitive' presumptive approach against the absent parties. Indeed, they state that the failure of a party to appear or to present its case shall not be considered as an admission of the other party's assertions.³⁶¹ The defaulting party is also protected because the tribunal shall promptly notify to it the request of the participating party to analyse the case and render the award. Moreover, the tribunal shall also grant it a 'second chance' in the form of a period of grace that shall not exceed sixty days without the consent of the active party.³⁶² After the expiration of the period of grace or when no such period is granted, which happens if it is satisfied that the party will not appear, the tribunal resumes the consideration of the dispute.

242. Finally, ICSID provisions specify that the tribunal 'shall' examine ICSID jurisdiction and its own competence in the dispute. If they are satisfied, it shall decide whether the submissions are well founded in fact and in law. To this end, the tribunal may call on the participating party to file observations, produce evidence or submit oral explanations.³⁶³ This provision places an additional burden over both the tribunal and the sole participating party.³⁶⁴ Similarly, the tribunal shall assess the veracity of what it affirmed without the advantages of an adversarial debate.³⁶⁵ As

359. Article 25 of the Convention; Christoph Schreuer, 710, *supra* note 195; Arts 38, 42, 53 and 54 of the Convention represent other corollaries of the same principle.

360. Arbitration Rules 44 and 45.

361. Christoph Schreuer, 710, *supra* note 195.

362. Arbitration Rule 42(2). In particular, if that party failed to file a pleading or any other instrument within the time limit fixed therefor, it shall fix a new time limit for its filing; alternatively, if that party failed to appear or present its case at a hearing, it shall establish a new date for the hearing.

363. Arbitration Rule 42(4).

364. Jan Paulsson, Lucy Reed and Nigel Blackaby, *Guide to ICSID Arbitration*, 97 (Kluwer Law International 2010).

365. The additional burden placed upon the sole participating party and the tribunal is well exemplified by *Liberian Eastern Timber Corporation v. Liberia* (ICSID Case No. ARB/83/2), Award of 31 March 1986, 2 ICSID Reports 346 (1994).

happened in an early ICSID case,³⁶⁶ the tribunal shall examine jurisdiction and competence even if there have not been objections to them. Indeed, the rule of evidence examined above prevents the tribunal from inferring that the absent party implicitly consented to the jurisdiction of the tribunal.

243. Failure to respect the provisions on default proceedings may lead to the annulment of the award for excess of power, failure to sufficiently state the reasons for the decision or serious departure from fundamental rules of procedure.³⁶⁷ Moreover, the provisions of Article 45 of the ICSID Convention also apply to annulment proceedings and the proceedings carried out by a new tribunal after the annulment.³⁶⁸

244. Default of a party is not common in ICSID arbitration practice. Among the several factual situations that took place in arbitration practice, one should distinguish two types of absence. First of all, there are rare cases of almost complete lack of participation and cooperation. This happened, for instance, in *LETCO v. Liberia* and *Kaiser Bauxite v. Jamaica*,³⁶⁹ where the States failed to appear at any of the hearings and did not communicate with the tribunals. In these cases, it is straightforward to declare a default proceeding because it is clear that the party is not willing to cooperate.

245. This assessment is much more complicated in cases where non-cooperation merely consists of delays in taking procedural actions, which is more common than absolute lack of participation. In cases when participation is poor but not absent, the tribunal has the discretion to decide whether it amounts to default. For instance, in several cases the failure to cooperate relates to the incapability of the party rather than to its unwillingness to cooperate.³⁷⁰ The tribunal shall take into account this element in the evaluation preceding the declaration of default.

246. It clearly emerges from arbitral practice that that default proceedings are not automatically activated once a party fails to take some procedural steps. On the contrary, they represent a last resort remedy that the tribunal exploits only when it is clear that there is no chance for future cooperation with the absent party.³⁷¹

247. This cautious approach emerges in disputes like *Benvenuti & Bonfant v. Congo*. In this case, the Congolese government declared that it was willing to cooperate, but missed a significant number of deadlines to submit procedural documents. The tribunal never declared the default and granted new deadlines after the

366. *Kaiser Bauxite Company v. Jamaica* (ICSID Case No. ARB/74/3), Decision on Jurisdiction of 6 July 1975, para. 6.

367. Embodied respectively in Art. 52 (b), (d) and (e) of the Convention.

368. Article 52(4) and (6) of the Convention.

369. *Liberian Eastern Timber Corporation v. Liberia*, 347–349, *supra* note 364; *Kaiser Bauxite Company v. Jamaica*, paras 6–10, *supra* note 365.

370. Christoph Schreuer, 711 *supra* note 195.

371. *Ibid.*, 724.

expiry of the period of grace. It motivated its decision considering the special Congolese internal political circumstances and stating that the documents of the Government contained important elements to decide the dispute.³⁷²

248. In a more recent *Eurogas v. Slovak Republic* case, the tribunal declared that the absence of claimant's counsel and the subsequent cancellation of a single hearing were not sufficient to declare a default procedure. Indeed, the tribunal pointed out that default is not an automatic sanction for procedural shortcomings, but a last resort measure.³⁷³

249. The *Goetz v. Burundi* tribunal reached a different conclusion.³⁷⁴ In this case, the State repeatedly failed to file documents within the deadlines and to participate in the hearings. Differently from the previous cases, the tribunal made use of Rule 42 despite the apparent willingness of this party to engage in the arbitration. Indeed, after granting several time extensions, the panel concluded that the respondent failed to present its case.

250. The tribunal also has the discretion to revert to the normal adversarial proceedings if the circumstances change once a proceeding has been declared in default.³⁷⁵ Overall, however, ICSID arbitral practice tends to use default proceedings as a last resort remedy in the event that the absent party does not grant its future cooperation.

§5. THIRD PARTIES

251. Participation of non-disputing parties in ICSID arbitral proceedings is tightly linked to the issue of transparency and represents a good indicator of the latter. Participation of non-disputing parties in the arbitral proceeding has several functions. First, it is aimed at ensuring a sufficient level of public scrutiny. Second, third-party participation contributes with perspectives that are different from those of the host state and the investor:³⁷⁶ indeed, the non-disputing country is a 'friend of the court' (*amicus curiae*) rather than a supporter of one party. Finally, it provides additional information that is not presented by the parties to the dispute.

372. *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo* (ICSID Case No. ARB/77/2). Award of 15 August 1980, paras 1.32–1.33.

373. *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic* (ICSID Case No. ARB/14/14), Procedural Order No. 5 of 11 January 2016, para. 2. See also *Mr. Franck Charles Arif v. Moldova* (ICSID Case No. ARB/11/23), Award of 8 April 2013, paras 14–16; *AGIP S.p.A. v. People's Republic of the Congo* (ICSID Case No. ARB/77/1), Award of 30 November 1979, para. 3, where the respondent just failed to appoint the arbitrator.

374. *Antoine Goetz et consorts v. Republic of Burundi* (ICSID Case No. ARB/95/3), Award of 10 February 1999, para. 46. Similarly, see *American Manufacturing & Trading, Inc. v. Republic of Zaire* (ICSID Case No. ARB/93/1), Award of 21 February 1997, paras 3.26 and following.

375. Christoph Schreuer, 724, *supra* note 195.

376. Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29(1) *Berkeley Journal of International Law* 200, 207 (2011).

252. Several IIAs have introduced a language allowing for the submission of *amicus curiae* briefs, thus legitimizing some types of participation of non-disputing parties.³⁷⁷ Moreover, states like the United States, Norway and Canada introduced this type of provision in their Model BITs, which have subsequently been used to draft investment treaties.³⁷⁸

253. In treaties like NAFTA, the possibility to intervene was limited to non-disputing state parties,³⁷⁹ while in other treaties everyone has the chance to do so under some conditions. However, the NAFTA approach to *amicus curiae* radically changed after the issuance of the 2003 NAFTA Free Trade Commission ‘Statement on Non-Disputing Party Participation’. This document opened to submissions by various *amici curiae* and provided some guidelines as to their filing. However, most of the investment treaties do not contain provisions addressing the participation of third parties to the proceedings. In this case, non-disputing parties may rely on arbitral rules that grant them the right to submit an *amicus curiae* brief.

254. Since 2006, ICSID Arbitration Rules allow this practice under some conditions.³⁸⁰ First, the tribunal shall consult both parties even if it can override their opinions. Second, it shall make sure that the submission would assist the tribunal in the decision. This means that it should bring a perspective different from that of the disputing parties and address a matter within the scope of the dispute. Moreover, the non-disputing party shall have a significant interest in the proceeding. Finally, the submission shall not disrupt the proceeding or unduly burden or prejudice either party.

255. According to ICSID Arbitration Rule 37:

- (2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the ‘non-disputing party’) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
 - (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
 - (b) the non-disputing party submission would address a matter within the scope of the dispute;
 - (c) the non-disputing party has a significant interest in the proceeding.

377. Jan Wouters and Nicolaz Hachez, ‘The Institutionalisation of Investment Arbitration and Sustainable Development’, in *Sustainable Development in World Investment Law*, 630 (Marie-Claire Cordonnier Segger, Markus W. Gehring and Andrew Paul Newcombe (eds) Kluwer 2011). *See, for instance*, Art. 39 Canada-Jordan BIT, Art. 10.20 CAFTA.

378. Article 28 US Model BIT, Art. 35 Canadian Model FIPA, Art. 18 Norway Model BIT.

379. Article 1128 NAFTA.

380. Arbitration Rule 37(2) and (3).

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

256. The *Biwater Gauff v. Tanzania* dispute represents one of the first applications of the revised ICSID Rules, and tries to strike a balance between inclusiveness and efficiency of the proceedings. To do so, the tribunal allowed a written submission by several NGOs under ICSID Arbitration Rule 37 while at the same time denying their access to documents and participation to the hearings under Rule 32 dealing with the possibility of third parties to attend or observe all or part of the hearings.³⁸¹ In another case, *Piero Foresti v. South Africa*, the tribunal granted the permission to file a written submission and access to key documents, but denied the participation in hearings.³⁸²

257. In most of the cases dealing with *amicus curiae* issues, the request to submit documentation was formulated by NGOs. However, in some recent disputes ICSID tribunals admitted the participation of entities like the European Commission³⁸³ and the home state,³⁸⁴ equally qualified to intervene as *amicus curiae*.³⁸⁵

258. The 2014 UNCITRAL Rules on Transparency dedicate a section to the conditions under which non-disputing parties may file their submissions. The Rules draw a distinction between third parties and non-disputing state parties.³⁸⁶ The Rules may apply to ICSID arbitration through the consent of the parties or as a matter of applicable law.

259. In any case, some investment tribunals have played a major role in ensuring third parties participation in arbitral proceedings even before the revision of arbitral rules. In several UNCITRAL cases, the tribunals elaborated an innovative interpretation of Article 15 of the Rules on the inherent powers of arbitrators. As a

381. *Biwater Gauff (Tanzania) Ltd. v. Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 5 of 2 February 2007, paras 60, 68, 71.

382. In the Additional Facility case, *Piero Foresti, Laura de Carli & Others v. South Africa* (ICSID Case No. ARB(AF)/07/01), Award of 4 August 2010, Procedural History.

383. *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Hungary* (ICSID Case No. ARB/07/22), Award of 23 September 2010, para. 3.22; *Electrabel S.A. v. Hungary* (ICSID Case No. ARB/07/19), Procedural Order No. 3 of 27 March 2009, para. 3. *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* (ICSID Case No. ARB/05/20), Final Award of 11 December 2013, para. 36.

384. *Marvin Roy Feldman Karpa v. Mexico* (ICSID Case No. ARB(AF)/99/1), Interim Decision on Preliminary Jurisdictional Issues of 6 October 2000, paras 2–12.

385. Jorge E. Vinuales and Florian Grisel, *L'amicus curiae dans l'arbitrage d'investissement*, 22(2) ICSID Rev. 380, 430 (2007).

386. Respectively laid out in Art. 4 and Art. 5.

consequence, they granted some NGOs the right to file amicus curiae submissions.³⁸⁷ ICSID tribunals have rarely allowed submissions before April 2006, and justified them under Arbitration Rule 44.³⁸⁸

387. *Methanex Corporation v. United States of America* (UNCITRAL), Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘Amici Curiae’ of 15 January 2001, para. 31. *United Parcel Services Inc. v. Canada* (UNCITRAL), Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae of 17 October 2001, paras 59–65; *Glamis Gold, Ltd. v. United States of America* (UNCITRAL), Decision on Application and Submission by Quechan Indian Nation of 16 September 2005, para. 9, is particularly interesting because it tackles the issue of indigenous rights.

388. *Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina* (ICSID Case No. ARB/03/17), Order in Response to a Petition for Participation as Amicus Curiae of 17 March 2006, para. 38; *Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina* (ICSID Case No. ARB/03/19), Order in Response to a Petition for Transparency and Participation as Amicus Curiae of 19 May 2005.

Chapter 5. Evidence in ICSID Arbitration

§1. OVERVIEW

260. The success of the parties in international investment arbitration depends on whether they can prove the facts that they allege. ICSID Arbitration Rules provide some guidance on marshalling of evidence and powers of tribunals in this respect. The ICSID Convention and Arbitration Rule devote several provisions to the power of the tribunal to collect and process evidence. However, the general approach to evidence is open to variation by the parties.³⁸⁹ Indeed, the parties may agree to apply different rules on the collection and evaluation of evidence. In this respect, the parties have often referred to the alternative regime of *IBA Rules on the Taking of Evidence in International Arbitration* as applicable law or guidance.³⁹⁰

261. The parties tend to make a voluntary disclosure of evidence in order to support their case. The ICSID normative framework provides that each party shall, within time limits fixed by the tribunal, communicate to the Secretary-General precise information regarding the evidence that it intends to produce and to request the tribunal to call for. This information shall be filed together with an indication of the points to which such evidence is directed.³⁹¹ Moreover, the parties shall file the documentation supporting each instrument in the proceeding together with it and within the time limit fixed for the filing of such instrument.³⁹²

262. However, when the parties do not produce a piece of evidence that the tribunal deems necessary, the arbitrators may call upon the parties to submit it.³⁹³ In any case, as observed in the *Wena v. Egypt* annulment decision, the tribunal is not obliged to call for evidence on any aspect that is critical for the solution of a dispute. Therefore, the inaction of the tribunal in this respect cannot be sanctioned as a violation of Article 52(1) (d) ICSID Convention.³⁹⁴

263. The tribunal may call for further evidence ‘at any stage of the proceedings’.³⁹⁵ Arbitral practice is diverse in this respect. Tribunals admitted or requested evidence before receiving memorials, after receiving limited memoranda, during a

389. Article 43 of the Convention.

390. See, for example, *Churchill Mining Plc Planet Mining Pty Ltd v. Indonesia* (ICSID Case Nos ARB/12/14 and ARB/12/40), Application for Annulment of 31 March 2017, para. 194; *Mobil Investments Canada Inc. v. Canada* (ICSID Case No. ARB/15/6), Procedural Order No. 1 of 24 November 2015, para. 28; *Teco Guatemala Holding LCC v. Guatemala* (ICSID Case No. ARB/10/23), Procedural Order No. 2 of 21 March 2012, para. 9.

391. Arbitration Rule 33; *Wena Hotels Ltd. v. Egypt* (ICSID Case No. ARB/98/4), Decision (Annulment Proceeding) of 5 February 2002, para. 72.

392. Arbitration Rule 24.

393. Article 43 of the Convention and Arbitration Rule 34(2).

394. Arbitration Rule 33; *Wena Hotels Ltd. v. Egypt* (ICSID Case No. ARB/98/4), Decision (Annulment Proceeding) of 5 February 2002, para. 73.

395. Article 43 of the Convention and Arbitration Rule 34(2).

hearing and even after oral pleadings, before rendering the award.³⁹⁶ This diversity is further encouraged by ICSID normative provisions. For instance, the tribunal may exceptionally reopen the proceeding after the declaration of closure and before rendering the award. This happens when decisive new evidence is forthcoming or when there is a vital need for clarification on certain specific points.³⁹⁷

264. Moreover, ICSID Convention provides that either party may request the revision of the award on the basis of evidence that may substantively affect the outcome reached in the award. This is allowed if, when the award was rendered, this evidence was unknown to the tribunal and the applicant without negligence.³⁹⁸

265. ICSID tribunals do not have the power to make binding requests to subjects other than the parties who consented to arbitration.³⁹⁹ Therefore, they cannot address a procedural order to third parties and the ICSID Secretariat, but they may ask these subjects to provide an opinion or some piece of evidence. In practice, tribunals tend to request evidence with a procedural order.⁴⁰⁰

266. The parties have the duty to cooperate with the tribunal in the production of evidence. Failure to do so may result in a formal note of the failure of a party to comply with its obligations.⁴⁰¹ Indeed, consent to jurisdiction of the ICSID tribunal implies a duty to cooperate: this allows the tribunal to draw adverse inferences from a failure to do so and to consequently assess damages and responsibilities.⁴⁰²

267. Moving to administrative issues, the expenses stemming from the production of evidence constitute part of the expenses of the arbitral proceeding.⁴⁰³ As a

396. See, for example, *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines* (ICSID Case No. ARB/03/25), Award of 16 August 2007, para. 383; *Société Ouest Africaine des Bétons Industriels v. Senegal* (ICSID Case No. ARB/82/1), Award of 25 February 1988, para. 1.23.

397. Arbitration Rule 38(2). This happened in *Klöckner Industrie-Anlagen GmbH and others v. Cameroon* (ICSID Case No. ARB/81/2), Award of 21 October 1983. However, many tribunals rejected this request, see, for instance, *Supervisión y Control, S.A v. Costa Rica* (ICSID Case No. ARB/12/4), Award of 18 January 2017, paras 44–48.

398. Article 51(1) of the Convention. See, for example, *Venezuela Holdings, B.V. Mobil Cerro Negro Holding, Ltd. Mobil Venezolana De Petróleos Holdings, Inc. Mobil Cerro Negro, Ltd. and Mobil Venezolana de Petróleos, Inc. v. Venezuela* (ICSID Case No. ARB/07/27), Decision on Revision of 12 June 2015.

399. Carine Dupeyron, ICCA Mauritius, Shall National Courts Assist Arbitral Tribunals In Gathering Evidence?, May 2016, 9.

400. Arbitration Rule 19.

401. Arbitration Rule 34.

402. *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/11/12), Award of 16 August 2007, para. 401; *Waste Management, Inc. v. Mexico* (ICSID Case No. ARB(AF)/00/3), Award of 30 April 2004; *Marvin Roy Feldman Karpa v. Mexico* (ICSID Case No. ARB(AF)/99/1), Final Award on the Merits of 16 December 2002, para. 142; *AGIP S.p.A. v. People's Republic of the Congo* (ICSID Case No. ARB/77/1), Award of 30 November 1979, paras 317–318.

403. Article 61(2) of the Convention.

consequence, the tribunal has the power to decide to which party it wants to allocate the expenses based on several factors.⁴⁰⁴ If evidence is in a language different than the procedural one, it shall be produced in both the original language and translated version.⁴⁰⁵ When the tribunal does not respect these rules on collection and evaluation of evidence, its award can be annulled for serious departure from fundamental rules of procedure.⁴⁰⁶

268. The Additional Facility Arbitration Rules are similar to the provisions that have been analysed in the previous paragraphs. They establish that the parties must provide precise information regarding the evidence that they intend to produce and request from the other party. To this end, they shall also indicate the points to which such evidence will be directed.⁴⁰⁷ Moreover, they empower the tribunal to request the production of documents, witnesses and experts and to determine their admissibility and probative value.⁴⁰⁸

269. The Fact-Finding (Additional Facility) Rules (available in Part VI of this monograph) first introduced pure fact-finding proceedings into ICSID arbitration.⁴⁰⁹ These rules offer the possibility to constitute a committee to inquire into and report on relevant circumstances in the pre-dispute phase in order to prevent disputes between the parties. The Rules address the institution of the proceedings, the workings of the committee and the termination of the proceedings. According to Article 15 of these Rules, the proceedings end with a report exclusively containing findings of fact.

§2. ADMISSIBILITY OF EVIDENCE

270. ICSID Arbitration Rules stipulate that ‘the Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value’.⁴¹⁰ In other words, a tribunal considers whether to admit evidence on a case-by-case basis without any further guidance thereto in the ICSID Arbitration Rules. Essentially, ICSID arbitral tribunals are in charge of judging the admissibility and the probative value of the produced evidence.⁴¹¹ The approach to the probative value of evidence depends on various factors, such as the balance of civil and common law arbitrators, even if the national procedural rules do not apply.⁴¹²

404. *Société Ouest Africaine des Bétons Industriels v. Senegal* (ICSID Case No. ARB/82/1), Award of 25 February 1998, para. 9.25: cooperation of the party is a significant factor.

405. Administrative and Financial Regulation 30.

406. Article 52(1)(d) of the Convention.

407. Article 40 of the Arbitration (Additional Facility) Rules.

408. Article 41 of the Arbitration (Additional Facility) Rules.

409. ICSID Fact-Finding (Additional Facility) Rules.

410. Arbitration Rule 34(1).

411. Arbitration Rule 34(1). In *Pan American Energy LLC and BP Argentina Exploration Company v. Argentina* (ICSID Case No. ARB/03/13), Decision on Preliminary Objections of 27 July 2006, para. 226, the tribunal denied the request for production of evidence.

412. Jan Paulsson, 142, *supra* note 13.

271. Tribunals may refuse the request of production of evidence when the parties obtained it improperly. For instance, in *Libananco v. Turkey* the tribunal ordered the exclusion from evidence of documents obtained in a questionable manner.⁴¹³ The tribunal argued that such conduct was contrary to the good faith obligation of the respondent towards the claimant and the tribunal. In sum, even though there is no direct prohibition in ICSID Arbitration Rules to admit unlawfully obtained documents as evidence, they tend not to do so for reasons of good faith.

272. The situation could be different when the parties seek to rely on documents obtained through open sources such as Wikileaks.⁴¹⁴ In *Conoco Phillips v. Venezuela*,⁴¹⁵ the respondent filed some US diplomatic cables released by WikiLeaks in order to demonstrate that there had been a good faith negotiation with the claimant. The tribunal ignored its request. The dissenting opinion stated that ignoring this evidence was unacceptable because those documents were public and not covered by privileges.⁴¹⁶

§3. TYPES OF EVIDENCE

273. Under Article 43 of the ICSID Convention, unless the parties otherwise agree, the tribunal may call upon the parties to produce documents or other evidence, visit the scene connected with the dispute, and conduct other inquiries. ICSID normative instruments do not explicitly specify in which form the tribunal shall call upon evidence. The only exception is represented by visit and inquiries, for which the panel shall issue a specific order.⁴¹⁷

274. ICSID Arbitration Rules provision on Marshalling of Evidence stipulates:

Without prejudice to the rules concerning the production of documents, each party shall, within time limits fixed by the Tribunal, communicate to the Secretary-General, for transmission to the Tribunal and the other party, precise information regarding the evidence which it intends to produce and that which it intends to request the Tribunal to call for, together with an indication of the points to which such evidence will be directed.⁴¹⁸

413. *Libananco Holdings Co. Limited v. Turkey* (ICSID Case No. ARB/06/8), Decision on Preliminary Issues of 23 June 2008, para. 80.

414. Jessica O. Ireton, *The Admissibility of Evidence in ICSID Arbitration: Considering the Validity of WikiLeaks Cables as Evidence*, 30(1) ICSID Rev. 231–242 (2014).

415. *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Venezuela* (ICSID Case No. ARB/07/30), Decision on Respondent Request for Reconsideration of 10 March 2014, para. 24.

416. *Ibid.*, Dissenting Opinion of Georges Abi-Saab of 10 March 2014, paras 64–67.

417. Arbitration Rule 37.

418. Arbitration Rule 33.

275. In practice, direct (primary) evidence is considered more reliable than circumstantial (secondary) evidence.⁴¹⁹ If direct evidence is unavailable, the tribunal will inquire into the reason thereto, which may include the consequences of armed conflicts and civil unrests.⁴²⁰ The tribunal may then rely on inferences of facts based ‘on a series of facts linked together and leading logically to a single conclusion’.⁴²¹

276. The ad hoc committee in *Impregilo v. Argentina* explained the discretionary nature of evaluating evidence:

There is no requirement whatsoever for arbitral tribunals to indicate in an award the reasons why some types of evidence are more credible than others. Discretionary authority that is reasonable and reasoned is the rule in this regard, and it is clearly not within the purview of Annulment Committees, which do not have direct and immediate access to the evidence submitted by both parties, to determine whether the determinations made in an award were correct.⁴²²

277. As far as documents are concerned, there is a trend towards a more extensive documentary discovery, partly motivated by the growing complexity of arbitral disputes. While documentary evidence may be extremely beneficial to the understanding of the facts of the dispute, unrestrained requests to produce documents may cause inefficiency. Therefore, tribunals try strike a balance between these opposing interests using arguments like relevance to the topic of the dispute, necessity, privileges, confidentiality or unreasonable burden.⁴²³

278. With respect to witnesses and experts, tribunals are allowed to:

- (a) admit evidence given by a witness or expert in a written deposition; and
- (b) with the consent of both parties, arrange for the examination of a witness or expert otherwise than before the tribunal itself.⁴²⁴

279. Moreover, the Arbitration Rules provide that:

- (1) Witnesses and experts shall be examined before the Tribunal by the parties under the control of its President. Questions may also be put to them by any member of the Tribunal.⁴²⁵

419. Martin Wiebecke, ‘Evidence and Proof’, in *The Investment Treaty Arbitration Review* 97 (3rd ed.).

420. IBA Rules of Evidence, Art. 9.2(d).

421. Corfu Channel case, Judgment of 9 April 1949, ICJ Reports 1949, 4, 18.

422. *Impregilo v. Argentina* (ICSID Case No. ARB/07/17), Decision on Annulment of January 24 2014, para. 176.

423. Christina L. Beharry, *Objections to Requests for Documents in International Arbitration: Emerging Practices from NAFTA Chapter 11*, 27(1) ICSID Rev. 33, 64 (2014).

424. Arbitration Rule 36.

425. Arbitration Rule 35(1).

280. The arbitration process is supposed to place disputing parties on an equal footing, but in investor-state disputes, the state often has much greater powers. In addition to being a disputing party, the state also acts as regulator, investigator and law enforcer.⁴²⁶ Such imbalance between parties may have an impact on evidence matters. For example, states may use coercive powers to intimidate witnesses into providing false testimony.⁴²⁷

281. ICSID Arbitration Rules contain provisions addressing witness and expert evidence, which fall within the definition of ‘other evidence’ of the ICSID Convention.⁴²⁸ Witnesses and experts must swear before the tribunal when presenting their evidence. Both the parties and the tribunal can examine these subjects under the control of the president. Moreover, the tribunal can admit witness or expert evidence in written form.⁴²⁹ In this case, it can establish the details of the examination of these subjects other than before the tribunal with the consent of both parties.

282. Even if ICSID Rules are silent on this topic, the appointment of the experts is usually made by the parties.⁴³⁰ However, ICSID tribunals have the right to appoint independent experts and request them to issue their opinion.⁴³¹ Moreover, the tribunal can request the parties to call witnesses on their own motion as happened in *Duke Energy v. Peru*.⁴³² However, as with experts, a tribunal cannot compel witnesses directly and may only invite them to appear: therefore, witnesses are usually provided by the parties. Arbitral practice has demonstrated that when the testimony or the expert report is not presented in person by witnesses or experts, with a possibility to cross-examine them before the tribunal, their probative value has been subjected to doubt.⁴³³ Several tribunals also analysed the reliability and credibility of witnesses and their testimonies.⁴³⁴

426. Yarik Kryvoi, *Economic Crimes in International Investment Law*, 67 *International and Comparative Law Quarterly* 577, 588–590 (2018).

427. *Riahi v. Iran*, 37 Iran-USCTR, Concurring and Dissenting Opinion of Judge Brower, paras 158, 195–99 (2003); *Cherafat v. Iran*, 28 Iran-USCTR, para. 216 (1992), discussed in Abba Kolo, *Witness Intimidation, Tampering and Other Related Abuses of Process in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal*, 26 *Arbitration International* 43, note 27 (2010).

428. Arbitration Rules 35 and 36.

429. These reports and testimonies shall be attested.

430. Dana H Freyer, ‘Assessing Expert Evidence’, in *The Leading Arbitrators’ Guide to International Arbitration*, 430 (Lawrence W. Newman and Richard D. Hill (eds), 2nd ed., Juris Publishing 2008).

431. *CMS Gas Transmission Co. v. Argentina* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para. 51.

432. *Duke Energy International Peru Investments No. 1 Ltd. v. Peru* (ICSID Case No. ARB/03/28), Decision on Jurisdiction of 1 February 2006, para. 20.

433. *Enron Corporation and Ponderosa Assets, L.P. v. Argentina* (ICSID Case No. ARB/01/3), Award of 22 May 2007, para. 142; *Tradex Hellas S.A. v. Albania* (ICSID Case No. ARB/94/2), Award of 29 April 1999, paras 184–185; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina* (ICSID Case No. ARB/97/3), Award of 20 August 2007, paras 2.7.6–2.7.16.

434. *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), Award of 12 October 2005, para. 98; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary* (ICSID Case No. ARB/03/16), Award of 2 October 2006, paras 250–257; *Hussein Nuaman Soufraki v. The United Arab Emirates* (ICSID Case No. ARB/02/7), Award of 7 July 2004, paras 80–81.

283. As far as site visits and inquiries are concerned, the tribunal may admit them on its own accord or upon the request of a party at any stage of the proceeding. A procedural order establishes the aim of the visit, the subject of the inquiry, the time limit, the procedure to be followed and other particulars.⁴³⁵ The parties have the right to participate in any visit or inquiry, even if the procedural order may limit their rights to object, comment, cross-examine or ask follow-up questions. If a visit or inquiry is undertaken upon a party's request, the tribunal shall charge its costs to that party.

284. Investment tribunals may also consider evidence contained in *amicus curiae* submissions. There is a public interest justification in taking into account such submissions, as the matters that investment tribunals consider and decide upon tend to impact interests beyond those of the two parties to a particular dispute.⁴³⁶

§4. BURDEN OF PROOF

285. Proof has two elements: burden of proof and standard of proof. The first one is burden of proof, that 'indicates which of the parties to a dispute must furnish the court with evidence on a certain matter'.⁴³⁷ Even if burden of proof is frequently determinative of the outcome of an arbitral dispute, there is no explicit rule addressing it in ICSID Convention and ICSID Arbitration Rules.⁴³⁸

286. Unlike domestic courts, investor-state tribunals lack the investigatory tools and powers and largely rely upon the submissions of the parties. According to the general principles of international law, the party asserting a fact has the duty to discharge the burden of proof.⁴³⁹ Therefore, as observed by several investment tribunals, the claimant bears the burden to prove its claims⁴⁴⁰ and the respondent has to

435. *Adel A Hamadi Al Tamimi v. Oman* (ICSID Case No. ARB/11/33), Procedural Order No. 2 Concerning the Claimant's Application for Access to Conduct a Site Inspection of 28 September 2012; *Marion Unglaube and Reinhard Unglaube v. Costa Rica* (ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20), Procedural Order No. 2 of 14 December 2010.

436. Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 *Berkeley Journal of International Law* 200, 205 (2011).

437. Anna Riddell and Brendan Plant, *Evidence before the International Court of Justice*, 80 (BIICL 2009).

438. On the contrary, Art. 27(1) UNCITRAL Arbitration Rules makes a concise reference to burden of proof.

439. *Saipem S.p.A. v. Bangladesh* (ICSID Case No. ARB/05/07), Decision on Jurisdiction of 21 March 2007, para. 83; *Hussein Nuaman Soufraki v. The United Arab Emirates* (ICSID Case No. ARB/02/7), Award of 7 July 2004, para. 58; *Azurix Corp. v. Argentina* (ICSID Case No. ARB/01/12), Decision on the Application for Annulment of 1 September 2009, para. 215; Mateus Aimore Carreiro, *Burden and Standard of Proof in International Arbitration: proposed Guidelines for Promoting Predictability*, 49 *Rev Brasileira de Arbitragem* 92 (2016).

440. *Tokios Tokelés v. Ukraine*, paras 121–122, *supra* note 195; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan* (ICSID Case No. ARB/02/13), Award of 31 January 2006, paras 70–75; *Plama Consortium Limited v. Bulgaria* (ICSID Case No. ARB/03/24), Award of 27 August 2008, para. 249.

prove its defences.⁴⁴¹ Parties have generally not considered burden of proof to be a very contentious issue in ICSID arbitration. Some tribunals made useful pronouncements on this topic. For example, in *Metal-Tech case*, the tribunal noted:

As a general matter, since the claims brought in this arbitration seek to establish the responsibility of a State for breach of the latter's international obligations, it is appropriate to apply international law to the burden of proof. The principle that each party has the burden of proving the facts on which it relies is widely recognised and applied by international courts and tribunals. The International Court of Justice as well as arbitral tribunals constituted under the ICSID Convention and under the NAFTA have characterized this rule as a general principle of law. Consequently, as reflected in the maxim *actori incumbat probatio*, each party has the burden of proving the facts on which it relies.⁴⁴²

287. The tribunal may decide to shift the burden of proof, by asking the respondent to disprove the claimant's assertions in case of 'special circumstances or good reasons'.⁴⁴³ In one case, the tribunal did so because the State failed to prove allegations of economic crimes in its own domestic courts.⁴⁴⁴

288. However, when a party has proven prima facie the facts that it asserts, the burden of proof may shift to the other party. In this case, the latter may be required to rebut the presumptive proof of these facts.⁴⁴⁵ Moreover, ICSID tribunals have often applied a special burden of proof rule to issues of jurisdiction.⁴⁴⁶ In particular, tribunals tend to evaluate whether the claimants' case is arguably reasonable prima facie.⁴⁴⁷ These presumptions may create burden of proof issues in ICSID arbitration.

289. The burden of demonstrating the impact of the state action in dispute rests fully on the investor. As the tribunal in *Tokios Tokelés* pointed out, the principle of

441. *Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Award of 6 May 2013, para. 178; *Wena Hotels Limited v. Egypt* (ICSID Case No. ARB/98/04), Award of 8 December 2002, para. 117.

442. *Metal-Tech Ltd. v. Uzbekistan* (ICSID Case No. ARB/10/3), Award of 4 October 2013, para. 273; *Tradex, supra* note 432, para. 74. See also *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan* (ICSID Case No. ARB/02/13), Award of 31 January 2006, para. 70 ('it is for a claimant to prove the facts on which it relies in support of his claim').

443. *Waguith Elie George Siag & Clorinda Vecchi v. Egypt* (ICSID Case No. ARB/05/15), Award of 11 April 2007, para. 318.

444. *Getma International and others v. Republic of Guinea* (ICSID Case No. ARB/11/29), Award of 16 August 2016, para. 163.

445. *Marvin Roy Feldman Karpa v. Mexico* (ICSID Case No. ARB(AF)/99/1), Award of 16 December 2002, paras 176–177.

446. Christoph Schreuer, 669, *supra* note 195.

447. *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan* (ICSID Case No. ARB/03/29), Decision on Jurisdiction of 14 November 2005, para. 197; *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction of 22 April 2005, paras 237–254; *Ioannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18), Decision on Jurisdiction of 6 July 2007, paras 103–104; *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/03/6), Award of 31 July 2007, paras 162–163.

onus probandi actori incumbit – stipulating that a claimant bears the burden of proving its claims – is widely recognized in practice before international tribunals.⁴⁴⁸ The tribunal in that case concluded that the claimant failed to satisfy this burden and rejected its claims.⁴⁴⁹

290. The significance of this principle was also emphasized in *Asian Agricultural Products, Ltd. v. Republic of Sri Lanka*, which found that the investor was not able to prove expropriation:

[a] Party having a burden of proof must not only bring evidence in support of his allegations, but must also convince the tribunal of their truth, less they be discredited for want, or insufficiency, of proof.⁴⁵⁰

The balance of probabilities serves as the general standard of proof. However, allegations of serious misconduct committed by state officials may require more persuasive evidence ‘as opposed to pure probabilities or circumstantial inferences’.⁴⁵¹

291. Burden of proof of economic crimes presents some peculiarities in ICSID arbitral practice. The general rule according to which the alleging party shall prove the asserted claim or defence is valid in disputes involving economic crimes.⁴⁵² However, ICSID tribunals dealing with economic crime issues tend not to shift the burden of proof because of due process concerns.⁴⁵³

292. Moreover, some tribunals did not apply the rules on burden of proof or presumptions to resolve the dispute.⁴⁵⁴ Indeed, these panels stated that the facts emerged thanks to the ‘investigative’ role of the tribunal, which issued orders instructing the parties to submit further evidence necessary for the decision.

448. *Tokios Tokelés v. Ukraine*, para. 121, *supra* note 5.

449. *Ibid.*, paras 121, 143.

450. *Asian Agricultural Products, Ltd. v. Sri Lanka* (ICSID Case No. ARB/87/3), Award of 27 June 1990, para. 56 (citing Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 329–331 (Cambridge University Press 1953)). *See also Tradex Hellas S.A. v. Albania* (ICSID Case No. ARB/94/2), Final Award of 29 April 1999, para. 74.

451. *Rompetrol*, para. 182, *supra* note 440.

452. *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Bolivia* (ICSID Case No. ARB/06/2), Decision on Jurisdiction of 27 September 2012, para. 259; *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Co. Ltd. ('Bapex') & Bangladesh Oil Gas & Mineral Corp* (ICSID Case No. ARB/10/18), Decision on Jurisdiction of 19 August 2013, para. 422.

453. *Waguih Elie George Siag & Clorinda Vecchi v. Egypt* (ICSID Case No. ARB/05/15), Award of 1 June 2009, paras 316–317.

454. *Metal-Tech Ltd. v. Uzbekistan* (ICSID Case No. ARB/10/3), Award of 4 October 2013, para. 239, the first tribunal that rejected an investment claim on grounds of corruption; *World Duty Free v. Kenya* (ICSID Case No. ARB/00/7), Award of 4 October 2006, para. 166.

§5. STANDARD OF PROOF

293. The standard of proof indicates the required degree of proof necessary to demonstrate that an assertion of fact has been proven.⁴⁵⁵ The ICSID provisions do not directly refer to standard of proof,⁴⁵⁶ and tribunals apply different standards to different evidentiary issues as explained in more detail below.

294. According to some authors, standard of proof should connect to the principles of ‘inner conviction’ and free evaluation of evidence by the arbitral tribunal.⁴⁵⁷ However, these principles do not prescribe any positive and specific standard of proof.⁴⁵⁸ In this respect, the standard of proof in ICSID arbitration may generally correspond to the ‘balance of probabilities’ test. This means that each party shall persuade the tribunal that its position should prevail over the other with a ‘preponderance of evidence’.⁴⁵⁹

295. At the jurisdictional phase, tribunals tend to apply the *prima facie* evidentiary standard to decide whether the facts alleged by the claimant would put the case under the jurisdiction of the tribunal. At the merits stage, tribunals often use the balance of probabilities standard, meaning which party’s evidence appeared more likely to be true as a result of evaluation of evidence.

296. ICSID arbitral tribunals tend to use the balance of probabilities standard not only for the merits of the dispute but also for the evaluation of damages.⁴⁶⁰ Indeed, investment tribunals often stated that the party shall give the tribunal enough evidence to reach a ‘sufficient certainty’ (probability) on the existence and amount of damage rather than a complete certainty.⁴⁶¹

297. However, the standard of proof tends to change according to the seriousness of the allegations. Therefore, with some exceptions,⁴⁶² tribunals dealing with issues of fraud, bribery and corruption generally required a higher standard of proof

455. Anna Riddell and Brendan Plant, 80, *supra* note 436.

456. For example, Arbitration Rule 34 only provides that the tribunal shall evaluate the probative value of evidence.

457. These are typical features of civil law jurisdictions.

458. *Ron Fuchs v. The Republic of Georgia* (ICSID Case No. ARB/07/15), Award of 3 March 2010; *Marion Unglaube and Reinhard Unglaube v. Costa Rica* (ICSID Cases Nos ARB/08/1 and ARB/09/20), Award of 16 May 2012, para. 34; Mateus Aimore Carreteiro, 94, *supra* note 438.

459. *Tokios Tokelés v. Ukraine*, para. 124, *supra* note 195. In cases like *Inceysa*, para. 118, *supra* note 274 this was not necessary as facts were ‘fully proven’.

460. *Gold Reserve Inc. v. Venezuela* (ICSID Case No. ARB(AF)/09/1), Award of 22 September 2014, para. 685.

461. *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. Mexico* (ICSID Case No. ARB(AF)/04/3), Award of 16 June 2010, para. 13.91; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina* (ICSID Case No. ARB/97/3), Award of 20 August 2007, para. 8.3.4.

462. *Libananco Holdings Co. Limited v. Turkey* (ICSID Case No. ARB/06/8), Award of 2 September 2011, para. 125, which represents a minority position, rejected the idea that the standard of proof should be higher.

(‘clear and convincing evidence’).⁴⁶³ For instance, the *Metal-Tech v. Uzbekistan* tribunal concluded that it needed ‘reasonable certainty’ about the allegations.⁴⁶⁴ The *Getma v. Guinea* tribunal affirmed that these two standards are equivalent.⁴⁶⁵ It appears that the only tribunal that required evidence to be ‘beyond any reasonable doubt’ (‘*preuve irrefutable*’) while dealing with economic crimes is *African Holding v. Congo*.⁴⁶⁶ As the *EDF v. Romania* tribunal noted:

There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption. The evidence before the Tribunal in the instant case concerning the alleged solicitation of a bribe is far from being *clear and convincing*.⁴⁶⁷

298. Allegations of economic crimes are difficult to prove because its perpetrators usually try to hide evidence. Therefore, some of the above-mentioned tribunals allowed circumstantial evidence (so-called *red flags*) where direct evidence was not available.⁴⁶⁸

299. In some cases, a party proposed the annulment of the award on the basis of a ‘serious departure from fundamental rules of procedure’ due to the incorrect use of burden and standard of proof. However, ad hoc annulment committees have always rejected this claim. Indeed, in order to be relevant, this violation must cause the tribunal to reach a substantially different result from what it would have awarded had such a rule been observed.⁴⁶⁹ This could happen when the parties make an

463. *Waguih Elie George Siag & Clorinda Vecchi v. Egypt* (ICSID Case No. ARB/05/15), Award of 1 June 2009, paras 325–326; in this case, the tribunal adopted the ‘clear and convincing evidence’ standard of proof. This conclusion was criticized by the Dissenting Opinion; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/11/12), Award of 10 December 2014, para. 479; *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13), Award of 8 October 2009, para. 221: ‘clear and convincing’ test was adopted in this award as well; *Saba Fakes v. Turkey* (ICSID Case No. ARB/07/20), Award of 14 July 2010, para. 131.

464. *Metal-Tech Ltd. v. Uzbekistan* (ICSID Case No. ARB/10/3), Award of 4 October 2013, para. 243.

465. *Getma International and others v. Republic of Guinea* (ICSID Case No. ARB/11/29), Award of 16 August 2016, paras 182–184.

466. *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République démocratique du Congo* (ICSID Case No. ARB/05/21), Sentence sur les déclinatoires de compétence et la recevabilité of 29 July 2008, para. 52.

467. *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13), Award of 8 October 2009, para. 221.

468. An exception is represented by the recent decision *Vladislav Kim and others v. Uzbekistan* (ICSID Case No. ARB/13/6), Decision on Jurisdiction of 8 March 2017, para. 591, which limited the role of red flags as instruments of circumstantial evidence of the economic crime. Carolyn B. Lamm, Brody K. Greenwald, Kristen M. Young, From World Duty Free to Metal-Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption, 29(2) ICSID Rev. 328, 338 (2014).

469. *Wena Hotels Ltd. v. Egypt* (ICSID Case No. ARB/98/4), Decision Annulment Proceedings of 5 February 2002, para. 58; *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2), Decision on Annulment of 17 May 1990, para. 6.72.

express choice as to the allocation of the burden of proof different from the traditional one, with either an express provision or applicable law. In this case, the tribunal exceeds its authority if it does not respect this decision.

300. In conclusion, ICSID tribunals have designed rules on the burden and standard of proof in absence of explicit rules. Even if there are some discernible trends, more precise rules would enhance the predictability of the decisions without necessarily forcing the adoption of evidentiary rules coming from a particular national system.⁴⁷⁰

§6. LAW APPLICABLE TO EVIDENTIARY ISSUES

301. In international commercial arbitration, two sets of procedural norms govern evidentiary issues: the applicable arbitration rules and the law at the seat of the arbitration (*lex arbitri*). However, *lex arbitri* is irrelevant for ICSID arbitration, where procedural matters are governed solely by international law.⁴⁷¹ Under the UNCITRAL Rules, the ICSID Additional Facility, or and other arbitration rules, however, *lex arbitri* have important consequences for procedural questions.

302. *Lex arbitri*, or international law in the case of an ICSID arbitration, may contain mandatory rules applicable to the conduct of the proceedings, including on issues of evidence. Failure to comply with such rules may have important consequences. For example, the UNCITRAL Model Law which forms the basis of many national arbitration laws contains a similar requirement to give each party the opportunity to present its case.⁴⁷²

303. An ICSID award may be annulled on the basis of a ‘serious departure from a fundamental rule of procedure’,⁴⁷³ which ‘refers to a set of minimal standards of procedure to be respected as a matter of international law’.⁴⁷⁴ In the context of evidentiary issues, the Annulment Committee in *Fraport v. Philippines* annulled one award for failure to give the claimant an adequate opportunity to be heard with respect to new evidence that was submitted after the close of the proceedings.⁴⁷⁵ Failure to give a given proper notice of the arbitration proceedings or making the

470. Mateus Aimore Carreteiro, 107, *supra* note 438.

471. Christoph Schreuer, 638, *supra* note 195. (‘Arbitration under the ICSID Convention is truly international and free from the interference of national rules. The choice of an ICSID tribunal’s place or places of proceedings is purely a matter of convenience and has no impact on the applicable law.’)

472. Article 18 UNCITRAL Model Law.

473. Article 52(1)(d) of the Convention.

474. *Wena Hotels Ltd. v. Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment of 5 February 2002, para. 57.

475. *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Annulment Proceeding of 23 December 2010.

other party otherwise unable to present his case may also lead to denial of enforcement under the New York Convention.⁴⁷⁶

§7. OBTAINING AND PRESENTING EVIDENCE

304. In many disputes, states can access evidence in ways not available to private parties. States may also invoke privileges, such as cabinet privileges, secret diplomatic negotiations, state secrets or the secrecy of law enforcement investigations.⁴⁷⁷ States can also prevent the presentation of evidence using their regulatory powers. Moreover, under certain conditions states may withdraw politically sensitive information.⁴⁷⁸ For instance, in *Biwater Gauff v. Tanzania*,⁴⁷⁹ the tribunal explained:

To the extent that some of the documents whose production will be ordered might be considered politically sensitive, as for example containing State secrets, the Respondent should immediately refer the matter to the Arbitral Tribunal. More precisely, the Respondent should identify the relevant document(s) and indicate the reasons why . . . the document concerned should be withheld, or disclosed subject to specific restrictions in order to preserve confidentiality.⁴⁸⁰

305. Accessing documents related to investors obtained through surveillance conducted by state intelligence services presents additional challenges. In *Libananco v. Turkey*, the claimant alleged that Turkish courts ordered the interception of approximately two thousand privileged or confidential emails, including email exchanges with the claimant's counsel.⁴⁸¹ The investor requested the tribunal to restore fairness by basing the decision only on the record at the moment of the claimant's request.⁴⁸² The tribunal denied the request because the investor failed to

476. Article V(b) of the New York Convention. ('The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.')

477. Barton Legum and Gauthier Vannieuwenhuysse, 'Document Disclosure in Investment Arbitration' in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Arthur W Rovine, Nijhoff Publishers 2013).

478. See, for example, IBA Rules of Evidence, Art. 9(2)(f).

479. *Biwater Gauff (Tanzania) Ltd. v. Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 2 of 24 May 2006, para. 9.

480. IBA Rules of Evidence, Art. 9.2(f). Note the parties had agreed at the first session that Art. 3 of the IBA Rules should guide the tribunal with respect to questions of document production. Article 3 incorporates, by reference, the bases for excluding evidence contained in Art. 9.2. See *Biwater Gauff (Tanzania) Ltd. v. Tanzania* (ICSID Case No. ARB/05/22), Minutes of the First Session of the Arbitral Tribunal of 1 June 2006, 10.

481. *Libananco Holdings Co. Limited v. Turkey* (ICSID Case No. ARB/06/8), Decision on Preliminary Issues of 23 June 2008, paras 43–44; see also *Europe Cement Investment & Trade S.A. v. Turkey* (ICSID Case No. ARB(AF)/07/2), Award of 13 August 2009, paras 21–24 and 35–36; *Cementownia 'Nowa Huta' S.A. v. Turkey* (ICSID Case No. ARB(AF)/06/2), Award of 17 September 2009, paras 38–44 (both noting the same factual circumstances as in *Libananco*).

482. *Ibid.*, *Libananco*, para. 44.

prove prejudice resulting from the surveillance.⁴⁸³ At the same time, the tribunal ordered the state to stop intercepting communications of the investor with its counsel while confirming that the state could legitimately investigate criminal activities on its territory.⁴⁸⁴

306. Admission of illegally obtained documents also presents serious practical challenges. In the wake of the WikiLeaks scandal, several tribunals in investor-state arbitrations have been faced with parties seeking to use evidence initially obtained through a large-scale data breach. The traditional approach under most countries' domestic rules would hold such communications inadmissible. However, the question is less clear-cut in investor-state arbitration, where the tribunal is often not bound by national law, and has the final authority over admitting evidence.⁴⁸⁵ In *Methanex v. Mexico*, the tribunal excluded illegally obtained evidence found by a private investigator in a dumpster in a parking lot and copied from private files, and explained the shifting nature of the burden of proof:

Once the [State] demonstrated prima facie that the evidence which Methanex was proffering had been secured unlawfully, if not criminally, the burden of proof with respect to its admissibility shifted to [the investor] On the materials before the Tribunal, the evidence shows beyond any reasonable doubt that [investor] unlawfully committed multiple acts of trespass over many months in surreptitiously procuring the [documents].⁴⁸⁶

483. *Ibid.*, 80–81.

484. *Ibid.*, para. 82.

485. Jessica O. Ireton, The Admissibility of evidence in ICSID Arbitration: considering the validity of WikiLeaks Cables as Evidence, 30 ICSID Rev. 1 (2015).

486. *Methanex Corporation v. Mexico* (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits of 3 August 2005, Part II Chapter I, para. 55.

Chapter 6. Damages in ICSID Arbitration

§1. PRINCIPLE OF FULL REPARATION

307. Most BITs provide a level of compensation (often ‘fair market value’) in the event of expropriation.⁴⁸⁷ Typically, investment treaties articulate the compensation requirement as an obligation to pay ‘just compensation’ or ‘prompt, adequate, and effective compensation’. Except for a few cases, most tribunals do not distinguish between differences in wording.⁴⁸⁸

308. In public international law, restitution remains the default remedy for any breaches. Restitution is often closely linked with specific performance and can be combined with compensation. Claimants typically do not request restitution and instead prefer monetary damages. ICSID tribunals also normally award monetary compensation.

309. Specific performance is usually impractical, because by the time of the award, the investment relationship had already broken down.⁴⁸⁹ However, in exceptional cases tribunals may also grant specific performance. For example, in *Goetz v. Burundi*, the tribunal gave two options to the state, to either (1) pay fair and adequate compensation or (2) grant a new certificate of free zone.⁴⁹⁰

310. Although occasionally investors seek declaratory relief in their claims, in the vast majority of cases tribunals award pecuniary damages. The root of all claims for damages under public international law is the *Chorzów* case where the Permanent Court of International Justice held that:

The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it.⁴⁹¹

311. The UN International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts and its commentary embrace this approach:

487. Article 6 US Model BIT (2012).

488. See, for example, *Amoco v. Iran*, 15 Iran-USCTR, 189 (in this case, the value decreased by the time of expropriation); *ADC v. Hungary* (ICSID Case No. ARB/03/16), Award of 2 October 2006 (the case dealt with windfall recovery for failure to pay compensation at the time of expropriation).

489. Christoph Schreuer, *Non-pecuniary Remedies in ICSID Arbitration*, 20(4) *Arbitration International* 325 (2004).

490. *Goetz v. Burundi* (ICSID Case No. ARB/95/3), Decision on Liability of 2 September 1998.

491. *Factory at Chorzów (Germany v. Poland)*, Merits, 1928 PCIJ (Series A) No. 17, para. 125.

Article 31. Reparation.

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.⁴⁹²

312. The principle of full reparation also applies in international investment law where states are often ordered to compensate investors for the harm caused by internationally wrongful acts. Some investment tribunals have concluded that the *Chorzów* customary international law standard applies beyond expropriations, to other breaches of investment treaties, such as a breach of the fair and equitable treatment (FET).⁴⁹³ The full reparation standard also applied to determine compensation when the state engaged in other types of unlawful conduct.⁴⁹⁴

§2. VALUATION METHODS

313. The decision on how to calculate damages normally rests with the tribunal unless a relevant treaty or contract provides otherwise. Tribunals employ various approaches to conduct this assessment. One study of top thirty ICSID awards by the amount of compensation concluded that due to its more straightforward calculation the investment cost method (asset-based approach) was the most relied upon basis for calculating damages.⁴⁹⁵ However, of the top ten ICSID largest awards in that study, seven were based on the discounted cash flow (DCF) method (income-based approach), and three on the investment cost method.⁴⁹⁶

314. The asset-based approach relies on the ‘book value’ or ‘replacement value’ of the expropriated assets. The Iran-US Claims Tribunal⁴⁹⁷ (IUSCT) heavily relied on this approach and it remains popular with ICSID tribunals. The book value is the

492. Articles on Responsibility of States for Internationally Wrongful Acts, Art. 31 (hereafter ‘Articles on State Responsibility’).

493. *BG Group Plc v. Argentina* (UNCITRAL), Final Award of 24 December 2007, paras 421–429 (concluding that the *Chorzów*’s approach crystallized into a rule of customary international law, and that it was appropriate to rely on it in non-expropriation context, such as a breach of the fair and equitable treatment provision).

494. See, for example, *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Spain* (SCC Arbitration Case No. 2015/063), Final Award of 15 February 2018; *Railroad Development Corp v. Guatemala* (ICSID Case No. ARB/07/23), Award of 29 June 2012; *Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Award of 28 March 2011; *Schneider v. Thailand* (UNCITRAL), Award of 1 July 2009; see also *White Industries Australia Ltd v. India* (UNCITRAL), Final Award of 30 November 2011 (applying the context under the most-favoured-nation clause).

495. Tim Hart, Study of Damages in International Center for the Settlement of Investment Disputes Cases (Credibility International, June 2014), 11(3) Transnational Dispute Management 11, 12–13 (2014).

496. *Ibid.*

497. See, for example, *Oil Field of Texas Inc v. Iran*, 12 Iran-USCTR 308; *Phillips Petroleum Co Iran v. Iran*, 21 Iran-USCTR 79.

difference between total assets and total liabilities, as reflected by the company's books.⁴⁹⁸ The replacement value is essentially the same approach but without deducting depreciation.

315. Income-based approaches normally refer to DCF, adjusted present value or capitalized cash flow.⁴⁹⁹ The DCF analysis focuses on the present value of future expected cash flows.⁵⁰⁰ The country risks concerning potentially illegal state conduct may affect determination of the appropriate rate at which to discount future cash flows to current value.⁵⁰¹

316. Tribunals have typically endorsed the use of DCF analysis where the available data permitted reasonable estimation of expected future cash flows, and rejected its application where projections were deemed too speculative.⁵⁰² The nature of the asset and the facts of the case determine whether DCF analysis is appropriate. If the investment is a start-up with no record of verifiable performance or other reliable way to estimate profits, tribunals prefer to avoid the DCF analysis.⁵⁰³ In certain industries and projects, such as extractive industries, relied on income-based approaches to calculate damages even for early-stage investments with no operating record.⁵⁰⁴

317. Unlike the asset-based and the income-based approaches, the market-based approach compares 'similar businesses, business ownership interests, securities or intangible assets that have been sold'.⁵⁰⁵ The analysis focuses on either comparable transactions or comparable items.⁵⁰⁶ For example, in *Yukos v. Russia*, the tribunal rejected the DCF analysis as less reliable on the facts and concluded that it had 'a measure of confidence in the comparable companies method'.⁵⁰⁷ Other transactions

498. John A Trenor (ed.), *Guide to Damages in International Arbitration*, 102 (Global Arbitration Review 2018).

499. Mark Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods, and Expert Evidence* (Kluwer Law International 2008).

500. William H. Knull, III, et al., *Accounting for Uncertainty in Discounted Cash Flow Valuation of Upstream Oil and Gas Investments*, 25 *J. Energy & Nat. Res. L.* 3, 5 (2007).

501. Diran Bodenhorn, *A Cash-Flow Concept of Profit*, 19(1) *The Journal of Finance* 16 (1964).

502. *Gold Reserve Inc v. Venezuela* (ICSID Case No. ARB(AF)/09/1), Award of 22 September 2014, para. 831; *Antin Infrastructure Services v. Spain* (ICSID Case No. ARB/13/31), Award of 15 June 2018, para. 689.

503. *Awdi v. Romania* (ICSID Case No. ARB/10/13), Award of 2 March 2015, para. 514; *Caratube International Oil Company LLP and Mr Devincci Salah Hourani v. Kazakhstan* (ICSID Case No. ARB/13/13), Award of 27 September 2017, para. 1095.

504. *Crystallex International Corporation v. Venezuela* (ICSID Case No. ARB(AF)/11/2), Award of 4 April 2016, para. 879; *Gold Reserve Inc v. Venezuela* (ICSID Case No. ARB(AF)/09/1), Award of 22 September 2014, paras 830, 831.

505. Mark Kantor, 4, *supra* note 498.

506. Charles N. Brower and Michael Ottolenghi, *Damages in Investor-State Arbitration*, 4 *Transnational Dispute Management* 6, 20–21 (2007).

507. *Hulley Enterprises Ltd (Cyprus) v. Russian Federation* (PCA Case No. AA 226), Final Award of 18 July 2014, paras 1785–1787; *Veteran Petroleum Ltd (Cyprus) v. Russian Federation* (PCA Case No. AA 228), Final Award of 18 July 2014, paras 1785–1787; *Yukos Universal Ltd (Isle of Man) v. Russian Federation* (PCA Case No. AA 227), Final Award of 18 July 2014, paras 1785–1787.

related to very similar or the same assets may be particularly persuasive for tribunals as evidence of the fair market value of these assets.⁵⁰⁸

318. In *Saipem v. Bangladesh*, for example, tribunals relied on the amount of recovery from prior decisions of courts or arbitration tribunals.⁵⁰⁹ Tribunals may also determine compensation on the basis of the sums of a wrongfully charged tax, or other financial obligations imposed by the state.⁵¹⁰ It is less common to establish the fair market value of the investment by relying on a ‘weighted combination’ of several valuation methods.⁵¹¹

§3. MORAL DAMAGES

319. In many legal systems, full compensation of damages also includes moral damages. ICSID tribunals sometimes face claims for moral damages, damages arising out of human rights of investors or damages to the investor’s business reputation. These damages are usually difficult to verify and quantify with precision. As a general rule, ICSID tribunals did not award moral damages, even in the cases of serious violations of investors’ rights, unless an investment treaty specifically protected such rights. As one tribunal observed, any emotional or other harm must be sufficiently serious to merit and additional compensation for moral damages, and tribunals are particularly cautious with awarding ‘moral’ damages suffered by a corporate investor.⁵¹²

320. ICSID tribunals award moral damages only in exceptional circumstances.⁵¹³ In *Biloune v. Ghana*,⁵¹⁴ the tribunal rejected recovery for moral damages claimed for denial of justice and violation of human rights resulting from arbitrary detention and unlawful forceful deportation of an investor. According to the tribunal:

The Government agreed to arbitrate only disputes ‘in respect of the foreign investment’. Thus, other matters – however compelling the claim or wrongful the alleged act – are outside this Tribunal’s jurisdiction ... [W]hile the acts

508. *CME Czech Republic BV v. The Czech Republic* (UNCITRAL), Final Award of 14 March 2003, para. 533; *Kardassopoulos v. Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15), Award of 3 March 2010, para. 599.

509. (ICSID Case No. ARB/05/07), Award of 30 June 2009, para. 202.

510. *Occidental Exploration and Production Co v. Ecuador* (LCIA Case No. UN3467), Final Award of 1 July 2004, paras 205–207; *British Caribbean Bank Ltd v. Belize* (PCA Case No. 2010-18), Award of 19 December 2014, para. 265.

511. See, for example, *Rusoro Mining Ltd v. Venezuela* (ICSID Case No. ARB(AF)/12/5), Award of 22 August 2016, para. 78.

512. *Rompetrol*, paras 182–183, *supra* note 440.

513. *Joseph C. Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Award of 28 Mar. 2011, para. 476 (quoting *Desert Line Projects LLC v. The Republic of Yemen* (ICSID Case No. ARB/05/17), Award of 29 January 2008, para. 289).

514. *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana* (UNCITRAL), Award of 27 October 1989 and 30 June 1990, para. 7.

alleged to violate the international human rights ... may be relevant in considering the investment dispute under arbitration, this Tribunal lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights.⁵¹⁵

321. In *Benvenuti and Bonfant* the ICSID tribunal awarded moral damages to an Italian investor⁵¹⁶ whose premises and property were occupied by the military of the People's Republic of Congo.⁵¹⁷ The investor's personnel were forced to leave the host country; the investor lost its credit with suppliers and banks and could not resume business operation in Italy.⁵¹⁸

322. In *Desert Line* the ICSID tribunal found the State liable for physical distress, maliciously inflicted on the claimant on the basis of a fault-based liability.⁵¹⁹ In that case the government 'directly and indirectly caused and allowed to be caused theft, harassment by armed groups and tribes, repeated attacks on the physical integrity of the Claimant's investment, such as the arrest and detention of the Claimant's personnel – including the son of the claimant's chairman'.⁵²⁰

323. Reputation damages are usually not awarded by ICSID tribunals. In *SGS Société Générale*, a foreign investor requested compensation for damages to its reputation resulting from termination of a contract with the host government.⁵²¹ The ICSID tribunal concluded that it had no jurisdiction because there was no evidence that the parties to BIT agreed to treat 'all breaches of each State's contracts with investors of the other state ... as breaches of the BIT'.⁵²² In *LETCO*, the ICSID tribunal did not award an investor damages for the loss of its commercial reputation because of the lack of adequate proof.⁵²³ In *Tokios Tokelés*, the ICSID tribunal declined any monetary compensation for reputation damages because there was no concrete evidence that any damage had been inflicted.⁵²⁴

324. As the *Desert Line v. Yemen* tribunal explained, 'even if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral

515. *Ibid.*, para. 9.

516. *S.A.R.L. Benvenuti and Bonfant v. People's Republic of the Congo* (ICSID Case No. ARB/77/2), Award of 8 August 1980, para. 4.96.

517. *Ibid.*, para. 4.56.

518. *Ibid.*, para. 4.95.

519. *Desert Line Projects LLC v. Republic of Yemen* (ICSID Case No. ARB/05/17), Award of 6 February 2008, para. 90.

520. *Ibid.*, para. 146.

521. Decision on Jurisdiction of 6 August 2003, paras 57–58; see also *SGS Société Générale de Surveillance S.A. v. Pakistan* (ICSID Case No. ARB/01/13).

522. *Ibid.*, para. 173.

523. Award of 31 March 1986. ('Because of a lack of adequate proof, the Tribunal does not award [the Claimant] damages for loss of commercial reputation.')

524. *Tokios Tokelés v. Ukraine*, para. 122, *supra* note 195.

damages’.⁵²⁵ There, the investor had been subject to physical duress and a siege by the armed forces of the host state, for which it was awarded USD 1 million. The tribunal explained that exceptional circumstances must warrant the award of moral damages and identified three criteria of such circumstances:

- (1) first, ‘the state’s actions imply physical threat, illegal detention, or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act’.
- (2) second, ‘the State’s actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position’; and
- (3) finally, ‘both cause and effect are grave or substantial’.⁵²⁶

325. The tribunal in *Joseph Charles Lemire v. Ukraine* awarded the claimant USD 3 million in moral damages for suffering stress, humiliation and other forms of moral harm resulting from the state’s conduct.⁵²⁷

525. *Desert Line Projects LLC v. Yemen* (ICSID Case No. ARB/05/17), Award of 29 January 2008, para. 289.

526. *Ibid.*, para. 333.

527. *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Award of 28 March 2011.

Chapter 7. ICSID Costs and Fees

§1. OVERVIEW

326. Damages represent only one element of overall costs that parties incur and subsequently seek to reimburse. Arbitrating cases at ICSID is expensive. An OECD survey showed that legal and arbitration costs for the parties in recent ISDS cases have averaged over United States Dollars (USD) 8 million and in some cases exceeded USD 30 million.⁵²⁸ Expenses include charges paid to the Centre, arbitrators and conciliators, and attorneys. ICSID Schedule of Fees regulates the Centre's charges. High costs were identified as one of the two greatest disadvantages of international arbitration in a recent survey of in-house counsel at leading corporations.⁵²⁹

327. Currently, the lodging fee of USD 25,000 is payable to the Centre by the party requesting the institution for conciliation or arbitration proceedings.⁵³⁰ This charge is non-refundable. The Centre charges an administrative fee of USD 42,000 following the constitution of the Conciliation Commission, arbitral tribunal or ad hoc committee concerned and on an annual basis thereafter.⁵³¹ A party requesting that the ICSID Secretary-General appoint an arbitrator, conciliator or mediator in proceedings not conducted under the Convention or Additional Facility Rules needs to pay a non-refundable fee of USD 10,000 is payable to the Centre.⁵³²

328. ICSID Schedule of Fees provides that in addition to receiving reimbursement for any direct expenses reasonably incurred, conciliators, arbitrators and the ad hoc committee members are entitled to receive, unless agreed on otherwise between them and the parties, a fee of USD 3,000 per day for meetings or other work performed in connection with the proceedings. They are also entitled to subsistence allowances and reimbursement of travel expenses within limits set forth in Administrative and Financial Regulation 14.⁵³³

329. The Secretary-General determines the costs of proceedings to be paid by the parties in accordance with the regulations of the ICSID Administrative Council.

528. OECD, Investor-State Dispute Settlement, Public Consultation: 16 May–9 July 2012, para. 18.

529. See Lucy Reed, Kluwer Arbitration Blog, More on Corporate Criticism of International Arbitration (16 Jul. 2010) (discussing survey by Corporate Counsel International Arbitration Group (CCIAG) which found that 100% of the corporate counsel participants believe that international arbitration takes too long (with 56% strongly agreed) and costs too much (69% strongly agreed), available at <http://kluwerarbitrationblog.com/blog/2010/07/16/more-on-corporate-criticism-of-international-arbitration/> (accessed on 1 May 2020).

530. ICSID Schedule of Fees effective as of 1 Jan. 2019, para. 1, available at <https://icsid.worldbank.org/en/Pages/icsiddocs/Schedule-of-Fees.aspx> (accessed on 1 May 2020).

531. *Ibid.*, para. 5.

532. *Ibid.*, para. 6.

533. *Ibid.*, para. 3.

ICSID tribunals usually make decisions on allocating expenses incurred by the parties. These expenses include the fees and expenses of the tribunal's members and the charges for the use of the Centre's facilities.⁵³⁴

330. However, if the parties have agreed on a different allocation of costs in advance, the tribunal upholds their decision. The parties are required to submit to the tribunal a statement of costs reasonably incurred or borne in the proceedings. The Secretary-General submits to the tribunal an account of all amounts paid by each party to the Centre and all costs incurred by the Centre for the proceedings.⁵³⁵ The decision on costs usually constitutes a part of the award.

§2. PARTY COSTS

331. Investment arbitration costs can be divided into two main categories: party costs and tribunals' costs.⁵³⁶ Party costs include expenses individually incurred by each party in the course of the arbitration, including legal fees, counsel fees, expenses relating to lay witnesses, fees and expenses related to party-appointed experts, translation, document production, travel and accommodation costs. Legal fees remain the main 'cost driver' accounting for more than 80% of the total costs of the arbitration.⁵³⁷ According to one study, in 2013–2017, average party costs for claimants were USD 7.41 million and USD 5.19 million for respondents.⁵³⁸ Before then, costs averaged USD 4.43 million for claimants and USD 4.6 million for respondents.

332. The drafters contemplated two aspects when deciding on the rules on costs. First, because the proceedings are supposed to be of a friendly nature, each party was to bear its own expenses and the expenses for the use of the Centre's facilities were to be born equally.⁵³⁹ Second, the drafters were aware of the need to discourage bringing claims that were frivolous and motivated by bad faith.⁵⁴⁰ The latter was one of the most important considerations in allowing tribunals to award costs against a party that brought such claims, so that it bears not only its own costs but also the expenses of the other party and the costs of the proceedings.⁵⁴¹

534. Arbitration Rule 28.

535. *Ibid.*

536. Susan D. Franck, *Myths and Realities in Investment Treaty Arbitration*, 190 (Oxford University Press 2019).

537. Decisions on Costs in International Arbitration – ICC Arbitration and ADR Commission Report, para. 2, available at <https://cdn.iccwbo.org/content/uploads/sites/3/2015/12/Decisions-on-Costs-in-International-Arbitration.pdf> (accessed on 1 May 2020).

538. The Cost of Investment Arbitration: UNCITRAL, ICSID Proceedings and Third-Party Funding, available at <https://www.acerislaw.com/cost-investment-arbitration-uncitral-icsid-proceedings-third-party-funding/> (accessed on 1 May 2020).

539. *History of the Convention*, Vol. II, 225.

540. *Ibid.*, 337, 351.

541. *Ibid.*, 351, 436.

§3. TRIBUNAL COSTS

333. Tribunal costs include the arbitrators' fees and expenses, arbitral institutions' administrative charges and other charges arising out of the assistance of the arbitral tribunal.⁵⁴² The overall cost of investment arbitration has significantly increased recently due to the rise in the tribunals costs. According to one study, at the end of 2012, tribunal costs averaged USD 746,000.⁵⁴³ Today, that number has risen nearly 50% to USD 1.19m.⁵⁴⁴ Between 2013 and 2017, the average ICSID tribunal costs reached USD 1.04m.⁵⁴⁵

334. ICSID Schedule of fees provides for the following tribunal's expenses: (i) fees for lodging requests, (ii) fees and expenses of conciliators, arbitrators, commissioners and ad hoc committee members, (iii) administrative charges, (iv) appointment and challenge fees and (v) charges for special services.

335. Regulation 16 of the Administrative and Financial Regulations stipulates that:

The party or parties (if a request is made jointly) wishing to institute a conciliation or arbitration proceeding, requesting a supplementary decision to, or the rectification, interpretation, revision or annulment of an arbitral award, or requesting resubmission of a dispute to a new Tribunal after the annulment of an arbitral award, shall pay to the Centre a non-refundable fee determined from time to time by the Secretary-General.

336. Regulation 14 indicates that each arbitrator shall receive:

- (a) a fee for each day on which he participates in meetings of the body of which he is a member;
- (b) a fee for the equivalent of each eight-hour day of other work performed in connection with the proceedings;
- (c) in lieu of reimbursement of subsistence expenses when away from his normal place of residence, a *per diem* allowance based on the allowance established from time to time for the Executive Directors of the Bank; and
- (d) travel expenses in connection with meetings of the body of which he is a member based on the norms established from time to time for the Executive Directors of the Bank.

542. Franck, *supra* note 535.

543. Matthew Hodgson, *Damages and Costs in Investment Treaty Arbitration Revisited* (2nd ed., GAR 2017).

544. *Ibid.*

545. *Ibid.*

§4. ALLOCATION OF COSTS

I. The Source of Power to Decide on Costs

337. In most arbitrations, the rules of the arbitral institution, *lex arbitri* and the parties' agreement normally give the arbitral tribunals power to allocate the costs.⁵⁴⁶ Domestic law either expressly empowers the arbitral tribunal to decide on costs⁵⁴⁷ or regards such authority as inherent.⁵⁴⁸ *Lex arbitri* does not play the same role in ICSID arbitration, unless dispute is arbitrated under the Rules of the ICSID Additional Facility, in which case the law of the seat of arbitration normally applies.

338. Parties can agree on cost allocations, and adjudicators often enforce those agreements,⁵⁴⁹ which should be explicit and precise. Theoretically, parties have multiple opportunities to agree on cost allocation. *Ex ante*, parties could agree on cost allocation through an express contract, reference to institutional rules with cost guidelines, or obligations in a treaty's offer to arbitrate.⁵⁵⁰ The 2012 US Model BIT provides guidance about cost allocation, noting that tribunals:

may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.⁵⁵¹

339. Institutional rules provide guidance on cost allocation. While the current ICSID Rules and ICSID Additional Facility Rules are clear on when tribunals can address costs, they are silent as to how and why tribunals should exercise their

546. Micha Bühler, Costs, Global Arbitration Review, available at <https://globalarbitrationreview.com/chapter/1177437/costs#footnote-102-backlink> (accessed on 1 May 2020).

547. Section 61 of the English Arbitration Act 1996; s. 1057 of the German Code of Civil Procedure; s. 609 of the Austrian Arbitration Act.

548. As is the case in France and Switzerland, the two leading jurisdictions for hosting arbitrations; Chartered Institute of Arbitrators, International Arbitration Practice Guideline – Drafting Arbitral Awards Part III – Costs, 1.

549. Marc Blessing, Mandatory Rules of Law Versus Party Autonomy in International Arbitration, 14 *Journal of International Arbitration* 23–24, 40 (1997).

550. Jan Paulsson, Arbitration Without Privity, 10 *ICSID Rev. - FILJ* 232, 236–41, 250–51, 255–66 (1995); *see also* Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments, 7 Sept. 1992, 2240 U.N.T.S. 387, 399, 400 (providing an express agreement on responsibility for costs); Won Kidane, China and India's Different Investment Treaty Dispute Resolution Experiences and Implications for Africa, 49 *Loyola U. Chi. L. Rev.* 405, 459 (2018) (identifying the new Indian Model BIT has express rules on costs).

551. Article 28(6) US Model BIT (2012).

authority.⁵⁵² ICSID’s August 2018 rule reform efforts have put costs front and centre – proposing new duties to act in a cost-effective manner, encouraging tribunals to make more interim decisions, and offering factors for tribunals to consider when assessing costs.⁵⁵³

II. Approaches to Cost Allocation

340. Most tribunals follow one of the two broad approaches: ‘costs follow the event’, and ‘pay your own cost’. The tribunals often diverge from these principles to take into account the misconduct of one of the parties during the proceedings or submitting a fraudulent claim (conduct-based approach).⁵⁵⁴

341. The objective of the costs follow the event rule is to indemnify successful parties by requiring the losing party to pay the successful party’s costs.⁵⁵⁵ Both common and civil law jurisdictions recognize this approach.⁵⁵⁶ This approach discourages frivolous claims or procedural actions.⁵⁵⁷ According to one study, this is the dominant approach in investment arbitration generally and in ICSID arbitration in particular.⁵⁵⁸ A successful party is entitled to a reimbursement of its costs so that it ‘should not be out of pocket as a result of having to seek adjudication to enforce or vindicate its legal rights’.⁵⁵⁹

342. A number of tribunals followed the principle that ‘costs follow the event’, making the losing party bear the costs of the proceeding and reimburse attorneys’ fees and expenses.⁵⁶⁰ In *Phoenix v. The Czech Republic*, the tribunal’s final award provided that the investor pay all costs of the proceedings, including the Czech Republic’s legal fees and expenses (excluding the lodging fee). The tribunal reasoned that because the claimant’s claim was without any merit, and constituted an abuse of the international investment protection regime, the state would not be penalized by having to pay for its defence.

552. Article 58 of the Additional Facility Rules.

553. ICSID, Proposals or Amendment of the ICSID Rules – Synopsis: Volume I, 3–4, 9.

554. Inna Uchkunova, Allocation of Costs in ICSID Arbitration, available at <http://arbitrationblog.kluwerarbitration.com/2014/12/03/allocation-of-costs-in-icsid-arbitration/> (accessed on 1 May 2020).

555. Even using ‘costs follow the event’, there are exceptions in national law; Micha Bühler, Awarding Costs in International Commercial Arbitration, 22 ASA Bull. 249, 262 (2004).

556. Bühler, 250, *supra* note 545.

557. Franck, 191, *supra* note 535.

558. Thomas H. Webster, Efficiency in Investment Arbitration: Recent Decisions on Preliminary and Costs Issues, *Arbitration International* 25, No. 4, LCIA (2009).

559. 2015 ICC Report on Decisions on Costs, para. 86, with reference to *Harold v. Smith* (1860) 5 H. & N. 381.

560. See, for example, *Plama Consortium Limited v. Bulgaria* (ICSID Case No. ARB/03/24), Award of 27 August 2008, paras 307–324 (awarding fees, costs, and the respondent’s attorneys’ fees and expenses where, *inter alia*, the claimant engaged in fraudulent misrepresentation and was held not entitled to protection under the BIT).

343. The other approach to costs is that each party should bear its own legal fees regardless of their success on the merits. This rule is a remnant from inter-state disputes in which the costs were typically split.⁵⁶¹ Tribunals strictly applying this approach have recognized that it would be unfair to leave the winning party to bear all of its costs.⁵⁶² To discourage frivolous annulment procedures, one ICSID Annulment Committee ruled in a decision rendered against the state of Seychelles that all costs should be borne by the state that had challenged the first award.⁵⁶³ This approach is, however, uncommon in ICSID arbitration. While the provisions of the ICSID Convention which deal with conciliation explicitly provide that costs ‘shall be borne equally by the parties’,⁵⁶⁴ there is no similar rule applicable to ICSID arbitration proceedings, which suggests that the tribunal is supposed to allocate the costs rather than split them.⁵⁶⁵

III. Security for Costs

344. Parties to ICSID arbitration may request security for costs. This is an interim measure requesting the other party to post security to cover the legal costs of arbitration such as counsel fees, tribunal fees or administrative costs.⁵⁶⁶

345. Investor-state tribunals are reluctant to order security for costs as a provisional measure.⁵⁶⁷ According to an empirical study of provisional measures in investment arbitration, if such requests were made, they were granted only in 12.5% of cases.⁵⁶⁸ One tribunal noted that a security for costs order would only be granted in an ‘extreme’ case in which an ‘essential interest’ risked ‘irreparable damage’.⁵⁶⁹ Another tribunal described security for costs as an ‘extraordinary remedy which ought not to be granted lightly’⁵⁷⁰ and ‘a very rare and exceptional measure’.⁵⁷¹ It

561. *Tza Yap Shum v. Peru* (ICSID Case No. ARB/07/6), Award (Spanish) of 7 July 2011, para. 296.

562. *Nations Energy v. Panama* (ICSID Case No. ARB/06/19), Award of 24 November 2010, para. 709.

563. *CDC Group plc v. Republic of the Seychelles* (ICSID Case No. ARB/02/14), Award of 17 December 2003; Decision on Annulment of 29 June 2005.

564. Article 61(1) of the Convention.

565. *Togo Electricité v. Togo* (ICSID Case No. ARB/06/07), Decision on Annulment of 6 September 2011, para. 257.

566. See generally Sarah Brewin, Security for Costs, IISD Best Practices Series - October 2018, 5.

567. *Ibid.*

568. David Goldberg, Yarik Kryvoi, Ivan Philippov, Provisional Measures in Investor-State Arbitration, BIICL/White & Case, London, 2019.

569. For example, *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste* (ICSID Case No. ARB/15/2), Award of 22 December 2017; *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic* (ICSID Case No. ARB/14/14); *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Company v. Grenada* (ICSID Case No. ARB/10/6), Tribunal’s Decision on Respondent’s Application for Security for Costs of October 14, 2010, para. 57.

570. *Ibid.*, *Grynberg v. Grenada*, para. 5.17.

571. *Guaracachi America, Inc. and Rurelec PLC v. Bolivia* (PCA Case No. 2011-17), Procedural Order No. 14 of 11 March 2013, para. 6.

would take ‘extreme circumstances, for example, where abuse or serious misconduct has been evidenced’ or conduct that ‘threatens the integrity of the proceedings’ or that amounts to bad faith.⁵⁷²

346. The high threshold mentioned above also governs how tribunals have considered the relevance of third-party funding to a request for security for costs. In one case, the tribunal explained that ‘third party funding – which has become a common practice – do[es] not necessarily constitute per se exceptional circumstances’.⁵⁷³

572. *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (ICSID Case No. ARB/09/17), Decision on El Salvador’s Application for Security for Costs of 20 September 2012.

573. *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic* (ICSID Case No. ARB/14/14), Procedural Order No. 3 of 23 June 2015.

Chapter 8. Remedies Against the Award

347. According to Article 53 of the Convention, the award is binding on the parties and is not subject to any appeal in either a domestic or an international forum. The Convention provides for several ‘internal’ ICSID remedies. These are supplementation and rectification, interpretation, revision and annulment.

§1. REQUEST FOR SUPPLEMENTATION AND RECTIFICATION

348. If the award rendered contains any clerical, arithmetical or similar errors, either party may request to rectify such an award. According to Article 49 of the Convention, the rectification request needs to be made within forty-five days after the award is rendered.

349. In *CDSE v. Costa Rica*, a claimant requested rectification of the award.⁵⁷⁴ The tribunal gave the other party an opportunity to file written observations of the request and rendered a decision correcting two minor clerical errors and a mistake in the identification of the parties. At the same time, the tribunal disagreed with the claimant’s request to correct an alleged misstatement of a party’s position on the point of law.

350. The ICSID ad hoc committee in *Vivendi v. Argentina* noted that the requested rectification must concern an aspect of the impugned award or decision that is purely accessory to its merits. The tribunal emphasized that ‘Article 49(2) does not permit the “rectification” of substantive findings made by a tribunal or committee or of the weight or credence accorded by the tribunal or committee to the claims, arguments and evidence presented by the parties’.⁵⁷⁵

§2. REQUEST FOR INTERPRETATION

351. In case of disagreement between the parties over the meaning of the award, either party may direct a request for interpretation to the Secretary-General under Article 50 of the Convention. Whenever possible, the tribunal that has rendered the award gives the requested interpretation. Otherwise, a new tribunal may be constituted that may stay enforcement of the award pending its decision. Generally, requests for interpretation are very rare.⁵⁷⁶

574. *Compañía del Desarrollo de Santa Elena S.A. v. Costa Rica* (ICSID Case No. ARB/96/1), Rectification of Award of 8 June 2000.

575. *Compañía De Aguas Del Aconquija S.A. and Vivendi Universal v. Argentina* (ICSID Case No. ARB/97/3), Decision of the Ad Hoc Committee on the Request for Supplementation and Rectification of Its Decision Concerning Annulment of the Award of 28 May 2003, para. 25.

576. See *Wena Hotels Limited v. Egypt* (ICSID Case No. ARB/98/4), Decision on the Claimant’s Application for Interpretation of the Arbitral Award of 8 December 2000; *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited* (ICSID Case No. ARB/98/8) (request for interpretation pending decision).

§3. REQUEST FOR REVISION

352. Article 51 of the Convention gives either party a right to request revision of the award. The only ground for revision under Article 51 is discovering a fact that is capable of decisively affecting the award. The parties are not allowed to trigger Article 51 if the reason for not discovering this fact is negligence. A request for revision must be submitted within ninety days after the discovery. However, if more than three years have passed since the date of the award, the case may not be revised. Like the request for interpretation under Article 50, the request for revision must be considered by the same tribunal. If that is not possible, a new tribunal is constituted.

§4. REQUEST FOR ANNULMENT

353. Unlike in cases of interpretation and revision, the chair of the tribunal appoints a new tribunal to deal with annulment. This ad hoc tribunal consists of three new arbitrators. Article 52 provides a number of additional restrictions on those who can serve on the ad hoc tribunal – members should not be of the same nationality as any former member of the tribunal, shall not be designated by either of those states or act as conciliators in the same dispute. The ad hoc committee has authority to stay the enforcement of the rendered award pending its decision. If the ad hoc committee concludes that the award is subject to annulment, a new tribunal decides the case de novo.

354. It is important to understand that annulment is different from appeal. This is apparent from Article 53 of the Convention, which provides that the award shall not be subject to any appeal or any other remedy except those provided for in the Convention. Moreover, it does not extend beyond the closed list of grounds to errors on the merits, i.e., errors of law or fact in the award. The result of a successful annulment procedure is the invalidation of the original decision; in contrast, an appeal may result in the modification of the decision. In theory, an appellate body could substitute its own decision for that of the first tribunal or require that tribunal to rectify its mistakes.

355. The annulment procedure is unavailable for decisions preliminary to awards, such as the decisions on jurisdiction or the orders for provisional measures. However, if the decision on the jurisdiction is a part of the award, then it is also subject to annulment. Similarly, annulment is not available in relation to decisions interpreting or revising the awards; whereas decisions on supplementation and correction are subject to annulment because they become integral parts of the award.

356. Annulment is different from appeal. Article 53 clearly provides that the award shall not be subject to any appeal or to any other remedy except those provided for in the Convention. The result of a successful annulment procedure is the invalidation of the original decision, but an appeal may result in the modification of the decision. As a general rule, annulment does not modify the award but rather

removes it. The Convention provides a limited number of grounds on which either party may request annulment of the award. The list of grounds as provided by Article 52 of the Convention are as follows:

- The tribunal was not properly constituted.
- The tribunal has manifestly exceeded its powers.
- There was corruption on the part of a member of the tribunal.
- There has been a serious departure from a fundamental rule of procedure.
- The award has failed to state the reasons on which it is based.

357. Improper constitution of the tribunal may involve the issues arising out of the arbitrators' nationalities. According to Article 38 of the Convention, arbitrators may not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute. Article 39 stipulates that the majority of arbitrators should not be nationals of states whose governments or investors are a party to the dispute. The annulments on the ground of nationality are unlikely to arise because the ICSID Secretariat carefully monitors the constitution of tribunals.

358. Another ground – the manifest excess of powers – has been frequently evoked in the past. The excess of powers is the most obvious example of where the tribunal has no jurisdiction. This may happen if jurisdictional requirements established by Article 25 of the Convention have not been met.

359. An example of manifest excess of powers is a failure to apply the proper law. In *Amco v. Indonesia*, the tribunal ruled that failure to apply the proper substantive law would constitute a manifest excess of powers and a ground for nullity.⁵⁷⁷ The tribunal in *Klöckner v. Cameroon* went even further by ruling that the absence of any references to legislative texts, judgments or scholarly opinions amounted to the application of an improper law.⁵⁷⁸ In *Malicorp* the tribunal explained that violation of the fundamental principle of equity of arms could constitute a serious departure from a fundamental rule of procedure sufficient to trigger ICSID annulment procedures.⁵⁷⁹

360. In *MINE v. Guinea*, the tribunal explained that the requirement to state reasons is satisfied if:

577. *Amco Asia Corporation and Others v. Indonesia* (ICSID Case No. ARB/81/1), Ad Hoc Committee Decision on the Application for Annulment of 16 May 1986, 1 ICSID Reports 509, 515 (1993).

578. *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2), Decision on Annulment of 3 May 1985, 2 ICSID Reports 9, 28 (1994).

579. *Malicorp Limited v. Egypt* (ICSID Case No. ARB/08/18), Decision on the Application for Annulment of Malicorp Limited of 3 July 2013, para. 29.

the award enables one to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.⁵⁸⁰

361. Early decision on annulment in *Klöckner v. Cameroon* adhered to the view that if at least one of the grounds for annulment provided by Article 52(1) is present, then the whole award should be annulled.⁵⁸¹ However, the tribunal in *MINE v. Guinea* has taken a different position. The respondent in that case requested annulment of a part of the award that did not deal with its counterclaims.⁵⁸² The tribunal ruled that the unchallenged part of the award would remain in effect regardless of the effect of the annulment award on the challenged portions of the award. That tribunal reasoned that ‘annulment is clearly not required to remedy procedural injustice and annulment would unjustifiably erode the binding force and finality of ICSID awards’.⁵⁸³

362. Corruption of an arbitrator, that is, an arbitrator’s misconduct because of personal gain, may also lead to annulment. Mere bias in the absence of improper financial gain does not amount to corruption. Article 52(2) of the Convention provides for a longer period of 120 days to submit a request for annulment under this ground.

363. In 2012, the ICSID Secretariat published a report detailing the ICSID Convention annulment mechanism and providing empirical data on annulment proceedings.⁵⁸⁴ The report purported to guide ad hoc committees to ensure fair and effective annulment proceedings. It reaffirmed that annulment is a limited and exceptional recourse.

364. The report acknowledged that despite general agreement on the standards for annulment, disagreements remain as to the correctness of specific decisions. It emphasized that in ICSID’s forty-seven-year history, of the 344 registered cases, which resulted in 150 awards, only six awards were annulled in full and another six were partially annulled. The report concluded that the increase in annulment applications in the last decade ‘reflects the vastly increased number of cases registered and awards rendered at ICSID in this same period. Between 2001 and June 2012, 119 awards were issued, 36 annulment proceedings were instituted (30% of the cases leading to awards) and 8 awards were annulled in full or in part (7% awards were annulled)’.

580. *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), Decision on Annulment of 22 December 1989, 4 ICSID Reports 79, 88 (1997).

581. *Klöckner v. Cameroon*, Decision on Annulment, para. 233, *supra* note 577.

582. *MINE v. Guinea* (ICSID Case No. ARB/84/4), Decision on Annulment of 22 December 1989, 4 ICSID Reports 79, 82 (1997).

583. *Ibid.*, 86.

584. ICSID, Background Report on Annulment by the ICSID Secretariat Provided to Contracting States, 15 Aug. 2012.

Chapter 9. Recognition and Enforcement of ICSID Arbitration Awards

§1. OVERVIEW

365. One of the most remarkable features of ICSID arbitration is the mechanism of recognition and enforceability of its awards. Unlike awards of other arbitration tribunals, ICSID awards do not need to be enforced in accordance with the New York Convention. It is important, however, to note that awards rendered under the ICSID Additional Facility Rules should be enforced as non-ICSID awards, usually in accordance with the New York Convention. The Additional Facility Arbitration Rules do not contain a recognition and enforcement mechanism, unlike the ICSID Convention.

366. Within 120 days after the completion of proceedings, the tribunal is required to draw up the award taking any individual or dissenting opinion into consideration. However, if the tribunal is unable to draw up the award within this period, it may extend it by an additional sixty days.⁵⁸⁵ Either party may request a supplementary decision or rectification of the award in accordance with Article 49(2) of the Convention and Rule 49 of the Arbitration Rules.

367. Article 53(1) of the Convention provides for the obligation to comply with an ICSID award:

The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

368. Article 54(1) of the Convention deals with enforcement and execution mechanisms:

Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as it were a final judgment of a court in that State.

369. Parties do not have to resort to enforcement mechanisms under Article 54(1). The award becomes binding on the parties under Article 53(1) immediately

585. Arbitration Rule 46.

upon rendering.⁵⁸⁶ The main purpose of Article 54(1) is to require that each Contracting Party opens its courts, in case either party fails to abide by or comply with the terms of the award.⁵⁸⁷

370. The Convention drafters intended that the award should have a *res judicata* effect on the national courts as a matter already determined in arbitration proceedings.⁵⁸⁸ In the unlikely event that a losing state failed to comply with the award, it would violate the Convention, which allows the state whose national had failed to obtain satisfaction to take up the case.⁵⁸⁹ The Executive Directors' Report noted that a Contracting State may institute proceedings against another Contracting State if there was a failure to comply with the award rendered in the dispute.⁵⁹⁰ However, the state is not entitled to commence proceedings against another state if it disagrees with the competence of ICSID in a particular case or disagrees with its substance.⁵⁹¹

371. ICSID tribunals have held that the requirement to pursue a breach of contract claim in domestic courts does not prevent the use of the investor-state dispute resolution mechanism of ICSID. This is true even when establishing the breach of contract under domestic law is central to the establishment of a breach of the state's treaty obligations.⁵⁹²

372. Traditionally, ICSID tribunals grant monetary relief. The parties usually request pecuniary relief rather than specific performance or declaratory awards. However, the drafting history of the Convention shows that although enforcement is meant to be restricted to the award's pecuniary obligations, the tribunals can order a party to perform or to refrain from certain acts. In the process of drafting the Convention, Aron Broches explained:

an award could well order the performance or non-performance of certain acts, but all that could be enforced would be to the obligation to pay damages if the party did not comply with the order. In the kind of disputes that would come before the Centre payment of damages was all that parties would ultimately expect in the absence of voluntary compliance.⁵⁹³

373. The issue of specific performance was addressed in the decision on the jurisdiction in *Enron v. Argentina*. Argentina argued that the tribunal had no power to order injunctive relief and hence could not declare taxes unlawful as the claimant

586. Christoph Schreuer, 1087, *supra* note 195.

587. Stanimir Alexandrov, Enforcement of ICSID Awards: Arts 53 and 54 of the ICSID Convention, 6 *Transnational Dispute Management* (2009).

588. History of the Convention, Vol. II, 519.

589. *Ibid.*, 344.

590. Executive Directors' Report, 48, *supra* note 28.

591. *Ibid.*

592. See, for example, *Alex Genin v. Estonia* (ICSID Case No. ARB/99/2), Award of 25 June 2001, para. 2.

593. History of the Convention, Vol. II, 991.

requested. The tribunal disagreed with Argentina and ruled that it was in its power to order specific performance. After referring to several non-ICSID awards, the tribunal held that ‘in addition to declaratory powers, it had the power to order measures involving performance or injunction of certain acts’.⁵⁹⁴ Christoph Schreuer also considers that ‘an award, that is expressed not in monetary terms but in terms of obligation to perform a particular act or to refrain from a certain course of action is equally binding and gives rise to the effect of *res judicata*’.⁵⁹⁵

374. The drafting history of the Convention shows that the drafters were against forced execution against the state.⁵⁹⁶ The drafters did not consider it necessary to change the principles that apply to Contracting States in enforcement of the final judgments. In other words, forceful execution is governed by domestic civil procedure rules. State compliance with ICSID arbitration awards has been good. Until recently only in four cases it was necessary to test compliance provisions of the ICSID Convention.⁵⁹⁷ However, recent reports indicate a growing number of refusals to comply with awards of investor-state tribunals among various states, including Russia, Thailand, Kyrgyz Republic and Zimbabwe.⁵⁹⁸

375. The benefits of the ICSID enforcement mechanism are well known. The award can only be challenged on the narrow grounds outlined in the ICSID Convention, and Contracting States must recognize it as if it were a judgment of its own courts.⁵⁹⁹ Some details, however, need to be clarified.

376. One issue is whether domestic courts are required to both recognize and enforce non-pecuniary obligations imposed by ICSID awards.⁶⁰⁰ The wording of Article 54 seems to only impose an obligation on Contracting States to enforce pecuniary obligations contained in awards. This view is supported by the fact that the relevant US legislation, for example, is silent on the question of the enforcement of non-pecuniary obligations.⁶⁰¹

377. This may seem to be a major flaw in the ICSID system as it means that injunctions and specific performance cannot be enforced in domestic courts. Yet if we focus on the nature of investment proceedings it becomes clear why this decision has been taken. As Broches pointed out, there are often practical issues with the enforcement of non-pecuniary awards, and there may be policy or sovereignty

594. *Enron Corp. and Ponderosa Assets, LP v. Argentina* (ICSID Case No. ARB/01/3), Decision on Jurisdiction of 14 January 2004.

595. Christoph Schreuer, Non-pecuniary Remedies in ICSID Arbitration, 20 *Arbitration International* 325, 331 (2004).

596. History of the Convention, Vol. II, 520.

597. Antonio Parra, The Enforcement of ICSID Awards, 24th joint Colloquium on International Arbitration Paris, 16 Nov. 2007.

598. Luke Eric Peterson, How Many States Are Not Paying Awards Under Investment Treaties, *Intl. Arb. Rep.* 7 (May 2010).

599. Articles 53 and 54 of the Convention.

600. Abby Smutny, Anne Smith and McCoy Pitt, Enforcement of ICSID Convention Arbitral Awards in US Courts, 43 *Pepperdine Law Review* 649, 665–667 (2016).

601. 22 USC 1650a.

objections to the domestic courts of one state requiring another state to perform or abstain from performing a particular act.⁶⁰²

§2. EXECUTION OF ICSID AWARDS

378. We must distinguish enforcement from execution of awards. While states have no option but to enforce pecuniary obligations contained in awards and recognize all awards, the position differs with regard to the execution of awards. The provision on execution reads:

[e]xecution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.⁶⁰³

379. The main consequence of this provision is that the doctrine of sovereign immunity, as conceived of in the relevant state, determines whether a given asset can be seized to enforce an award.⁶⁰⁴ One option for investors who are unable to secure execution is to ask their state to bring a claim in diplomatic protection, but this depends on the state's willingness to intervene in the dispute.⁶⁰⁵ This returns investors to the position they were in before the creation of investor-state arbitration.

380. Some commentators have suggested that it may be possible to challenge an ICSID award under domestic law.⁶⁰⁶ This argument seems to be based on the fact that Article 54 ICSID Convention requires a Contracting State to enforce pecuniary obligations as if the award was 'a final judgment of a court in that State'. However such arguments have an obvious flaw.⁶⁰⁷ Article 54 starts by stating that '[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding' Further, Article 53(1) explicitly states that awards are not subject to any appeal or review outside of the mechanisms in the Convention.

381. It is clear that the first half of Article 54(1) qualifies the second half, and it is not possible to challenge an award on domestic grounds. This approach is also supported in the earlier cases. For example, in *Mobil Cerro Negro Ltd v. Venezuela* the US court rejected domestic law challenges to the award on the basis that it

602. Aron Broches, Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution, 2 ICSID Rev. 287, 303, 315–316 (1987).

603. Article 54(3) of the Convention.

604. See also Art. 55 of the Convention; Executive Directors' Report, paras 42–43, *supra* note 28; Susan Choi, Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions, 28 New York University Journal of International Law and Politics 175 (1995); Inna Uchkunova and Oleg Temnikov, Enforcement of Awards under ICSID Convention – What Solutions to the Problem of State Immunity, 29(1) ICSID Rev. 187 (2014).

605. *Ibid.*, Choi, 213–214.

606. Edward Baldwin, Mark Kantor and Michael Nolan, Limits to Enforcement of ICSID Awards, 23 Journal of International Arbitration 1, 9–13 (2006).

607. See further Smutny, Smith and Pitt, 669–670 *supra* note 599.

reflects the consent of both parties to ICSID's jurisdiction and to limited avenues for review, and equates to a final judgment entered by a state's highest court.⁶⁰⁸

§3. ENFORCEMENT IN INTRA-EU CASES

382. A further challenge to enforcement comes when the dispute is between an investor from an EU state and a host state which is an EU state. This comes as a result of the Court of Justice of the European Union (CJEU) in *Slovak Republic v. Achmea*.⁶⁰⁹ This case revolved around an ad hoc investment arbitration between Achmea and the Slovak Republic. The tribunal found in the investor's favour and awarded substantial damages. The host state sought to set aside the award in the German courts on the basis that the BIT was inconsistent with EU law. The first instance court rejected the challenge but the German Federal Court of Justice heard an appeal and decided to refer the question to the CJEU for a preliminary ruling.

383. The CJEU held that the arbitration clause contained in the BIT was incompatible with EU law. The Court started by reaffirming the principles of autonomy and primacy contained in the EU treaties. According to the Court, these principles mean that EU Member States are obliged to ensure the uniform application of EU law within their territories.⁶¹⁰ The Court then went on to state that arbitral tribunals may be called on to interpret or apply EU law, including the law relating to the fundamental freedoms.⁶¹¹

384. The Court then held that the tribunal could be regarded as part of the judicial system of the EU whose decisions were subject to challenge mechanisms to ensure the effectiveness of EU law.⁶¹² As German national law, like many national laws of EU Member States, provide for limited review of arbitral awards, it followed that there was no mechanism which ensured the effective and consistent application of EU law. Therefore, the arbitration provision in the BIT was held to be contrary to EU law.⁶¹³

385. Finally, the Court distinguished investment arbitration from commercial arbitration. It held that although it had previously held the latter to be permissible, investment arbitration was said to be different because it originates in a treaty by which the Member States:

608. 87 F. Supp. 3d 573 (S.D.N.Y. 2015).

609. See further Anna Bilanova and Jaroslav Kudrna, *Achmea: The End of Investment Arbitration as We Know It?*, 3(1) *European Investment Law and Arbitration Review Online* 261 (2018); Jens Hillenbrand Pohl, *Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?*, 14(4) *European Constitutional Law Review* 767 (2018).

610. *Achmea v. Slovak Republic* Case No. C-284/16, paras 32–34.

611. *Ibid.*, paras 39–42.

612. *Ibid.*, paras 43–49.

613. *Ibid.*, paras 50–53.

agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law [...], disputes which may concern the application or interpretation of EU law.⁶¹⁴

386. There are, however, a number of pertinent issues which the Court did not deal with. For example, it failed to mention the Vienna Convention on the Law of Treaties (VCLT) or the New York Convention, and did not consider the question of whether the IIAs remain valid. It also failed to deal with the issue of whether the decision applies to all IIAs, or whether multilateral agreements are exempt. Most pertinently, it did not give any indication as to the potential consequences for ICSID arbitration.

387. Since *Achmea* a number of investment tribunals have considered the issue, but have not followed the CJEU's approach. In *Masdar Solar & Wind v. Spain* the tribunal pointed out that the CJEU did not mention the Energy Charter Treaty, so held that the *Achmea* judgment was irrelevant in that case.⁶¹⁵ In *UP and C.D. Holding Internationale v. Hungary* the tribunal held that *Achmea* could not excuse compliance with public international law,⁶¹⁶ and in *Vattenfall v. Germany* the tribunal held that EU law was irrelevant to the case before it as it is not part of general international law and the treaty in question, the Energy Charter Treaty, could be considered to be a later treaty or a *lex specialis*.⁶¹⁷ The issue is clearly far from settled.

388. In 2019, the European Union Member States reached agreement on a plurilateral treaty for the termination of intra-EU BITs. The agreement follows the *Achmea* judgment and on investment protection in the European Union, where Member States committed to terminate their intra-EU BITs.⁶¹⁸

614. *Ibid.*, para. 55.

615. *Masdar Solar & Wind Cooperatief U.A. v. Spain* (ICSID Case No. ARB/14/1), Award of 16 May 2018.

616. *UP and C.D. Holding Internationale v. Hungary* (ICSID Case No. ARB/13/35), Award of 9 October 2018.

617. *Vattenfall AV and others v. Germany* (ICSID Case No. ARB/12/12), Decision on the *Achmea* Issue of 31 August 2018.

618. European Commission, EU Member States agree on a plurilateral treaty to terminate bilateral investment treaties (24 Oct. 2019), available at https://ec.europa.eu/info/publications/191024-bilateral-investment-treaties_en (accessed on 1 May 2020).

Part IV. Applicable Substantive Law in ICSID Disputes

Chapter 1. Choice of Substantive Law

389. The Convention gives parties certain flexibility as far as their choice of the applicable law. Such law can be determined by the parties' agreement. According to Article 42(1) of the Convention, tribunals 'shall decide a dispute in accordance with such rules of law as may be agreed to by the parties'. It is important to note that Article 42(1) is phrased in terms of 'rules of law' rather than 'systems of law'. Therefore, the parties are not restricted to a certain legal system in its entirety, but may combine rules of different legal origins.

390. The applicable substantive law may be chosen in one of several ways – by direct agreement, by stipulation in legislation or a treaty, or in the course of arbitration proceedings. Article 42(1) of the Convention does not require that the agreement on applicable law be expressed verbally or in writing. However, usually the substantive law is chosen with 'reasonable certainty' as dictated by the terms of the parties' contract or by the circumstances of the case.⁶¹⁹ Sometimes the choice of law can be established by the ICSID tribunal based on the conduct of the parties, for instance, the choice may be based on the reliance by the parties on a particular system of law.⁶²⁰

391. In certain situations, the parties may fail to agree on the applicable law. This may be the result of the parties' oversight or disagreement, or it may arise because the parties believe that the tribunal is better qualified to decide the matter. If the parties failed to reach an agreement on the applicable law, the tribunal applies the law of the Contracting State party to the dispute, which also includes the rules on the conflict of laws.

619. Ibrahim Shihata and Antonio Parra, 'Applicable Substantive Law in Disputes between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention', 9 ICSID Rev. - FILJ 183, at 190 (1994).

620. See, for example, *Asian Agricultural Products Limited v. Sri Lanka* (ICSID Case No. ARB/87/3), Award of 27 June 1990, 4 ICSID Reports 250, 256 (1997); *Amco v. Indonesia* (ICSID Case No. ARB/81/1), Award of 20 November 1984, 1 ICSID Reports 413 (1993).

392. Similarly, if the parties failed to reach a complete agreement on the applicable law, leaving certain aspects of their legal relationship without a clear choice of the applicable law, these aspects are decided in accordance with the residual rule of Article 42(1).

393. Most investment treaties contain no provisions on the issue of applicable law.⁶²¹ In some cases, investment treaties refer both to domestic and international laws as applicable law.⁶²² In other cases, investment treaties fail to designate applicable law.⁶²³ According to the ICSID Convention, if the parties fail to agree on applicable law, the law of the host state applies.⁶²⁴

394. A failure to comply with the laws of the host state may even act to exclude the investment from protection under the investment treaty. For example, in *Maffezini v. Spain*, the tribunal held that the Argentine investor's failure to comply with its environmental regulations constituted a violation of the investor's obligations.⁶²⁵ In the 2006 case, *Inceysa v. El Salvador*, the tribunal declined jurisdiction on the basis of an investment treaty provision that the investment must be made in accordance with the laws of the host country.⁶²⁶ It held that an investment made through fraudulent means could not be made in accordance with law.⁶²⁷

395. It is not controversial that applicable domestic law contemplates investor obligations. However, not all domestic law obligations rise to the level of international law obligations. Counterclaims arising out of the application of domestic law of general applicability usually fall outside of the international tribunals' jurisdiction.

396. In *Amco v. Indonesia* the State asserted a counterclaim seeking payment of taxes and customs duties.⁶²⁸ Subsequently, it modified its counterclaim and alleged tax fraud. The tribunal considered the tax fraud as a new claim because Indonesia did not introduce it as counterclaim in accordance with ICSID Arbitration Rules.⁶²⁹ The tribunal eventually ruled that because the claim did not arise 'directly out of an investment', as required by the ICSID Convention, the tax fraud case was outside its jurisdiction. The tribunal also distinguished between rights and obligations provided by the investment treaty and generally applicable rights and obligations.⁶³⁰

621. Antonio Parra, 'Applicable Law in Investor-State Arbitration in Contemporary Issues' in *Contemporary Issues in International Arbitration and Mediation*, 7–8 (Arthur Rovine (ed.), Martinus Nijhoff 2008).

622. Taida Begic, *Applicable Law in International Investment Disputes*, 232 (Eleven International Publishing 2005).

623. *Ibid.*

624. Article 42(1) of the Convention.

625. *Maffezini v. Spain* (ICSID Case No. ARB/97/7), Award of 13 November 2000.

626. *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), 2 August 2006.

627. *Ibid.*

628. *Amco v. Indonesia* (ICSID Case No. ARB/81/1), Award of 20 November 1984, paras 283–287.

629. *Ibid.*, Resubmitted Case: Decision on Jurisdiction, 10 May 1988.

630. *Ibid.*, paras 125–126.

397. Investment disputes that arise out of tort law obligations may also fall under the jurisdictional reach of investor-state tribunals. As was pointed out in the *Amco v. Indonesia*, an international tort and an investment dispute were not mutually exclusive categories.⁶³¹ However, only certain torts arising directly out of investment rather than out of law of general applicability can fall within the jurisdiction of ICSID tribunals.

398. It must be noted that although normally general measures such as tax or economic policy are outside of jurisdiction of investor-state tribunals as long as they do not result in violation of specific commitments.⁶³² In other words, if ‘general’ measures violate pre-existing commitments, they may fall under jurisdiction of arbitral tribunals.

399. The tribunal is not permitted to conclude that the situation engaged in a case has no answer from the governing system of law because of silence or obscurity.⁶³³ The tribunal is entitled to call on the parties to produce documents or other evidence, visit the scene and conduct necessary inquiries, unless the parties have agreed otherwise.⁶³⁴

400. Failure to apply applicable substantive law may constitute an excess of powers and lead to annulment of the award under Article 52(1)(b). For instance, the ad hoc committee in *Klöckner v. Cameroon* decided that the tribunal manifestly exceeded its powers when the award’s reasoning seemed more like a reference to equity, rather than the agreed-on applicable law of a Contracting State.⁶³⁵

401. ICSID tribunals have analysed the following main interpretive arguments in the past and found them consistent with Article 38(d) of the Statute of the ICJ and Articles 32–33 of the VCLT: the wording of the provision, the context, the object and purpose, the customary international law, the general principles of law, the analogies and *contrario* arguments, the agreements between the parties, the case law, the state practice, the preparatory work, the legal doctrine and the reasonable results.⁶³⁶

631. *Ibid.*, Ad Hoc Committee Decision on the Application for Annulment of 16 May 1986.

632. *Roussalis v. Romania*, para. 490 *supra* note 161; *El Paso Energy International Company v. Argentina* (ICSID Case No. ARB/03/15), Decision on Jurisdiction, para. 97; for a UNCITRAL dispute, see *GAMI v. Mexico* (UNCITRAL), Final Award of 15 November 2004.

633. Article 42(2) of the Convention.

634. Article 43 of the Convention.

635. *Klöckner v. Cameroon* (ICSID Case No. ARB/81/2), Decision on Annulment of 3 May 1985, 2 ICSID Reports 124 (1994).

636. Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, European Journal of International Law 301, 308 (2008).

402. The parties may agree that the dispute is decided on the basis of equity, or *ex aequo et bono*.⁶³⁷ The decision will be based not on certain legal rules but the considerations deemed right and fair by the court.⁶³⁸ The ICJ Statute provides a similar provision in Article 38(2).

403. In *Benvenuti and Bonfant v. Congo*, the tribunal decided the dispute on the basis of *ex aequo et bono*.⁶³⁹ The tribunal may decide a dispute *ex aequo et bono* only if there is an explicit agreement by the parties to that effect. It should be noted that this agreement can be reached in the course of arbitration proceedings.

404. An empirical study on interpretative arguments used by ICSID tribunals found that the three arguments most frequently used by ICSID tribunals are ICSID earlier cases, legal doctrine and state practice.⁶⁴⁰

637. Article 42(3) of the Convention.

638. See Christoph Schreuer, *Decisions Ex Aequo et Bono under the ICSID Convention*, 1 ICSID Rev. - FILJ 37 (1996).

639. *S.A.R.L. Benvenuti and Bonfant v. People's Republic of the Congo* (ICSID Case No. ARB/77/2), Award of 8 August 1980, 1 ICSID Reports 330, 342 (1993).

640. *Ibid.*, 356.

Chapter 2. International Substantive Law

§1. THE ROLE OF INTERNATIONAL LAW

405. According to Article 42 of the ICSID Convention, if the parties have not reached an agreement on the rules of the international law, the tribunal – in addition to the law of a state party to the dispute – applies ‘such rules of international law as may be applicable’. One of the earlier drafts of the Convention provided that, in the absence of agreement, the tribunal should apply ‘national or international law’. However, this has been changed to avoid the impression that it was necessarily a question of alternatives.⁶⁴¹

406. The parties may even exclude domestic law altogether and apply only international law. For instance, NAFTA⁶⁴² and the Energy Charter Treaty⁶⁴³ provide for international law as a sole source of the applicable law. However, doing so is not recommended because the international law may lack clarity and technical details necessary for the resolution of the dispute. International law remains applicable unless the parties have explicitly excluded it. In *SPP v. Egypt*, the ICSID tribunal considered the issue of whether the choice of national law made international law rules irrelevant. The tribunal concluded the following:

When municipal law contains a lacuna, or international law is violated by the exclusive application of municipal law, the Tribunal is bound in accordance with Article 42 of the Washington Convention to apply directly the relevant principles and rules of international law.⁶⁴⁴

407. Moreover, it had been argued that characterizing the role of international law as only ‘supplemental and corrective’ does not make practical sense, because tribunals ought to test claims both against applicable domestic law and international law.⁶⁴⁵ Two other cases, in which the tribunals have taken a similar approach, are *MTD v. Chile* and *Azurix v. Argentina*. In the *MTD* case, the tribunal declared that ‘[t]his being a dispute under the BIT, the parties have agreed that the merits of the dispute will be decided in accordance with international law’.⁶⁴⁶

408. According to the traditional doctrine of international law, only states, not individuals are the subjects of obligation and responsibility in international law.⁶⁴⁷ Until the second half of the twentieth century, the dominant principle of international law was that a wrong done to a national of one state, for which another state

641. History of the Convention, Vol. II, 800.

642. Article 1131 NAFTA.

643. Article 26 Energy Charter Treaty.

644. *SPP v. Egypt* (ICSID Case No. ARB/84/3), Award of 20 May 1992, 3 ICSID Reports 189, para. 84.

645. *Amco v. Indonesia* (ICSID Case No. ARB/81/1) Resubmitted Case: Award of 5 June 1990, 1 ICSID Reports 580 (1993).

646. *MTD Equity Sdn Bhd v. Chile* (ICSID Case No. ARB/01/7), Award of 14 July 2006, para. 86; see also *Azurix Corp. v. Argentina* (ICSID Case No. ARB/01/12), Award of 14 July 2006, para. 67.

647. Hans Kelsen, *Principles of International Law*, 194 (Rinehart & Co 1966).

was intentionally responsible, was actionable not by the injured national, but by his state. The only option available to foreign investors was invoking diplomatic protections of their home state to support his case and to initiate proceedings before an international tribunal.⁶⁴⁸ The investors were unable to proceed with an international claim against a foreign government directly.

409. Over the recent decades the legal status of investors in international law has shifted from this classical position and now they are considered bearers of certain international rights and obligations.⁶⁴⁹ One of earliest examples of individual's civil responsibility is the International Convention for the Protection of Submarine Telegraph Cables, which provided for an obligation to pay for the cost of repair of submarine cables.⁶⁵⁰ Norms of international law can determine that an individual by his own conduct may commit an international delict.⁶⁵¹ In the past, examples included piracy, breach of blockade and carriage of contraband or acts of illegitimate warfare.⁶⁵²

410. Subjects of international law can be defined as 'persons to whom international law attributes rights and duties directly and not through the medium of their states'.⁶⁵³ It is indisputable that today foreign investors – be they corporations or individuals, have certain direct rights.

411. As discussed below, international law also imposes certain obligations on foreign investors, attributable not through the medium of states. The source of such obligations arises out of investor's consent to resolve the dispute under a certain set of procedural rules, such as the ICSID Convention or UNCITRAL Arbitration Rules. The obligations can be found in international law, domestic law or even contracts.⁶⁵⁴

412. The Report of Executive Directors clarifies that the term *international law* has the same meaning as Article 38(1) of the Statute of the ICJ with allowance being made that Article 38 was designed to apply to inter-state disputes. According to Article 38(1) the following constitutes sources of international law:

648. Kryvoi, *see* Ch. 3, 27.

649. *See* Elihu Lauterpacht, *Aspects of Administration of International Justice*, 70–72 (Cambridge University Press 1991); The Special Representative of the Secretary-General, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, delivered to the Human Rights Council, U.N. Doc. A/HRC/4/35 (9 Feb. 2007).

650. *See* Article IV International Convention for the Protection of Submarine Telegraph Cables.

651. Hans Kelsen, *Principles of International Law*, 203 (Rinehart & Co 1966).

652. *Ibid.*, 203–207.

653. Marek St. Korowicz, The Problem of the International Personality of Individuals, 50 *American Journal of International Law* 533, 535 (1956).

654. For an overview of investment treaty provisions containing obligations of investors, *see* Andrea Bjorklund, Yarik Kryvoi and Jean-Michel Marcoux, Investment Promotion and Protection in the Canada-UK Trade Relationship, 23–31, available: <https://ssrn.com/abstract=3312617> (accessed on 1 May 2020).

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

413. A brief explanation of each source of international law is in order.

§2. INTERNATIONAL CONVENTIONS

414. International treaties are of primary importance in investment disputes. First, the ICSID Convention is a treaty itself. Second, most clauses establishing jurisdiction of the Centre as well as the substantive rights and obligations of states towards investors are often found in treaties, such as BITs. International law always includes rules set out in bilateral investment agreements between the states concerned.⁶⁵⁵ Not only do the already-ratified treaties constitute international law but also the unratified treaties as well as the preparatory work, which may not even end up in the conclusion of a treaty, often have an effect of a customary international law.⁶⁵⁶

415. International conventions (treaties) and, in particular, investment treaties, are the first and foremost source of international law applied by investor-state tribunals. In addition to investment treaties, multilateral treaties such as NAFTA and the Energy Charter Treaty also serve as jurisdictional bases of investor-state disputes. These treaties provide specific rights of foreign investors such as protection against expropriation and the right to FET.⁶⁵⁷

416. Disputes arising out of obligations in international treaties often involve disagreements over the interpretation of particular terms, such as what constitutes investment or FET. ICSID tribunals often rely on VCLT of 1969, which provides guidance on treaty interpretation.

417. Article 31 of the VCLT is considered to be the expression of customary international law.⁶⁵⁸ According to this Article:

655. History of the Convention, Vol. II, 984.

656. Robert Jennings & Arthur Watts (eds), *Oppenheim's International Law*, 33 (Oxford University Press 1997).

657. See Art. 1105 NAFTA and Art. 10 Energy Charter Treaty.

658. *Phoenix Action, Ltd v. The Czech Republic* (ICSID Case No. ARB/06/5), Award of 15 April 2009, para. 54.

- (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
- (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
- (3) There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
- (4) A special meaning shall be given to a term if it is established that the parties so intended.⁶⁵⁹

418. In addition to these basic rules of interpretation, the Vienna Convention allows for recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.⁶⁶⁰

419. Treaties other than the Convention and BITs are also applied in ICSID arbitrations. In *SPP v. Egypt*, the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention for the Protection of the World Cultural and Natural Heritage played a key role.⁶⁶¹

§3. CUSTOMARY INTERNATIONAL LAW

420. In a typical investor-state dispute arising out of an investment treaty, a tribunal would start its examination with the text of a relevant treaty. If the investor's obligations are not set out in those treaties, or their provisions are not sufficiently complete, the tribunal would refer to international custom unless the treaty refers to the application of different law (e.g., domestic law).

421. For instance, in *ADC v. Hungary*, the tribunal first applied the relevant investment treaty and then explained that consent to arbitration:

659. Article 32 VCLT.

660. Article 33 VCLT.

661. Award of 20 May 1992, 3 ICSID Reports 206, 207 (1995).

must be deemed to comprise a choice for general international law, including customary international law, if and to the extent that it comes into play for interpreting and applying the provisions of the Treaty.⁶⁶²

422. According to Article 38 of the Statute of the ICJ, international custom constitutes ‘evidence of a general practice accepted as law’.⁶⁶³ The definition includes two basic elements – the actual behaviour of states and the psychological or subjective belief that such behaviour is ‘law’.⁶⁶⁴

423. During the course of drafting of the ICSID Convention, a number of rules of customary international law have been discussed. These included the obligation to act in good faith,⁶⁶⁵ protection against discriminatory treatment,⁶⁶⁶ the prohibition of measures contrary to international public policy, *pacta sunt servanda*, the exhaustion of local remedies and rules on state succession.⁶⁶⁷ However, none of these principles was specifically mentioned in the ICSID Convention.

424. The meaning of custom, or customary international law, has been clarified by the ICJ in the *Asylum* case:

The party which relies on custom ... must prove that this custom is established in such a manner that it has become binding on the other party ... that the rule invoked ... is in accordance with a consent and uniform usage, practiced by the States in question, and that this usage is the expression of a right appertaining to the State and a duty incumbent on the territorial State.⁶⁶⁸

425. In the theory of international law, there are two essential components of custom, namely practice and *opinio juris*. Oppenheim’s International Law defines custom as ‘a clear and continuous habit of doing certain actions which has grown up under the aegis of the conviction that these actions are, according to international law, obligatory or right’.⁶⁶⁹

662. *ADC v. Hungary* (ICSID Case No. ARB/03/16), Final Award of 2 October 2006, paras 288–290. See also *Siemens v. Argentina* looking at customary international law to determine the standard of compensation for unlawful expropriation. *Siemens v. Argentina* (ICSID Case No. ARB/02/8), Award of 6 February 2007, para. 349.

663. Statute of the ICJ.

664. A number of commentators argue that if subjective perception of a particular state does not give the final verdict as to legality of a set of usages to create a custom.

665. History of the Convention, Vol. II, 570.

666. *Ibid.*, 419.

667. *Ibid.*, 801 and 985.

668. *Asylum Case (Colombia/Peru)*, Judgment of 20 November 1950, ICJ Reports 1950, 267, 277.

669. Robert Jennings & Arthur Watts (eds), *Oppenheim’s International Law*, 27 (Oxford University Press 1997).

426. Tribunals generally prefer to apply customary international law at the time of the dispute. For instance, in *Técnicas v. Mexico*, the tribunal applied ‘customary international law not as frozen in time, but in evolution’ to interpret the concept of indirect expropriation.⁶⁷⁰

427. It must be noted that this body of law develops as a result of interaction between states and is meant to create obligations for states, not private investors.⁶⁷¹ This source of international law affects interpretations of treaties and obligations of one state vis-à-vis another but does not directly create obligations of investors.

§4. GENERAL PRINCIPLES OF LAW

428. General principles of law have played a prominent role in arbitrations between states and foreign nationals as the jurisprudence of the IUSCT and ICSID cases demonstrate.⁶⁷² The principles usually have a less political and more technical character compared to customary international law.⁶⁷³ Therefore, they are more relevant for determining investor obligations. The main distinction between general principles of law and international custom is that they do not arise out of international public law as such.⁶⁷⁴ Instead, they come from domestic law, practices of international organizations or relations between states and private organizations.⁶⁷⁵

429. Choosing domestic law as applicable does not make general principles of law irrelevant. The sole arbitrator in a non-ICSID investor-state dispute in *Texaco v. Libya*, explained the relevance of general principles of law when domestic Libyan law was chosen as applicable:

the application of the principles of [domestic] law does not have the effect of ruling out the application of the principles of international law, but quite the contrary: it simply requires us to combine the two in verifying the conformity of the first with the second.⁶⁷⁶

670. *Técnicas v. Mexico* (ICSID Case No. ARB(AF)/00/2), 43 ILM 133, para. 116 (2004).

671. Ian Brownlie, *Principles of Public International Law*, 6–12 (Oxford University Press 2008).

672. Richard Lillich, ‘The Law Governing Disputes under Economic Development Agreements: Reexamining the Concept of “Internationalization”’ in *International Arbitration in the 21st Century: Towards ‘Judicialization’ and Uniformity?*, 107 (Richard Lillich and Charles Brower (eds) Transnational Publishers Inc 1994); Kent Lipstein, ‘International Arbitration between Individuals and Governments and the Conflict of Laws’ in *Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger*, 177 (Bin Cheng and Edward Duncan Brown (eds), Stevens & Sons 1988).

673. Grant Hanessian, ‘General Principles of Law’ in the Iran-US Claims Tribunal, 27 *Colum. J. Transnat’l L.* 309, 309 (1989).

674. *Ibid.*

675. *Ibid.*

676. *Ibid.*, 14.

430. The arbitrator relied both on the principle of the binding force of contracts recognized by Libyan law, and on the principle *pacta sunt servanda* (agreements must be kept), which is essential to international law.⁶⁷⁷

431. All domestic legal systems as well as the UN Charter recognize that the principle of good faith occupies the most important position.⁶⁷⁸ This principle comes into play in the context of the exercise of rights,⁶⁷⁹ and is otherwise described as the prohibition of malicious injury, i.e., the exercise of a right – or supposed right – for the sole purpose of causing injury to another.⁶⁸⁰ The principle of good faith establishes interdependence between the rights of an investor and its obligations. A bona fide exercise of a right is expected rather than exercise aimed at procuring an unfair advantage.⁶⁸¹ The exercise of a right in a manner, which prejudices the interests of the other party (the state) would constitute a breach of the principle.

432. The general principle of good faith gives rise to more specific obligations such as good faith in the conclusion, interpretation and performance of contracts.⁶⁸² An even more specific principle would be interpretation against a party that unilaterally drafted a contract.⁶⁸³ International arbitration tribunals have developed increasingly specialized general principles of law in their cases.⁶⁸⁴

433. Unlike international treaties or international customary law, general principles of law can provide for obligations of private parties. In the absence of specific provisions setting out obligations of investors in international treaties, these principles of law serve as an appropriate source of law to determine obligations of investors in investor-state arbitration.

434. The general principles of law recognized by civilized nations constitute another source of international law. Their main distinction from international customs is that they do not arise out of international law as such. Instead, they come from domestic law, practice of international organizations or relations between states and private organizations. These principles touch on the issues of the choice of law, the independence of judiciary, its transparency, among other issues. The

677. *Ibid.*

678. Article 2(2) United Nations Charter.

679. Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 121 (Cambridge University Press 1953). For application of the principle in ICSID context, see *Inceysa v. El Salvador*, para. 230, *supra* note 274.

680. *Ibid.*, 122. For application of this principle in investor-state context, see, for example, *Saipem S.p.A. v. Bangladesh* (ICSID Case No. ARB/05/7), Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007, paras 154–158; *Waguih Elie George Siag and Clorinda Vecchi v. Egypt* (ICSID Case No. ARB/05/15), Decision on Jurisdiction of 11 April 2007, paras 119, 125, 213.

681. *Ibid.*, 125.

682. Emmanuel Gaillard, *Legal Theory of International Arbitration*, 54 (Brill 2010).

683. *Ibid.*

684. *Ibid.*

most important principle is that of good faith. This principle can be found in any domestic legal system as well as in the UN Charter.⁶⁸⁵

435. Other examples of general principles of law applied by investor-state tribunals include *res judicata*, the plaintiff's bearing of the burden of proof, *restitutio in integrum* according to which the damage caused by both direct and foreseeable prejudice⁶⁸⁶ is compensable, and an injured person's duty to mitigate damages.⁶⁸⁷ Tribunals have also applied principles of *pacta sunt servanda*,⁶⁸⁸ estoppel,⁶⁸⁹ *nemo auditur propriam turpitudinem allegans* (prohibition from benefiting from one's own fraud),⁶⁹⁰ the *exceptio non adimpleti contractus* (person who is being sued for non-performance of contractual obligations can defend themselves by proving that the plaintiff did not perform their side of the bargain),⁶⁹¹ unjust enrichment⁶⁹² and general principles of contract law.⁶⁹³ The principle of compensation in case of nationalization was regarded as a generally recognized principle of international law in ICSID case *Benvenuti and Bonfant v. Congo*.⁶⁹⁴

§5. ICSID CASES AND OTHER SECONDARY SOURCES

436. While some general principles of law and legal rules are codified and easy to access,⁶⁹⁵ others are more difficult to identify.⁶⁹⁶ In practice, tribunals often skip the process of finding the 'general principles of law recognized by civilized nations'

685. Article 2(2) United Nations Charter.

686. See *Award on the Merits in Dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Co. and the Government of the Libyan Arab Republic (Texaco v. Libya)*, Award on the Merits of 19 January 1977, paras 97–109; *Amco v. Indonesia*, Award on the Merits of 20 November 1984, para. 268.

687. See *Middle East Cement Shipping and Handling Co. S.A. v. Egypt* (ICSID Case No. ARB/99/6), Award of 12 April 2002, para. 167.

688. *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2), Award of 21 October 1983, 2 ICSID Reports 9 (1994) (excerpts).

689. *SPP v. Egypt*, 246–247, *supra* note 643; *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2), Decision on Annulment of 3 May 1985, 2 ICSID Reports 9, 140–141 (1994).

690. *Inceysa v. El Salvador*, para. 240, *supra* note 274.

691. *Klöckner v. Cameroon*, Award of 21 October 1983, 2 ICSID Reports 61; *Autopista Concesionada de Venezuela, C.A. v. Venezuela* (ICSID Case No. ARB/00/5), Award of 23 September 2003, para. 316.

692. *Amco Asia Corporation and others v. Indonesia* (ICSID Case No. ARB/81/1), Resubmitted Case: Award of 5 June 1990, paras 154–156; *SPP v. Egypt*, paras 245–249, *supra* note 643; *Inceysa v. El Salvador*, para. 253, *supra* note 274. For a longer list of cases in which tribunals relied upon by ICSID tribunals, see Christoph Schreuer, 608–609, *supra* note 195.

693. *Amco v. Indonesia*, Award of 20 November 1984, paras 180–183.

694. *S.A.R.L. Benvenuti and Bonfant v. People's Republic of the Congo* (ICSID Case No. ARB/77/2), Award of 8 August 1980, 1 ICSID Reports 330.

695. See, for example, UNIDROIT Principles of International Commercial Contracts 2004.

696. General principles of law often overlap with other sources of international law and often are traced back to State practice. See Ian Brownlie, *Principles of Public International Law*, 19 (Oxford University Press 2008).

mentioned in Article 28 of the ICJ Statute because it is difficult and time-consuming. Instead, tribunals tend to rely on relevant international jurisprudence.⁶⁹⁷

437. International law does not operate on the basis of *stare decisis* doctrine or prior ICSID awards, even those applying similar investment treaty language do not constitute binding precedent.⁶⁹⁸ However, many investor-state tribunals found themselves not barred, as a matter of principle, from considering the position taken or the opinion expressed by other tribunals.⁶⁹⁹

438. An ICSID tribunal in *ADC v. Hungary* emphasized, despite their non-binding nature, that ‘cautious reliance on certain principles developed [in earlier cases], as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States’.⁷⁰⁰ In addition to earlier cases, investor-state tribunals often rely on scholarly writings to help establish norms of law.⁷⁰¹ Therefore, international jurisprudence and scholarly writings can be used as subsidiary means of identifying investor obligations in investor-state disputes.

439. The Statute of the ICJ mentions judicial decisions and writings of distinguished scholars as secondary sources for determination of the rules of international law.⁷⁰² Taking into account the number of citations in ICSID awards, currently the writings of Christoph Schreuer, Aron Broches, Antonio Parra and C.F. Amerasinghe are among the most respected in the field.

440. Although the decisions of tribunals and courts, either domestic or international, are not a primary source of international law, they are important for treaty arbitrations.⁷⁰³ Unlike common law judges, ICSID arbitrators do not create, but only apply, international law.⁷⁰⁴ However, ICSID tribunals tend to rely heavily on the previous international judicial decisions, in particular on those of other ICSID tribunals. ICSID tribunals rely on prior ICSID decisions as well as UNCITRAL, IUSCT, and other investment tribunal decisions.⁷⁰⁵ It is interesting to note that purely domestic judicial decisions also constitute a part of international law in accordance with Article 38 at the ICJ Statute.

697. See Ole Kristian Fauchald, 301, *supra* note 635.

698. *AES Corporation v. Argentina* (ICSID Case No. ARB/02/17), Decision on Jurisdiction of 26 April 2005, 12 ICSID Reports 308, paras 27–28.

699. *Ibid.*

700. *ADC Affiliate et al. v. Hungary* (ICSID Case No. ARB/03/16), Award of 2 October 2006, para. 293.

701. For a survey of sources relied upon by investor-state tribunals, see Jeffrey Commission, Precedent in Investment Treaty Arbitration – A Citation Analysis of a Developing Jurisprudence, 24 *Journal of International Arbitration* 129 (2007).

702. Statute of the ICJ, Art. 38.

703. Emmanuel Gaillard and Yas Banifatemi (eds), *The Precedent in International Arbitration* (Juris Net 2008).

704. See, generally, Edward McWhinney, *The World Court and the Contemporary International Law-Making Process* (Brill 1979).

705. Ole Kristian Fauchald, *supra* note 635.

441. The tribunal in *Enron v. Argentina* explained why tribunals resort to this source of law:

The conclusions of the Tribunal follow the same line of reasoning, not because there might be a compulsory precedent, but because the circumstances of the various cases are comparable, and in some circumstances identical.⁷⁰⁶

442. Similarly, the tribunal in *AES Corporation v. Argentina* observed that although prior ICSID awards, even those applying similar BIT language, do not constitute binding precedent, this does not mean that no consideration is given to other decisions on jurisdiction or to awards delivered by other tribunals in similar cases.⁷⁰⁷ The tribunal found itself not barred, as a matter of principle, from considering the position taken or the opinion expressed by other tribunals.⁷⁰⁸

443. Arguably, ICSID earlier cases have become one of the most important factors shaping international law for two reasons. First, well-qualified and impartial jurists, who address specific facts by applying international law, render ICSID awards. Second, the reliance on earlier cases facilitates the consistent application of international law and the predictability of results, which is important for development and underscores the increasing role and prestige of international investment law.

706. *Enron Corporation and Ponderosa Assets v. Argentina* (ICSID Case No. ARB/01/3), Decision on Jurisdiction (Ancillary Claim) of 2 August 2004, para. 25.

707. *AES Corporation v. Argentina* (ICSID Case No. ARB/02/17), Decision on Jurisdiction of 26 April 2005, 12 ICSID Reports 308, 317, paras 27–28.

708. *Ibid.*

Chapter 3. Applicability of the ILC Articles on State Responsibility

444. The law on state responsibility is a major topic in international law, and it plays an important role in international investment law. This chapter will first explore preliminary issues, such as whether and when investment tribunals should apply the International Law Commission Articles on State Responsibility (ILC Articles),⁷⁰⁹ noting significant differences in the awards of different tribunals. Then it will consider how ICSID tribunals apply the ILC Articles, paying attention to issues and challenges specific to the investment context.

445. The first question to address is whether the ILC Articles are relevant to investor-state disputes as customary international law when one party is not a state entity. Despite the widespread acceptance of the articles, not all of them represent custom. When drafting the articles, the International Law Commission (ILC) itself stated that it was engaged in an exercise of both codification and progressive development of international law, but did not specify which provision was which. The ILC Articles discussed below were explored in some depth by tribunals and are generally viewed as representing custom.⁷¹⁰ The one exception to this is Article 5 (Conduct of persons or entities exercising elements of governmental authority): on a number of occasions the ICJ has refused to give its opinion on the customary nature of this provision.⁷¹¹ Nevertheless, the awards of investor-state tribunals⁷¹² are strongly in favour of Article 5 being treated as representing custom.

446. The second issue is whether the ILC Articles apply in disputes where one of the parties is not a state entity. Here, the approach of tribunals has been mixed. In *Wintershall v. Argentina*, for example, the tribunal held that the ILC Articles have no applicability to disputes between state and non-state actors.⁷¹³ However, the dominant position is that at least Part I of the ILC Articles, the provisions on attribution, do apply to investor-state disputes. This position is supported by the text of the ILC Articles themselves as well as general comments.⁷¹⁴

709. Articles on State Responsibility.

710. For Art. 4, see *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports 43 (hereafter ‘*Bosnian Genocide*’) (2007), para. 385; for Art. 8, see *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 14, paras 105–116 (1986) and *Bosnian Genocide*, paras 396–415; for Art. 11, see *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ Reports 3 (1980) and Articles on State Responsibility, Commentary to Article 11.

711. See, for example, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Reports 168, para. 160 (2005).

712. See, for example, *Jan de Nul N.V. and Dredging International N.V. v. Egypt* (ICSID Case No. ARB/04/13), Decision on Jurisdiction of 16 June 2006, para. 89; *Noble Ventures, Inc v. Romania*, para. 69, *supra* note 433; *Saipem SpA v. Bangladesh* (ICSID Case No. ARB/05/07), Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007, para. 148.

713. *Wintershall Aktiengesellschaft v. Argentina* (ICSID Case No. ARB/04/14), Award of 8 December 2008, para. 113.

714. See Articles on State Responsibility, General Comment 5 to Article 1. Note that the question of whether other parts of the Articles on State Responsibility apply to investor-state disputes is more controversial. See further *Quiborax S. A. and Non Metallic Minerals S. A. v. Bolivia* (ICSID Case

447. The ILC Articles were intended to apply when a state has breached its international obligation: the title of the articles itself suggests that they only apply to an ‘Internationally Wrongful Act’, a conclusion reinforced by the commentary.⁷¹⁵ Nevertheless, a number of ICSID tribunals have sought to apply the articles in other contexts, including the question of whether the state is bound by an estoppel.⁷¹⁶ Academic commentary has, however, been critical of such decisions,⁷¹⁷ and the orthodox position is that the articles only apply when dealing with a breach of an international obligation.⁷¹⁸

448. A particular issue relating to the scope of application of the ILC Articles concerns umbrella clauses. These clauses aim to elevate contractual (or other domestic law) obligations into treaty obligations. The question is whether the ILC Articles should be used when determining whether a state has entered into a domestic law obligation which it then breached. Tribunals have never properly explored this issue, often avoiding it or stating their conclusions without explanation.⁷¹⁹ However, three broad positions seem to emerge.

449. According to one view, the ILC Articles do apply.⁷²⁰ However, this position has been criticized on the basis that, as noted above, the ILC Articles only apply when there has been a breach of an international obligation which is not present in the mere act of entering into a relationship with an investor.⁷²¹ According to another view, although the ILC Articles do not apply, they are relevant to the question of attribution. While this position has some academic support, it has little support from

No. ARB/06/02), Award of 16 December 2015 and *MTD Equity Sdn. Bhd. and MTD Chile S. A. v. Chile* (ICSID Case No. ARB/01/7), Award of 25 May 2004 and Decision on Annulment of 21 March 2007.

715. Articles on State Responsibility, Introductory Commentary to Part One, Ch. II, paras 5 and 7.

716. *Duke Energy International Peru Investments No 1 Limited v. Peru* (ICSID Case No. ARB/03/28), Award of 18 August 2008. See also *Waguïh Elie George Siag and Clorinda Vecchi v. Egypt* (ICSID Case No. ARB/05/15), Award of 1 June 2009 where the tribunal relied on the Articles on State Responsibility to decide whether the respondent state should be viewed to have waived an objection to jurisdiction.

717. For example, Simon Olleson, Attribution in Investment Treaty Arbitration, 31(2) ICSID Rev. 457, 463–464 (2016) and James Crawford, Investment Arbitration and the ILC Articles on State Responsibility, 25 ICSID Rev. 127 (2010).

718. *Ibid.*, Crawford.

719. Nick Gallus, An Umbrella Just for Two? BIT Obligations Observance Clauses and the Parties to a Contract, 24 Arbitration International 157 (2008).

720. *SGS Société Générale de Surveillance SA v. Pakistan* (ICSID Case No. ARB/01/13), Decision on Jurisdiction of 6 August 2003, para. 166; *Noble Ventures*, para. 86, *supra* note 433. See also Georgios Petrochilos, Case Comment: Bosh International, Inc and B&P Ltd Foreign Investment Enterprise v. Ukraine – When Is Conduct by a University Attributable to the State, 28(2) ICSID Rev. 262, 272 (2013).

721. Olleson, 465, *supra* note 716.

tribunals.⁷²² Further, even those commentators who argue for this position give little detail on the content of these international rules and fail to clearly justify why the ILC Articles should apply.⁷²³

450. Finally some conclude the proper law of the contract should control attribution.⁷²⁴ In other words, unless international law is chosen by the parties, it will be a system of domestic law that decides whether a state entered into a contract (or other obligation) with the investor. This approach avoids the problems of the two previous approaches and seems to best fit with the dominant view that umbrella clauses only operate to give the tribunal jurisdiction and do not affect the nature of the obligation.⁷²⁵

451. While all of the provisions in Part I of the ILC Articles are potentially relevant, we will focus on Articles 4, 5 and 8, which are most often applied by ICSID tribunals. This chapter will focus on these articles and their interpretation. Article 4 states:

Article 4. Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

452. As the Commentary to Article 4 explains, analysis of attribution should start with Article 4. Unsurprisingly, the provision has been discussed and applied by investment tribunals on a number of occasions.⁷²⁶ Article 4 raises issues concerning

722. Shotaro Hamamoto, Parties to the ‘Obligations’ in the Obligations Observance (‘Umbrella’) Clause, 30(2) ICSID Rev. 449, 462–463 (2015); Michael Feit, Attribution and the Umbrella Clause – Is there a Way out of the Deadlock?, 21 Minnesota Journal of International Law 21, 38–40 (2012).

723. James Crawford and Paul Mertenskotter, ‘The Use of the ILC’s Attribution Rules in Investment Treaty Arbitration’ in Building International Investment Law: The First 50 Years of ICSID, 33–34 (Meg Kinnear, Geraldine R. Fischer, Jara Minguez Almeida, Luisa Fernanda Torres, Mairée Uran Bidegain (eds), Kluwer Law International 2015).

724. This seems to have been followed in a number of decisions: *Impregilo SpA v. Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction of 22 April 2005; *Azurix Corp. v. Argentina* (ICSID Case No. ARB/01/12), Award of 14 July 2006; *CMS Gas Transmission Company v. Argentina* (ICSID Case No. ARB/01/8), Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic of 25 September 2007; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina* (ICSID Case No. ARB/97/3), Decision on Annulment of 3 July 2002.

725. Crawford and Mertenskotter, 34, *supra* note 722; Olleson, 466, *supra* note 716.

726. For example, *Toto Costruzioni Generali S.P.A v. Lebanon* (ICSID Case No. ARB/07/12), Decision on Jurisdiction of 11 September 2009; *EDF (Services) Ltd v. Romania* (ICSID Case No. ARB/05/13), Award of 8 October 2009; *Gustav F W Hamester GmbH & Co KG v. Ghana* (ICSID Case No.

the role of domestic law. The first issue is whether the classification of a person or entity as an organ of the state in domestic law is conclusive for Article 4's purposes.

453. Tribunal practice is mixed: some tribunals seem to treat domestic law as merely creating a presumption,⁷²⁷ while others take the view that domestic law is conclusive.⁷²⁸ The second way that domestic law may be relevant is where the relevant person or entity is not designated as a state organ. The Commentary to Article 4 notes that it is not strictly necessary for an entity to be designated as an organ, and that it may be appropriate to examine the powers of the relevant entity under domestic law. The *Hamester* award is one example of this.⁷²⁹ As Article 5 states:

Article 5. Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

454. Where a person or entity is not an organ of the state in the Article 4 sense, it nevertheless remains open to a tribunal to find that the person or entity is a de facto organ under Article 5. According to Article 5, where an entity is 'empowered by the law of the State to exercise elements of governmental authority' its conduct will be attributed to the state.

455. The obvious difficulty here is determining what should be considered as 'elements of governmental authority'. The Commentary to Article 5 gives little guidance on the scope of this concept other than that what is governmental authority and how it differs across time and from state to state.⁷³⁰ Tribunals have stated that it must be shown that 'the precise act in question was an exercise of governmental authority and not merely an act that could be performed by a commercial entity',⁷³¹ but this does little more than restating the problem. On the whole, however, a restrictive view has been taken, with a number of tribunals denying attribution where the entity was acting pursuant to a contract and was acting in a way in which any contractual party could act.⁷³² As Article 8 states:

ARB/07/24), Award of 18 June 2010; *Jan de Nul N.V. and Dredging International N.V. v. Egypt* (ICSID Case No. ARB/04/13), Award of 6 November 2008.

727. *Ibid.*, *EDF v. Romania*, para. 188.

728. *Deutsche Bank AG v. Sri Lanka* (ICSID Case No. ARB/09/02), Award of 31 December 2012, para. 356.

729. *Hamester*, paras 183–186, *supra* note 725.

730. Articles on State Responsibility, Commentary to Article 5, para. 6.

731. *Hamester*, para. 193, *supra* note 725.

732. *Jan de Nul*, para. 161, *supra* note 725; *Hamester*, paras 190–193, 197, 255, 266 and 284, *supra* note 725; *Ulysseas v. Ecuador* (UNCITRAL), Final Award of 12 June 2012, paras 136, 139, 178 and 185.

Article 8. Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

456. A further way in which the acts of an entity may be attributed to the state is through Article 8, which states that the conduct of a person or entity is attributable when ‘acting on the instructions of, or under the direction or control of, that State in carrying out the conduct’. ICJ cases have clarified that the test is extremely narrow; in *Bosnian Genocide* the ICJ confirmed that it must be shown either that the State exercised direction or control over the entity in question or gave instructions to the entity, in relation to the specific conduct in question.⁷³³

457. The broader overall control test suggested in *Tadic*⁷³⁴ was clearly rejected. Investment tribunals have also applied the stricter test.⁷³⁵ Article 8 has featured a small number of cases, possibly because of the difficulty of satisfying the high threshold established in *Nicaragua* and *Bosnian Genocide*.

458. To sum up, attribution is an important topic in international investment arbitration, but tribunals are struggling to develop a uniform position on basic questions such as the applicability of the ILC Articles. Nevertheless, when applying the articles tribunals are, on the whole, following the approaches and tests established in general international law.

733. *Bosnian Genocide*, para. 400, *supra* note 709, confirming *Nicaragua*, para. 115, *supra* note 709.

734. *Prosecutor v. Tadic*, Case No. IT-94-1, 38 ILM 1518 (1999).

735. For example, *Jan de Nul*, para. 173, *supra* note 725; *White Industries Australia Limited v. India* (UNCITRAL), Final Award of 30 November 2011, paras 8.1.16–8.1.18.

Chapter 4. Principles of International Investment Law

459. As discussed above, ICSID tribunals play an important role in development of international investment law. The principles commonly included in BITs to protect investors include FET, non-discrimination, protection from expropriation, unfair and unjustified measures, the most-favoured-nation (MFN) principle as well as full protection and security. The following sections demonstrate how these principles are understood in ICSID jurisprudence.

§1. FAIR AND EQUITABLE TREATMENT (FET)

I. Overview

460. The FET is one of the most important principles of international investment law.⁷³⁶ The World Bank Guidelines on the Treatment of Foreign Direct Investment require that all states extend FET to investments established in their territories by nationals of any other state.⁷³⁷ The treatment should be as favourable as that accorded by the state to domestic investors in similar circumstances.⁷³⁸ In addition, FET includes non-discrimination among foreign investors on the grounds of nationality. The Guidelines further clarify that full protection and security should be accorded to the investor's rights regarding ownership, control and substantial benefits derived from the property.⁷³⁹

461. The concept of legitimate expectations is key for determining FET. The FET is not a static standard frozen at the moment of conclusion of the treaty but reflects 'the present state of development of public international law in the field of investment protection'.⁷⁴⁰ The standard does not entitle the investors to stability as such but rather to a reasonable expectation created by written commitments (such as a stabilization clause), statements or conduct of the state.⁷⁴¹ It is important to have specific rather than abstract expectations with specific evidential support for the alleged expectation.⁷⁴² Decision on what constitutes a breach often requires a

736. Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, 1 (Oxford University Press 2008).

737. World Bank Guidelines, para. 3.

738. *Ibid.*

739. *Ibid.*

740. *Gold Reserve Inc. v. Venezuela* (ICSID Case No. ARB(AF)/09/01), Award of 22 September 2014, para. 567.

741. *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* (ICSID Case No. ARB/05/20), Final Award of 11 December 2013, para. 666.

742. *David Minnotte & Robert Lewis v. Poland* (ICSID Case No. ARB(AF)/10/1), Award of 16 May 2014, paras 194, 196.

judgment all of the tribunal. For example, in one case ICSID tribunal ruled that a tax increase of 50% had not breached the FET provision while the tax at 99% had.⁷⁴³

462. FET of foreign investors implies prompt issue of licences and concessions that may be necessary for the uninterrupted operation of the admitted investment, the authorization of foreign personnel, the free transfer of net revenues realized from the investment and the guarantees in case of the liquidation of the investment.⁷⁴⁴ In *Mondev*, the ICSID tribunal explained that a state need not act in bad faith to violate fair and equitable principle.⁷⁴⁵ Tribunal in *Rumeli Telekom* explained that the FET standard includes the following elements: good faith, transparency, treatment by the State should not be grossly unfair, arbitrary or lacking in procedural propriety or due process. It also emphasized the importance of the investor's reasonable legitimate expectations.⁷⁴⁶

463. ICSID tribunals looked into various factors to determine whether the treatment of investors was fair and equitable, including any specific representations made to the investor on which he or she reasonably relied, discrimination compared to other investors, transparency of decision-making, as well as coercion and harassment by state authorities.⁷⁴⁷ It has been held by ICSID tribunals that the de facto difference in treatment of foreign investors as compared to national investors is a violation of the national treatment principle and is sufficient to create a presumption of discrimination.⁷⁴⁸

464. *El Paso v. Argentina* tribunal ruled that the full protection and security standard entails 'no more than the traditional obligation to protect aliens under international customary law' and which applies when 'the acts challenged may not in themselves be attributed to the Government, but to a third party'.⁷⁴⁹ This standard imposes 'a duty of prevention and a duty of repression'. If the challenged actions are attributable to the host state, this standard is not relevant.⁷⁵⁰

743. *Gold Reserve Inc. v. Venezuela* (ICSID Case No. ARB(AF)/09/1), Award of 22 September 2014, para. 567.

744. *Ibid.*, paras 5–6.

745. See also *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002, para. 116; *The Loewen Group, Inc. & Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award on Jurisdiction of 5 January 2001, para. 132.

746. *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan* (ICSID Case No. ARB/05/16), Award of 29 July 2008.

747. *Pope and Talbot Inc. v. Canada* (UNCITRAL), Award on the Merits of Phase 2 of 10 April 2001.

748. *Marvin Roy Feldman Karpa v. Mexico* (ICSID Case No. ARB(AF)/99/1), Award and Dissenting Opinion of 16 December 2002, 7 ICSID Reports 341, 366–367.

749. *El Paso Energy International Company v. Argentina* (ICSID Case No. ARB/03/15), Award of 31 October 2011, paras 522.

750. *Ibid.*, paras 523–524.

465. In *Waste Management v. Mexico*, a claimant asserted that the failure in its business resulted from the combination of the conduct of local, provincial and federal authorities with the failure of the Mexican courts and tribunals to provide any relief. The tribunal elaborated:

fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust, idiosyncratic or discriminatory and exposes claimant to sectional or racial prejudice.⁷⁵¹

466. At the same time, the standard of FET should be viewed in the light of ‘the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders’.⁷⁵² This, *inter alia*, includes the right of governments to act in the broader public interest by protecting the environment, granting or withdrawing government subsidies, regulating tariff levels and imposing zoning restrictions.⁷⁵³

467. The unlawfulness of a host state’s measures under its own legislation is neither necessary nor sufficient to constitute a breach actionable under the Convention. The tribunal in *ADF Group Inc.* has stated with regard to the ‘FET’ standard contained in Article 1105(1) NAFTA that ‘something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements’.⁷⁵⁴

468. Investment treaties are not meant to penalize each and every breach by the government of the rules or regulations to which it is subject and for which the investor may normally seek redress before the courts of the host state.⁷⁵⁵ In *Saluka Investments BV v. Czech Republic*,⁷⁵⁶ the claimant alleged that the government acted in violation of the ‘FET’ standard by illegally granting massive financial assistance to its competitors and thus distorting fair competition.⁷⁵⁷ The tribunal in *Saluka* disagreed with the claimant and observed that the standard of FET and the non-impairment standards are not breached by a mere violation of domestic law.

469. There have also been a number of cases where tribunals have relied on a breach of contract to find a violation of the FET standard. For example, in *Teinver* the tribunal held that although not all contractual breaches would amount to a

751. *Waste Management, Inc v. Mexico* (ICSID Case No. ARB(AF)/00/3), Award of 30 April 2004, para. 98.

752. *S.D. Myers v. Canada* (UNCITRAL), First Partial Award on Liability of 13 November 2000, para. 236.

753. *Mavrin Roy Feldman v. Mexico* (ICSID Case No. ARB(AF)/99/1), Award and Dissenting Opinion of 16 December 2002, para. 103.

754. *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1), Award of 9 January 2003.

755. *Ibid.*, 442.

756. *Saluka Investments BV v. The Czech Republic* (UNCITRAL), Partial Award of 17 March 2006.

757. *Ibid.*, paras 433–467.

breach of the FET standard there was a breach on the fact as the contract was one which allowed the Argentine government to fulfil ‘its public obligation to guarantee the provision and continuity of air transportation services in Argentina’.⁷⁵⁸

470. An important recent development in the FET standard has been the requirement that investors carry out due diligence before they make their investment. Some tribunals have relied on a failure to conduct due diligence to reject the investor’s claim.⁷⁵⁹ This is a novel element of tribunals’ analysis, and there is no clear indication as to what investors must do to ensure that they satisfy this requirement.⁷⁶⁰

II. Legitimate Expectations and Legal Stability

471. A major element of the FET standard is the protection of the investor’s legitimate expectations,⁷⁶¹ which, according to tribunals, consist of three elements: a specific representation, the investor must have relied on the representation and the investor’s reliance on the representation must have been reasonable.⁷⁶²

472. Interpretation of legitimate expectations of foreign investors has led to some controversy. The first issue is the relationship between treaty law and customary international law. While some tribunals treated the FET standard as the same as the minimum standard of treatment in customary international law,⁷⁶³ others held that the two were distinct.⁷⁶⁴

473. The second issue has been how specific a state’s representation must be before it may give rise to a legitimate expectation on the part of the investor. Some tribunals have held that absent a specific representation to the claimant general legislation is not enough to create a legitimate expectation. *Teinver* concerned the imposition of a new regime regulating the aviation industry, which affected, *inter alia*, domestic airfares. In rejecting the investor’s argument that the state had breached its legitimate expectation, the tribunal stated:

758. *Autobuses Urbanos del Sur S.A., Teinver S.A. and Transportes de Cercanías S.A. v. Argentina* (ICSID Case No. ARB/09/1), Award of 21 July 2017, para. 854.

759. *Antaris Solar GmbH and Dr Michael Gode v. The Czech Republic* (PCA Case No. 2014-01), Award of 2 May 2018, paras 395–397 and 432–440; *David R. Aven and others v. Costa Rica* (ICSID Case No. UNCT/15/3), Final Award of 18 September 2018, paras 282 and 460.

760. Note that this requirement often does not appear in international investment agreements, and arbitrators have taken mixed views as to its relevance, *see* UNCTAD, *Fair and Equitable Treatment: A Sequel in UNCTAD Series on Issues in International Investment Agreements II*.

761. *See further* Teerawat Wongkaew, *Protection of Legitimate Expectations in Investment Treaty Arbitration: A Theory of Detrimental Reliance* (Cambridge University Press 2019).

762. *Peter A. Allard v. Barbados* (PCA Case No. 2012-06), Award of 27 July 2016, para. 194.

763. *Mercer International v. Canada* (ICSID Case No. ARB(AF)/12/3), Award of 6 March 2018, para. 2.61.

764. *Cervin Investissements S.A. and Rhone Investissements S.A. v. Costa Rica* (ICSID Case No. ARB/13/2), Award of 7 March 2017, paras 452–453.

[T]he Tribunal finds that the regulatory framework for domestic air transportation at the time of Claimants' investment did not provide an objective basis for much in the way of expectations on the part of Claimants. The applicable legislation was very general in nature, and did not reflect any specific intention or commitment to protect tariffs ...⁷⁶⁵

474. Other tribunals, however, have allowed a claim for breach of the FET standard founded on legitimate expectations on the basis of general legislation or regulation.⁷⁶⁶ Some tribunals ignore the requirement of a representation altogether, and focus on the question of what it was reasonable for the claimant to expect.⁷⁶⁷

475. However, tribunals that adopted the former position still found a breach of the broader FET standard where the state had failed to provide fundamental stability in basic legal system. One example of such a case is *Eiser v. Spain* which concerned changes in the host state's legislative framework for renewable energy. While the tribunal argued that for the investor to have legitimate expectations there had to be an explicit undertaking made to the investor, it held that there was nevertheless a breach of the FET standard contained in Article 10(1) Energy Charter Treaty. The tribunal stated that the provision:

embrace[d] an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments.⁷⁶⁸

476. The fundamental stability rule does have limits. *Novenergia v. Spain* concerned the same reforms as in *Eiser*. The tribunal held that there was a breach of the FET standard in relation to only some of the changes. It explained that the changes which occurred between 2010 and 2013 did not breach the FET standard because they did not 'entirely transform fundamentally change the framework the Claimant relied on when it made its investment ...'.⁷⁶⁹ Yet reforms that took place between 2013 and 2014 did effect such a change resulting in a breach of the standard.⁷⁷⁰

765. *Teinver*, para. 677, *supra* note 757. See also *Union Fenosa v. Egypt* (ICSID Case No. ARB/14/4), Award of 31 August 2018, paras 9.151–9.154.

766. *Foresight Luxembourg and others v. Spain* (SCC Arbitration v. 2015/150), Final Award of 14 November 2018, paras 342–381; *Novenergia v. Spain* (SCC Arbitration 2015/063), Final Award of 15 February 2018, paras 665–681; *Masdar Solar & Wind Cooperatief U.A. v. Spain* (ICSID Case No. ARB/14/1), Award of 16 May 2018, paras 489–522.

767. *Murphy Exploration & Production Company – International v. The Republic of Ecuador (II)* (PCA Case No. 2012-16), Partial Final Award of 6 May 2016, paras 276, 280, 281 and 292; *Ell Lilly v. Canada* (ICSID Case No. UNCT/14/2), Final Award of 16 March 2017, paras 382–384.

768. *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Spain* (ICSID Case No. ARB/13/36), Award of 4 May 2017, para. 382.

769. *Novenergia*, para. 689, *supra* note 765.

770. *Ibid.*, para. 695.

III. Preserving Regulatory Autonomy

477. Some states became increasingly vocal that international investment law erodes their sovereignty and regulatory autonomy. Tribunals have started to respond to such concerns in their analysis. One way is by explicitly invoking the state's right to regulatory freedom as part of their reasoning. For example, the tribunal in *Philip Morris v. Uruguay* stated that where the challenged measure deals with a well-known health issue, and is reasonable and adopted in good faith, states must be given substantial deference.⁷⁷¹

478. Tribunals have also invoked the principle of proportionality to protect the regulatory autonomy of states.⁷⁷² *Antaris and Gode* concerned amendments to the incentive regime in the renewable energy sector. The tribunal accepted the respondent's justification that the changes were needed to reduce excessive profits and reduce the burden on energy consumers. In doing so it adopted a two-stage analysis. First, the tribunal asked whether the Respondent has a rational objective for adopting the measures. Second, the tribunal asked whether the challenged measures were proportionate to the objectives pursued.⁷⁷³ In considering the FET obligation in Article 10(1) Energy Charter Treaty, the tribunal in the earlier *Blusun* case similarly held that if the measures were not disproportionate to their aim and paid due regard to the interests of investors they were permissible.⁷⁷⁴

§2. PROHIBITION OF ARBITRARY AND DISCRIMINATORY MEASURES

479. The standard of protection against arbitrariness and discrimination is related to that of FET. Any measure that might involve arbitrariness or discrimination is in itself contrary to FET.⁷⁷⁵ Investment tribunals often cite the ICJ decision in the *ELSI* case⁷⁷⁶ on the issue of arbitrary measures.⁷⁷⁷ Considering the legality of the requisition of a foreign-owned factory in order to prevent its closure and the lay-off of a thousand workers, the ICJ observed:

771. *Philip Morris v. Uruguay* (ICSID Case No. ARB/10/7), Award of 8 July 2016, para. 418; *see also Urbaser and CABB v. Argentina* (ICSID Case No. ARB/07/26), Award of 8 December 2016, paras 622 and 628.

772. *See further* Gebhard Bucheler, *Proportionality in Investor-State Arbitration* (Oxford University Press 2015); Valentina Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (Edgar Elgar Publishing 2018); Federico Ortino, *Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing*, 30(1) *Leiden Journal of International Law* 71 (2017).

773. *Antaris Solar and Gode*, para. 444, *supra* note 758.

774. *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italy* (ICSID Case No. ARB/14/3), Award of 27 December 2016, para. 319(5); *Teinver and others v. Argentina*, para. 688, *supra* note 757.

775. *CMS Gas Transmission Company v. Argentina* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para. 290.

776. *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment of 20 July 1989.

777. *See, for example, Alex Genin and Others v. Estonia* (ICSID Case No. ARB/99/2), Award of 25 June 2001, para. 371; *Noble Ventures, Inc. v. Romania*, para. 176, *supra* note 433.

[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the court in the Asylum case, when it spoke of ‘arbitrary action’ ‘being substituted for the rule of law’. It is wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.

480. In *S.D. Myers*⁷⁷⁸ an investor alleged that the government’s measures affecting the operations of waste exporters were applied in an arbitrary and unjustifiable manner that also constituted a disguised restriction on international trade or investment. In that case, waste disposal companies in the United States were not permitted to operate in Canada in the same fashion as Canadian waste disposal companies. It was alleged that the government limited the investor’s ability to carry out its operations on an arbitrary and discriminatory basis in violation of the treaty.⁷⁷⁹ The tribunal concluded that the principle of FET was violated by Canada’s unjust and arbitrary measures:

only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case.⁷⁸⁰

481. Another ICSID tribunal concluded that foreign investors could legitimately expect a host state to act consistently, that is, ‘without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities’.⁷⁸¹

482. In *Tokios Tokelés v. Ukraine*, the claimant alleged that governmental authorities in the Ukraine were engaged in a campaign of oppression, which violated the Ukraine-Lithuania BIT.⁷⁸² The alleged violations merely pertained to a tax investigation, which was seen by the claimant as retaliation for certain political activities in which he was engaged in the past. The tribunal observed that ‘[w]hat does matter, for the purposes of the Treaty, is whether there was a malicious campaign, and if so whether it can be attributed to the respondent State’.⁷⁸³ The tribunal

778. *S.D. Myers v. Canada* (UNCITRAL), Partial Award of 13 November 2000.

779. The claimant relied on the following NAFTA treaty provision: ‘[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security’.

780. *S.D. Myers v. Canada*, para. 236, *supra* note 777.

781. *Técnicas Medioambientales Tecmed, S.A. v. Mexico* (ICSID Case No. ARB(AF)/00/2), Award of 29 May 2003.

782. *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18), Award of 26 July 2007, para. 4.

783. *Ibid.*

eventually concluded that the claimant failed to meet the burden of proof by showing that his assertions were more likely than not to be true.⁷⁸⁴

483. Many tribunals treat arbitrary and discriminatory measures as just one instance that could give rise to a breach of the FET standard.⁷⁸⁵ Nevertheless, some BITs, contracts and tribunals have considered such matters independently of the FET standard. For example, *Teinver* concerned the failure of the state to comply with the agreed valuation method in a sale agreement. In holding that this breached the FET provision of the Argentina-Spain BIT, the tribunal found that the state's conduct, especially its act of obtaining an injunction to maintain its appointee as the manager of the airlines in question and expropriating the shares, was arbitrary due to the clear breach of contract.⁷⁸⁶

484. *Copper Mesa Mining v. Ecuador* concerned measures taken by the state in response to local opposition to the investor's activities. Faced with protesters imposing a blockade on the investor's site, the state issued an administrative resolution which prohibited all persons, including the investor, accessing the site. The tribunal found that the state had effectively supported the protestor's activity despite having granted a concession to the investor. Such a decision, the tribunal said:

was arbitrary, in the sense that it was unreasonable and disproportionate at that time to side so completely with the anti-miners as to make it impossible, both legally and physically, for the Claimant to complete its [environmental impact study], with inevitable consequences.⁷⁸⁷

485. Some cases which have dealt with the issue of arbitrariness have displayed concern for the regulatory autonomy of states. *Mercer v. Canada* related to an alleged failure by Canadian regulators to ensure uniform treatment for pulp mills. There were also allegations that the state denied the benefits to the claimant's subsidiary which were available to its competitors. The tribunal held that Article 1105 of NAFTA does not provide an absolute prohibition on discriminatory measures or require regulatory transparency. It held that on the facts the claimant had failed to show 'irrationality, injustice, arbitrariness or a violation of due process' that would justify the finding of a breach.⁷⁸⁸

784. *Ibid.*, paras 124, 136.

785. *Cervin Investissements S.A. and Rhone Investissements S.A. v. Costa Rica* (ICSID Case No. ARB/13/2), Award of 7 March 2017, para. 462.

786. *Autobuses Urbanos del Sur S.A., Teinver S.A. and Transportes de Cercanías S.A. v. Argentina* (ICSID Case No. ARB/09/1), Award of 21 July 2017, para. 925.

787. *Copper Mesa Mining Corporation v. Republic of Ecuador* (PCA Case No. 2012-2), Award of 15 March 2016, para. 6.84.

788. *Mercer International v. Canada* (ICSID Case No. ARB(AF)/12/3), Award of 6 March 2018, para. 7.76.

§3. DENIAL OF JUSTICE

I. Overview

486. The OECD considers denial of justice a part of customary international law:

In the broadest sense, it seems to embrace the whole field of State responsibility, and has been applied to all types of wrongful conduct on the part of the State towards aliens it includes therefore acts or omissions of the authorities of any of the three branches of government, i.e., executive, legislative or judiciary. In the narrowest sense, it is ‘limited to refusal of a State to grant an alien access to its courts or a failure of a court to pronounce a judgment’.⁷⁸⁹

487. In one case tribunal explained that the prohibition of denial of justice constitutes a part of the FET standard and also a part of customary international law.⁷⁹⁰ The essential requirements include treatment of foreign investors in the manifestly unjust and anti-judicial manner; and the investor should have exhausted all internal legal remedies to set aside the clearly anti-judicial decision, unless domestic challenges would be futile.⁷⁹¹

488. Another tribunal also distinguished between denial of justice claim under and relevant BIT as a part of its FET clause and denial of justice as part of international customary law.⁷⁹² Unlike the customary international law standard, the FET standard also ‘protects the foreign shareholder in a local company’.⁷⁹³ The *Arif* tribunal also explained that although acts of judiciary are acts of state as acts of any other branch of the government, ‘international tribunals must refrain from playing the role of ultimate appellate courts’. Denial of justice would require bad faith, lack of due process and adoption by courts of arguments ‘so egregious li wrong that no honest court would use them’.⁷⁹⁴

489. When investors are dissatisfied with the way they are treated by the courts or administrative agencies of a host state, they often claim denial of justice. The *Loewen* case is the most frequently discussed authority on denial of justice in which the tribunal defined the criteria for the denial of justice:

In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was

789. OECD, Fair and Equitable Treatment Standard in International Investment Law (2004), 28 (internal citations omitted).

790. *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Venezuela* (ICSID Case No. ARB/10/19), paras 376–378.

791. *Ibid.*, para. 365.

792. *Ibid.*, para. 435.

793. *Ibid.*, para. 438.

794. *Arif v. Moldova* (ICSID Case No. ARB/11/23), Award of 8 April 2013, paras 453, 497.

clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.⁷⁹⁵

490. As noted in *Azinian v. United Mexican States*, an investor can claim the denial of justice if ‘the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way’.⁷⁹⁶ The tribunal held that the possibility of holding a state accountable for judicial decisions does not ‘entitle a claimant to a review of national court decisions as though the international jurisdiction seized this plenary appellate jurisdiction’.⁷⁹⁷ As the tribunal further emphasized, ‘[w]hat must be shown is that the court decision itself constitutes a violation of the treaty’.⁷⁹⁸ It is important to emphasize that a claim for denial of justice must not be confused with an appeal against decisions of national judiciary. ICSID tribunals are not a substitute for a super-appellate court reviewing decisions of domestic courts.⁷⁹⁹

491. If the investor can effectively address the alleged violations in domestic courts, there is usually no denial of justice. According to *Mondev International Ltd. v. United States of America*,⁸⁰⁰ the applicable standard for denial of justice is the presence of a ‘wilful disregard of due process of law, which shocks, or at least surprises, a sense of judicial propriety’.⁸⁰¹

492. As one commentator noted, ‘international law attaches state responsibility for juridical action only if it is shown that there was no reasonably available mechanism to correct the challenged action’.⁸⁰² States are expected to provide a fair and efficient *system* of justice, but they cannot guarantee that judicial misconduct will never occur.⁸⁰³

II. Exhaustion of Local Remedies

493. In recent years tribunals have paid greater attention to the interests of states by denying claims for a denial of justice where the investor has not yet exhausted local remedies in the host state. This suggests the adoption of a more holistic view

795. *Loewen Group, Inc. & Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award of 26 June 2003, para. 133 (quoting *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002, para. 127.

796. *Azinian v. Mexico* (ICSID Case No. ARB(AF)/97/2), Decision of 1 November 1999, para. 102.

797. *Ibid.*, para. 99.

798. *Ibid.*

799. *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Albania* (ICSID Case No. ARB/11/24), Award of 30 March 2015, para. 764.

800. *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002.

801. *Ibid.*, para. 127.

802. Jan Paulsson, *Denial of Justice in International Law*, 100 (Cambridge University Press 2005) (discussing the ICSID ruling in *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award of 26 June 2003.

803. *Ibid.*

of whether there has been a denial of justice rather than simply assessing whether one isolated incident constitutes a denial.

494. This can be seen most clearly in *Corona Materials v. Dominican Republic* in which the investor complained that it had not received a reply to its motion for reconsideration after it had been denied a licence to operate a mine. The tribunal left open the question of whether the decision itself was problematic, instead noting that the first-level administrative decision could not give rise to a denial of justice. It pointed out that the investor had not exhausted other remedies and avenues of appeal which were available under domestic law, and for that reason rejected the denial of justice claim.⁸⁰⁴

495. This approach was also adopted in the case of *Marfin v. Cyprus*. The investors claimed that there had been a denial of justice due to the granting of a worldwide freezing injunction against its assets, but the tribunal noted that the claimant had not exhausted all avenues of appeal.⁸⁰⁵ Therefore, as the futility exception clearly did not apply,⁸⁰⁶ the tribunal held that there had not been a denial of justice.

496. The rule has, however, been interpreted flexibly. Notable, the requirement to exhaust local remedies has not been raised to the status of a jurisdictional requirement. This is evident from the tribunal's decision in *Chevron and Texpet v. Ecuador*. The tribunal held that there was a denial of justice due too, *inter alia*, the acceptance of a bribe by the judge at first instance, the fact that the same judge allowed his judgment to be ghost written and the failure of the higher courts to address these instances of misconduct.⁸⁰⁷ Most notably, the tribunal allowed the claim despite the fact that the claimants had not exhausted local remedies when it first brought the claim. It was sufficient that the claimants had exhausted local remedies by the time the award was given.⁸⁰⁸

III. The Required Standard

497. The important issue is how serious a denial of justice must be for the claimant to succeed. In *Philip Morris v. Uruguay* the tribunal stated that:

804. *Corona Materials LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3), Award on the Respondent's Expedited Preliminary Objections in accordance with Art. 10.20.5 DR-CAFTA, paras 248, 264.

805. *Marfin Investment Group v. The Republic of Cyprus* (ICSID Case No. ARB/13/27), Award of 26 July 2018, paras 1272–1276.

806. *Ibid.*

807. *Chevron Corporation v. Texaco Petroleum Company v. The Republic of Ecuador* (PCA Case No. 2009-23), Second Partial Award on Track II of 20 August 2018, paras 8.46–8.60.

808. *Ibid.*, paras 7.116–7.154.

there must be ‘clear evidence of [...] an outrageous failure of the judicial system’ or a demonstration of ‘systemic injustice’ or that ‘the impugned decision was clearly improper and discreditable.’⁸⁰⁹

498. Hence, the tribunal found that although there were a number of procedural problems none were so serious as to result in a denial of justice.⁸¹⁰

499. A similar view was taken in *Alghanim v. Jordan*, which concerned a tax on the proceeds of the sale of the claimant’s telecommunications licence, which had been upheld by the highest domestic court. The tribunal stated that the question was not whether the decision of the Court of Cassation was correct, but whether its judgment was inexcusable.⁸¹¹ Although some of the steps taken by the state when imposing the tax were unprecedented, they were all consistent with the basic principle of constitutional government and the rule of law.⁸¹² The denial of justice claim was therefore rejected.

§4. GUARANTEES IN THE EVENT OF EXPROPRIATION

I. Overview

500. The right to property is protected not only in international investment law but also in International Human Rights Law⁸¹³ and particularly by the European Convention. In the European Convention on Human Rights (ECHR) jurisprudence, the notion of expropriation is used to characterize state actions, which in reality remove the owner’s ability to use or dispose of its property.⁸¹⁴ Protection against unlawful indirect expropriation has a special meaning in the context of international investment law.

501. According the World Bank’s Guidelines, a state may not expropriate or otherwise take in whole or in part a foreign private investment on its territory, or undertake the measures that have similar effects. The only exception is when such an action is done in accordance with the applicable legal procedures, in pursuance of good faith for a public purpose, without discrimination on the basis of nationality

809. *Philip Morris v. Uruguay*, para. 500, *supra* note 770.

810. *Ibid.*, para. 578.

811. *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Mr. Fouad Mohamed Thunyan Alghanim v. Jordan* (ICSID Case No. ARB/13/38), Award of 14 December 2017, para. 366(b).

812. *Ibid.*, paras 391–393.

813. Article 17 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (10 Dec. 1948).

814. *Sporrong & Lönnroth v. Sweden*, A52 (European Court of Human Rights 1982) (being one of the most important decisions under Art. 1 of Protocol No. 1 of the European Convention).

and against the payment of appropriate compensation.⁸¹⁵ It is also generally expected that the due process requirement is met.⁸¹⁶

502. It should be noted that states are not liable for bona fide expropriations. In *Saluka v. The Czech Republic* the tribunal held that:

it is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at general welfare.⁸¹⁷

503. The MIGA, another World Bank Institution aimed at facilitating foreign investment, provides the following definition of expropriation and similar measures:

any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment, with the exception of non-discriminatory measures of general application which the governments normally take for the purpose of regulating economic activity in their territories.⁸¹⁸

504. ICSID tribunal in *S.D. Myers* gave another definition of expropriation: ‘a taking by a government-type authority of a person’s “property” with a view to transferring ownership of that property to another person, usually the authority that exercised its de jure or de facto power to do the “taking”.’⁸¹⁹ An example of direct expropriation would be when ‘governmental authorities take over a mine or a factory, depriving the investor of all meaningful benefits of ownership and control’.⁸²⁰

505. Expropriation can also be indirect. Indirect expropriation usually involves creeping measures taken for regulatory purposes but resulting in the loss of economic value.⁸²¹ In *Parkerings v. Lithuania* the tribunal understood indirect expropriation as ‘the negative effect of government measures on the investor’s property rights which does not involve a transfer of property but a deprivation of the enjoyment of the property’.⁸²²

815. World Bank Guidelines, Part IV, para. 1.

816. UNCTAD, Taking of Property, 11–16.

817. *Saluka Investments BV v. The Czech Republic* (UNCITRAL), Partial Award of 17 March 2006, para. 255.

818. Convention Establishing the MIGA, 11 October 1985, Art. 11(ii), 1508 U.N.T.S. 100.

819. *S.D. Myers v. Canada* (UNCITRAL), First Partial Award on Liability of 13 November 2000.

820. *Marvin Roy Feldman Karpa v. Mexico* (ICSID Case No. ARB(AF)/99/1), Award and Dissenting Opinion of 16 December 2002.

821. UNCTAD, Investor-State Disputes Arising from Investment Treaties: A Review, 42.

822. *Parkerings-Compagniet AS v. Lithuania* (ICSID Case No. ARB/05/8), Award of September 2007, para. 435.

506. The ICSID tribunal in *Metalclad* defined indirect expropriation as ‘covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State’.⁸²³ Tribunal in *El Paso v. Argentina* explained that ‘the neutralization of the use of the investment’ is a necessary condition of indirect expropriation which should be coupled with the loss of control rather than just the loss of value.⁸²⁴

507. ICSID tribunals held that when the government issues certain permissions to the investor, but later deprives him or her of this right, its actions might amount to expropriation. In *Vivendi v. Argentina*, the tribunal found that ‘there can be no doubt that contractual rights are capable of being expropriated’.⁸²⁵ In *Middle East Cement Shipping v. Egypt* the tribunal decided that Egypt’s decree prohibiting the import of cement had an effect tantamount to expropriation.⁸²⁶ It concluded that the investor was entitled to prompt, adequate and effective compensation. In *Antoine Goetz and Others v. Republic of Burundi* the tribunal decided that the withdrawal of the certificate of free zone constituted a measure equivalent to expropriation, defined in Article 4 of the BIT as a ‘measure depriving of or restricting property rights’.⁸²⁷

508. According to the World Bank’s Guidelines, appropriate compensation is based on the fair market value and paid in convertible currency without delay.⁸²⁸ The Guidelines define what constitutes fair market value in the absence of agreement between the parties:

an amount that a willing buyer would normally pay to willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it had been in existence, the proportion of tangible assets in the total investment and other relevant factors pertinent to the specific circumstances of each case.⁸²⁹

509. The categories of property, which can be expropriated by a State, extend beyond tangible property to intangible property, such as contractual rights.⁸³⁰ In

823. *Metalclad Corporation v. Mexico* (ICSID Case No. ARB(AF)/97/1), Award of 30 August 2000, para. 103.

824. *El Paso Energy International Company v. Argentina* (ICSID Case No. ARB/03/15), Award of 31 October 2011, para. 245.

825. *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina* (ICSID Case No. ARB/97/3), Award of 20 August 2007, para. 7.5.3.

826. *Middle East Cement Shipping and Handling Co. S.A. v. Egypt* (ICSID Case No. ARB/99/6), Award of 12 April 2002.

827. *Antoine Goetz and Others v. Republic of Burundi* (ICSID Case No. ARB/95/3), Award of 10 February 1999, English translation of French original.

828. World Bank Guidelines, Part IV, paras 2–3.

829. *Ibid.*, para. 5.

830. See, for example, *Phillips Petroleum Iran v. Iran & National Iranian Co* (Case No. 39), Award No.425-39-2 of 29 June 1989, Year Book of Commercial Arbitration, Vol. XVI, 289–321, 75

theory, rights under an arbitral award constitute intangible property capable of being expropriated. The award is merely a crystallization of the rights arising out of the underlying contract.⁸³¹ Therefore, the principles related to expropriation of contractual rights should be applicable to situations when arbitration awards are not enforced.

510. It is well established that an expropriation can be affected not only by executive organs, but also by acts of the judiciary attributable to the state.⁸³² Because of involvement of the courts, non-enforcement of arbitral awards might give rise to a claim for violation of the right to a fair trial, also known as denial of justice or to an expropriation claim.⁸³³

511. It is important to look into the degree of unlawful economic deprivation to determine whether an expropriation has occurred. Mere restrictions on the property rights do not constitute takings. One ICSID tribunal pointed out that substantial deprivation of investor's ability to enjoy the benefits of the arbitration award is not sufficient to amount to an expropriation.⁸³⁴

512. It must be noted that partial deprivation of value of investment does not usually constitute expropriation, the deprivation has to be 'complete or near complete'.⁸³⁵ These measures should 'radically [deprive the investor] of the economical use and enjoyment of its investments, as if the rights related thereto ... had ceased to exist' or, in other words, 'the assets involved have lost their value or economic use for their holder ...'.⁸³⁶ Generally if the investor's rights have only been substantially reduced, and the situation is not 'irreversible', no 'deprivation' has occurred.⁸³⁷ There is no clear-cut standard of international law to determine what degree of economic deprivation constitutes expropriation. The most suitable method

(IUSCT 1991); *Southern Pacific Properties (Middle East) Ltd v. Egypt* (ICSID Case No. ARB/84/3), Award & Dissenting Opinion of 20 May 1992.

831. *Saipem v. Bangladesh* (ICSID Case No. ARB/05/07), Award of 30 June 2009, para. 127 ('[t]he rights embodied in the [arbitration] Award were not created by the Award, but arise out of the Contract. The [arbitration] Award crystallized the parties' rights and obligations under the original contract').

832. *See, for example, Allard v. Sweden* (App. No. 35179/97), Judgment of 24 June 2003, European Court of Human Rights.

833. *See Yarik Kryvoi, Can an Arbitration Award Be Expropriated? Can an Arbitration Award Be Expropriated? Introductory Note to European Court of Human Rights: Kin-Stib and Majkic v. Serbia*, 49 ILM 1181 (2010).

834. *Saipem*, para. 133 *supra* note 836.

835. *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/08/6), Decision on Remaining Issues of Jurisdiction and on Liability of 12 September 2014, para. 672.

836. *Técnicas Medioambientales Tecmed S.A. v. Mexico* (ICSID Case No. ARB(AF)/00/2), Award of 29 May 2003, para. 115.

837. *See Hélène Ruiz Fabri, The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for 'Regulatory Expropriations' of the Property of Foreign Investors*, 11 NYU Environmental Law Journal 148 (2002).

of determining what kind of interference constitutes a ‘taking’ under international law is to analyse each situation on a case-by-case basis.⁸³⁸

II. Police Powers

513. One issue in recent expropriation cases has been the host state’s police power. According to the police powers doctrine, measures which are aimed at achieving a public policy are not viewed as indirect expropriations so do not give rise to an obligation to pay compensation.⁸³⁹ Measures are usually deemed as falling under police powers when: ‘that action [is] taken bona fide for the purpose of protecting the public welfare, [is] non-discriminatory and proportionate’.⁸⁴⁰ The exact role of this doctrine will be considered further in the next section.

514. There has, however, been some controversy as to the status of the police powers doctrine. In *Bear Creek Mining v. Peru*, Peru argued that the revocation had been a valid exercise of its police powers in response to opposition from local people, however the tribunal rejected this argument. The tribunal stated that the police powers doctrine did not exist in customary international law,⁸⁴¹ and found for the claimant.

515. However, not all tribunals take this view. *Marfin v. Cyprus* concerned a decree which increased the government’s participation in a Cypriot bank in which the claimants had invested. One reason why the claim was rejected was because this type of measure was deemed to be within the scope of the state’s police powers, and was not abusive or unreasonable. Notably, the tribunal in *Marfin* took the view that the police powers doctrine was part of customary international law.⁸⁴²

III. Deprivation of Value

516. The second issue in indirect expropriation concerns the significance of the effect of the measure on the value of the investment. One facet of this relates to how much loss of value there must be. In *Philip Morris v. Uruguay* the contested measure concerned cigarette packaging measures. One reason for the rejection of the

838. George Christie, What Constitutes a Taking of Property under International Law?, 38 *British Yearbook of International Law* 307–338 (1962); see also OECD, ‘Indirect Expropriation’ and the ‘Right to Regulate’ in *International Investment Law* 10–14 (2004).

839. See further Catharine Titi, ‘Police Powers Doctrine and International Investment Law’ in *General Principles of Law and International Investment Arbitration* (Andrea Gattini, Attila Tanzini and Filippo Fontanelli (eds), Brill 2018); Prabhash Ranjan and Pushkar Anand, ‘Determination of Indirect Expropriation and Doctrine of Police Power in International Investment Law’ in *Judging the State in International Trade and Investment Law* (Leila Choukroune ed., Springer 2018).

840. *Philip Morris v. Uruguay*, para. 305, *supra* note 770; *WNC Factoring v. The Czech Republic* (PCA Case No. 2014-34), Award of 22 February 2017, paras 389–395.

841. *Bear Creek Mining v. Peru* (ICSID Case No. ARB/14/21), Award of 30 November 2017, para. 473.

842. *Marfin Investment Group Holdings v. Republic of Cyprus* (ICSID Case No. ARB/13/27), Award of 26 July 2018, paras 827–828.

claim was that the tribunal argued that when dealing with the deprivation of value it is more appropriate to look at the profitability of the business as a whole rather than the profitability of the different brands owned by the claimant.⁸⁴³ As the business as still profitable, the tribunal rejected the claim. This decision to examine the overall business rather than individual brands suggests that a considerable loss of value is necessary.

517. This approach was also supported by the tribunal in *Anglia v. Czech Republic*. Here the claimant alleged that the state had improperly expropriated its contractual right to damages following an arbitral award given in favour of the claimant. Unfortunately for the claimant, the award debtor had gone bankrupt before the award could be enforced, allegedly because of delays in domestic courts. As well as pointing out that it could not be said for certain that the delay was the fault of the host state's courts, the tribunal noted that the claimant had been able to recover 77% of the value of the award:

[T]he Tribunal notes that the Claimant has, over the years 2001-2004, managed to recover a substantial portion of the sums due to it under the 1997 Award, either through civil court proceedings against Kyjovan's subdebtors ... or through successful enforcement proceedings against Kyjovan's bank ... The Respondent referred in this regard to the recovery of 77 percent of the principal amount under the Award ... The Claimant did not challenge this statement.⁸⁴⁴

518. It was therefore held that the claimant had not been deprived of the value of the award and so there had been no indirect expropriation. However the tribunal in *UP and C.D Holding v. Hungary* seemed to take a different approach. This case concerned the enactment of legislation which gave the government a monopoly over certain prepaid corporate vouchers. It was held that indirect expropriation had occurred as the claimants lost their market share.⁸⁴⁵ Unlike in *Philip Morris*, the tribunal did not appear adopt the arguably stricter test of whether the overall profitability of the company had been affected. Further given that the claimant seems to have retained at least some of its market share, the decision sits in tension with the high threshold in *Bear Creek Mining*.

519. The second facet of the relevance of value is whether a fall in value suffices. There has long been disagreement between the 'sole effects' test and an approach which looks at the purpose of the measure. Scholars tend to agree that the

843. *Philip Morris v. Uruguay*, para. 283, *supra* note 770.

844. *Anglia Auto Accessories Ltd v. The Czech Republic* (SCC Case No. 2014/181), Final Award of 10 March 2017, paras 293–297.

845. *UP and C.D Holding Internationale v. Hungary* (ICSID Case No. ARB/13/35), Award of 9 October 2018, 98–120.

‘sole effects’ test is inappropriate,⁸⁴⁶ but tribunal practice on the issue is mixed. The award in *Bear Creek Mining* suggests that the tribunal favoured the ‘sole effects’ test; in dismissing the relevance of the police powers doctrine due to a belief that it was not part of customary international law the tribunal effectively suggests that the only relevant issue is the effect that the measure had on the value of the investment. By the same token, the view of the tribunal in *Marfin* can be seen as a rejection of the sole effect test.

520. The award in *Philip Morris* took a less clear approach. Although the tribunal dismissed the claim on the basis of a lack of detrimental effect on the claimant’s business, it also went on to consider the purpose of the measure and the police powers doctrine without clarifying the relationship between the two strands of its reasoning.⁸⁴⁷

IV. Compensation

521. It is well established that in order for an expropriation to be lawful the state is obliged to pay the investor prompt, adequate and effective compensation.

522. There are two issues of particular interest in relation to compensation. The first relates to the significance of an offer of compensation. In *Rusoro Mining v. Venezuela* the issue was the direct expropriation of the investor’s mining rights. On the topic of compensation the tribunal said that the fact that the investor had not received compensation at the time of the award does not itself render the expropriation unlawful if, for example, there has been an offer of compensation.⁸⁴⁸ Yet on the facts of the case the tribunal noted that there was a cap on compensation in the expropriation decree which was below the market value of the investment, and the offer itself was well below the cap in the decree.⁸⁴⁹ Hence, the expropriation was held to be unlawful.

523. The second issue concerns the need for compensation where the state has restored the investment to the claimant. In *Olin v. Libya* the state expropriated the claimants’ factory and served eviction notices but later restored title to the claimant and never sought to dismantle the factory. Nevertheless, the tribunal held that the length and impact of the measures on the investment were sufficiently serious and important to amount to expropriation.⁸⁵⁰ The lack of compensation therefore made the expropriation unlawful.

846. Yarik Kryvoi and Lizaveta Trakhalina, Can Regulatory Freedom Justify Indirect Expropriation in Investment Arbitration?, available at <http://arbitrationblog.kluwerarbitration.com/2019/08/10/can-regulatory-freedom-justify-indirect-expropriation-in-investment-arbitration/> (accessed on 1 May 2020).

847. *Philip Morris*, paras 272–307, *supra* note 770.

848. *Rusoro Mining Ltd v. Venezuela* (ICSID Case No. ARB(AF)/12/5), Award of 22 August 2016, paras 400–401.

849. *Ibid.*, paras 408–409.

850. *Olin Holdings Ltd v. Libya* (ICC Case No. 20355/MCP), Final Award of 25 May 2018, para. 165.

524. A related issue is how tribunals should value expropriated investments, both in cases of lawful and unlawful expropriations. There are four main valuation methods, each of which is appropriate in different circumstances.⁸⁵¹ The Discounted Cash Flow (DCF) method is appropriate for an asset with a record of profitability. This method takes the reasonably projected receipts of the enterprise for each future year of its economic life and applies a discount rate which reflects a number of factors including expected inflation, the time value of money and risk. It then minuses projected expenditure.

525. The liquidation value approach is appropriate when the investment shows a lack of profitability. This approach simply takes the amount at which assets could be sold in liquidation, less any of the investment's remaining liabilities. The third approach is to calculate the 'replacement value' which is the appropriate measure where the value of the investment has been recently assessed. It calculates the value of the investment based on the amount of cash which would be required to replace the assets of the investment at the date of expropriation. The final approach, calculating the 'book value' is also appropriate when the measure of the investment has recently been assessed. To calculate the book value tribunals should calculate the difference between the investment's assets and liabilities, taking into account the depreciation in the value of physical assets.

526. The DCF method is sometimes considered the most accurate as it takes into account future profits, but it has its problems. The discount rate which is applied is inherently subjective, making it impossible for parties to predict the outcome.⁸⁵² There is also a tension with the principle that the rules on state responsibility do not allow the award of damages for speculative damage.⁸⁵³ These concerns have led tribunals to use the DCF measure conservatively, or to reject it altogether, even in situations where it might be considered the most accurate measure of the investment's value.⁸⁵⁴

§5. FULL PROTECTION AND SECURITY

527. One standard which is closely related to the FET standard, but is usually considered distinct from it, is that of full protection and security.⁸⁵⁵ Although sometimes treated as part of the FET standard by some tribunals, it has its own distinct history in Friendship, Commerce and Navigation treaties and the ABS-Shawcross draft treaty, and is typically concerned with physical damage to the investment rather than the effect of

851. See generally UNCTAD, Expropriation: A Sequel, 118–119.

852. Thomas W Walde and Borzu Sabahi, Compensation, Damages and Valuation in International Investment Law, 4(6) Transnational Dispute Management 1, 19 (2007).

853. UNCTAD, 120, *supra* note 850.

854. For example, *Southern Pacific Profits v. Egypt* (ICSID Case No. ARB/84/3), Award of 20 May 1992, para. 36.

855. More generally, see Christoph Schreuer, Full Protection and Security, 1(2) Journal of International Dispute Settlement 353 (2010); Helge Zeitler, 'Full Protection and Security' in International Investment Law and Comparative Public Law (Stephan Schill (ed.), Oxford University Press 2010).

decisions made by host state officials. Nevertheless, some blurring of the distinction still occurs. This chapter will be structured in accordance with the three main elements of the full protection and security standard – the standard of care, the acts that are regulated by the full protection and security standard and the interests protected by the standard.

I. The Standard of Care

528. *AAPL v. Sri Lanka*, the very first investor-state investment dispute, established that the full protection and security standard does not impose a duty of strict liability on the host state. The case concerned joint venture agreements between the claimant and Sri Lankan government agencies and private individuals to operate a shrimp farm in Sri Lanka. However, the farm was later destroyed during a counter-insurgency operation carried out by the Sri Lankan armed forces.

529. The tribunal's conclusion that the standard is only one of due diligence rests on two key strands of analysis. The first is an interpretation of the full protection and security provision. The tribunal took account of the fact that in customary international law, relevant through Article 31(3)(c) VCLT, the duty was only that of due diligence. As the tribunal found no evidence that the parties had sought to elevate the duty above this, the full protection and security provision in the treaty also only imposed a duty of due diligence.⁸⁵⁶

530. The second factor which the tribunal relied upon was the fact that the BIT also contained specific provisions relating to the destruction of property. The principle of *effet utile* suggested that such provisions should have an independent meaning and effect. As this would not be achieved if a strict liability duty was imposed, the due diligence duty was the more appropriate standard in relation to the full protection and security provision.⁸⁵⁷ It is worth noting, however, that on the facts of *AAPL* this made little difference, as the Sri Lankan authorities were found to have failed to take precautionary measures before commencing the counter-insurgency operation.

531. Later tribunals have slightly refined this position. In *Pantechniki* the sole arbitrator adopted the position in *AAPL*, but held that there was no objective standard of 'due diligence':

Although the host state is required to exercise an objective minimum standard of due diligence, the standard of due diligence is that of a host state in the circumstances and with the resources of the state in question. This suggests that due diligence is a modified objective standard – the host state must exercise the level of due diligence of a host state in its particular circumstances. In practice, tribunals will likely consider the state's level of development and stability

856. *Asian Agricultural Products Ltd (AAPL) v. Sri Lanka* (ICSID Case No. ARB/87/3), Award of 27 June 1990, para. 53.

857. *Ibid.*, paras 57–68.

as relevant circumstances in determining whether there has been due diligence. An investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo.⁸⁵⁸

532. This position was also adopted in *Houben v. Burundi*. The tribunal stated that what was required under the due diligence standard varied according to the circumstances and the resources of the state, but held that on the acts the state did have sufficient resources to deal with the situation.⁸⁵⁹

II. Acts and Interests Protected

533. It may be obvious from the nature of the due diligence obligation as discussed above that it does not matter whether the damage to the investment was caused by the state or by third parties. What matters is whether the state acted with due diligence in dealing with the causes of the damage. This point can be made with more force by considering the facts of the leading cases.

534. The dispute in *AMT v. Zaire* concerned losses as a result of the destruction and looting of the claimant's property. Although the claimant alleged that Zairian soldiers were responsible, the tribunal held that this was largely irrelevant; what was important was that the host state had failed to take any action to protect the claimant's property.⁸⁶⁰

535. *MNSS and RCA v. Montenegro* concerned an occupation of the host state's property by striking workers, and an attack on its CEO. There was nothing to suggest that the host state was somehow involved in either the occupation or the attack, but the tribunal concluded that the host state should have done more to prevent these incidents.⁸⁶¹

536. Finally, in *Wena Hotels v. Egypt* the claimant's investment was harmed as a result of repeated terrorist attacks on a gas line on which the investment depended. Again, there was no evidence the state itself behind the attacks, but the tribunal nevertheless found the state to be in breach of the full protection and security obligation due to the failure to take any steps to stop the attacks.⁸⁶²

858. *Pantehniki SA contractors and Engineers v. Albania* (ICSID Case No. ARB/07/21), Award of 30 July 2009, para. 81 citing Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties*, 310 (Kluwer Law International 2009).

859. *Joseph Houben v. Republic of Burundi* (ICSID Case No. ARB/13/7), Award of 12 January 2016, paras 161–175.

860. *AMT v. Republic of Zaire* (ICSID Case No. ARB/93/1), Award of 21 February 1997, paras 6.07–6.13.

861. *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro* (ICSID Case No. ARB(AF)/12/8), Award of 4 May 2016, paras 352–356.

862. *Wena Hotels Ltd v. Egypt* (ICSID Case No. ARB/98/4), Award of 8 December 2000, paras 85–95.

537. Despite some suggestions to the contrary,⁸⁶³ the orthodox position in international investment law is that the full protection and security obligation only relates to the physical security of investments and investors. This was well summed up by the tribunal in *Gold Reserve v. Venezuela*:

the more traditional, and commonly accepted view, as confirmed in the numerous cases cited by Respondent is that this standard of treatment refers to protection against physical harm to persons and property. As noted in *Salukav Czech Republic*, ‘[t]he practice of arbitral tribunals seems to indicate, however, that the “full security and protection” clause is not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force.’ This position was confirmed more recently in *AWG v. Argentina* where, following an analysis of previous decisions on the subject, the tribunal concluded that the obligation of full protection and security required ‘due diligence to protect investors and investments primarily from physical injury’.⁸⁶⁴

538. However, some decisions have at least stretched the notion of physical security. A non-ICSID case *Copper Mesa v. Ecuador* concerned a mining concession that faced opposition from local citizens who instituted a physical blockade of the mining site. The state later effectively supported this action by promulgating a resolution which forbade anyone, including the investor, from accessing the site. There does not seem to be any suggestion of protestors causing physical damage to the site. The tribunal nevertheless found that this amounted to a breach of both the full protection and security and FET obligations.⁸⁶⁵

539. In *MNSS v. Montenegro* two incidents formed the basis of the claimant’s full protection and security claim. One was the physical assault of its CEO, which clearly falls under the conventional understanding of full protection and security.⁸⁶⁶ However, it is more difficult to see how the second incident, the occupation of the claimant’s property by striking workers, falls within the purview of the full protection and security obligation in *Gold Reserve discussed above*, as the workers did not cause physical damage. The result here was slightly more nuanced as although the tribunal found a breach of the full protection and security obligation it declined to award compensation on the basis that the claimant had failed to show damage that flowed from the two incidents.

863. See, for example, Nartnirun Junngam, *The Full Protection and Security Standard in International Investment Law: What and Who is Investment Fully[?] Protected and Secured From?*, 7(1) American University Business Law Review 1 (2018).

864. *Gold Reserve Inc v. Venezuela* (ICSID Case No. ARB(AF)/09/1), Award of 22 September 2014, para. 622.

865. *Copper Mesa Mining Corporation v. Republic of Ecuador* (PCA Case No. 2012-2), Award of 15 March 2016, paras 6.78–6.85.

866. *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro* (ICSID Case No. ARB(AF)/12/8), Award of 4 May 2016.

540. Finally, the decision in *Ampal-American v. Egypt* also seems to expand the notion of physical harm of the investment.⁸⁶⁷ As noted above, the case concerned attacks on a gas line on which the claimant's investment relied. The physical damage was therefore to the gas lines which were not owned by the claimant, rather than to the claimant's investment itself. This may have made it difficult for the claimant to operate its investment and may even have caused loss. However, it remains the case that the claimant's property itself was not physically damaged. The tribunal's finding of a breach of the full protection and security provision may therefore represent a further expansion of the scope of such provisions.

§6. MOST-FAVoured-NATION TREATMENT (MFN)

I. Overview

541. MFN provisions in IIAs typically require that a foreign investor be given the most generous standard of treatment available to an investor from any other foreign country. MFN clauses are becoming an increasingly common feature in IIAs.⁸⁶⁸

542. However, the question of whether procedural rights can be borrowed by foreign investors from other treaties has been a controversial issue. For example, in *Garanti Koza v. Turkmenistan*, the tribunal extended the MFN clause to jurisdictional matters ruling that the investor had a choice between ICSID arbitration and UNCITRAL use the trial arbitration if the applicable BIT expressly extended the scope of the MFN close to dispute resolution procedure.⁸⁶⁹ But the same tribunal also admitted was 'a fairly even split between the number of tribunals that have applied the MFN clause of a BIT to vary its dispute resolution provisions, and the number that have declined to do so'.⁸⁷⁰

543. According to *Maffezini v. Spain*, foreign investors can rely on more liberal dispute resolution provisions. In that case, the tribunal permitted the investor to rely on a Chile-Spain BIT and ignore the less liberal cooling-off requirement of the Argentina-Spain BIT before invoking the jurisdiction of the arbitral tribunal.⁸⁷¹

867. *Ampal-American Israel Corporation and others v. Egypt* (ICSID Case No. ARB/12/11), Decision on Liability and Heads of Loss of 21 February 2017.

868. More generally, see J. Benton Heath and Simon Batifort, The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralisation, 111(4) *American Journal of International Law* 873 (2017); Stephan Schill, MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J Benton Heath, 111(4) *American Journal of International Law* 914 (2017); Pavel Sturma, Goodbye, Maffezini? On the Recent Developments of Most-Favoured-Nation Clause Interpretation in International Investment Law, 15(1) *The Law and Practice of International Courts and Tribunals* 81 (2016).

869. *Garanti Koza LLP v. Turkmenistan* (ICSID Case No. ARB/11/20), Decision on the Objection to Jurisdiction for Lack of Consent of 3 July 2013, paras 41, 79.

870. *Ibid.*, 41.

871. *Emilio Agustín Maffezini v. Spain* (ICSID Case No. ARB/97/7), Decision on Objections to Jurisdiction of 25 January 2000.

However, in *Plama* the ICSID tribunal rejected expansion of the dispute resolution clause using the MFN provision and emphasized the need for an unambiguous agreement between the parties, even when reached by the incorporation of reference.⁸⁷² The tribunal rejected the investor's attempt to invoke the ICSID jurisdiction by virtue of the more generous provisions of the Bulgaria-Finland BIT.

544. *Plama's* tribunal approach is practical because otherwise all provisions providing for dispute resolution would have become meaningless. The investors' right to choose any dispute resolution mechanism would seriously undermine the fundamental principle of state sovereignty. Consent is the cornerstone of the ICSID jurisdiction. In *East Timor* case, the ICJ pointed out the importance of distinguishing between the application of a substantive obligation and conferring a mandatory jurisdiction of international tribunal, emphasizing that jurisdiction in international law depends on consent.⁸⁷³

545. In *Beijing Urban Construction v. Yemen* the claimant sought to use the MFN clause to expand the tribunal's jurisdiction to disputes other than expropriation. The tribunal pointed out that the MFN clause referred to treatment accorded by the host state 'in its territory'. It understood this phrase as 'invok[ing] territorial limits that are directed to substantive provisions in relation to local treatment, and are not apt to describe international arbitration'.⁸⁷⁴ The claimant's argument was therefore rejected.

546. In *Anglia v. Czech Republic* and *Busta v. Czech Republic* the claimant sought to use an MFN clause to circumvent the requirement that only disputes relating to certain provisions of the BIT could be submitted to arbitration. The majority in both cases rejected this argument, reasoning that as the MFN clause was not one of the articles included in the list, the claimant could not rely on it to expand the tribunal's jurisdiction.⁸⁷⁵

547. In *Ansung Housing v. China* the claimant sought to use an MFN clause to avoid a three-year limitation period. The tribunal paid close attention to the wording of the clause and concluded without much discussion that the clause did not extend to MFN treatment for a state's concern to arbitrate with investors.⁸⁷⁶

872. *Plama Consortium Limited v. Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction of 8 February 2005.

873. *Case Concerning East Timor (Portugal v. Australia)*, Judgment of 30 June 1995.

874. *Beijing Urban Construction Group Co. Ltd v. Yemen* (ICSID Case No. ARB/14/30), Decision on Jurisdiction of 31 May 2017, para. 87.

875. *Anglia Auto Accessories Ltd v. The Czech Republic* (SCC Case No. 2014/181), Final Award of 10 March 2017, para. 191; *I.P. Busta v. The Czech Republic* (SCC Case No. 2015/014), Final Award of 10 March 2017, para. 168.

876. *Ansung Housing Co Ltd v. People's Republic of China* (ICSID Case No. ARB/14/25), Award of 9 March 2017, para. 138.

548. Investors should bear this issue in mind and carefully consider the requirements of the dispute resolution provisions in any BIT upon which they may seek to rely. It remains almost impossible to predict how a tribunal would rule on the scope of MFN protection.

II. MFN Clauses and Substantive Obligations

549. In some cases, the claimant has sought to invoke an MFN clause to gain the benefit of substantive obligations found in other treaties. One such case was *Ickale v. Turkmenistan*. In considering the effect of the MFN clause the tribunal focused on the wording of the clause, especially the phrase ‘treatment accorded in similar situations’. According to the tribunal this phrase meant that it was not enough to simply compare the content of different BITs, but also the factual situation of the particular claimant and investors operating under other BITs.⁸⁷⁷ On the facts the claimant was unable to show differential treatment, so the tribunal rejected its MFN argument.

550. In *Teinver v. Argentina*, the claimant attempted to rely on the MFN clause to invoke an umbrella clause in another of Argentina’s BITs. Again, the tribunal paid close attention to the textual formation of the clause, noting that it referred to ‘all matters governed by this agreement’.⁸⁷⁸ On this basis the tribunal took the view that the MFN clause did not allow for the importation of ‘a new right of standard not provided for [in the applicable] treaty’.⁸⁷⁹

§7. UMBRELLA CLAUSES AND CONTRACTUAL OBLIGATIONS

I. Overview

551. Umbrella clauses have long been a source of some of the most complex and contested legal issues in international investment law.⁸⁸⁰ The precise nature and effect of umbrella clauses remains uncertain. Some commentators interpret them as investor contractual rights against ‘any interference which might be caused by either a simple breach of contract or by administrative or legislative acts’.⁸⁸¹ The application of this principle, however, does not explain whether umbrella clauses also

877. *Ickale Insaat Limited Sirketi v. Turkmenistan* (ICSID Case No. ARB/10/24), Award of 8 March 2016.

878. *Autobuses Urbanos del Sur S.A., Teinver S.A. and Transportes de Cercanias S.A. v. Argentina* (ICSID Case No. ARB/09/1), Award of 21 July 2017, paras 880–884.

879. *Ibid.*, para. 884.

880. More generally, see Mary Footer, *Umbrella Clauses and Widely-Formulated Arbitration Clauses: Discerning the Limits of ICSID Jurisdiction*, 16(1) *The Law & Practice of International Courts and Tribunals* 87 (2017).

881. Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties*, 82 (Brill 1995).

cover purely commercial contracts.⁸⁸² Some tribunals considered these clauses as automatically elevating the host state's breaches of contract with investors to a treaty violation.⁸⁸³ Other tribunals rejected this interpretation without explaining the meaning of the umbrella clauses.⁸⁸⁴

552. When the state breaches a contract concluded with foreign investors, the investors may have both contract and treaty claims against the host state. Many investment agreements also provide investors with the right to arbitrate contract disputes with sovereign states. Subject-matter jurisdiction of ICSID tribunals in this case is much wider when investment treaty provisions guarantee the host state's observance of obligations or commitments entered into vis-à-vis foreign investors. These provisions are commonly known as umbrella clauses. A typical umbrella clause provides that 'each party shall observe any obligation it may have entered into with regard to investments'.⁸⁸⁵

553. There is no uniform interpretation of umbrella clauses in ICSID jurisprudence. Some tribunals consider these clauses as automatically elevating the host state's breaches of contract with investors to a treaty violation.⁸⁸⁶ Other cases rejected this interpretation without explaining the meaning of the umbrella clauses.⁸⁸⁷ Tribunals may extend umbrella clause to cover obligations of any nature, regardless of their source (e.g., contractual or non-contractual).⁸⁸⁸ However, the claimant needs to provide sufficient evidence on the content and the existence of an obligation to be protected by the umbrella clause (e.g., content of domestic law).⁸⁸⁹ The main rationale in favour of the narrow interpretation of umbrella clauses is the Convention's concern of opening the floodgates of investment treaty arbitration to every contractual claim. According to one study the current trend is not to include umbrella clauses into newly concluded treaties.

554. ICSID tribunals often address the question of whether a contract breach gives rise to a treaty breach when there is an umbrella clause or even in the absence of such clause. Contractual rights can also be expropriated. Even an investment in sovereign bonds can be regarded as investment made in the territory of another

882. See UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking*, 74–75 (2007).

883. See, for example, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction of 29 January 2004; *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), Award of 12 October 2005.

884. See, for example, *Société Générale de Surveillance S.A. v. Pakistan* (ICSID Case No. ARB/01/13), Decision on Objections to Jurisdiction of 6 Aug. 2003, paras 164–173.

885. Article 2.2 United States-Argentina BIT (1991).

886. See, for example, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction of 29 January 2004; *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), Award of 12 October 2005.

887. See, for example, *SGS Société Générale de Surveillance S.A. v. Pakistan* (ICSID Case No. ARB/01/13), Decision on Objections to Jurisdiction of November 2003, paras 164–173.

888. *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* (ICSID Case No. ARB/05/20), Final Award of 11 December 2013, para. 415.

889. *Ibid.*, para. 459.

state.⁸⁹⁰ In one case the tribunal ruled that a travel ban on a ship as indirect expropriates room, which destroyed the value of the claimants' contractual rights, which were permanent.⁸⁹¹ However, a contractual right can be subject of expropriation only if it has given a rise to an asset in which to which a monetary value may be ascribed, not a potential right, for example arising of participation in the tendering process.⁸⁹² It should be noted that failure to perform a contract might amount to a breach of treaty even in the absence of an umbrella clause. For instance, such failure may constitute a violation of the FET standard because it frustrates the investor's legitimate expectations.

555. In *Azurix v. Argentina*, the tribunal held that a contract entered into by a province of Buenos Aires was not covered by the umbrella clause.⁸⁹³ Similarly, in *Impregilo v. Pakistan* the tribunal stated that the umbrella clause would not cover contracts entered into between the foreign investor and a distinct legal entity.⁸⁹⁴ However, in *Noble Ventures v. Romania* the tribunal held that the conduct of the entity was attributable to Romania and gave rise to the breach of umbrella clause.⁸⁹⁵

556. The ICSID tribunal in *Tecmed v. Mexico* defined legitimate expectations as the requirement to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.⁸⁹⁶ However, there is a clear trend in ICSID earlier cases to consider the violations of a contract to amount to a treaty breach only if the violating party acted as a sovereign, and not as an ordinary Contracting Party.⁸⁹⁷

557. One tribunal explained that for the purposes of establishing jurisdiction over conduct of state under a treaty, the conduct 'must be capable of characterization as sovereign conduct', rather than as an ordinary contractual party pursuing its commercial best interests.⁸⁹⁸ Article 8 of the ILC Articles on State Responsibility

890. *Ambiente Ufficio S.p.A. and others v. Argentina* (ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility of 8 February 2013, para. 508.

891. *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine* (ICSID Case No. ARB/08/8), Award of 1 March 2012, paras 300–301.

892. *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary* (ICSID Case No. ARB/12/2), Award of 16 April 2014, paras 253–254.

893. *Azurix Corp. v. Argentina*, *supra* note 645.

894. *Impregilo S.p.A. v. Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction of 22 April 2005.

895. *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), Award of 12 October 2005.

896. *Técnicas Medioambientales Tecmed, S.A. v. Mexico* (ICSID Case No. ARB(AF)/00/2), Award of 29 May 2003 (Spanish original).

897. *See, for example, Siemens A.G. v. Argentina* (ICSID Case No. ARB/02/8), Decision on Jurisdiction of 3 August 2004; *Salini, supra* note 295; *Impregilo S.p.A. v. Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction of 22 April 2005.

898. *Tulip Real Estate and Development Netherlands B.V. v. Turkey* (ICSID Case No. ARB/II/28), Award of 10 March 2014, para. 354.

provide that ‘the conduct of a person or a group of persons is in fact acting on the instructions or, or under the direction and control or, that stayed in caring out of the conduct’.⁸⁹⁹

558. Some BITs grant investors a right to establishment under certain conditions.⁹⁰⁰ This raises the issue of whether it is possible to initiate ICSID arbitration prior to the conclusion of investment, concession or a similar contract to do business in a host state. The ICSID tribunal in *Mihaly v. Sri Lanka* addressed this issue concluding that ICSID tribunals have no jurisdiction until a contract had been concluded.⁹⁰¹

559. Most investor-state disputes involve one or more contracts concluded between the foreign investor and the state. That could be a privatization contract, a concession contract, a licence agreement or other contracts. Unlike investment treaties, in addition to obligations of states, these contracts also include concrete investor obligations. Therefore, it is important to understand whether obligations of investors arising out of contracts can fall under the jurisdiction of investor-state tribunals.

560. UNCITRAL and ICC Arbitration Rules provide that contract provisions should be taken into account when tribunals resolve disputes.⁹⁰² The reason why most arbitration rules explicitly cover contractual obligations is because those rules were originally developed for resolution of purely contractual disputes between private parties. Even the ICSID Convention was adopted primarily with contractual disputes in mind – when the Convention was finalized in 1965 there were almost no investment treaties.⁹⁰³ On the other hand, nothing in Article 46 of the ICSID Convention implies that its purpose was only to encompass contractual disputes and to exclude investment treaty arbitrations.⁹⁰⁴

561. It would be wrong to conclude that any obligations in contracts concluded between the foreign investor and the host state automatically rise to the level of being arbitrable by investor-state tribunals. As James Crawford suggested, contractual jurisdiction can be invoked under any sufficiently broad investment treaty dispute resolution clause as long as three conditions are met.⁹⁰⁵ First, the contract should relate to an investment rather than an ordinary contract for the supply of

899. Articles on State Responsibility.

900. See Dolzer and Stevens, 50–57, *supra* note 880.

901. *Mihaly International Corporation v. Sri Lanka* (ICSID Case No. ARB/00/2), Award of 15 Mar. 2002.

902. Article 35.3 UNCITRAL Arbitration Rules (2010) and Art. 17.1 ICC Arbitration Rules (1998).

903. Dolzer and Stevens, *supra* note 880.

904. Pierre Lalive and Laura Halonen, On the Availability of Counterclaims in Investment Treaty Arbitration, 2 Czech Yearbook of International Law 141, 143 (2011).

905. James Crawford, Treaty and Contract in Investment Arbitration, 22nd Freshfields Lecture on International Arbitration, London (29 Nov. 2007), 13 available at: <http://www.lcil.cam.ac.uk/Media/lectures/pdf/Freshfields%20Lecture%202007.pdf> (accessed on 1 May 2020).

goods or services.⁹⁰⁶ Second, the contract should be with the state itself and not with a separate legal entity controlled by the state or a third party.⁹⁰⁷ Third, the contract with the state should not have its own dispute resolution clause.⁹⁰⁸

562. The majority of cases interpreting MFN clauses focused two particular issues: the personal and material scope of such clauses.

II. Scope of *Ratione Personae*

563. The personal scope of umbrella clauses remains controversial. *Supervision v. Costa Rica* concerns the government's breach of a contract between the state and the claimant's subsidiary. The tribunal noted that the language of the particular umbrella clause in issue made reference to obligations 'related' to investments, and hence was not limited to the direct contractual relationship between the investor and the host state.⁹⁰⁹ On this basis the majority of the tribunal decided that the clause was broad enough to cover the claimant's claim.

564. The tribunal in *WNC v. Czech Republic* reached the opposite conclusion in a situation where the claimant's subsidiary was the party to the relevant contract. The tribunal focused on the prior cases rather than a textual interpretation of the clause in question, noting that most tribunals had taken the position that umbrella clauses do not cover claimants which are not parties to the underlying agreement.⁹¹⁰ As that was the case here, the tribunal held that it did not have jurisdiction over the claim. It is worth noting that although the BIT here did not use the same broad language as the BIT in *Supervision*,⁹¹¹ the relevant BITs in three the cases cited by the tribunal did.

565. The difference in outcome between *WNC* and the cases it cites, on the one hand, and the award in *Supervision*, on the other hand, is difficult to explain away on the basis of textual differences alone.

906. *Ibid.*

907. *Ibid.*

908. *Ibid.*

909. *Supervision y Control S.A. v. Costa Rica* (ICSID Case No. ARB/12/4), Award of 18 January 2017, para. 287.

910. *WNC Factoring v. The Czech Republic* (PCA Case No. 2014-34), Award of 22 February 2017, paras 325–341, which cited *Azurix Corp v. Argentina* (ICSID Case No. ARB/01/12), Award of 14 July 2006, para. 384; *CMS Gas Transmission Company v. Argentina* (ICSID Case No. ARB/01/8), Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic of 25 September 2007, para. 95; *Burlington Resources Inc v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Liability of 14 December 2012, paras 211–214.

911. *Ibid.*, *WNC v. Czech Republic*, para. 71.

III. Jurisdiction *Ratione Materiae*

566. The second issue is what type of domestic obligations are covered by umbrella clauses. A range of positions have been taken. In *Philip Morris v. Uruguay*, the claimants argued that there had been a breach of the umbrella clause on the basis that the host state had failed to ensure that the investor enjoyed the full rights that trademark holders usually enjoy in Uruguay. The tribunal, however, rejected this argument. It took the view that while umbrella clauses can protect contractual commitments between the state and the claimant it did not protect general obligations owed by the state to the claimant by the virtue of host state law.⁹¹² Further, the granting of a trademark itself did not amount to a ‘commitment’ by the host state to the investor. The umbrella clause claim failed because:

[Uruguay] did not actively agree to be bound by any obligation or course of conduct; it simply allowed the investor to access the same domestic IP system available to anyone eligible to register a trademark.⁹¹³

567. The tribunal in *Garanti v. Turkmenistan* took a different starting point from the *Philip Morris* tribunal, suggesting that a breach of contract itself was not enough to lead to a breach of an umbrella clause.⁹¹⁴ Instead, the umbrella clause covers situations where the cause of the breach was an action of a state organ other than the Contracting Party.⁹¹⁵ As the claimant was able to prove this on the facts, the tribunal found that there had been a breach of the umbrella clause.

912. *Philip Morris*, para. 478, *supra* note 770.

913. *Ibid.*, para. 480.

914. *Garanti Koza LLP v. Turkmenistan* (ICSID Case No. ARB/11/20), Award of 19 December 2016, para. 330.

915. *Ibid.*, paras 330–337.

Chapter 5. Non-investment Obligations in ICSID Arbitration

§1. THE GROWING IMPORTANCE

568. Despite the apparent economic benefits that FDI brings, FDI and international investment law have proved controversial. One major cause of this is the externalities which accompany foreign investment. States, civil society representatives and other actors express concerns about the impact that foreign investment has on a host state, leading some countries to consider withdrawing from the ISDS system altogether. The most prominent of these concerns relate to human rights, labour rights, environmental obligations and acts of bribery and corruption.

569. International investment law is paying increasing attention to non-investment concerns. While investment treaties remain the primary regulator of investment obligations, domestic law and soft law instruments are increasingly playing important roles. This is in part due to the impact that domestic law and soft law instruments have in their own right, but also because investment agreements are increasingly referring to them when defining obligations of investors and states.

570. This chapter will examine the main ways in which the ISDS system and ICSID in particular has been addressing these concerns. It will first examine the different ways in which such concerns may be addressed, focusing on treaties, domestic law and soft law. It will then consider how the specific areas of concern mentioned above are being addressed.

§2. SOURCES OF OBLIGATIONS

I. Treaties

571. Protecting non-investment concerns through IIAs can take various forms. One method is to include preambular statements. The content of such statements varies across treaties, but will generally express concern with non-investment issues such as human rights, combating corruption or the environment.⁹¹⁶ Being contained in the preamble, such statements do not impose any substantive obligations on states or investors, but they do form the context for the interpretation of later provisions.⁹¹⁷ They may also send out an important political signal to investors and the wider public that the state parties take such issues seriously.

916. *See, for example*, the Preamble, Albania-Azerbaijan BIT (2012) which states ‘Desiring to achieve these objectives in a manner consistent with the protection of health, safety and the environment and the promotion of sustainable development.’ Compare the India-Singapore Comprehensive Economic Cooperation Agreement (2005) which is much more general in its preambular language: ‘Reaffirming their [the State Parties’] right to pursue economic philosophies suited to their development goals and their right to regulate activities to realise their national policy objectives.’

917. Article 31(2) VCLT.

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572. The second way in which IIAs deal with non-investment concerns is through the inclusion of substantive provisions. Two types of substantive provisions should be distinguished. Some provisions merely encourage states or investors to follow a particular course of action, and hence do not impose any substantive obligations. An example of this can be found in the 2014 Canada-Cote D'Ivoire BIT which reads:

Each Party shall encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.

573. These provisions will be explored further below in relation to soft law instruments.

574. Other substantive provisions actually create substantive obligations. Such provisions may impose direct obligations on investors,⁹¹⁸ or provide a means by which account can be taken of the investor's negative impact on the host state when making an award in the investor's favour.⁹¹⁹ However, such provisions remain controversial, with critics pointing out that they are often vague and uncertain.⁹²⁰ Further, it is questionable whether the processes and procedures of an investment tribunal are well suited to dealing with non-investment issues, and whether there is a sufficient number of arbitrators who have the expertise to deal with such a range of issues.⁹²¹

918. See Art. 15(1) South African Development Community BIT (2012): 'Investors and their investments have a duty to respect human rights in the workplace and the community and State in which they are located. Investors and their investments shall not assist in, or be complicit in, the violation of human rights by others in the Host State, including by public authorities or during civil strife.'

919. *Ibid.*, Art. 19(1): 'Subject to any other specific directions under this Agreement as to the consequences of a breach of an obligation, where an Investor or an Investment is alleged by a State Party in a dispute settlement proceeding under this Agreement to have failed to comply with its obligations under this Agreement, the tribunal hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such an award.'

920. Karsten Nowrot, How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?, 15 *The Journal of World Investment and Trade* 612 (2014); Jan Wouters and Nicolas Hachez, When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights be Ensured?, 3 *Human Rights and International Legal Discourse* 301 (2009).

921. James Fry, International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity, 18 *Duke Journal of Comparative and International Law* 77, 111 (2007).

II. Domestic Law

575. The second major source of non-investment obligations is domestic law. Domestic law is most relevant to economic crimes and corruption, and so will be explored further below. However, there are a number of issues with domestic law as a source of non-investment obligations which should be noted at this stage.

576. The first issue is when domestic law will become relevant to an investment dispute. This can be dealt with straightforwardly when there is an express legality requirement,⁹²² or the *travaux préparatoires* support the existence of such a requirement.⁹²³ However, some tribunals have gone further and found domestic law to be relevant even where there is no discernible legality requirement by stating that investors must come with ‘clean hands’ to benefit from the protection of a treaty.⁹²⁴ A further way in which domestic law may be relevant is when IIAs impose substantive obligations on investors (*see above*). While the obligation is created in the IIA, the investor’s conduct will fall to be judged by domestic law standards.

577. The second issue is how domestic law is relevant. Some tribunals have suggested that where there is a legality requirement a breach of domestic law goes to the tribunal’s jurisdiction,⁹²⁵ while others have argued it is a question of admissibility.⁹²⁶ However, some have rejected the relevance of the distinction between jurisdiction and admissibility altogether.⁹²⁷ One further issue concerns whether tribunals will raise issues of domestic law of their own motion. Here, the practice of tribunals remains mixed. The dominant approach seems to raise the issue where the necessary evidence has been submitted by the parties.⁹²⁸

578. The final issue concerns the standard of review that tribunals apply to the decisions of domestic courts on non-investment issues. Most tribunals are aware of the fact that they do not have the necessary expertise or resources to conduct criminal investigations or extensive reviews into the decisions of domestic courts,⁹²⁹ and have generally avoided engaging in purely domestic law disputes.⁹³⁰

922. *See, for example*, Art. 14(2) Iran-Slovakia BIT (2016).

923. *Inceysa*, paras 190–207, *supra* note 274.

924. *Plama Consortium Limited v. Bulgaria* (ICSID Case No. ARB/03/24), Award of 27 August 2008, para. 140.

925. *Inceysa*, para. 207, *supra* note 274.

926. *Plama*, *supra* note 923; *Churchill Mining PLC and Planet Mining Pty Ltd v. Indonesia* (ICSID Case No. ARB/12/14 and 12/40), Award of 6 December 2016, paras 530–532; *Hesham T. M. Al Warrag v. Indonesia* (UNCITRAL), Final Award of 15 December 2014.

927. *Pan American Energy LLC and BP Argentina Exploration Company v. Argentina* (ICSID Case No. ARB/03/13), Decision on Preliminary Objections of 27 July 2006, para. 54.

928. *World Duty Free Company Limited v. Kenya* (ICSID Case No. ARB/00/7), Award of October 2006.

929. *Técnicas Medioambientales Tecmed v. Mexico* (ICSID Case No. ARB(AF)/00/2), Award of 29 May 2003, para. 135.

930. *Amco Asia Corporation and others v. Indonesia* (ICSID Case No. ARB/81/1), Decision on Jurisdiction in Resubmitted Proceeding of 10 May 1988, para. 125.

III. Soft Law Instruments

579. Although hard-edged legal obligations are perhaps the most effective way to protect non-investment interests, soft law instruments play an increasingly important role. The adoption of, and compliance with, such instruments may be used both to send a political message and to send messages to those who are concerned about the protection of non-investment interests.

580. A wide range of codes or principles that may be adopted by, or recommended to, investors. Some, such as the OECD Guidelines for Multinational Enterprises are general in nature, and consist of broad-brush provisions regarding, *inter alia*, the interests identified above.⁹³¹ Others are more specific.⁹³²

581. An increasingly common type of soft law instrument is adoption of corporate social responsibility codes.⁹³³ While a number of investors are adopting such codes voluntarily, it is increasingly common for investment agreements to provide that states should encourage investors to adopt such codes. One example can be found in the 2018 Netherlands Model BIT:

The Contracting Parties reaffirm the importance of each Contracting Party to encourage investors operating within its territory or subject to its jurisdiction to voluntarily incorporate into the internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party, such as the OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights, and the Recommendation CM/REC(2016) of the Committee of Ministers to Member States on human rights and business.⁹³⁴

582. The Netherlands Model BIT is particularly notable for two reasons. First, it suggests the adoption of specific CSR codes and, second, Article 23 states that non-compliance with the given codes may result in an investor's award being reduced.

931. Eva van der Zee, *Incorporating the OECD Guidelines in International Investment Agreements: Turning a Soft Law Obligation into Hard Law?*, 40(1) *Legal Issues of Economic Integration* 33 (2013).

932. *See, for example*, 'The Equator Principles' which are aimed at actors in the project finance market, and 'The Santiago Principles' which were developed for the activities of Sovereign Wealth Funds.

933. More generally, *see* Yulia Levashova, *The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law*, 14(2) *Utrecht Law Review* 40 (2018); Mary Footer, *BITs and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment*, 19 *Michigan State Journal of International Law* 33, 57–63 (2009); Karsten Nowrot, 614–616, *supra* note 932.

934. Article 7(2) Netherlands Model BIT (2018).

§3. NATURE OF NON-INVESTMENT OBLIGATIONS

583. A number of non-investment obligations may be relevant to an ICSID dispute. This section will focus on four areas most commonly dealt by ICSID tribunals – human rights, labour rights, environmental obligations and corruption.

I. Protection of Human Rights

584. The protection of human rights has been the driving force behind much legal development on both the domestic and the international level. Key developments at the international level include the recognition of social and economic rights, which have resulted in greater burdens being imposed on states,⁹³⁵ and the creation of regional treaties and dispute settlement systems, which opened new public international law dispute resolution mechanisms for individuals.

585. Historically BITs have rarely addressed human rights. However, there is an increasing willingness to explicitly provide for their protection in more recent investment treaties.⁹³⁶ This may take the form of a preambular statement, such as in the Switzerland-Georgia BIT,⁹³⁷ but may also take the form of substantive provisions.⁹³⁸ Such provisions may permit states to bring counterclaims against investors, or even to bring an independent claim if the dispute resolution clause is broad enough.⁹³⁹

586. Soft law instruments also play a role here. A number of investment treaty clauses that encourage the adoption of CSR Guidelines explicitly mention human rights as a value that should be protected.⁹⁴⁰ Moreover, many of the international standards and guides explicitly protect human rights. For example, the OECD Guidelines for Multinational Enterprises contain a whole chapter on the actions businesses can take to protect the human rights of those affected by their activities.⁹⁴¹

935. Consider the ICCPR and the ICESCR.

936. See an overview of the most recent trends in this area in Andrea Bjorklund, Yarik Kryvoi and Jean-Michel Marcoux, *Investment Promotion and Protection in the Canada-UK Trade Relationship* (18 Nov. 2018), available at <https://ssrn.com/abstract=3312617> or <http://dx.doi.org/10.2139/ssrn.3312617> (accessed on 1 Dec. 2019).

937. The Preamble states that the parties reaffirm ‘their commitment to democracy, the rule of law, human rights and fundamental freedoms in accordance with their obligations under international law’.

938. Article 14(2) ECOWAS Community Rules on Investment states ‘Investors shall uphold human rights in the workplace and the community in which they are located. Investors shall not undertake or cause to be undertaken, acts that breach such human rights. Investor shall not manage or operate the investments in a manner that circumvents human rights obligations [...].’

939. However it should be noted that the vast majority of IIAs do not permit independent claims by states against investors, see, for example, Art. 27 Morocco-Nigeria BIT (2016).

940. See Art. 14(2)(b) Brazil Model CFIA (2015).

941. Chapter IV of the OECD Guidelines for Multinational Enterprises (2011 Edition), available at <https://www.oecd.org/daf/inv/mne/48004323.pdf> (accessed on 10 May 2020).

587. The relevance of domestic law is more complex. While the legality provisions in investment treaties are mostly confined to economic crimes such as fraud and corruption,⁹⁴² there are a number of BITs that state that investors must obey the laws of the host state.⁹⁴³ As noted above such provisions could form the basis of a counterclaim. Hence it appears that although domestic human rights have little relevance when considering whether the investment will receive treaty protection, they are more relevant when deciding whether the state is able to make a counterclaim.

II. Protection of Labour Rights

588. Connected to the protection of human rights is the protection of labour rights. Protection of labour rights have a considerable history in international law, and have long been recognized in conventions prepared under the auspices of the International Labour Organization. Therefore, while it is arguable that labour rights have been subsumed by the latest generation of human rights, they have a distinct history which is reflected in international investment law.

589. Labour rights have long been explicitly recognized in investment treaties. For example, the Preamble to the Austria-Georgia BIT states that the parties reaffirm ‘their commitment to the observance of internationally recognised labour standards’. Notably, a number of investment treaties contain obligations on state parties not to lower their labour standards in order to try to attract foreign investors.⁹⁴⁴

590. As above, domestic law on labour rights may be relevant for determining whether a state can make a counterclaim against an investor, but currently has no

942. See Art. 14(2) Iran-Slovakia BIT (2016).

943. *Supra* note 917.

944. Article 13 Rwanda-USA BIT (2008).

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effect on the issue of whether the investment receives substantive protection. Moreover, a number of soft law provisions and instruments explicitly mention labour rights.⁹⁴⁵

III. Protection of Environment

591. Protection of the environment has become an increasingly important concern for both states and the general public, and there have been a number of treaties and initiatives addressing this issue. While, historically, environmental rarely featured in investment treaties, more recent treaties have explicitly dealt with environmental protection in various ways, for example, through preambular statements⁹⁴⁶ and obligations not to reduce environmental standards to attract investors.⁹⁴⁷ However, investment treaties rarely make reference to international standards of environmental protection.⁹⁴⁸ It is also notable that more recent BITs allow a tribunal to reduce an investor's award where the investor's activities have resulted in damage to the environment.⁹⁴⁹

592. However, domestic law and soft law instruments continue to play the most important role in creating obligations or expectations related to protection of environment. Domestic law standards may become relevant through obligations on investors to respect the laws of the host state in general,⁹⁵⁰ or through provisions which make explicit reference to the environmental laws of the host state.⁹⁵¹ As above, provisions which encourage investors to adopt corporate social responsibility principles often make explicit reference to environmental protection.⁹⁵² Further, the guidelines produced by international organizations also make specific provision for the environment.⁹⁵³

IV. Combating Economic Crimes and Corruption

593. Concerns related to economic crimes and corruption began to feature more prominently in IIAs. The commission of an economic crime does not flow from the investment itself – the investment activity merely forming the context in which the prohibited acts take place. Although investment treaties rarely deal with economic crime and corruption, states are increasingly becoming aware of these issues and the

945. See Part I, Chapter V OECD Guidelines for Multinational Enterprises.

946. For example, the India-Singapore Comprehensive Economic Agreement.

947. Articles 11 and 12 Norway Model BIT (2015). It is, however, questionable how far lower environmental standards attract foreign investors: Ann Harrison, *Do Polluters Head Overseas: Testing the Pollution Haven Hypothesis ARE Update* (University of California 2002).

948. One exception is Art. 14(3) Morocco-Nigeria BIT (2016) which refers to the precautionary principle, presumably as recognized by the ICJ in *Pulp Mills*.

949. For example, Art. 2(2) Bangladesh-Denmark BIT (2009).

950. Article 11 Argentina-Qatar BIT (2016).

951. Article 14(1) Morocco-Nigeria BIT (2016).

952. See, for example, Art. 15(2) Canada-Cote D'Ivoire BIT (2014).

953. Part I, Chapter VI OECD Guidelines for Multinational Enterprises.

need to include relevant provisions.⁹⁵⁴ The provisions generally fall into two camps. One consists of provisions which deny protection for investments made through corruption or involve the commission of an offence.⁹⁵⁵ However, investment treaties rarely set out a detailed definition of such crimes, leaving it to domestic law to regulate the elements of an offence.⁹⁵⁶ The second group of provisions imposes obligations on states in investment treaties (particularly multilateral).⁹⁵⁷

594. Except for a few recently concluded treaties, IIAs are usually silent on the issue of either economic crimes generally or specific offences. However, in recent years have some countries started to include provisions related to economic crimes in IIAs. For example, Japan started to include provisions in its treaties, imposing an obligation on states to ‘ensure that measures and efforts are undertaken to prevent and combat corruption ... in accordance with its laws and regulations’.⁹⁵⁸

595. Similarly, Canada includes in its BITs anti-corruption principles as a part of corporate social responsibility which should be encouraged by the Contracting Parties.⁹⁵⁹ Some BITs also mention money laundering, terrorism financing and general criminal law offences in the context of restrictions which the state can impose on the investor’s transfer of funds.⁹⁶⁰ Several recently concluded BITs emphasize ‘the necessity for all governments and civil actors alike to adhere to United Nations and OECD anti-corruption efforts, and in particular the 2003 UN Convention against Corruption (UNCAC)’.⁹⁶¹ Yet, despite the existence of such treaties, tribunals rarely refer to them and instead rely primarily on domestic law.⁹⁶²

596. In practice, international investment tribunals usually rely on domestic law rather than international instruments expressing international consensus on issues

954. For further discussion, see Yarik Kryvoi, *Economic Crimes in International Investment Law*, 67 *International and Comparative Law Quarterly* 577 (2018).

955. For example, Art. 8.18 CETA states ‘an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption or conduct amounting to an abuse of process’.

956. *Ibid.*

957. See Art. 8 Japan-Oman BIT (2015).

958. See, for example, the same text in Art. 8 Japan-Oman BIT (2015); Art. 9 Japan-Uzbekistan BIT (2008); Art. 9 Iraq-Japan BIT (2010).

959. See, for example, Art. 15(3) Canada-Mali BIT (2014). (‘Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations, and anti-corruption.’) Similar provisions can be found in other BITs and agreements with investment provisions recently concluded by Canada, such as Art. 8.16 Canada-Korea Free Trade Agreement (2014), Art. 16 Canada-Serbia BIT (2014) and Art. 16 Canada-Senegal BIT (2014).

960. See Art. 9 Austria-Kazakhstan BIT (2010); Art. 9 Austria-Nigeria BIT (2013); Art. 12 Japan-Saudi Arabia BIT (2013); Art. 8 Belarus-Mexico BIT (2008).

961. See Austria-Nigeria BIT (2013); Austria-Tajikistan BIT (2010); Austria-Kazakhstan BIT (2010). See also references to the UN Convention against Corruption (UNCAC) in the Preamble, Burkina Faso-Canada BIT (2015) and Art. 17 Guatemala-Trinidad and Tobago BIT (2013).

962. *Hesham*, para. 607, *supra* note 925.

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related to economic crimes.⁹⁶³ Only in a handful of cases did the tribunals refer to the UNCAC⁹⁶⁴ and the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.⁹⁶⁵ For example, the aforementioned recent decision *Kim v. Uzbekistan* referred to the OECD Convention and the UNCAC to ascertain the content of an international public policy rule against corruption and concluded that domestic criminal law followed the same approach.⁹⁶⁶

597. In *Al Warraq v. Indonesia*, the investor made several arguments based on the alleged failure of Indonesia to implement the UNCAC.⁹⁶⁷ The tribunal held that the convention only established a general obligation on state parties to adopt legislation which criminalizes the bribery of public officials and bribery in the private sector rather than set out elements of corruption and money laundering.⁹⁶⁸ The tribunal did not proceed to examine other international law instruments to determine international obligations of the state.

598. In most cases tribunals usually analyse domestic law and rarely refer to international instruments related to economic crimes such as bribery or hold that

963. See, for instance, Art. 7 Southern African Development Community Protocol on Finance and Investment (2006) which contains an investor-state dispute resolution clause that imposes an obligation on states to 'become members of and liaise with the International Organization of Securities Commissions and International Association of Insurance Supervisors and International Association of Insurance Supervisors', available at www.sadc.int/files/4213/5332/6872/Protocol_on_Finance_Investment2006.pdf (accessed on 17 Oct. 2017); *Valeri Belokon v. Kyrgyz Republic* (UNCITRAL), Award of 24 October 2014, para. 153, the tribunal used the definition of money laundering proposed by Financial Task Force on Money Laundering (FAFT), 'processing of these criminal proceeds to disguise their illegal origin, [which] enables the criminal to enjoy these profits without jeopardizing their source' citing Financial Action Taskforce, What is Money Laundering, available at www.fatf-gafi.org/pages/faq/moneylaundering (accessed on 30 Oct. 2017).

964. UNCAC in Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the work of its first to seventh sessions, G.A. Res. 58/4, U.N. GAOR, 58th Sess., 50th and 51st plen. mtgs., Annex, Agenda Item 108, U.N. Doc. A/58/422 (9 Dec. 2003). See ratification status, available at <https://www.unodc.org/unodc/en/corruption/ratification-status.html> (accessed on 21 Oct. 2019). States are parties to the UNCAC, which, *inter alia*, imposes an obligation on states that are expected to encourage their nationals and residents to report the commission of acts of corruption to the law enforcement authorities, and to consider establishing measures and systems to facilitate the reporting by officials of acts of corruption to the appropriate authorities when such acts come to their notice in the performance of their functions; see Arts 8(4) and 39(2) UNCAC.

965. See *Sistem Mühendislik In aat Sanayi ve Ticaret A. v. Kyrgyz Republic* (ICSID Case No. ARB(AF)/06/1), Award of 9 September 2009, para. 42 (the tribunal found reasonable and useful definition of bribery in the OECD Convention); *Metal-Tech Limited v. Uzbekistan* (ICSID Case No. ARB/10/3), Award of 4 October 2013, para. 291 (the tribunal mentioned the OECD Convention and several other anti-corruption conventions to emphasize the international consensus on combating corruption).

966. *Vladislav Kim and others v. Uzbekistan* (ICSID Case No. ARB/13/6), Decision on Jurisdiction of 8 March 2017, paras 594–598 (highlighting that international public policy against corruption focuses on corruption of government officials rather than private individuals).

967. *Ibid.*, paras 197, 208, 212, and 218–224.

968. *Hesham T. M. Al Warraq v. Indonesia* (UNCITRAL), Final Award of 15 December 2014, para. 607.

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these instruments do not provide enough detail to determine the rights and obligations of the parties.⁹⁶⁹

969. *See* a more detailed analysis of this in Yarik Kryvoi, *Economic Crimes in International Investment Law*, 67 *International and Comparative Law Quarterly* 577, 605 (2018).

Part V. ICSID in the Global Context

Chapter 1. Concerns Related to ICSID

§1. OVERVIEW

599. ICSID remains the dominant institution in international investment disputes and in the ISDS more generally. A number of criticisms have been levelled at ICSID over the years, and the concerns of some states are so great that they have withdrawn or threatened to withdraw their consent to be bound by ICSID jurisdiction. This chapter examines these concerns, which include the high cost of defending proceedings, the negative impact on sovereignty and the role of ICSID in maintaining the imbalance between the Global North and South. The specific issues raised by the civil society relate to transparency of ICSID proceedings and third-party participation in proceedings.

600. One of the main purposes of ICSID dispute resolution proceedings is to encourage the development of the rule of law promote IIAs and create a favourable investment climate in host countries. However, investor-state arbitration poses a challenge for developing countries. These countries do not have the capacity to handle the increasing number and growing complexity of investment disputes, the potentially high costs of conducting such procedures, and the potential impacts of awards on their budgets and national reputations as investment destinations.⁹⁷⁰

601. As one NGO observed:

investment treaty arbitration rules are weighted heavily in favour of global corporations and against the mostly poor countries caught up in disputes ... 93% of the cases [at ICSID] involve low- or middle-income developing countries ... [and] ICSID tribunals have ruled in favour of the investor and ordered the government to pay compensation in nearly 70% of cases.⁹⁷¹

970. UNCTAD, *International Investment Rule-Making: Stocktaking, Challenges and the Way Forward*, 29.

971. Food and Water Watch, *World Bank Court Grants Power to Corporations*, 30 Apr. 2007, available at www.foodandwaterwatch.org/press/releases/world-bank-courtgrants-power-to-corporations-article12302007 (accessed on 15 Jan. 2013).

602. In 2007, Bolivia became the first country to withdraw from ICSID.⁹⁷² Bolivia's withdrawal from ICSID came at a time when the Bolivian government was nationalizing key sectors of its economy. In 2007, Ecuador limited the scope of disputes arbitrable under ICSID.⁹⁷³ Ecuador announced that it would not consent to ICSID arbitration in disputes arising out of investments in natural resources, such as oil, gas and minerals. In July 2009, Ecuador submitted a notice of denunciation from the ICSID Convention.⁹⁷⁴ Venezuela became the third country to denounce the ICSID Convention in 2012.

603. ICSID tribunals often arbitrate very sensitive issues, such as the management of water (Bolivia),⁹⁷⁵ indigenous land rights (Guatemala) or protecting the economy during crises (Argentina).⁹⁷⁶ Some proceedings are carried out behind closed doors and many without any meaningful participation or even knowledge of the social groups affected by the ICSID decisions.

604. ICSID arbitration is also expensive. According to UNCTAD, the average legal costs incurred by governments range between USD 1 million and USD 2 million, including the lawyers' fees.⁹⁷⁷ Some claims involve sums reaching hundreds of millions of dollars.⁹⁷⁸ Although they are not particularly high for large multinational enterprises, these costs may be insurmountable for small and poor countries. Heavy legal costs especially hurt developing nations, which are either forced to hire expensive teams of foreign lawyers or risk losing their cases and paying foreign investors significant amounts diverting public finances from other areas.

605. Many developing countries, particularly those in Latin America, view ICSID as a challenge to their sovereignty and a tool of foreign investors rather than

972. ICSID News Release, Bolivia Submits a Notice under Art. 71 of the Convention, 16 May 2007, available at icsidfiles.worldbank.org/icsid/icsid/staticfiles/Announcement3.html (accessed on 15 Jan. 2013).

973. Ecuador's Notification under Art. 25(4) of the Convention, 5 Dec. 2007.

974. ICSID News Release, Ecuador Submits a Notice under Art. 71 of the Convention, 9 Jul. 2009.

975. Jim Shultz, The Democracy Center, Bolivia's War over Water, available at: www.democracyctr.org/bolivia/investigations/water/the_water_war.htm (accessed on 11 Nov. 2009).

976. See 'People's Rights before Corporate Profits', handout circulated at the programme at the UN ECOSOC event 'Peoples' Rights not Corporate Profits: Closing of the International Centre for Settlement of Investment Disputes (ICSID) and Challenging Free Trade Agreements in the Road to Build a Just Economic and Social Governance' (25 Jun. 2009), available at https://web.archive.org/web/20161105162910/https://www.un.org/ga/econcrisissummit/docs/Final-flyer-25_June.pdf (accessed on 15 Jan. 2013).

977. UCTAD, Investor-State Disputes Arising from Investment Treaties: A Review, 8.

978. For instance, ICSID Tribunal in *CMS Gas Transmission Company v. Argentina* awarded the investor USD 133.2 million plus interest (ICSID Case No. ARB/01/8), Award of 12 May 2005, para. 472.

an impartial forum.⁹⁷⁹ Although statistically investors lose at least as often as governments,⁹⁸⁰ financial implications are significant even when the state has to defend a meritless claim that does not result in an award favouring the investor.

606. Developing countries will remain capital-importing countries and it is they who will bear the main burden of heavy awards against them. Argentina is the most frequent respondent in ICSID cases, the majority of which arose after major economic crises there. Although foreign investors are able to recover their losses through ICSID, heavy ICSID awards against countries recovering from economic meltdowns may aggravate problems in those countries even more.

607. There is an ongoing debate as to the appropriateness of ICSID rulings on public policy issues and awards of hundreds of millions of dollars against developing countries in the absence of transparency and accountability required from the domestic judicial systems of developed nations. It had been alleged that the regulatory disputes considered by international private arbitrators conflict with principles of judicial accountability and independence in democratic societies and compromise the integrity of the legal system by contracting out the judicial function in public law.⁹⁸¹ NGOs are pushing for more transparency in ICSID tribunals' decision-making.⁹⁸²

608. Another concern is the lack of diversity with respect to nationality of arbitrators. The ICSID Convention entitles each Member State to designate up to four persons to the Panel of Arbitrators.⁹⁸³ Although the Arbitrators' Panel itself listed on the ICSID web site is diverse, the disputing parties and the ICSID Secretariat tend to appoint arbitrators from developed countries. The United States and the United Kingdom are the top two nations whose nationals appointed as arbitrators.⁹⁸⁴

609. It is also argued that investment treaty tribunals are biased in favour of investors because the former depends on claims brought against the latter.⁹⁸⁵ Many are concerned that in the absence of any appellate body, there is a risk that the tribunals will not decide like cases in like manner because they are not obliged to do

979. For instance, Nicaragua openly advocates withdrawal from ICSID. *See* Skadden, Arps, Slate, Meagher & Flom LLP, *Nicaragua Advocates Withdrawal from ICSID: Implications for Investors* (24 Apr. 2008), available at: www.skadden.com/content%5CPublications%5CPublications1391_0.pdf (accessed on 15 Jan. 2013).

980. OECD, *Improving the System of Investor-State Dispute Settlement: An Overview*, 11–14.

981. Gus Van Harten, *Investment Treaty Arbitration and Public Law*, 4 (Oxford University Press 2007).

982. *See, for example*, Howard Mann, et al., *Comments on ICSID Discussion Paper, 'Possible Improvements of the Framework for ICSID Arbitration'*, available at www.iisd.org/pdf/2004/investment_icsid_response.pdf (accessed on 15 Jan. 2013).

983. ICSID, *Panels of Arbitrators and Conciliators*, available at <https://icsid.worldbank.org/en/Pages/about/Panels-of-Arbitrators-and-Conciliators.aspx> (accessed on 1 May 2020).

984. *See* empirical data on appointment of arbitrators: Susan Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration*, 86 *N.C. L. Rev.* 1, 86–87 (2007).

985. Van Harten, 5, *supra* note 980, 5.

so.⁹⁸⁶ This also may hurt the predictability and consistency of ICSID awards. Even when the tribunals listen to the disputes arising from virtually identical treaty provisions, where the same counsel represented the parties and the same witnesses testified, the tribunals may reach mutually inconsistent decisions.⁹⁸⁷ On the one hand, this hurts the predictability of ICSID decisions, but on the other hand, it means that awards are final and are not subject to review, at least in theory.

610. Commentators argue that ICSID annulment procedures are often used to review the merits of cases, something that the Convention does not permit. Annulment procedures were meant to be used as ‘the extraordinary and limited remedy’.⁹⁸⁸ But instead of ensuring that the awards are final, some ad hoc committees reviewed awards on the merits.⁹⁸⁹

§2. DELAYS IN PROCEEDINGS

611. According to one estimate, in 2017 the average ICSID proceedings took just under four years.⁹⁹⁰ With many disputes lasting far longer than this, many stakeholders consider that ICSID proceedings take too long.⁹⁹¹ This is especially so given the cost of proceedings, an issue which will be explored further below. This section will consider the main reasons for delays in the system.

612. The first potential point of delays of ICSID proceedings comes when appointing arbitrators. The ICSID Convention currently allows the parties ninety days to agree on the constitution of the tribunal before the Chairman of the Administrative Council will step in to appoint the arbitrators.⁹⁹² Further, the parties must go through a number of steps before this point is reached. First, there is a set procedure detailed in the ICSID Arbitration Rules which aims to encourage the parties to reach agreement within a limited period of time.⁹⁹³ Second, there is a fall back provision which reads as follows:

986. *Ibid.*

987. Judith Gill, Inconsistent Decisions: An Issue to be Addressed or a Fact of Life?, 2 *Transnational Dispute Management* 2 (April 2005) (discussing insistent approaches in *CME Czech Republic BV v. The Czech Republic* (UNCITRAL), Partial Award of 13 September 2001 and *Ronald S Lauder v. The Czech Republic* (UNCITRAL), Final Award of 3 September 2001; *SGS Société Générale de Surveillance SA v. Pakistan* (ICSID Case No. ARB/01/13), Decision on Jurisdiction of 6 August 2003 and *SGS Société Générale de Surveillance SA v. The Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision on Jurisdiction of 29 January 2004).

988. Aron Broches, On the Finality of Awards: A Reply to Michael Reisman, 8 *ICSID Rev.* 102 (1993).

989. Jason Clapham, Finality of Investor-State Arbitral Awards, 26 *Journal of International Arbitration* 437, 456–459 (2009).

990. Matthew Hodgson and Alastair Campbell, *Damages and Costs in Investment Treaty Arbitration Revisited*, *Global Arbitration Review* (2017).

991. Yarik Kryvoi, *ICSID Arbitration Reform: Mapping Concerns of Users and How to Address Them*, *British Institute of International and Comparative Law* (8 Nov. 2018), available at <https://ssrn.com/abstract=3280782> (accessed on 1 May 2020).

992. Article 38 of the Convention.

993. Arbitration Rule 2.

Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.⁹⁹⁴

613. ICSID wishes to give the parties ample time to find agreement on the identities of the arbitrators, but the current position may cause three months to elapse before the tribunal is even constituted. Moreover, the steps that ICSID stipulates parties should take to try to reach agreement mean that the parties may need to expend considerable energy and resources dealing with a relatively minor issue.

614. The second source of delay in ICSID proceedings is the challenge of arbitrators. The challenge procedure in ICSID is generally controversial due to the stricter test that applicants have to satisfy.⁹⁹⁵ Such a challenge results in proceedings being automatically suspended. Further, the current wording appears to leave parties some leeway as to when to challenge arbitrators, who could be challenged at various points throughout the duration of the dispute.⁹⁹⁶ As well as opening up the possibility that one party may seek to abuse the process as a delaying tactic, it also means the length of proceedings is extended in cases of legitimate challenges.⁹⁹⁷

615. The third cause of delays comes at the end of ICSID proceedings, and concerns the time taken to render the award. The current rule imposes few limits on the tribunal's discretion as to when to give the award. The tribunal has 120 days to render the award, but can extend this period by a further sixty days. The tribunal also has discretion as to when to close proceedings.⁹⁹⁸ The second reason relates to the availability of arbitrators. The best arbitrators are understandably in high demand, and many continue to serve as counsel in other proceedings. The result is that arbitrators end up with too much work, leading to additional delays.

616. However, ICSID has recognized these problems and proposed solutions to address them.⁹⁹⁹ For example, in relation to the issue of challenging arbitrations a number of proposals have been put forward, including a strict twenty-day time limit from the constitution of the tribunal or the date from which the party knew or ought to have known the facts that give rise to the challenge. There is also a proposed

994. Article 37(2)(b) of the Convention.

995. For an overview, see James Crawford, 'Challenges to Arbitrators in ICSID Arbitration' in Practising Virtue: Inside International Arbitration (David Caron and others (eds), Oxford University Press 2015) and Baiju Vasani and Shaun Palmer, Challenge and Disqualification of Arbitrators at ICSID: A New Dawn, 30(1) ICSID Rev. 194 (2015).

996. Article 57 of the Convention; Arbitration Rule 9(1).

997. Debevoise & Plimpton, The Australian Law Council, and Lucy Martinez of Three Crowns in 'Public Comments to Amendment of ICSID's Rules and Regulations (2016-2018)', available at [https://icsid.worldbank.org/en/Documents/about/Public%20Comments%20to%20Amendment%20to%](https://icsid.worldbank.org/en/Documents/about/Public%20Comments%20to%20Amendment%20to%20) (accessed on 1 May 2020).

998. Arbitration Rules 38 and 46.

999. Kryvoi, *supra* note 990.

thirty-day time limit between the parties' final written submissions on the challenge and the decision. However the most significant proposal on the issue reads as follows:

The proceeding shall continue while the proposal is pending unless it is suspended, in whole or in part, by agreement of the parties. If the proposal results in a disqualification, either party may request that any order or decision issued by the Tribunal while the proposal was pending, be reconsidered by the reconstituted Tribunal.¹⁰⁰⁰

617. Suggestions have also been put forward in relation to the other issues described here.¹⁰⁰¹ However, some commentators suggest that the proposals do not go far enough, and that ICSID can do more to tackle these problems.¹⁰⁰²

§3. INCONSISTENT DECISION-MAKING

618. The second concern that affects all users of the system is the inconsistency of decision-making. The lack of a system of precedent and the often political nature of many issues present in investment disputes mean that tribunals sometimes take different views on the same subject.¹⁰⁰³

619. Vague principles relied upon by tribunals also lead to an increase in the number of disputes because they create an impression that each party has a chance to win. It is therefore not surprising that states complain about long duration, unpredictability, and a lack of consistency in arbitral decisions resulting from the significant interpretative discretion that adjudicators have.¹⁰⁰⁴

620. Inconsistency of decisions where tribunals interpret the same treaty standard or principle of international law differently without a justifiable ground for the

1000. Draft Arbitration Rule 29(3).

1001. Kryvoi, *supra* note 990; Debevoise & Plimpton, Suggestions on the Proposed Amendments to 2006 ICSID Rules, 31 Mar. 2017; Christoph Schreuer, Amending ICSID's Rules and Regulations: Some Modest Proposals, 20 Jul. 2017.

1002. *Ibid.*

1003. UNCITRAL, A/CN.9/WG.III/WP.150 - Possible reform of ISDS – Consistency and related matters, available at <https://undocs.org/en/A/CN.9/WG.III/WP.150> (accessed on 15 Jun. 2020); *see also supra* note 986.

1004. The recent reform movement at the UNCITRAL duly acknowledged all these concerns regarding the current ISDS regime expressed by different stakeholders. *See* UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session, Doc. A/CN.9/935, 8–14 (2018), available at http://www.uncitral.org/pdf/english/commissionsessions/51st-session/a-cn9-935_-_clean_submitted_ADVANCE_COPY.PDF (accessed on 1 May 2020). For further reflections on these concerns, *see also* UNCITRAL Secretariat Note on Possible Reform of Investor-State Dispute Settlement (ISDS): Arbitrators and decision makers: appointment mechanisms and related issues, UN Doc. A/CN.9/WG.III/WP.52, 5–10 (2018), available at http://www.uncitral.org/pdf/english/workinggroups/wg_3/142-e.pdf (accessed on 1 May 2020).

distinction,¹⁰⁰⁵ has a direct relevance to the development of the applicable substantive law, as it helps or fails to help the parties to understand their rights and obligations.

§4. HIGH COSTS OF PROCEEDINGS

621. In addition to the issues described above, states have their own distinct concerns with the ICSID system by virtue of their unique position. States are always the respondent and so appear to have little to gain from engaging in disputes. ICSID has engaged in active dialogues with states, not only on the upcoming rules reform, but also on the benefits of ICSID membership and developments in investment arbitration.¹⁰⁰⁶ However, the ICSID system and the ISDS system more generally are still often perceived as posing a threat to the sovereignty of states, as tribunals are able to rule on the legality of domestic regulatory action. Further, the number of proceedings that are brought against some states results in high legal costs, so that states have less money to spend elsewhere.

622. One concern for a number of states is the cost of ICSID proceedings. With the average respondent costs being around USD 4.9 million per case and the average ICSID case costs being USD 920,000 per case it is clear that defending ICSID claims is expensive.¹⁰⁰⁷ The main reason for the high costs of proceedings is the length of time for which they run. Much of what was discussed above is therefore relevant here. Simply put, the longer that proceedings go on for, the more that parties have to pay in terms of their own legal fees and the costs of the tribunal.

623. In some cases, both states and claimant investors are equally affected by high costs. However, the burden of high costs increasingly falls on states rather than claimants due to the involvement of third-party funders. The UNCITRAL Working Group III has expressed fears that the increasing involvement of such funders may create a range of unforeseen problems, including an increasing number of frivolous claims, a risk of a negative effect on the independence and impartiality of arbitrators and a potential decrease in the likelihood of reaching an amicable resolution of disputes.¹⁰⁰⁸

624. Moreover, the UNCITRAL Working Group III expressed a fear that third-party funders may create ‘a structural imbalance in the ISDS regime as respondent

1005. UNCITRAL Secretariat Note on Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters, UN Doc. A/CN.9/WG.III/WP.150 (2018), available at <https://undocs.org/en/A/CN.9/WG.III/WP.150> (accessed on 1 May 2020). For a brief analysis of inconsistency in the adjudication of investor-state disputes with a number of illustrations from case law, see Irene M. Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 *Columbia Journal of Transnational Law* 418, 424–435 (2013).

1006. ICSID, 2019 Annual Report, 36.

1007. Hodgson and Campbell, *supra* note 989.

1008. UNCITRAL, Report of Working Group III on the Work of Its Thirty-Seventh Session, Doc. A/CN.9/970, paras 17–25.

States generally did not have access to it'.¹⁰⁰⁹ In short, the availability of third-party funding risks encouraging spurious claims, and puts claimants in a better position to deal with the high cost of ICSID proceedings.¹⁰¹⁰

§5. THE NEGATIVE IMPACT ON SOVEREIGNTY

625. The second concern that is particular to states is the perceived negative impact on sovereignty. Investment arbitration involves the judging of state measures against international standards, leading many to feel that the state's regulatory and legislative freedom is eroded. Politicians, including in developed countries, expressed concerns that foreign companies were able to ignore domestic laws which ordinary citizens have to follow, while ad hoc arbitrators who were not elected or directly accountable can make decisions on important public policy issues.¹⁰¹¹ Such concerns are particularly strong in states which have most often been respondents in ICSID proceedings.

626. In Latin America, for example, states debated withdrawing from ICSID, with some actually doing so, and of the creation of a regional framework to deal with investment disputes.¹⁰¹² As above, the concerns around sovereignty relate to ISDS in general and not to ICSID alone. Nevertheless, the position of ICSID as the dominant arbitral institution means that it is often the target for such criticisms. A connected concern is that ICSID pays little attention to non-economic interests that states seek to address, such as human rights, the environment and cultural rights. This issue has been addressed in another chapter.

627. Yet some commentators questioned these concerns. Some pointed out that the alternative of hearing investment disputes in domestic courts has its own problems,¹⁰¹³ and actually offers little that is not already offered by the ICSID system.¹⁰¹⁴ Some go even further and argue that the surrender of sovereignty to ICSID tribunals is in no way different to the surrender of sovereignty under customary and treaty law.¹⁰¹⁵ Indeed, consent to be bound by ICSID awards is arguably an expression of sovereignty. The debate about the impact of ICSID and ISDS on state sovereignty is consequently likely to continue.

1009. *Ibid.*, para. 19.

1010. *Ibid.*, para. 20 for suggested reforms of this issue.

1011. Letter from Elizabeth Warren to Robert Lighthizer, 19 Sept. 2017.

1012. Nicolas Boeglin, ICSID and Latin America: Criticisms, Withdrawals and Regional Alternatives, available at <https://isds.bilaterals.org/?icsid-and-latin-america-criticisms> (accessed on 1 May 2020).

1013. Leon E. Trakman, The ICSID Under Siege, 45 *Cornell International Law Journal* 603, 653 (2012).

1014. *Ibid.*, 649–655.

1015. *Ibid.*, 652.

§6. CONTRIBUTING TO AN IMBALANCE BETWEEN THE GLOBAL NORTH AND SOUTH

628. Another important concern is the potential for ICSID to create an imbalance between the Global North, made up of rich developed countries, and the Global South, made up of poorer developing countries. The reality of the ICSID practice is that most disputes concern an investor from a wealthy state suing a developing state.¹⁰¹⁶ This is why the system of ISDS appears to only benefit developed states via their investors.

629. A number of other issues also point to an unequal relationship in ISDS in general, and ICSID in particular. For example, capital-exporting states are usually able to dictate the terms of the investment treaties to the developing state, to best suit its own interests.¹⁰¹⁷ This, some argue, leads to arbitrators being more likely to construe treaty provisions and the relevant aspects of customary international law in a way which favours capital exporting states.¹⁰¹⁸

630. Further, developing states are unlikely to be able to ensure that investment agreements pay adequate attention to their non-investment concerns, such as the environment and human rights. Combined with the fact that arbitrators are more likely to have training in commercial law than public law,¹⁰¹⁹ this lead to arbitration awards paying little attention to the wider consequences of the investment.

631. Supporters of ICSID argue that the institution merely facilitates the resolution of disputes, and that criticisms from certain developing countries merely reflect a cost-benefit analysis for those particular states and not for developing states more generally.¹⁰²⁰ However even if ICSID itself is not to blame, there remains a strong argument that the ISDS system more broadly creates an imbalance between developed and developing states.¹⁰²¹ Therefore, as long as ICSID stays at the centre of the regime, it is likely to continue to receive criticism. This perceived imbalance will likely strengthen as a result of intra-European Union disputes vanishing because of the planned conclusion of a new plurilateral treaty aimed at eliminating ISDS within the European Union.¹⁰²²

632. It may also be argued that the imbalance is disappearing, or at least changing. Sovereignty concerns from developed countries such as the United States and global trade and investment patterns suggest that those developed countries which

1016. Boeglin, *supra* note 1011.

1017. Trakman, 608, 615, *supra* note 1012; Susan Sell, *Private Power, Public Law: The Globalisation of Intellectual Property Rights*, Ch. 5 (Cambridge University Press 2003).

1018. Gus van Harten, *Investment Treaty Arbitration and Public Law* 122–151 (Oxford University Press 2008); Jeswald W. Salacuse, *The Law of Investment Treaties* 11–137 (The Oxford International Law Library 2010).

1019. Van Harten, *ibid.*

1020. Trakman, 610–611, *supra* note 1012.

1021. *Ibid.*

1022. European Commission, *supra* note 617.

are usually viewed as on the beneficial side of the historical imbalance are increasingly seeking to attract investment and hence more likely to be defendants in investment disputes. Nevertheless, there is evidence that the historical imbalance still persists. For example, some argue that developed states now seek to invoke customary and treaty law defences and exceptions despite previously arguing against them when they were exporting capital.¹⁰²³ In light of such evidence and the limited ability of ICSID to tackle this problem, it seems that the inequality in the investment regime will persist. Eventually, it is up to states to change their investment agreements and their dispute resolution mechanisms.

§7. LIMITED TRANSPARENCY

633. In addition to concerns that are particular to states, the general public or civil society point to other problems. These concerns arise because although procedurally international investment arbitration resembles commercial arbitration, the subject matter of disputes often raises issues of public interest that commercial arbitration does not. This section will explore complaints relating to the two main ways in which the public interest is reflected and represented in investment arbitration: transparency and third-party participation.

634. The decisions of tribunals can have significant financial and policy implications for states and investors, and consequently there is almost always a public interest element to each dispute. A degree of transparency is therefore important to ensure the legitimacy of ICSID proceedings.

635. The main element of ICSID's transparency efforts has been the publication of awards and documents. Although the consent of both parties is needed to publish the full award, ICSID publishes excerpts of the legal reasoning of the award where such consent is not forthcoming.¹⁰²⁴ This ensures a degree of transparency regardless of the specific consent of the parties.

636. Case materials, on the other hand, are not routinely publicly available in the absence of the specific agreement of the parties.¹⁰²⁵ On the question of the openness of proceedings the position remains that an objection by one party is sufficient to prevent hearings being opened to the wider public.¹⁰²⁶ However, significant steps towards transparency have been taken on the issue of amicus curiae submissions. In *Agua Argentinas v. Argentina* the tribunal found a power to accept amicus curiae submissions under Article 44 ICSID Convention,¹⁰²⁷ which reads:

1023. Trakman, 608, *supra* note 1012.

1024. Arbitration Rule 48(4).

1025. See *Malaysian Salvors v. Malaysia* (ICSID Case No. ARB/05/10), Decision on Annulment of 16 April 2009.

1026. Arbitration Rule 32(2).

1027. *Agua Argentinas v. Argentina* (ICSID Case No. ARB/03/19), Order in Response to a Petition for Transparency and Participation as Amicus Curiae of 19 May 2005, paras 8–29.

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

637. This decision was followed by a change in the ICSID Arbitration Rules, which, although previously silent, now empower a tribunal to allow a non-disputing party to file submissions after consulting both parties and considering the interests of the non-disputing party and the insight or knowledge it could add.¹⁰²⁸ ICSID's latest consultation also raised issues of transparency. It is anticipated that the new proposed arbitration rules, to be submitted for approval in 2020, will further address this issue.¹⁰²⁹

638. The following statement from the European Commission provides a good summary of the concerns around transparency in international investment law:

In most ISDS cases, no or little information is made available to the public, hearings are not open and third parties are not allowed to intervene in the proceedings. This makes it difficult for the public to know the basic facts and to evaluate the claims being brought by either side. This lack of openness has given rise to concern and confusion with regard to the causes and potential outcomes of ISDS disputes. Transparency is essential to ensure the legitimacy and accountability of the system. It enables stakeholders interested in a dispute to be informed and contribute to the proceedings. It fosters accountability in arbitrators, as their decisions are open to scrutiny. It contributes to consistency and predictability as it helps create a body of cases and information that can be relied on by investors, stakeholders, states and ISDS tribunals.¹⁰³⁰

639. In other words, the combination of the lack of transparency and the important public interests at stake leads to concerns of legitimacy and accountability.¹⁰³¹

640. These concerns apply with equal force to ICSID in particular as to ISDS in general. While ICSID publishes excerpts of the legal reasoning of the awards, the

1028. Arbitration Rule 37(2).

1029. ICSID, 2019 Annual Report, 8, 9.

1030. European Commission, Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement in the Transatlantic Trade and Investment Partnership Agreement (TTIP), 80, SWD(2015) 3 Final, available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf (accessed 1 May 2020).

1031. James D. Fry and Odysseas G. Repousis, *Towards a New World for Investor-State Arbitration Through Transparency*, 48 *New York Journal of International Law and Politics* 795 (2015–2016); Julie Maupin, 'Transparency in International Investment Law: The Good, the Bad and the Murky' in *Transparency in International Law* (Andrea Bianchi and Anne Peters (eds), Cambridge University Press 2013).

publication of the full award remains a decision for the parties.¹⁰³² Materials relating to the dispute are also generally not available to the public,¹⁰³³ and it is still up to the parties whether other persons are permitted to observe the proceedings.

641. An important development in the area of international investment law is the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the Mauritius Convention) adopted in 2014 to take account of the public interest in investor-state arbitrations. The Convention introduced UNCITRAL Rules on Transparency, which apply to any investor-state arbitration in which a state and the claimant are parties to the Convention and have not made a reservation under its Article 3(1)(a).¹⁰³⁴ The rules will also apply, if the respondent state is a party to the Convention, and the claimant agrees to the application of the UNCITRAL Rules on Transparency.¹⁰³⁵

642. The parties may also agree to application of those rules to their proceedings regardless of being a party to this Convention.¹⁰³⁶ The rules provide for publication of information about proceedings and related documents, submission by a third person, non-disputing party, public nature of hearings as well as exceptions to transparency. It should be noted that the entry into force of the Mauritius Convention has the potential to make proceedings significantly more transparent.¹⁰³⁷ However, almost six years after the Convention was adopted, only five states ratified it.¹⁰³⁸

643. Investor-state tribunals have been labelled as ‘secret tribunals’ and received negative press coverage for the alleged lack of transparency.¹⁰³⁹ In reality, however these are states rather than corporations who often are interested in less publicity. This explains why only five states have ratified the Mauritius Convention.¹⁰⁴⁰ If privacy is something which parties appreciate and want to keep, there can be ways to

1032. Arbitration Rule 48.

1033. See *Malaysian Historical Salvors v. Malaysia* (ICSID Case No. ARB/05/10), Award on Jurisdiction of 17 May 2017 and *Foresti v. South Africa* (ICSID Case No. ARB(AF)/07/1), Letter Regarding Non-Disputing Parties of 5 October 2009 for exceptions.

1034. Article 2(1) United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (New York, 2014), *supra* note 215 (hereinafter ‘Mauritius Convention on Transparency’).

1035. Article 2(2) Mauritius Convention on Transparency.

1036. Article 1(2) UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration.

1037. Esmé Shirlow, Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration, 31 ICSID Rev. 622 (2016).

1038. UNCITRAL, Status: United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (New York, 2014), available at <https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status> (accessed on 20 Jun. 2020).

1039. Haley Edwards, The Secret Tribunals That Corporations Use to Sue Countries, available at <https://billmoyers.com/story/shadow-courts-secret-tribunals-trade> (accessed on 1 May 2020). (‘These ad hoc courts are a main reason why so many politicians and activists are against trade agreements like the TPP.’)

1040. Overview of the status of UNCITRAL Conventions and Model Laws, available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/overview-status-table-0.pdf> (accessed on 1 May 2020).

contribute to greater legal certainty by publishing summarized or anonymized decisions to help law develop. However, because there is no appeal mechanism explaining which decision is right and which is wrong – the value of increased transparency can be limited.

§8. THE LIMITED ACCESS TO PARTICIPATION IN PROCEEDINGS

644. The second concern of civil society relates to the limited right of third parties to participate in ICSID proceedings. The situation has been changing in recent years.¹⁰⁴¹

645. The traditional position was that without the consent of the parties, tribunals do not permit amicus curiae briefs.¹⁰⁴² This followed from the silence of the ICSID Rules on the issue. However, in *Aguas Argentinas v. Argentina* the tribunal found a power to accept amicus curiae submissions under the general power it has to decide on procedural issues not dealt with in the ICSID Convention or Arbitration Rules.¹⁰⁴³ Further, ICSID also adopted a new rule which gave the tribunal discretion to accept amicus curiae submissions.¹⁰⁴⁴

646. Since these two developments, amicus curiae submissions have been accepted in a number of cases.¹⁰⁴⁵ However, problems remain. One such problem is how third parties can satisfy the criteria to give submissions. In particular, how can third parties show that they can bring ‘a perspective, particular knowledge or insight that is different from that of the disputing parties’¹⁰⁴⁶ when the materials and details of the arbitration are private? Further, investment disputes will usually contain private interests as well as any public interests. Some have suggested that tribunals will only permit amicus briefs where the public interest is predominant,¹⁰⁴⁷ which may turn on the view of individual arbitrators. The best that can be said is that practice on this is likely to be unpredictable and uneven.

1041. For an overview see Sophie Lamb, Daniel Harrison and Jonathan Hew, Recent Developments in the Law and Practice of Amicus Curiae Briefs in Investor-State Arbitration, 5(2) *Indian Journal of Arbitration Law* 72 (2017).

1042. *Aguas del Tunari v. Bolivia* (ICSID Case No. ARB/02/03), Letter by NGO to Petition to Participate as Amicus Curiae of 29 January 2003.

1043. *Aguas Argentinas v. Argentina* (ICSID Case No. ARB/03/19), Order in Response to a Petition for Transparency and Participation as Amicus Curiae of 19 May 2005.

1044. Arbitration Rule 37(2).

1045. *Philip Morris v. Uruguay* (ICSID Case No. ARB/10/7), Procedural Order No. 3 of 17 February 2015; *Bewater v. Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 5 of 2 February 2007.

1046. Arbitration Rule 37(2).

1047. Trakman, 633 *supra* note 1012.

Chapter 2. ICSID Reform

647. ICSID has implemented a number of reforms aimed at increasing its transparency, including publishing a web-based list of pending and completed cases. Today, the ICSID Secretariat has the authority to publish significant extracts of decisions without the consent of the parties. And there is a proposal to amend Arbitration Rule 48 to give ICSID the power to promptly include in its publications excerpts from the legal reasoning of the tribunal.¹⁰⁴⁸

648. In 2008, ICSID undertook a number of reforms to strengthen and modernize its operations, including the creation of several specialized teams within ICSID.¹⁰⁴⁹ Three staff teams worked exclusively on case administration, which resulted in a significant reduction in the amount of time necessary to register cases. A special financial team was created to tackle the issues of accounting and financial reporting controls. And a special team was assigned to handle ICSID publications and knowledge management.

649. It is difficult to disagree with the view that international arbitration should involve unbiased, depoliticized adjudication and that the outcomes should be based on law rather than on factors unrelated to the merits of the case.¹⁰⁵⁰ Other proposals include the need to facilitate transparency and consistency of ICSID proceedings, which includes the establishment of the appeal body.¹⁰⁵¹ The ICSID appellate body could make ICSID jurisprudence more consistent and predictable, which is very important to investors, governments, and other stakeholders. In theory, an appellate body could substitute its own decision for that of the first tribunal or require that tribunal to rectify its mistakes.

650. Creating an appeal body has a number of advantages, including ensuring consistency, rectification of legal errors and avoiding possibly serious errors of fact; the review would be confined to a neutral tribunal rather than the national courts. The disadvantages of an appellate mechanism include departure from the principle of finality, additional delays and costs, increased caseload and politicization of the system.¹⁰⁵² Also, each treaty is unique and applying a one-fit-all approach can lead to additional problems.

1048. ICSID, Suggested Changes to the ICSID Rules and Regulations – Working paper of the ICSID Secretariat, Proposed Amendment to Arbitration Rule 48, 12 May 2005.

1049. ICSID, 2009 Annual Report, 3.

1050. Robert E. Hudec, 'The Judicialization of GATT Dispute Settlement' in *In Whose Interest? Due Process and Transparency in International Trade*, 9 (Michael M. Hart & Debra P. Steger (eds), Centre for Trade Policy and Law 1992).

1051. *See generally* Gabrielle Kaufmann-Kohler, *In Search of Transparency and Consistency: ICSID Reform Proposal*, 2(5) *Transnational Dispute Management* 1 (November 2005).

1052. OECD, *Improving the System of Investor-State Dispute Settlement: An Overview – Working Papers on International Investment*, February 2006, 11–14.

651. The recently proposed changes put forward by the OECD relate to the improvement of the quality of arbitral awards by establishing an Additional Annulment Facility and an appellate mechanism.¹⁰⁵³ An OECD study also proposed encouraging consolidation of parallel proceedings to improve problems related to multiple proceedings involving the same subject matter.¹⁰⁵⁴

652. International organizations, such as UNCTAD recognize the need for systematic reform of the global regime of IIAs to reflect sustainable development objectives. They encourage states, among other priorities, to safeguard the right to regulate while providing protection, improve investment dispute settlement and add a component of investment promotion and facilitation to the regime and to ensure responsible.¹⁰⁵⁵

653. It had also been suggested that providing more particularized guidelines about arbitrator appointments would help alleviate concerns that presiding arbitrators, who are usually from developed countries, would not be biased against developing countries.¹⁰⁵⁶ However, a recent empirical study found no significant correlation between the outcomes of investor-state arbitrations and the development status of the respondent state, the development status of the presiding arbitrator, or some interaction between the two.¹⁰⁵⁷ This means that the investment treaty arbitration system, as a whole, seems fair and does not need a radical overhaul of the arbitration process. But the study also found that tribunals with presiding arbitrators from the developing world tend to make smaller awards against developed states.¹⁰⁵⁸

654. There is a growing debate about the need to make the regime of investor-state dispute and IIAs work better for sustainable development. International investment treaties increasingly include provisions that limit their scope.¹⁰⁵⁹ Also, for example, they:

- exclude certain assets from the definition of investment;
- clarify obligations by making them more detailed (e.g., FET, expropriation);
- include sections for transfer of funds clauses and carve-outs for prudential measures;

1053. *Ibid.*, 6–9.

1054. *Ibid.*, 14–19.

1055. See UNCTAD, Taking Stock of IIA Reform, UNCTAD IIA Issues Note, March 2016, http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d1_en.pdf (accessed on 1 May 2020).

1056. Susan Franck, Development and Outcomes of Investment Treaty Arbitration, 50 *Harv. J. Intl. L.* 435, 485 (2009).

1057. *Ibid.*, 487.

1058. *Ibid.*, 488.

1059. UNCTAD, Recent trends in IIAS and ISDS, February 2015, 3, available at unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf (accessed on 1 May 2020).

- limit provisions which can invoke investor-state disputes, for example by excluding certain state policies, introducing special measures for taxation, restricting time periods within which claims can be submitted.¹⁰⁶⁰

655. Whatever the future reforms of ICSID will be, they should not harm foreign investors because otherwise they might prefer to submit cases to other arbitration institutions.

656. As discussed in more detail above, the current ICSID ISDS suffers from several deficiencies hampering its perceived legitimacy. These shortages include lack of transparency and consistency, difficulties in correcting errors of law, issues of impartiality and independence of arbitrators, and concerns relating to the costs and time of arbitral procedures.¹⁰⁶¹

657. With the view of solving some of these issues, in 2016 ICSID has launched its fourth rules amendment process, which will require the approval of two-thirds of its Member States.¹⁰⁶² In order for the amendments to respond to the necessities of the states, ICSID started this procedure by requesting states to suggest topics that merited consideration.¹⁰⁶³ Then, in January 2017 the Centre invited the public to make suggestions for rule amendments in order to collect the opinion of the academia and arbitration practitioners. The main purpose of this Rules amendment is to render ICSID arbitration time and cost effective as well as transparent and environmental friendly.¹⁰⁶⁴ The first of the sixteen topics of possible reforms concerns the appointment of arbitration. More specifically, ICSID is looking for ways to simplify their process of appointment.

658. ICSID made two additional propositions regarding arbitrators. First, ICSID Rules currently require a simple declaration that the arbitrator meets the conditions required by the ICSID Convention in order to be appointed.¹⁰⁶⁵ In summer 2020,

1060. *Ibid.*

1061. UNCTAD, Reform of Investor-State Dispute Settlement: In Search of a Roadmap, UNCTAD IIA Issue Note No. 2, 3–4 Jun. 2013. *See also* Leon E Trakman, The ICSID Under Siege, 45(3) Cornell International Law Journal 603, 630 (2012) and Piero Bernardini, Reforming Investor-State Dispute Settlement: The Need to Balance Both Parties' Interests, 32(1) ICSID Rev. 38, 53–55 (2017).

1062. Article 6 of the Convention.

1063. Law Council of Australia (Attorney General's Department), Potential rule amendments or improvements to the arbitration and conciliation procedures of the International Centre for Settlement of Investment Disputes (ICSID), 25 Jan. 2017, represents an example of Member State response to the consultation.

1064. ICSID, The ICSID Rules Amendment Process, <https://icsid.worldbank.org/en/Documents/about/ICSID%20Rules%20Amendment%20Process-ENG.pdf> (accessed 1 May 2020).

1065. Arbitration Rule 6.

ICSID Secretariat published Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement.¹⁰⁶⁶ Second, arbitral practice has demonstrated that challenges of arbitration have increased in recent years.¹⁰⁶⁷ In this respect ICSID affirmed that it is going to address issues such as the capacity of arbitrators to resign before the constitution of the tribunal, the automatic stay of proceedings and the allocation of the costs of an unsuccessful challenge.

659. Third-party funding arrangements for high-value claims have recently come to the attention of commentators.¹⁰⁶⁸ Indeed, it is a fast-growing phenomenon that will likely play a key role in future ICSID arbitration. Despite its positive aspects, it may create issues in terms of – *inter alia* – increase of litigiousness, influence on the conduct of proceedings, jurisdiction and law applicable to the agreement.¹⁰⁶⁹ With reference to third-party funding, ICSID intends to open a discussion regarding whether there should be disclosure of third-party funding aimed at conflict checking and the allocation of and security for costs.

660. ICSID arbitration is criticized for the incoherence and inconsistency of its cases, which jeopardizes the sense of legitimacy of the system. Consolidation of cases forms part of the response to this issue because it lowers the risk of multiple conflicting awards, and also represent an instrument of procedural efficiency.¹⁰⁷⁰ However, ICSID Arbitration Rules do not contain any provision addressing this issue: consequently, the Centre would like to introduce a specific discipline of consolidation in the new Rules.

661. In ICSID arbitral practice, the Secretariat has enormously increased the use of electronic means of communication. For instance, it has webcasted some hearings open to the public.¹⁰⁷¹ In view of improving the efficiency of the ICSID arbitration system and to make it more environmentally friendly, the Rules should be updated to follow this practice.

662. The Centre has also observed that the Rules can be improved in several ways from a procedural viewpoint. First of all, practice from 2006 has suggested

1066. ICSID, Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement. Available at https://icsid.worldbank.org/en/Documents/Draft_Code_Conduct_Adjudicators_ISDS.pdf (accessed on 7 Jul. 2020).

1067. Baiju S Vasani and Shaun A Palmer, Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?, 30(1) ICSID Rev. 194–216 (2015).

1068. Examples of claimants obtaining TPF include *S & T Oil Equipment and Machinery Ltd v. Romania* (ICSID Case No. ARB/07/13); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentina* (ICSID Case No. ARB/09/1); *Venezuela Holdings, B.V. et al v. Venezuela* (ICSID Case No. ARB/07/27).

1069. Eric De Brabandere and Julia Lepeltak, Third-Party Funding in International Investment Arbitration, 27(2) ICSID Rev. 379, 397–398 (2012). See Jean-Christophe Honlet, Recent Decisions on Third-Party Funding in Investment Arbitration, 30(3) ICSID Rev. 699 (2015).

1070. UNCTAD, 6, *supra* note 1060.

1071. Junji Nakagawa, Transparency in International Trade and Investment Dispute Settlement, 110 (Routledge 2013).

that the relatively new provision on preliminary objections would need further clarifications. Also the discipline of the first session would necessitate some additional improvements: for example, the first session and the preliminary procedural consultation should be merged because they are usually treated together in practice.¹⁰⁷²

663. In view of rendering the proceedings more time efficient, the Centre proposed to reduce the period necessary to declare the discontinuance of the proceeding where the parties fail to pay the advances. With the same objective, several proposals have advised to include stricter time frames for the closure of the proceedings and the issuance of awards. Moreover, there has been a proposal to link the timing for the publication of the dissenting opinion to that of the main award.

664. Another area of possible reform regards the allocation of costs of the proceeding. Under the current Rules, ICSID tribunals have a complete discretion to decide how to allocate expenses. In early cases, tribunals divided costs evenly by adopting a ‘pay your own way’ approach. Conversely, recent awards tend to give a greater consideration to factors such as the conduct of the party or their ‘relative success’.¹⁰⁷³ More rarely, tribunals also make reference to public interest, settlement efforts and complexity of the case.

665. According to ICSID, stakeholders should discuss the introduction and content of express rules regarding the assessment of costs in order to provide more certainty to the parties. Moreover, establishing a default position may encourage ICSID tribunals to devote more consideration to this issue than they are currently doing. Indeed, especially when they deviate from the rule, they shall give an adequate explanation to this exception.¹⁰⁷⁴

666. There will also be a discussion on several aspects of annulment proceedings. These aspects include the clarification of the discipline of cross applications on annulment, the records to be used in these proceedings and the timing of the proceeding.

667. Time will show whether ICSID will be able to reform itself and to effectively facilitate dispute resolution between investors and states in the context of new challenges, such as the global pandemics, trade wars and the rising economic nationalism.

1072. Jan Paulsson, Lucy Reed and Nigel Blackaby, *Guide to ICSID Arbitration*, 138 (Kluwer Law International 2010).

1073. Matthew Hodgson, *Costs in Investment Treaty Arbitration: The Case for Reform*, 11(1) *Transnational Dispute Management* 1, 3–5 (2014).

1074. *Ibid.*, 9.

Part VI. Documents

1. ICSID CONVENTION

CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES PREAMBLE

The Contracting States

Considering the need for international cooperation for economic development, and the role of private international investment therein;

Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;

Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;

Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;

Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development;

Recognizing that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and

Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,

Have agreed as follows:

CHAPTER I**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES****Section 1****Establishment and Organization**

Article 1

- (1) There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre).
- (2) The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.

Article 2

The seat of the Centre shall be at the principal office of the International Bank for Reconstruction and Development (hereinafter called the Bank). The seat may be moved to another place by decision of the Administrative Council adopted by a majority of two-thirds of its members.

Article 3

The Centre shall have an Administrative Council and a Secretariat and shall maintain a Panel of Conciliators and a Panel of Arbitrators.

Section 2**The Administrative Council**

Article 4

- (1) The Administrative Council shall be composed of one representative of each Contracting State. An alternate may act as representative in case of his principal's absence from a meeting or inability to act.
- (2) In the absence of a contrary designation, each governor and alternate governor of the Bank appointed by a Contracting State shall be ex officio its representative and its alternate respectively.

Article 5

The President of the Bank shall be ex officio Chairman of the Administrative Council (hereinafter called the Chairman) but shall have no vote. During his absence or inability to act and during any vacancy in the office of President of the Bank, the person for the time being acting as President shall act as Chairman of the Administrative Council.

Article 6

- (1) Without prejudice to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall:
 - (a) adopt the administrative and financial regulations of the Centre;
 - (b) adopt the rules of procedure for the institution of conciliation and arbitration proceedings;
 - (c) adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules);
 - (d) approve arrangements with the Bank for the use of the Bank's administrative facilities and services;
 - (e) determine the conditions of service of the Secretary-General and of any Deputy Secretary-General;
 - (f) adopt the annual budget of revenues and expenditures of the Centre;
 - (g) approve the annual report on the operation of the Centre.

The decisions referred to in sub-paragraphs (a), (b), (c) and (f) above shall be adopted by a majority of two-thirds of the members of the Administrative Council.

- (2) The Administrative Council may appoint such committees as it considers necessary.
- (3) The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention.

Article 7

- (1) The Administrative Council shall hold an annual meeting and such other meetings as may be determined by the Council, or convened by the Chairman, or convened by the Secretary-General at the request of not less than five members of the Council.
- (2) Each member of the Administrative Council shall have one vote and, except as otherwise herein provided, all matters before the Council shall be decided by a majority of the votes cast.
- (3) A quorum for any meeting of the Administrative Council shall be a majority of its members.
- (4) The Administrative Council may establish, by a majority of two-thirds of its members, a procedure whereby the Chairman may seek a vote of the Council without convening a meeting of the Council. The vote shall be considered

valid only if the majority of the members of the Council cast their votes within the time limit fixed by the said procedure.

Article 8

Members of the Administrative Council and the Chairman shall serve without remuneration from the Centre.

Section 3

The Secretariat

Article 9

The Secretariat shall consist of a Secretary-General, one or more Deputy Secretaries-General and staff.

Article 10

- (1) The Secretary-General and any Deputy Secretary-General shall be elected by the Administrative Council by a majority of two-thirds of its members upon the nomination of the Chairman for a term of service not exceeding six years and shall be eligible for re-election. After consulting the members of the Administrative Council, the Chairman shall propose one or more candidates for each such office.
- (2) The offices of Secretary-General and Deputy Secretary-General shall be incompatible with the exercise of any political function. Neither the Secretary-General nor any Deputy Secretary-General may hold any other employment or engage in any other occupation except with the approval of the Administrative Council.
- (3) During the Secretary-General's absence or inability to act, and during any vacancy of the office of Secretary-General, the Deputy Secretary-General shall act as Secretary-General. If there shall be more than one Deputy Secretary-General, the Administrative Council shall determine in advance the order in which they shall act as Secretary-General.

Article 11

The Secretary-General shall be the legal representative and the principal officer of the Centre and shall be responsible for its administration, including the appointment of staff, in accordance with the provisions of this Convention and the rules adopted by the Administrative Council. He shall perform the function of registrar and shall have the power to authenticate arbitral awards rendered pursuant to this Convention, and to certify copies thereof.

Section 4

The Panels

Article 12

The Panel of Conciliators and the Panel of Arbitrators shall each consist of qualified persons, designated as hereinafter provided, who are willing to serve thereon.

Article 13

- (1) Each Contracting State may designate to each Panel four persons who may but need not be its nationals.
- (2) The Chairman may designate ten persons to each Panel. The persons so designated to a Panel shall each have a different nationality.

Article 14

- (1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce; industry or finance, 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.
- (2) The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.

Article 15

- (1) Panel members shall serve for renewable periods of six years.
- (2) In case of death or resignation of a member of a Panel, the authority which designated the member shall have the right to designate another person to serve for the remainder of that member's term.
- (3) Panel members shall continue in office until their successors have been designated.

Article 16

- (1) A person may serve on both Panels.

- (2) If a person shall have been designated to serve on the same Panel by more than one Contracting State, or by one or more Contracting States and the Chairman, he shall be deemed to have been designated by the authority which first designated him or, if one such authority is the State of which he is a national, by that State.
- (3) All designations shall be notified to the Secretary-General and shall take effect from the date on which the notification is received.

Section 5

Financing the Centre

Article 17

If the expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts, the excess shall be borne by Contracting States which are members of the Bank in proportion to their respective subscriptions to the capital stock of the Bank, and by Contracting States which are not members of the Bank in accordance with rules adopted by the Administrative Council.

Section 6

Status, Immunities and Privileges

Article 18

The Centre shall have full international legal personality. The legal capacity of the Centre shall include the capacity:

- (a) to contract;
- (b) to acquire and dispose of movable and immovable property;
- (c) to institute legal proceedings.

Article 19

To enable the Centre to fulfill its functions, it shall enjoy in the territories of each Contracting State the immunities and privileges set forth in this Section.

Article 20

The Centre, its property and assets shall enjoy immunity from all legal process, except when the Centre waives this immunity.

Article 21

The Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed pursuant to paragraph (3) of Article 52, and the officers and employees of the Secretariat.

- (a) shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity;
- (b) not being local nationals, shall enjoy the same immunities from immigration restrictions, alien registration requirements and national service obligations, the same facilities as regards exchange restrictions and the same treatment in respect of traveling facilities as are accorded by Contracting States to the representatives, officials and employees of comparable rank of other Contracting States.

Article 22

The provisions of Article 21 shall apply to persons appearing in proceedings under this Convention as parties, agents, counsel, advocates, witnesses or experts; provided, however, that sub-paragraph (b) thereof shall apply only in connection with their travel to and from, and their stay at, the place where the proceedings are held.

Article 23

- (1) The archives of the Centre shall be inviolable, wherever they may be.
- (2) With regard to its official communications, the Centre shall be accorded by each Contracting State treatment not less favorable than that accorded to other international organizations.

Article 24

- (1) The Centre, its assets, property and income, and its operations and transactions authorized by this Convention shall be exempt from all taxation and customs duties. The Centre shall also be exempt from liability for the collection or payment of any taxes or customs duties.
- (2) Except in the case of local nationals, no tax shall be levied on or in respect of expense allowances paid by the Centre to the Chairman or members of the Administrative Council, or on or in respect of salaries, expense allowances or other emoluments paid by the Centre to officials or employees of the Secretariat.
- (3) No tax shall be levied on or in respect of fees or expense allowances received by persons acting as conciliators, or arbitrators, or members of a Committee appointed pursuant to paragraph (3) of Article 52, in proceedings under this Convention, if the sole jurisdictional basis for such tax is the location of the Centre or the place where such proceedings are conducted or the place where such fees or allowances are paid.

CHAPTER II

JURISDICTION OF THE CENTRE

Article 25

- (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
- (2) “National of another Contracting State” means:
 - (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
 - (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.
- (3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.
- (4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

Article 26

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

Article 27

- (1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.
- (2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

CHAPTER III

CONCILIATION

Section 1

Request for Conciliation

Article 28

- (1) Any Contracting State or any national of a Contracting State wishing to institute conciliation proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.
- (2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to conciliation in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.
- (3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

Section 2

Constitution of the Conciliation Commission

Article 29

- (1) The Conciliation Commission (hereinafter called the Commission) shall be constituted as soon as possible after registration of a request pursuant to Article 28.
 - (a) The Commission shall consist of a sole conciliator or any uneven number of conciliators appointed as the parties shall agree.

- (b) Where the parties do not agree upon the number of conciliators and the method of their appointment, the Commission shall consist of three conciliators, one conciliator appointed by each party and the third, who shall be the president of the Commission, appointed by agreement of the parties.

Article 30

If the Commission shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 28, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the conciliator or conciliators not yet appointed.

Article 31

- (1) Conciliators may be appointed from outside the Panel of Conciliators, except in the case of appointments by the Chairman pursuant to Article 30.
- (2) Conciliators appointed from outside the Panel of Conciliators shall possess the qualities stated in paragraph (1) of Article 14.

Section 3

Conciliation Proceedings

Article 32

- (1) The Commission shall be the judge of its own competence.
- (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Commission, shall be considered by the Commission which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 33

Any conciliation proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Conciliation Rules in effect on the date on which the parties consented to conciliation. If any question of procedure arises which is not covered by this Section or the Conciliation Rules or any rules agreed by the parties, the Commission shall decide the question.

Article 34

- (1) It shall be the duty of the Commission to clarify the issues in dispute between the parties and to endeavor to bring about agreement between them upon mutually acceptable terms. To that end, the Commission may at any stage of the proceedings and from time to time recommend terms of settlement to the parties. The parties shall cooperate in good faith with the Commission in order to enable the Commission to carry out its functions, and shall give their most serious consideration to its recommendations.
- (2) If the parties reach agreement, the Commission shall draw up a report noting the issues in dispute and recording that the parties have reached agreement. If, at any stage of the proceedings, it appears to the Commission that there is no likelihood of agreement between the parties, it shall close the proceedings and shall draw up a report noting the submission of the dispute and recording the failure of the parties to reach agreement. If one party fails to appear or participate in the proceedings, the Commission shall close the proceedings and shall draw up a report noting that party's failure to appear or participate.

Article 35

Except as the parties to the dispute shall otherwise agree, neither party to a conciliation proceeding shall be entitled in any other proceeding, whether before arbitrators or in a court of law or otherwise, to invoke or rely on any views expressed or statements or admissions or offers of settlement made by the other party in the conciliation proceedings, or the report or any recommendations made by the Commission.

CHAPTER IV

ARBITRATION

Section 1

Request for Arbitration

Article 36

- (1) Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.
- (2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

- (3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

Section 2

Constitution of the Tribunal

Article 37

- (1) The Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request pursuant to Article 36.
 - (a) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.
 - (b) Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.

Article 38

If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

Article 39

The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.

Article 40

- (1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38.
- (2) Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.

Section 3

Powers and Functions of the Tribunal

Article 41

- (1) The Tribunal shall be the judge of its own competence.
- (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 42

- (1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.
- (2) The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law.
- (3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

Article 43

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,

- (a) call upon the parties to produce documents or other evidence; and
- (b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.

Article 44

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

Article 45

- (1) Failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions.
- (2) If a party fails to appear or to present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.

Article 46

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

Article 47

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

Section 4**The Award**

Article 48

- (1) The Tribunal shall decide questions by a majority of the votes of all its members.
- (2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.
- (3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.
- (4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.
- (5) The Centre shall not publish the award without the consent of the parties.

Article 49

- (1) The Secretary-General shall promptly dispatch certified copies of the award to the parties. The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.
- (2) The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide

any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.

Section 5

Interpretation, Revision and Annulment of the Award

Article 50

- (1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.
- (2) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

Article 51

- (1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.
- (2) The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.
- (3) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.
- (4) The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request.

Article 52

- (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
 - (a) that the Tribunal was not properly constituted;
 - (b) that the Tribunal has manifestly exceeded its powers;
 - (c) that there was corruption on the part of a member of the Tribunal;
 - (d) that there has been a serious departure from a fundamental rule of procedure; or
 - (e) that the award has failed to state the reasons on which it is based.
- (2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.
- (3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an ad hoc Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).
- (4) The provisions of Articles 41–45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee.
- (5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.
- (6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter.

Section 6

Recognition and Enforcement of the Award

Article 53

- (1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

- (2) For the purposes of this Section, “award” shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

Article 54

- (1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.
- (2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.
- (3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Article 55

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

CHAPTER V

REPLACEMENT AND DISQUALIFICATION OF CONCILIATORS AND ARBITRATORS

Article 56

- (1) After a Commission or a Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged; provided, however, that if a conciliator or an arbitrator should die, become incapacitated, or resign, the resulting vacancy shall be filled in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.
- (2) A member of a Commission or Tribunal shall continue to serve in that capacity notwithstanding that he shall have ceased to be a member of the Panel.
- (3) If a conciliator or arbitrator appointed by a party shall have resigned without the consent of the Commission or Tribunal of which he was a member, the Chairman shall appoint a person from the appropriate Panel to fill the resulting vacancy.

Article 57

A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

Article 58

The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

CHAPTER VI**COST OF PROCEEDINGS**

Article 59

The charges payable by the parties for the use of the facilities of the Centre shall be determined by the Secretary-General in accordance with the regulations adopted by the Administrative Council.

Article 60

- (1) Each Commission and each Tribunal shall determine the fees and expenses of its members within limits established from time to time by the Administrative Council and after consultation with the Secretary-General.
- (2) Nothing in paragraph (1) of this Article shall preclude the parties from agreeing in advance with the Commission or Tribunal concerned upon the fees and expenses of its members.

Article 61

- (1) In the case of conciliation proceedings the fees and expenses of members of the Commission as well as the charges for the use of the facilities of the Centre, shall be borne equally by the parties. Each party shall bear any other expenses it incurs in connection with the proceedings.
- (2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees

and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

CHAPTER VII

PLACE OF PROCEEDINGS

Article 62

Conciliation and arbitration proceedings shall be held at the seat of the Centre except as hereinafter provided.

Article 63

Conciliation and arbitration proceedings may be held, if the parties so agree,

- (a) at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may make arrangements for that purpose; or
- (b) at any other place approved by the Commission or Tribunal after consultation with the Secretary-General.

CHAPTER VIII

DISPUTES BETWEEN CONTRACTING STATES

Article 64

Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.

CHAPTER IX

AMENDMENT

Article 65

Any Contracting State may propose amendment of this Convention. The text of a proposed amendment shall be communicated to the Secretary-General not less than 90 days prior to the meeting of the Administrative Council at which such amendment is to be considered and shall forthwith be transmitted by him to all the members of the Administrative Council.

Article 66

- (1) If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment.
- (2) No amendment shall affect the rights and obligations under this Convention of any Contracting State or of any of its constituent subdivisions or agencies, or of any national of such State arising out of consent to the jurisdiction of the Centre given before the date of entry into force of the amendment.

CHAPTER X**FINAL PROVISIONS**

Article 67

This Convention shall be open for signature on behalf of States members of the Bank. It shall also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention.

Article 68

- (1) This Convention shall be subject to ratification, acceptance or approval by the signatory States in accordance with their respective constitutional procedures.
- (2) This Convention shall enter into force 30 days after the date of deposit of the twentieth instrument of ratification, acceptance or approval. It shall enter into force for each State which subsequently deposits its instrument of ratification, acceptance or approval 30 days after the date of such deposit.

Article 69

Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories.

Article 70

This Convention shall apply to all territories for whose international relations a Contracting State is responsible, except those which are excluded by such State by written notice to the depositary of this Convention either at the time of ratification, acceptance or approval or subsequently.

Article 71

Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

Article 72

Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

Article 73

Instruments of ratification, acceptance or approval of this Convention and of amendments thereto shall be deposited with the Bank which shall act as the depositary of this Convention. The depositary shall transmit certified copies of this Convention to States members of the Bank and to any other State invited to sign the Convention.

Article 74

The depositary shall register this Convention with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations and the Regulations thereunder adopted by the General Assembly.

Article 75

The depositary shall notify all signatory States of the following:

- (a) signatures in accordance with Article 67;
- (b) deposits of instruments of ratification, acceptance and approval in accordance with Article 73;
- (c) the date on which this Convention enters into force in accordance with Article 68;
- (d) exclusions from territorial application pursuant to Article 70;
- (e) the date on which any amendment of this Convention enters into force in accordance with Article 66; and
- (f) denunciations in accordance with Article 71.

DONE at Washington, in the English, French and Spanish languages, all three texts being equally authentic, in a single copy which shall remain deposited in the archives of the International Bank for Reconstruction and Development, which has indicated by its signature below its agreement to fulfill the functions with which it is charged under this Convention.

2. LIST OF THE ICSID CONVENTION SIGNATORIES (2020)

CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES
 BETWEEN STATES AND NATIONALS OF OTHER STATES LIST OF CON-
 TRACTING STATES AND OTHER SIGNATORIES OF THE CONVENTION
 (as of June 9, 2020)

The 163 States listed below have signed the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States on the dates indicated. The names of the 147 States that have deposited their instruments of ratification are in bold, and the dates of such deposit and of the attainment of the status of Contracting State by the entry into force of the Convention for each of them are also indicated.

State	Signature	Deposit of Ratification	Entry into Force of Convention
Afghanistan	Sep. 30, 1966	Jun. 25, 1968	Jul. 25, 1968
Albania	Oct. 15, 1991	Oct. 15, 1991	Nov. 14, 1991
Algeria	Apr. 17, 1995	Feb. 21, 1996	Mar. 22, 1996
Argentina	May 21, 1991	Oct. 19, 1994	Nov. 18, 1994
Armenia	Sep. 16, 1992	Sep. 16, 1992	Oct. 16, 1992
Australia	Mar. 24, 1975	May 2, 1991	Jun. 1, 1991
Austria	May 17, 1966	May 25, 1971	Jun. 24, 1971
Azerbaijan	Sep. 18, 1992	Sep. 18, 1992	Oct. 18, 1992
Bahamas	Oct. 19, 1995	Oct. 19, 1995	Nov. 18, 1995
Bahrain	Sep. 22, 1995	Feb. 14, 1996	Mar. 15, 1996
Bangladesh	Nov. 20, 1979	Mar. 27, 1980	Apr. 26, 1980
Barbados	May 13, 1981	Nov. 1, 1983	Dec. 1, 1983
Belarus	Jul. 10, 1992	Jul. 10, 1992	Aug. 9, 1992

State	Signature	Deposit of Ratification	Entry into Force of Convention
Belgium	Dec. 15, 1965	Aug. 27, 1970	Sep. 26, 1970
Belize	Dec. 19, 1986		
Benin	Sep. 10, 1965	Sep. 6, 1966	Oct. 14, 1966
Bosnia and Herzegovina	Apr. 25, 1997	May 14, 1997	Jun. 13, 1997
Botswana	Jan. 15, 1970	Jan. 15, 1970	Feb. 14, 1970
Brunei Darussalam	Sep. 16, 2002	Sep. 16, 2002	Oct. 16, 2002
Bulgaria	Mar. 21, 2000	Apr. 13, 2001	May 13, 2001
Burkina Faso	Sep. 16, 1965	Aug. 29, 1966	Oct. 14, 1966
Burundi	Feb. 17, 1967	Nov. 5, 1969	Dec. 5, 1969
Cambodia	Nov. 5, 1993	Dec. 20, 2004	Jan. 19, 2005
Cameroon	Sep. 23, 1965	Jan. 3, 1967	Feb. 2, 1967
Canada	Dec. 15, 2006	Nov. 1, 2013	Dec. 1, 2013
Cape Verde	Dec. 20, 2010	Dec. 27, 2010	Jan. 26, 2011
Central African Republic	Aug. 26, 1965	Feb. 23, 1966	Oct. 14, 1966
Chad	May 12, 1966	Aug. 29, 1966	Oct. 14, 1966
Chile	Jan. 25, 1991	Sep. 24, 1991	Oct. 24, 1991
China	Feb. 9, 1990	Jan. 7, 1993	Feb. 6, 1993
Colombia	May 18, 1993	Jul. 15, 1997	Aug. 14, 1997
Comoros	Sep. 26, 1978	Nov. 7, 1978	Dec. 7, 1978

State	Signature	Deposit of Ratification	Entry into Force of Convention
Congo	Dec. 27, 1965	Jun. 23, 1966	Oct. 14, 1966
Congo, Democratic Rep. of	Oct. 29, 1968	Apr. 29, 1970	May 29, 1970
Costa Rica	Sep. 29, 1981	Apr. 27, 1993	May 27, 1993
Côte d’Ivoire	Jun. 30, 1965	Feb. 16, 1966	Oct. 14, 1966
Croatia	Jun. 16, 1997	Sep. 22, 1998	Oct. 22, 1998
Cyprus	Mar. 9, 1966	Nov. 25, 1966	Dec. 25, 1966
Czech Republic	Mar. 23, 1993	Mar. 23, 1993	Apr. 22, 1993
Dominican Republic	Mar. 20, 2000		
Denmark	Oct. 11, 1965	Apr. 24, 1968	May 24, 1968
Djibouti	Apr. 12, 2019	Jun. 9, 2020	Jun. 9, 2020
Egypt, Arab Rep. of	Feb. 11, 1972	May 3, 1972	Jun. 2, 1972
El Salvador	Jun. 9, 1982	Mar. 6, 1984	Apr. 5, 1984
Estonia	Jun. 23, 1992	Jun. 23, 1992	Jul. 23, 1992
Ethiopia	Sep. 21, 1965		
Fiji	Jul. 1, 1977	Aug. 11, 1977	Sep. 10, 1977
Finland	Jul. 14, 1967	Jan. 9, 1969	Feb. 8, 1969
France	Dec. 22, 1965	Aug. 21, 1967	Sep. 20, 1967
Gabon	Sep. 21, 1965	Apr. 4, 1966	Oct. 14, 1966
Gambia, The	Oct. 1, 1974	Dec. 27, 1974	Jan. 26, 1975

State	Signature	Deposit of Ratification	Entry into Force of Convention
Georgia	Aug. 7, 1992	Aug. 7, 1992	Sep. 6, 1992
Germany	Jan. 27, 1966	Apr. 18, 1969	May 18, 1969
Ghana	Nov. 26, 1965	Jul. 13, 1966	Oct. 14, 1966
Greece	Mar. 16, 1966	Apr. 21, 1969	May 21, 1969
Grenada	May 24, 1991	May 24, 1991	Jun. 23, 1991
Guatemala	Nov. 9, 1995	Jan. 21, 2003	Feb. 20, 2003
Guinea	Aug. 27, 1968	Nov. 4, 1968	Dec. 4, 1968
Guinea-Bissau	Sep. 4, 1991		
Guyana	Jul. 3, 1969	Jul. 11, 1969	Aug. 10, 1969
Haiti	Jan. 30, 1985	Oct. 27, 2009	Nov. 26, 2009
Honduras	May 28, 1986	Feb. 14, 1989	Mar. 16, 1989
Hungary	Oct. 1, 1986	Feb. 4, 1987	Mar. 6, 1987
Iceland	Jul. 25, 1966	Jul. 25, 1966	Oct. 14, 1966
Indonesia	Feb. 16, 1968	Sep. 28, 1968	Oct. 28, 1968
Iraq	Nov. 17, 2015	Nov. 17, 2015	Dec. 17, 2015
Ireland	Aug. 30, 1966	Apr. 7, 1981	May 7, 1981
Israel	Jun. 16, 1980	Jun. 22, 1983	Jul. 22, 1983
Italy	Nov. 18, 1965	Mar. 29, 1971	Apr. 28, 1971
Jamaica	Jun. 23, 1965	Sep. 9, 1966	Oct. 14, 1966

State	Signature	Deposit of Ratification	Entry into Force of Convention
Japan	Sep. 23, 1965	Aug. 17, 1967	Sep. 16, 1967
Jordan	Jul. 14, 1972	Oct. 30, 1972	Nov. 29, 1972
Kazakhstan	Jul. 23, 1992	Sep. 21, 2000	Oct. 21, 2000
Kenya	May 24, 1966	Jan. 3, 1967	Feb. 2, 1967
Kyrgyz Republic	Jun. 9, 1995		
Korea, Rep. of	Apr. 18, 1966	Feb. 21, 1967	Mar. 23, 1967
Kosovo	Jun. 29, 2009	Jun. 29, 2009	Jul. 29, 2009
Kuwait	Feb. 9, 1978	Feb. 2, 1979	Mar. 4, 1979
Latvia	Aug. 8, 1997	Aug. 8, 1997	Sep. 7, 1997
Lebanon	Mar. 26, 2003	Mar. 26, 2003	Apr. 25, 2003
Lesotho	Sep. 19, 1968	Jul. 8, 1969	Aug. 7, 1969
Liberia	Sep. 3, 1965	Jun. 16, 1970	Jul. 16, 1970
Lithuania	July 6, 1992	Jul. 6, 1992	Aug. 5, 1992
Luxembourg	Sep. 28, 1965	Jul. 30, 1970	Aug. 29, 1970
Macedonia, former Yugoslav Rep. of	Sep. 16, 1998	Oct. 27, 1998	Nov. 26, 1998
Madagascar	Jun. 1, 1966	Sep. 6, 1966	Oct. 14, 1966
Malawi	Jun. 9, 1966	Aug. 23, 1966	Oct. 14, 1966
Malaysia	Oct. 22, 1965	Aug. 8, 1966	Oct. 14, 1966
Mali	Apr. 9, 1976	Jan. 3, 1978	Feb. 2, 1978

State	Signature	Deposit of Ratification	Entry into Force of Convention
Malta	Apr. 24, 2002	Nov. 3, 2003	Dec. 3, 2003
Mauritania	Jul. 30, 1965	Jan. 11, 1966	Oct. 14, 1966
Mauritius	Jun. 2, 1969	Jun. 2, 1969	Jul. 2, 1969
Mexico	Jan. 11, 2018	Jul. 27, 2018	Aug. 26, 2018
Micronesia	Jun. 24, 1993	Jun. 24, 1993	Jul. 24, 1993
Moldova	Aug. 12, 1992	May 5, 2011	Jun. 4, 2011
Mongolia	Jun. 14, 1991	Jun. 14, 1991	Jul. 14, 1991
Montenegro	Jul. 19, 2012	Apr. 10, 2013	May 10, 2013
Morocco	Oct. 11, 1965	May 11, 1967	Jun. 10, 1967
Mozambique	Apr. 4, 1995	Jun. 7, 1995	Jul. 7, 1995
Namibia	Oct. 26, 1998		
Nauru	Apr. 12, 2016	Apr. 12, 2016	May 12, 2016
Nepal	Sep. 28, 1965	Jan. 7, 1969	Feb. 6, 1969
Netherlands	May 25, 1966	Sep. 14, 1966	Oct. 14, 1966
New Zealand	Sep. 2, 1970	Apr. 2, 1980	May 2, 1980
Nicaragua	Feb. 4, 1994	Mar. 20, 1995	Apr. 19, 1995
Niger	Aug. 23, 1965	Nov. 14, 1966	Dec. 14, 1966
Nigeria	Jul. 13, 1965	Aug. 23, 1965	Oct. 14, 1966
Norway	Jun. 24, 1966	Aug. 16, 1967	Sep. 15, 1967

State	Signature	Deposit of Ratification	Entry into Force of Convention
Oman	May 5, 1995	Jul. 24, 1995	Aug. 23, 1995
Pakistan	Jul. 6, 1965	Sep. 15, 1966	Oct. 15, 1966
Panama	Nov. 22, 1995	Apr. 8, 1996	May 8, 1996
Papua New Guinea	Oct. 20, 1978	Oct. 20, 1978	Nov. 19, 1978
Paraguay	Jul. 27, 1981	Jan. 7, 1983	Feb. 6, 1983
Peru	Sep. 4, 1991	Aug. 9, 1993	Sep. 8, 1993
Philippines	Sep. 26, 1978	Nov. 17, 1978	Dec. 17, 1978
Portugal	Aug. 4, 1983	Jul. 2, 1984	Aug. 1, 1984
Qatar	Sep. 30, 2010	Dec. 21, 2010	Jan. 20, 2011
Romania	Sep. 6, 1974	Sep. 12, 1975	Oct. 12, 1975
Russian Federation	Jun. 16, 1992		
Rwanda	Apr. 21, 1978	Oct. 15, 1979	Nov. 14, 1979
Saint Vincent and the Grenadines	Aug. 7, 2001	Dec. 16, 2002	Jan. 15, 2003
Serbia	May 9, 2007	May 9, 2007	Jun. 8, 2007
Samoa	Feb. 3, 1978	Apr. 25, 1978	May 25, 1978
San Marino	Apr. 11, 2014	Apr. 18, 2015	May 18, 2015
Sao Tome and Principe	Oct. 1, 1999	May 20, 2013	Jun. 19, 2013
Saudi Arabia	Sep. 28, 1979	May 8, 1980	Jun. 7, 1980
Senegal	Sep. 26, 1966	Apr. 21, 1967	May 21, 1967

State	Signature	Deposit of Ratification	Entry into Force of Convention
Serbia	May 9, 2007	May 9, 2007	Jun. 8, 2007
Seychelles	Feb. 16, 1978	Mar. 20, 1978	Apr. 19, 1978
Sierra Leone	Sep. 27, 1965	Aug. 2, 1966	Oct. 14, 1966
Singapore	Feb. 2, 1968	Oct. 14, 1968	Nov. 13, 1968
Slovak Republic	Sep. 27, 1993	May 27, 1994	Jun. 26, 1994
Slovenia	Mar. 7, 1994	Mar. 7, 1994	Apr. 6, 1994
Solomon Islands	Nov. 12, 1979	Sep. 8, 1981	Oct. 8, 1981
Somalia	Sep. 27, 1965	Feb. 29, 1968	Mar. 30, 1968
South Sudan	Apr. 18, 2012	Apr. 18, 2012	May 18, 2012
Spain	Mar. 21, 1994	Aug. 18, 1994	Sep. 17, 1994
Sri Lanka	Aug. 30, 1967	Oct. 12, 1967	Nov. 11, 1967
St. Kitts & Nevis	Oct. 14, 1994	Aug. 4, 1995	Sep. 3, 1995
St. Lucia	Jun. 4, 1984	Jun. 4, 1984	Jul. 4, 1984
Sudan	Mar. 15, 1967	Apr. 9, 1973	May 9, 1973
Syria	May 25, 2005	Jan. 25, 2006	Feb. 24, 2006
Swaziland	Nov. 3, 1970	Jun. 14, 1971	Jul. 14, 1971
Sweden	Sep. 25, 1965	Dec. 29, 1966	Jan. 28, 1967
Switzerland	Sep. 22, 1967	May 15, 1968	Jun. 14, 1968
Tanzania	Jan. 10, 1992	May 18, 1992	Jun. 17, 1992

State	Signature	Deposit of Ratification	Entry into Force of Convention
Thailand	Dec. 6, 1985		
Timor-Leste	Jul. 23, 2002	Jul. 23, 2002	Aug. 22, 2002
Togo	Jan. 24, 1966	Aug. 11, 1967	Sep. 10, 1967
Tonga	May 1, 1989	Mar. 21, 1990	Apr. 20, 1990
Trinidad and Tobago	Oct. 5, 1966	Jan. 3, 1967	Feb. 2, 1967
Tunisia	May 5, 1965	Jun. 22, 1966	Oct. 14, 1966
Turkey	Jun. 24, 1987	Mar. 3, 1989	Apr. 2, 1989
Turkmenistan	Sep. 26, 1992	Sep. 26, 1992	Oct. 26, 1992
Uganda	Jun. 7, 1966	Jun. 7, 1966	Oct. 14, 1966
Ukraine	Apr. 3, 1998	Jun. 7, 2000	Jul. 7, 2000
United Arab Emirates	Dec. 23, 1981	Dec. 23, 1981	Jan. 22, 1982
United Kingdom of Great Britain and Northern Ireland	May 26, 1965	Dec. 19, 1966	Jan. 18, 1967
United States of America	Aug. 27, 1965	Jun. 10, 1966	Oct. 14, 1966
Uruguay	May 28, 1992	Aug. 9, 2000	Sep. 8, 2000
Uzbekistan	Mar. 17, 1994	Jul. 26, 1995	Aug. 25, 1995
Yemen, Republic of	Oct. 28, 1997	Oct. 21, 2004	Nov. 20, 2004
Zambia	Jun. 17, 1970	Jun. 17, 1970	Jul. 17, 1970
Zimbabwe	Mar. 25, 1991	May 20, 1994	Jun. 19, 1994

3. ICSID ADMINISTRATIVE AND FINANCIAL REGULATIONS (2006)

The Administrative and Financial Regulations of ICSID were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(a) of the ICSID Convention.

The Regulations of particular interest to parties to proceedings under the Convention are: 14–16, 22–31 and 34(1). They are intended to be complementary both to the Convention and to the Institution, Conciliation and Arbitration Rules adopted pursuant to Article 6(1)(b) and (c) of the Convention.

Administrative and Financial Regulations

Chapter I

Procedures of the Administrative Council

Regulation 1

Date and Place of the Annual Meeting

- (1) The Annual Meeting of the Administrative Council shall take place in conjunction with the Annual Meeting of the Board of Governors of the International Bank for Reconstruction and Development (hereinafter referred to as the “Bank”), unless the Council specifies otherwise.
- (2) The Secretary-General shall coordinate the arrangements for the Annual Meeting of the Administrative Council with the appropriate officers of the Bank.

Regulation 2

Notice of Meetings

- (1) The Secretary-General shall, by any rapid means of communication, give each member notice of the time and place of each meeting of the Administrative Council, which notice shall be dispatched not less than 42 days prior to the date set for such meeting, except that in urgent cases such notice shall be sufficient if dispatched by telegram or cable not less than 10 days prior to the date set for such meeting.
- (2) Any meeting of the Administrative Council at which no quorum is present may be adjourned from time to time by a majority of the members present and notice of the adjourned meeting need not be given.

Regulation 3**Agenda for Meetings**

- (1) Under the direction of the Chairman, the Secretary-General shall prepare a brief agenda for each meeting of the Administrative Council and shall transmit such agenda to each member with the notice of such meeting.
- (2) Additional subjects may be placed on the agenda for any meeting of the Administrative Council by any member provided that he shall give notice thereof to the Secretary-General not less than seven days prior to the date set for such meeting. In special circumstances the Chairman, or the Secretary-General after consulting the Chairman, may at any time place additional subjects on the agenda for any meeting of the Council. The Secretary-General shall as promptly as possible give each member notice of the addition of any subject to the agenda for any meeting.
- (3) The Administrative Council may at any time authorize any subject to be placed on the agenda for any meeting even though the notice required by this Regulation shall not have been given.

Regulation 4**Presiding Officer**

- (1) The Chairman shall be the Presiding Officer at meetings of the Administrative Council.
- (2) If the Chairman is unable to preside over all or part of a meeting of the Council, one of the members of the Administrative Council shall act as temporary Presiding Officer. This member shall be the Representative, Alternate Representative or temporary Alternate Representative of that Contracting State represented at the meeting that stands highest on a list of Contracting States arranged chronologically according to the date of the deposit of instruments of ratification, acceptance or approval of the Convention, starting with the State following the one that had on the last previous occasion provided a temporary Presiding Officer. A temporary Presiding Officer may cast the vote of the State he represents, or he may assign another member of his delegation to do so.

Regulation 5**Secretary of the Council**

- (1) The Secretary-General shall serve as Secretary of the Administrative Council.

- (2) Except as otherwise specifically directed by the Administrative Council, the Secretary-General, in consultation with the Chairman, shall have charge of all arrangements for the holding of meetings of the Council.
- (3) The Secretary-General shall keep a summary record of the proceedings of the Administrative Council, copies of which shall be provided to all members.
- (4) The Secretary-General shall present to each Annual Meeting of the Administrative Council, for its approval pursuant to Article 6(1)(g) of the Convention, the annual report on the operation of the Centre.

Regulation 6

Attendance at Meetings

- (1) The Secretary-General and the Deputy Secretaries-General may attend all meetings of the Administrative Council.
- (2) The Secretary-General, in consultation with the Chairman, may invite observers to attend any meeting of the Administrative Council.

Regulation 7

Voting

- (1) Except as otherwise specifically provided in the Convention, all decisions of the Administrative Council shall be taken by a majority of the votes cast. At any meeting the Presiding Officer may ascertain the sense of the meeting in lieu of a formal vote but he shall require a formal vote upon the request of any member. Whenever a formal vote is required the written text of the motion shall be distributed to the members.
- (2) No member of the Administrative Council may vote by proxy or by any other method than in person, but the representative of a Contracting State may designate a temporary alternate to vote for him at any meeting at which the regular alternate is not present.
- (3) Whenever, in the judgment of the Chairman, any action must be taken by the Administrative Council which should not be postponed until the next Annual Meeting of the Council and does not warrant the calling of a special meeting, the Secretary-General shall transmit to each member by any rapid means of communication a motion embodying the proposed action with a request for a vote by the members of the Council. Votes shall be cast during a period ending 21 days after such dispatch, unless a longer period is approved by the Chairman. At the expiration of the established period, the Secretary-General shall record the results and notify all members of the Council. If the replies received do not include those of a majority of the members, the motion shall be considered lost.

- (4) Whenever at a meeting of the Administrative Council at which all Contracting States are not represented, the votes necessary to adopt a proposed decision by a majority of two-thirds of the members of the Council are not obtained, the Council with the concurrence of the Chairman may decide that the votes of those members of the Council represented at the meeting shall be registered and the votes of the absent members shall be solicited in accordance with paragraph (3) of this Regulation. Votes registered at the meeting may be changed by the member before the expiration of the voting period established pursuant to that paragraph.

Chapter II

The Secretariat

Regulation 8

Election of the Secretary-General and His Deputies

In proposing to the Administrative Council one or more candidates for the office of Secretary-General or any Deputy Secretary-General, the Chairman shall at the same time make proposals with respect to:

- (a) the length of the term of service;
- (b) approval for any of the candidates to hold, if elected, any other employment or to engage in any other occupation;
- (c) the conditions of service, taking into account any proposals made pursuant to paragraph (b).

Regulation 9

Acting Secretary-General

- (1) If, on the election of a Deputy Secretary-General, there should at any time be more than one Deputy Secretary-General, the Chairman shall immediately after such election propose to the Administrative Council the order in which these Deputies shall act as Secretary-General pursuant to Article 10(3) of the Convention. In the absence of such a decision the order shall be that of seniority in the post of Deputy.
- (2) The Secretary-General shall designate the member of the staff of the Centre who shall act for him during his absence or inability to act, if all Deputy Secretaries-General should also be absent or unable to act or if the office of Deputy should be vacant. If there should be a simultaneous vacancy in the offices of Secretary-General and Deputy Secretary-General, the Chairman shall designate the member of the staff who shall act for the Secretary-General.

Regulation 10

Appointment of Staff Members

The Secretary-General shall appoint the members of the staff of the Centre. Appointments may be made directly or by secondment.

Regulation 11

Conditions of Employment

- (1) The conditions of service of the members of the staff of the Centre shall be the same as those of the staff of the Bank.
- (2) The Secretary-General shall make arrangements with the Bank, within the framework of the general administrative arrangements approved by the Administrative Council pursuant to Article 6(1)(d) of the Convention, for the participation of members of the Secretariat in the Staff Retirement Plan of the Bank as well as in other facilities and contractual arrangements established for the benefit of the staff of the Bank.

Regulation 12

Authority of the Secretary-General

- (1) Deputy Secretaries-General and the members of the staff, whether on direct appointment or on secondment, shall act solely under the direction of the Secretary-General.
- (2) The Secretary-General shall have authority to dismiss members of the Secretariat and to impose disciplinary measures. In the case of Deputy Secretaries-General dismissal may only be imposed with the concurrence of the Administrative Council.

Regulation 13

Incompatibility of Functions

The Secretary-General, the Deputy Secretaries-General and the members of the staff may not serve on the Panel of Conciliators or of Arbitrators, or as members of any Commission or Tribunal.

Chapter III

Financial Provisions

Regulation 14

Direct Costs of Individual Proceedings

- (1) Unless otherwise agreed pursuant to Article 60(2) of the Convention, and in addition to receiving reimbursement for any direct expenses reasonably incurred, each member of a Commission, a Tribunal or an ad hoc Committee appointed from the Panel of Arbitrators pursuant to Article 52(3) of the Convention (hereinafter referred to as “Committee”) shall receive:
 - (a) a fee for each day on which he participates in meetings of the body of which he is a member;
 - (b) a fee for the equivalent of each eight-hour day of other work performed in connection with the proceedings;
 - (c) in lieu of reimbursement of subsistence expenses when away from his normal place of residence, a *per diem* allowance based on the allowance established from time to time for the Executive Directors of the Bank;
 - (d) travel expenses in connection with meetings of the body of which he is a member based on the norms established from time to time for the Executive Directors of the Bank.

The amounts of the fees referred to in paragraphs (a) and (b) above shall be determined from time to time by the Secretary-General, with the approval of the Chairman. Any request for a higher amount shall be made through the Secretary-General.
- (2) All payments, including reimbursement of expenses, to the following shall in all cases be made by the Centre and not by or through either party to the proceeding:
 - (a) members of Commissions, Tribunals and Committees;
 - (b) witnesses and experts summoned at the initiative of a Commission, Tribunal or Committee, and not of one of the parties;
 - (c) members of the Secretariat of the Centre, including persons (such as interpreters, translators, reporters or secretaries) especially engaged by the Centre for a particular proceeding;
 - (d) the host of any proceeding held away from the seat of the Centre pursuant to Article 63 of the Convention.
- (3) In order to enable the Centre to make the payments provided for in paragraph (2), as well as to incur other direct expenses in connection with a proceeding (other than expenses covered by Regulation 15):
 - (a) the parties shall make advance payments to the Centre as follows:
 - initially as soon as a Commission or Tribunal has been constituted, the Secretary-General shall, after consultation with the President of the body in question and, as far as possible, the parties, estimate the

- expenses that will be incurred by the Centre during the next three to six months and request the parties to make an advance payment of this amount;
- if at any time the Secretary-General determines, after consultation with the President of the body in question and as far as possible the parties, that the advances made by the parties will not cover a revised estimate of expenses for the period or any subsequent period, he shall request the parties to make supplementary advance payments.
- (b) the Centre shall not be required to provide any service in connection with a proceeding or to pay the fees, allowances or expenses of the members of any Commission, Tribunal or Committee, unless sufficient advance payments shall previously have been made;
- (c) if the initial advance payments are insufficient to cover estimated future expenses, prior to requesting the parties to make additional advance payments, the Secretary-General shall ascertain the actual expenses incurred and commitments entered into by the Centre with regard to each proceeding and shall appropriately charge or credit the parties;
- (d) in connection with every conciliation proceeding, and in connection with every arbitration proceeding unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, each party shall pay one half of each advance or supplemental charge, without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to Article 61(2) of the Convention. All advances and charges shall be payable, at the place and in the currencies specified by the Secretary-General, as soon as a request for payment is made by him. If the amounts requested are not paid in full within 30 days, then the Secretary-General shall inform both parties of the default and give an opportunity to either of them to make the required payment. At any time 15 days after such information is sent by the Secretary-General, he may move that the Commission or Tribunal stay the proceeding, if by the date of such motion any part of the required payment is still outstanding. If any proceeding is stayed for non-payment for a consecutive period in excess of six months, the Secretary-General may, after notice to and as far as possible in consultation with the parties, move that the competent body discontinue the proceeding;
- (e) in the event that an application for annulment of an award is registered, the above provisions of this Rule shall apply *mutatis mutandis*, except that the applicant shall be solely responsible for making the advance payments requested by the Secretary-General to cover expenses following the constitution of the Committee, and without prejudice to the right of the Committee in accordance with Article 52(4) of the Convention to decide how and by whom expenses incurred in connection with the annulment proceeding shall be paid.

Regulation 15**Special Services to Parties**

- (1) The Centre shall only perform any special service for a party in connection with a proceeding (for example, the provision of translations or copies) if the party shall in advance have deposited an amount sufficient to cover the charge for such service.
- (2) Charges for special services shall normally be based on a schedule of fees to be promulgated from time to time by the Secretary-General and communicated by him to all Contracting States as well as to the parties to all pending proceedings.

Regulation 16**Fee for Lodging Requests**

The party or parties (if a request is made jointly) wishing to institute a conciliation or arbitration proceeding, requesting a supplementary decision to, or the rectification, interpretation, revision or annulment of an arbitral award, or requesting resubmission of a dispute to a new Tribunal after the annulment of an arbitral award, shall pay to the Centre a non-refundable fee determined from time to time by the Secretary-General.

Regulation 17**The Budget**

- (1) The fiscal year of the Centre shall run from July 1 of each year to June 30 of the following year.
- (2) Before the end of each fiscal year the Secretary-General shall prepare and submit, for adoption by the Administrative Council at its next Annual Meeting and in accordance with Article 6(1)(f) of the Convention, a budget for the following fiscal year. This budget is to indicate the expected expenditures of the Centre (excepting those to be incurred on a reimbursable basis) and the expected revenues (excepting reimbursements).
- (3) If, during the course of a fiscal year, the Secretary-General determines that the expected expenditures will exceed those authorized in the budget, or if he should wish to incur expenditures not previously authorized, he shall, in consultation with the Chairman, prepare a supplementary budget, which he shall submit to the Administrative Council for adoption, either at the Annual Meeting or at any other meeting, or in accordance with Regulation 7(3).
- (4) The adoption of a budget constitutes authority for the Secretary-General to make expenditures and incur obligations for the purposes and within the limits specified in the budget. Unless otherwise provided by the Administrative

Council, the Secretary-General may exceed the amount specified for any given budget item, provided that the total amount of the budget is not exceeded.

- (5) Pending the adoption of the budget by the Administrative Council, the Secretary-General may incur expenditures for the purposes and within the limits specified in the budget he submitted to the Council, up to one quarter of the amount authorized to be expended in the previous fiscal year but in no event exceeding the amount that the Bank has agreed to make available for the current fiscal year.

Regulation 18

Assessment of Contributions

- (1) Any excess of expected expenditures over expected revenues shall be assessed on the Contracting States. Each state that is not a member of the Bank shall be assessed a fraction of the total assessment equal to the fraction of the budget of the International Court of Justice that it would have to bear if that budget were divided only among the Contracting States in proportion to the then current scale of contributions applicable to the budget of the Court; the balance of the total assessment shall be divided among the Contracting States that are members of the Bank in proportion to their respective subscription to the capital stock of the Bank. The assessments shall be calculated by the Secretary-General immediately after the adoption of the annual budget, on the basis of the then current membership of the Centre, and shall be promptly communicated to all Contracting States. The assessments shall be payable as soon as they are thus communicated.
- (2) On the adoption of a supplementary budget, the Secretary-General shall immediately calculate supplementary assessments, which shall be payable as soon as they are communicated to the Contracting States.
- (3) A state which is party to the Convention during any part of a fiscal year shall be assessed for the entire fiscal year. If a state becomes a party to the Convention after the assessments for a given fiscal year have been calculated, its assessment shall be calculated by the application of the same appropriate factor as was applied in calculating the original assessments, and no recalculation of the assessments of the other Contracting States shall be made.
- (4) If, after the close of a fiscal year, it is determined that there is a cash surplus, such surplus shall, unless the Administrative Council otherwise decides, be credited to the Contracting States in proportion to the assessed contributions they had paid for that fiscal year. These credits shall be made with respect to the assessments for the fiscal year commencing two years after the end of the fiscal year to which the surplus pertains.

Regulation 19**Audits**

The Secretary-General shall have an audit of the accounts of the Centre made once each year and on the basis of this audit submit a financial statement to the Administrative Council for consideration at the Annual Meeting.

Chapter IV**General Functions of the Secretariat****Regulation 20****List of Contracting States**

The Secretary-General shall maintain a list, which he shall transmit from time to time to all Contracting States and on request to any state or person, of the Contracting States (including former Contracting States, showing the date on which their notice of denunciation was received by the depositary), indicating for each:

- (a) the date on which the Convention entered into force with respect to it;
- (b) any territories excluded pursuant to Article 70 of the Convention and the dates on which the notice of exclusion and any modification of such notice were received by the depositary;
- (c) any designation, pursuant to Article 25(1) of the Convention, of constituent subdivisions or agencies to whose investment disputes the jurisdiction of the Centre extends;
- (d) any notification, pursuant to Article 25(3) of the Convention, that no approval by the State is required for the consent by a constituent subdivision or agency to the jurisdiction of the Centre;
- (e) any notification, pursuant to Article 25(4) of the Convention, of the class or classes of disputes which the State would or would not consider submitting to the jurisdiction of the Centre;
- (f) the competent court or other authority for the recognition and enforcement of arbitral awards, designated pursuant to Article 54(2) of the Convention;
- (g) any legislative or other measures taken, pursuant to Article 69 of the Convention, for making its provisions effective in the territories of the State and communicated by the State to the Centre.

Regulation 21**Establishment of Panels**

- (1) Whenever a Contracting State has the right to make one or more designations to the Panel of Conciliators or of Arbitrators, the Secretary-General shall invite the State to make such designations.

- (2) Each designation made by a Contracting State or by the Chairman shall indicate the name, address and nationality of the designee, and include a statement of his qualifications, with particular reference to his competence in the fields of law, commerce, industry and finance.
- (3) As soon as the Secretary-General is notified of a designation, he shall inform the designee thereof, indicating to him the designating authority and the terminal date of the period of designation and requesting confirmation that the designee is willing to serve.
- (4) The Secretary-General shall maintain lists, which he shall transmit from time to time to all Contracting States and on request to any State or person, of the members of the Panels of Conciliators and of Arbitrators, indicating for each member:
 - (a) his address;
 - (b) his nationality;
 - (c) the terminal date of the current designation;
 - (d) the designating authority;
 - (e) his qualifications.

Regulation 22

Publication

- (1) The Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding.
- (2) If both parties to a proceeding consent to the publication of:
 - (a) reports of Conciliation Commissions;
 - (b) arbitral awards; or
 - (c) the minutes and other records of proceedings,the Secretary-General shall arrange for the publication thereof, in an appropriate form with a view to furthering the development of international law in relation to investments.

Chapter V

Functions with Respect to Individual Proceedings

Regulation 23

The Registers

- (1) The Secretary-General shall maintain, in accordance with rules to be promulgated by him, separate Registers for requests for conciliation and requests for

arbitration. In these he shall enter all significant data concerning the institution, conduct and disposition of each proceeding, including in particular the method of constitution and the membership of each Commission, Tribunal and Committee. On the Arbitration Register he shall also enter, with respect to each award, all significant data concerning any request for the supplementation, rectification, interpretation, revision or annulment of the award and any stay of enforcement.

- (2) The Registers shall be open for inspection by any person. The Secretary-General shall promulgate rules concerning access to the Registers, and a schedule of charges for the provision of certified and uncertified extracts therefrom.

Regulation 24

Means of Communication

- (1) During the pendency of any proceeding the Secretary-General shall be the official channel of written communications among the parties, the Commission, Tribunal or Committee, and the Chairman of the Administrative Council, except that:
 - (a) the parties may communicate directly with each other unless the communication is one required by the Convention or the Institution, Conciliation or Arbitration Rules (hereinafter referred to as the “Rules”);
 - (b) the members of any Commission, Tribunal or Committee shall communicate directly with each other.
- (2) Instruments and documents shall be introduced into the proceeding by transmitting them to the Secretary-General, who shall retain the original for the files of the Centre and arrange for appropriate distribution of copies. If the instrument or document does not meet the applicable requirements, the Secretary-General:
 - (a) shall inform the party submitting it of the deficiency, and of any consequent action the Secretary-General is taking;
 - (b) may, if the deficiency is merely a formal one, accept it subject to subsequent correction;
 - (c) may, if the deficiency consists merely of an insufficiency in the number of copies or the lack of required translations, provide the necessary copies or translations at the cost of the party concerned.

Regulation 25

Secretary

The Secretary-General shall appoint a Secretary for each Commission, Tribunal and Committee. The Secretary may be drawn from among the Secretariat of the Centre, and shall in any case, while serving in that capacity, be considered as a member of its staff. He shall:

- (a) represent the Secretary-General and may perform all functions assigned to the latter by these Regulations or the Rules with regard to individual proceedings or assigned to the latter by the Convention, and delegated by him to the Secretary;
- (b) be the channel through which the parties may request particular services from the Centre;
- (c) keep summary minutes of hearings, unless the parties agree with the Commission, Tribunal or Committee on another manner of keeping the record of the hearings; and
- (d) perform other functions with respect to the proceeding at the request of the President of the Commission, Tribunal or Committee, or at the direction of the Secretary-General.

Regulation 26

Place of Proceedings

- (1) The Secretary-General shall make arrangements for the holding of conciliation and arbitration proceedings at the seat of the Centre or shall, at the request of the parties and as provided in Article 63 of the Convention, make or supervise arrangements if proceedings are held elsewhere.
- (2) The Secretary-General shall assist a Commission or Tribunal, at its request, in visiting any place connected with a dispute or in conducting inquiries there.

Regulation 27

Other Assistance

- (1) The Secretary-General shall provide such other assistance as may be required in connection with all meetings of Commissions, Tribunals and Committees, in particular in making translations and interpretations from one official language of the Centre into another.
- (2) The Secretary-General may also provide, by use of the staff and equipment of the Centre or of persons employed and equipment acquired on a short-time

basis, other services required for the conduct of proceedings, such as the duplication and translation of documents, or interpretations from and to a language other than an official language of the Centre.

Regulation 28

Depositary Functions

- (1) The Secretary-General shall deposit in the archives of the Centre and shall make arrangements for the permanent retention of the original text:
 - (a) of the request and of all instruments and documents filed or prepared in connection with any proceeding, including the minutes of any hearing;
 - (b) of any report by a Commission or of any award or decision by a Tribunal or Committee.
- (2) Subject to the Rules and to the agreement of the parties to particular proceedings, and upon payment of any charges in accordance with a schedule to be promulgated by the Secretary-General, he shall make available to the parties certified copies of reports and awards (reflecting thereon any supplementary decision, rectification, interpretation, revision or annulment duly made, and any stay of enforcement while it is in effect), as well as of other instruments, documents and minutes.

Chapter VI

Special Provisions Relating to Proceedings

Regulation 29

Time Limits

- (1) All time limits, specified in the Convention or the Rules or fixed by a Commission, Tribunal, Committee or the Secretary-General, shall be computed from the date on which the limit is announced in the presence of the parties or their representatives or on which the Secretary-General dispatches the pertinent notification or instrument (which date shall be marked on it). The day of such announcement or dispatch shall be excluded from the calculation.
- (2) A time limit shall be satisfied if a notification or instrument dispatched by a party is delivered at the seat of the Centre, or to the Secretary of the competent Commission, Tribunal or Committee that is meeting away from the seat of the Centre, before the close of business on the indicated date or, if that day is a Saturday, a Sunday, a public holiday observed at the place of delivery or a day on which for any reason regular mail delivery is restricted at the place of delivery, then before the close of business on the next subsequent day on which regular mail service is available.

Regulation 30

Supporting Documentation

- (1) Documentation filed in support of any request, pleading, application, written observation or other instrument introduced into a proceeding shall consist of one original and of the number of additional copies specified in paragraph (2). The original shall, unless otherwise agreed by the parties or ordered by the competent Commission, Tribunal or Committee, consist of the complete document or of a duly certified copy or extract, except if the party is unable to obtain such document or certified copy or extract (in which case the reason for such inability must be stated).
- (2) The number of additional copies of any document shall be equal to the number of additional copies required of the instrument to which the documentation relates, except that no such copies are required if the document has been published and is readily available. Each additional copy shall be certified by the party presenting it to be a true and complete copy of the original, except that if the document is lengthy and relevant only in part, it is sufficient if it is certified to be a true and complete extract of the relevant parts, which must be precisely specified.
- (3) Each original and additional copy of a document which is not in a language approved for the proceeding in question, shall, unless otherwise ordered by the competent Commission, Tribunal or Committee, be accompanied by a certified translation into such a language. However, if the document is lengthy and relevant only in part, it is sufficient if only the relevant parts, which must be precisely specified, are translated, provided that the competent body may require a fuller or a complete translation.
- (4) Whenever an extract of an original document is presented pursuant to paragraph (1) or a partial copy or translation pursuant to paragraph (2) or (3), each such extract, copy and translation shall be accompanied by a statement that the omission of the remainder of the text does not render the portion presented misleading.

Chapter VII

Immunities and Privileges

Regulation 31

Certificates of Official Travel

The Secretary-General may issue certificates to members of Commissions, Tribunals or Committees, to officers and employees of the Secretariat and to the parties, agents, counsel, advocates, witnesses and experts appearing in proceedings, indicating that they are traveling in connection with a proceeding under the Convention.

Regulation 32**Waiver of Immunities**

- (1) The Secretary-General may waive the immunity of:
 - (a) the Centre;
 - (b) members of the staff of the Centre.
- (2) The Chairman of the Council may waive the immunity of:
 - (a) the Secretary-General or any Deputy Secretary-General;
 - (b) members of a Commission, Tribunal or Committee;
 - (c) the parties, agents, counsel, advocates, witnesses or experts appearing in a proceeding, if a recommendation for such waiver is made by the Commission, Tribunal or Committee concerned.
- (3) The Administrative Council may waive the immunity of:
 - (a) the Chairman and members of the Council;
 - (b) the parties, agents, counsel, advocates, witnesses or experts appearing in a proceeding, even if no recommendation for such a waiver is made by the Commission, Tribunal or Committee concerned;
 - (c) the Centre or any person mentioned in paragraph (1) or (2).

Chapter VIII**Miscellaneous****Regulation 33****Communications with Contracting States**

Unless another channel of communications is specified by the State concerned, all communications required by the Convention or these Regulations to be sent to Contracting States shall be addressed to the State's representative on the Administrative Council.

Regulation 34**Official Languages**

- (1) The official languages of the Centre shall be English, French and Spanish.
- (2) The texts of these Regulations in each official language shall be equally authentic.

4. ICSID RULES OF PROCEDURE FOR THE INSTITUTION OF CONCILIATION AND ARBITRATION PROCEEDINGS (INSTITUTION RULES) (2006)

The Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the Institution Rules) of ICSID were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(b) of the ICSID Convention.

The Institution Rules are supplemented by the Administrative and Financial Regulations of the Centre, in particular by Regulations 16, 22(1), 23, 24, 30 and 34(1).

The Institution Rules are restricted in scope to the period of time from the filing of a request to the dispatch of the notice of registration. All transactions subsequent to that time are to be regulated in accordance with the Conciliation and the Arbitration Rules.

Institution Rules

Rule 1

The Request

- (1) Any Contracting State or any national of a Contracting State wishing to institute conciliation or arbitration proceedings under the Convention shall address a request to that effect in writing to the Secretary-General at the seat of the Centre. The request shall indicate whether it relates to a conciliation or an arbitration proceeding. It shall be drawn up in an official language of the Centre, shall be dated, and shall be signed by the requesting party or its duly authorized representative.
- (2) The request may be made jointly by the parties to the dispute.

Rule 2

Contents of the Request

- (1) The request shall:
 - (a) designate precisely each party to the dispute and state the address of each;
 - (b) state, if one of the parties is a constituent subdivision or agency of a Contracting State, that it has been designated to the Centre by that State pursuant to Article 25(1) of the Convention;
 - (c) indicate the date of consent and the instruments in which it is recorded, including, if one party is a constituent subdivision or agency of a Contracting State, similar data on the approval of such consent by that State unless it had notified the Centre that no such approval is required;
 - (d) indicate with respect to the party that is a national of a Contracting State:
 - its nationality on the date of consent; and
 - if the party is a natural person:
 - (a) his nationality on the date of the request; and

- (b) that he did not have the nationality of the Contracting State party to the dispute either on the date of consent or on the date of the request; or
 - if the party is a juridical person which on the date of consent had the nationality of the Contracting State party to the dispute, the agreement of the parties that it should be treated as a national of another Contracting State for the purposes of the Convention;
 - (e) contain information concerning the issues in dispute indicating that there is, between the parties, a legal dispute arising directly out of an investment; and
 - (f) state, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request.
- (2) The information required by subparagraphs (1)(c), (1)(d)(iii) and (1)(f) shall be supported by documentation.
- (3) “Date of consent” means the date on which the parties to the dispute consented in writing to submit it to the Centre; if both parties did not act on the same day, it means the date on which the second party acted.

Rule 3

Optional Information in the Request

The request may in addition set forth any provisions agreed by the parties regarding the number of conciliators or arbitrators and the method of their appointment, as well as any other provisions agreed concerning the settlement of the dispute.

Rule 4

Copies of the Request

- (1) The request shall be accompanied by five additional signed copies. The Secretary-General may require such further copies as he may deem necessary.
- (2) Any documentation submitted with the request shall conform to the requirements of Administrative and Financial Regulation 30.

Rule 5

Acknowledgement of the Request

- (1) On receiving a request the Secretary-General shall:
 - (a) send an acknowledgement to the requesting party;
 - (b) take no other action with respect to the request until he has received payment of the prescribed fee.

- (2) As soon as he has received the fee for lodging the request, the Secretary-General shall transmit a copy of the request and of the accompanying documentation to the other party.

Rule 6

Registration of the Request

- (1) The Secretary-General shall, subject to Rule 5(1)(b), as soon as possible, either:
 - (a) register the request in the Conciliation or the Arbitration Register and on the same day notify the parties of the registration; or
 - (b) if he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre, notify the parties of his refusal to register the request and of the reasons therefor.
- (2) A proceeding under the Convention shall be deemed to have been instituted on the date of the registration of the request.

Rule 7

Notice of Registration

The notice of registration of a request shall:

- (a) record that the request is registered and indicate the date of the registration and of the dispatch of that notice;
- (b) notify each party that all communications and notices in connection with the proceeding will be sent to the address stated in the request, unless another address is indicated to the Centre;
- (c) unless such information has already been provided, invite the parties to communicate to the Secretary-General any provisions agreed by them regarding the number and the method of appointment of the conciliators or arbitrators;
- (d) invite the parties to proceed, as soon as possible, to constitute a Conciliation Commission in accordance with Articles 29 to 31 of the Convention, or an Arbitral Tribunal in accordance with Articles 37 to 40;
- (e) remind the parties that the registration of the request is without prejudice to the powers and functions of the Conciliation Commission or Arbitral Tribunal in regard to jurisdiction, competence and the merits; and
- (f) be accompanied by a list of the members of the Panel of Conciliators or of Arbitrators of the Centre.

Rule 8**Withdrawal of the Request**

The requesting party may, by written notice to the Secretary-General, withdraw the request before it has been registered. The Secretary-General shall promptly notify the other party, unless, pursuant to Rule 5(1)(b), the request had not been transmitted to it.

Rule 9**Final Provisions**

- (1) The texts of these Rules in each official language of the Centre shall be equally authentic.
- (2) These Rules may be cited as the “Institution Rules” of the Centre.

**5. ICSID RULES OF PROCEDURE FOR CONCILIATION PROCEEDINGS
(CONCILIATION RULES)**

The Rules of Procedure for Conciliation Proceedings (the Conciliation Rules) of ICSID were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(c) of the ICSID Convention.

The Conciliation Rules are supplemented by the Administrative and Financial Regulations of the Centre, in particular by Regulations 14–16, 22–31 and 34(1).

The Conciliation Rules cover the period of time from the dispatch of the notice of registration of a request for conciliation until a report is drawn up. The transactions previous to that time are to be regulated in accordance with the Institution Rules.

Conciliation Rules

Chapter I

Establishment of the Commission

Rule 1

General Obligations

- (1) Upon notification of the registration of the request for conciliation, the parties shall, with all possible dispatch, proceed to constitute a Commission, with due regard to Section 2 of Chapter III of the Convention.
- (2) Unless such information is provided in the request, the parties shall communicate to the Secretary-General as soon as possible any provisions agreed by them regarding the number of conciliators and the method of their appointment.

Rule 2

Method of Constituting the Commission in the Absence of Previous Agreement

- (1) If the parties, at the time of the registration of the request for conciliation, have not agreed upon the number of conciliators and the method of their appointment, they shall, unless they agree otherwise, follow the following procedure:
 - (a) the requesting party shall, within 10 days after the registration of the request, propose to the other party the appointment of a sole conciliator or of a specified uneven number of conciliators and specify the method proposed for their appointment;
 - (b) within 20 days after receipt of the proposals made by the requesting party, the other party shall:

- accept such proposals; or
 - make other proposals regarding the number of conciliators and the method of their appointment;
- (c) within 20 days after receipt of the reply containing any such other proposals, the requesting party shall notify the other party whether it accepts or rejects such proposals.
- (2) The communications provided for in paragraph (1) shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General. The parties shall promptly notify the Secretary-General of the contents of any agreement reached.
- (3) At any time 60 days after the registration of the request, if no agreement on another procedure is reached, either party may inform the Secretary-General that it chooses the formula provided for in Article 29(2)(b) of the Convention. The Secretary-General shall thereupon promptly inform the other party that the Commission is to be constituted in accordance with that Article.

Rule 3

Appointment of Conciliators to a Commission Constituted in Accordance with Convention Article 29(2)(b)

- (1) If the Commission is to be constituted in accordance with Article 29(2)(b) of the Convention:
- (a) either party shall, in a communication to the other party:
- name two persons, identifying one of them as the conciliator appointed by it and the other as the conciliator proposed to be the President of the Commission; and
 - invite the other party to concur in the appointment of the conciliator proposed to be the President of the Commission and to appoint another conciliator;
- (b) promptly upon receipt of this communication the other party shall, in its reply:
- name a person as the conciliator appointed by it; and
 - concur in the appointment of the conciliator proposed to be the President of the Commission or name another person as the conciliator proposed to be President;
- (c) promptly upon receipt of the reply containing such a proposal, the initiating party shall notify the other party whether it concurs in the appointment of the conciliator proposed by that party to be the President of the Commission.
- (2) The communications provided for in this Rule shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General.

Rule 4

Appointment of Conciliators by the Chairman of the Administrative Council

- (1) If the Commission is not constituted within 90 days after the dispatch by the Secretary-General of the notice of registration, or such other period as the parties may agree, either party may, through the Secretary-General, address to the Chairman of the Administrative Council a request in writing to appoint the conciliator or conciliators not yet appointed and to designate a conciliator to be the President of the Commission.
- (2) The provision of paragraph (1) shall apply *mutatis mutandis* in the event that the parties have agreed that the conciliators shall elect the President of the Commission and they fail to do so.
- (3) The Secretary-General shall forthwith send a copy of the request to the other party.
- (4) The Chairman shall use his best efforts to comply with that request within 30 days after its receipt. Before he proceeds to make an appointment or designation, with due regard to Article 31(1) of the Convention, he shall consult both parties as far as possible.
- (5) The Secretary-General shall promptly notify the parties of any appointment or designation made by the Chairman.

Rule 5

Acceptance of Appointments

- (1) The party or parties concerned shall notify the Secretary-General of the appointment of each conciliator and indicate the method of his appointment.
- (2) As soon as the Secretary-General has been informed by a party or the Chairman of the Administrative Council of the appointment of a conciliator, he shall seek an acceptance from the appointee.
- (3) If a conciliator fails to accept his appointment within 15 days, the Secretary-General shall promptly notify the parties, and if appropriate the Chairman, and invite them to proceed to the appointment of another conciliator in accordance with the method followed for the previous appointment.

Rule 6

Constitution of the Commission

- (1) The Commission shall be deemed to be constituted and the proceeding to have begun on the date the Secretary-General notifies the parties that all the conciliators have accepted their appointment.

- (2) Before or at the first session of the Commission, each conciliator shall sign a declaration in the following form:

“To the best of my knowledge there is no reason why I should not serve on the Conciliation Commission constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between __ and __.

“I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any report drawn up by the Commission.

“I shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and in the Regulations and Rules made pursuant thereto.

“A statement of my past and present professional, business and other relationships (if any) with the parties is attached hereto.”

Any conciliator failing to sign such a declaration by the end of the first session of the Commission shall be deemed to have resigned.

Rule 7

Replacement of Conciliators

At any time before the Commission is constituted, each party may replace any conciliator appointed by it and the parties may by common consent agree to replace any conciliator. The procedure of such replacement shall be in accordance with Rules 1, 5 and 6.

Rule 8

Incapacity or Resignation of Conciliators

- (1) If a conciliator becomes incapacitated or unable to perform the duties of his office, the procedure in respect of the disqualification of conciliators set forth in Rule 9 shall apply.
- (2) A conciliator may resign by submitting his resignation to the other members of the Commission and the Secretary-General. If the conciliator was appointed by one of the parties, the Commission shall promptly consider the reasons for his resignation and decide whether it consents thereto. The Commission shall promptly notify the Secretary-General of its decision.

Rule 9

Disqualification of Conciliators

- (1) A party proposing the disqualification of a conciliator pursuant to Article 57 of the Convention shall promptly, and in any event before the Commission first recommends terms of settlement of the dispute to the parties or when the proceeding is closed (whichever occurs earlier), file its proposal with the Secretary-General, stating its reasons therefor.
- (2) The Secretary-General shall forthwith:
 - (a) transmit the proposal to the members of the Commission and, if it relates to a sole conciliator or to a majority of the members of the Commission, to the Chairman of the Administrative Council; and
 - (b) notify the other party of the proposal.
- (3) The conciliator to whom the proposal relates may, without delay, furnish explanations to the Commission or the Chairman, as the case may be.
- (4) Unless the proposal relates to a majority of the members of the Commission, the other members shall promptly consider and vote on the proposal in the absence of the conciliator concerned. If those members are equally divided, they shall, through the Secretary-General, promptly notify the Chairman of the proposal, of any explanation furnished by the conciliator concerned and of their failure to reach a decision.
- (5) Whenever the Chairman has to decide on a proposal to disqualify a conciliator, he shall use his best efforts to take that decision within 30 days after he has received the proposal.
- (6) The proceeding shall be suspended until a decision has been taken on the proposal.

Rule 10

Procedure during a Vacancy on the Commission

- (1) The Secretary-General shall forthwith notify the parties and, if necessary, the Chairman of the Administrative Council of the disqualification, death, incapacity or resignation of a conciliator and of the consent, if any, of the Commission to a resignation.
- (2) Upon the notification by the Secretary-General of a vacancy on the Commission, the proceeding shall be or remain suspended until the vacancy has been filled.

Rule 11**Filling Vacancies on the Commission**

- (1) Except as provided in paragraph (2), a vacancy resulting from the disqualification, death, incapacity or resignation of a conciliator shall be promptly filled by the same method by which his appointment had been made.
- (2) In addition to filling vacancies relating to conciliators appointed by him, the Chairman of the Administrative Council shall appoint a person from the Panel of Conciliators:
 - (a) to fill a vacancy caused by the resignation, without the consent of the Commission, of a conciliator appointed by a party; or
 - (b) at the request of either party, to fill any other vacancy, if no new appointment is made and accepted within 45 days of the notification of the vacancy by the Secretary-General.
- (3) The procedure for filling a vacancy shall be in accordance with Rules 1, 4(4), 4(5), 5 and, *mutatis mutandis*, 6(2).

Rule 12**Resumption of Proceeding after Filling a Vacancy**

As soon as a vacancy on the Commission has been filled, the proceeding shall continue from the point it had reached at the time the vacancy occurred. The newly appointed conciliator may, however, require that any hearings be repeated in whole or in part.

Chapter II**Working of the Commission****Rule 13****Sessions of the Commission**

- (1) The Commission shall hold its first session within 60 days after its constitution or such other period as the parties may agree. The dates of that session shall be fixed by the President of the Commission after consultation with its members and the Secretary-General. If upon its constitution the Commission has no President because the parties have agreed that the President shall be elected by its members, the Secretary-General shall fix the dates of that session. In both cases, the parties shall be consulted as far as possible.
- (2) The dates of subsequent sessions shall be determined by the Commission, after consultation with the Secretary-General and with the parties as far as possible.

- (3) The Commission shall meet at the seat of the Centre or at such other place as may have been agreed by the parties in accordance with Article 63 of the Convention. If the parties agree that the proceeding shall be held at a place other than the Centre or an institution with which the Centre has made the necessary arrangements, they shall consult with the Secretary-General and request the approval of the Commission. Failing such approval, the Commission shall meet at the seat of the Centre.
- (4) The Secretary-General shall notify the members of the Commission and the parties of the dates and place of the sessions of the Commission in good time.

Rule 14

Sittings of the Commission

- (1) The President of the Commission shall conduct its hearings and preside at its deliberations.
- (2) Except as the parties otherwise agree, the presence of a majority of the members of the Commission shall be required at its sittings.
- (3) The President of the Commission shall fix the date and hour of its sittings.

Rule 15

Deliberations of the Commission

- (1) The deliberations of the Commission shall take place in private and remain secret.
- (2) Only members of the Commission shall take part in its deliberations. No other person shall be admitted unless the Commission decides otherwise.

Rule 16

Decisions of the Commission

- (1) Decisions of the Commission shall be taken by a majority of the votes of all its members. Abstention shall count as a negative vote.
- (2) Except as otherwise provided by these Rules or decided by the Commission, it may take any decision by correspondence among its members, provided that all of them are consulted. Decisions so taken shall be certified by the President of the Commission.

Rule 17**Incapacity of the President**

If at any time the President of the Commission should be unable to act, his functions shall be performed by one of the other members of the Commission, acting in the order in which the Secretary-General had received the notice of their acceptance of their appointment to the Commission.

Rule 18**Representation of the Parties**

- (1) Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Commission and the other party.
- (2) For the purposes of these Rules, the expression “party” includes, where the context so admits, an agent, counsel or advocate authorized to represent that party.

Chapter III**General Procedural Provisions****Rule 19****Procedural Orders**

The Commission shall make the orders required for the conduct of the proceeding.

Rule 20**Preliminary Procedural Consultation**

- (1) As early as possible after the constitution of a Commission, its President shall endeavor to ascertain the views of the parties regarding questions of procedure. For this purpose he may request the parties to meet him. He shall, in particular, seek their views on the following matters:
 - (a) the number of members of the Commission required to constitute a quorum at its sittings;
 - (b) the language or languages to be used in the proceeding;
 - (c) the evidence, oral or written, which each party intends to produce or to request the Commission to call for, and the written statements which each party intends to file, as well as the time limits within which such evidence should be produced and such statements filed;
 - (d) the number of copies desired by each party of instruments filed by the other; and

- (e) the manner in which the record of the hearings shall be kept.
- (2) In the conduct of the proceeding the Commission shall apply any agreement between the parties on procedural matters, except as otherwise provided in the Convention or the Administrative and Financial Regulations.

Rule 21

Procedural Languages

- (1) The parties may agree on the use of one or two languages to be used in the proceeding, provided that, if they agree on any language that is not an official language of the Centre, the Commission, after consultation with the Secretary-General, gives its approval. If the parties do not agree on any such procedural language, each of them may select one of the official languages (i.e., English, French and Spanish) for this purpose.
- (2) If two procedural languages are selected by the parties, any instrument may be filed in either language. Either language may be used at the hearings, subject, if the Commission so requires, to translation and interpretation. The recommendations and the report of the Commission shall be rendered and the record kept in both procedural languages, both versions being equally authentic.

Chapter IV

Conciliation Procedures

Rule 22

Functions of the Commission

- (1) In order to clarify the issues in dispute between the parties, the Commission shall hear the parties and shall endeavor to obtain any information that might serve this end. The parties shall be associated with its work as closely as possible.
- (2) In order to bring about agreement between the parties, the Commission may, from time to time at any stage of the proceeding, make—orally or in writing—recommendations to the parties. It may recommend that the parties accept specific terms of settlement or that they refrain, while it seeks to bring about agreement between them, from specific acts that might aggravate the dispute; it shall point out to the parties the arguments in favor of its recommendations. It may fix time limits within which each party shall inform the Commission of its decision concerning the recommendations made.
- (3) The Commission, in order to obtain information that might enable it to discharge its functions, may at any stage of the proceeding:

- (a) request from either party oral explanations, documents and other information;
- (b) request evidence from other persons; and
- (c) with the consent of the party concerned, visit any place connected with the dispute or conduct inquiries there, provided that the parties may participate in any such visits and inquiries.

Rule 23

Cooperation of the Parties

- (1) The parties shall cooperate in good faith with the Commission and, in particular, at its request furnish all relevant documents, information and explanations as well as use the means at their disposal to enable the Commission to hear witnesses and experts whom it desires to call. The parties shall also facilitate visits to and inquiries at any place connected with the dispute that the Commission desires to undertake.
- (2) The parties shall comply with any time limits agreed with or fixed by the Commission.

Rule 24

Transmission of the Request

As soon as the Commission is constituted, the Secretary-General shall transmit to each member a copy of the request by which the proceeding was initiated, of the supporting documentation, of the notice of registration and of any communication received from either party in response thereto.

Rule 25

Written Statements

- (1) Upon the constitution of the Commission, its President shall invite each party to file, within 30 days or such longer time limit as he may fix, a written statement of its position. If, upon its constitution, the Commission has no President, such invitation shall be issued and any such longer time limit shall be fixed by the Secretary-General. At any stage of the proceeding, within such time limits as the Commission shall fix, either party may file such other written statements as it deems useful and relevant.
- (2) Except as otherwise provided by the Commission after consultation with the parties and the Secretary-General, every written statement or other instrument shall be filed in the form of a signed original accompanied by additional copies whose number shall be two more than the number of members of the Commission.

Rule 26

Supporting Documentation

- (1) Every written statement or other instrument filed by a party may be accompanied by supporting documentation, in such form and number of copies as required by Administrative and Financial Regulation 30.
- (2) Supporting documentation shall ordinarily be filed together with the instrument to which it relates, and in any case within the time limit fixed for the filing of such instrument.

Rule 27

Hearings

- (1) The hearings of the Commission shall take place in private and, except as the parties otherwise agree, shall remain secret.
- (2) The Commission shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Commission may attend the hearings.

Rule 28

Witnesses and Experts

- (1) Each party may, at any stage of the proceeding, request that the Commission hear the witnesses and experts whose evidence the party considers relevant. The Commission shall fix a time limit within which such hearing shall take place.
- (2) Witnesses and experts shall, as a rule, be examined before the Commission by the parties under the control of its President. Questions may also be put to them by any member of the Commission.
- (3) If a witness or expert is unable to appear before it, the Commission, in agreement with the parties, may make appropriate arrangements for the evidence to be given in a written deposition or to be taken by examination elsewhere. The parties may participate in any such examination.

Chapter V**Termination of the Proceeding****Rule 29****Objections to Jurisdiction**

- (1) Any objection that the dispute is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Commission shall be made as early as possible. A party shall file the objection with the Secretary-General no later than in its first written statement or at the first hearing if that occurs earlier, unless the facts on which the objection is based are unknown to the party at that time.
- (2) The Commission may on its own initiative consider, at any stage of the proceeding, whether the dispute before it is within the jurisdiction of the Centre and within its own competence.
- (3) Upon the formal raising of an objection, the proceeding on the merits shall be suspended. The Commission shall obtain the views of the parties on the objection.
- (4) The Commission may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Commission overrules the objection or joins it to the merits, it shall resume consideration of the latter without delay.
- (5) If the Commission decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, it shall close the proceeding and draw up a report to that effect, in which it shall state its reasons.

Rule 30**Closure of the Proceeding**

- (1) If the parties reach agreement on the issues in dispute, the Commission shall close the proceeding and draw up its report noting the issues in dispute and recording that the parties have reached agreement. At the request of the parties, the report shall record the detailed terms and conditions of their agreement.
- (2) If at any stage of the proceeding it appears to the Commission that there is no likelihood of agreement between the parties, the Commission shall, after notice to the parties, close the proceeding and draw up its report noting the submission of the dispute to conciliation and recording the failure of the parties to reach agreement.
- (3) If one party fails to appear or participate in the proceeding, the Commission shall, after notice to the parties, close the proceeding and draw up its report noting the submission of the dispute to conciliation and recording the failure of that party to appear or participate.

Rule 31

Preparation of the Report

The report of the Commission shall be drawn up and signed within 60 days after the closure of the proceeding.

Rule 32

The Report

- (1) The report shall be in writing and shall contain, in addition to the material specified in paragraph (2) and in Rule 30:
 - (a) a precise designation of each party;
 - (b) a statement that the Commission was established under the Convention, and a description of the method of its constitution;
 - (c) the names of the members of the Commission, and an identification of the appointing authority of each;
 - (d) the names of the agents, counsel and advocates of the parties;
 - (e) the dates and place of the sittings of the Commission; and
 - (f) a summary of the proceeding.
- (2) The report shall also record any agreement of the parties, pursuant to Article 35 of the Convention, concerning the use in other proceedings of the views expressed or statements or admissions or offers of settlement made in the proceeding before the Commission or of the report or any recommendation made by the Commission.
- (3) The report shall be signed by the members of the Commission; the date of each signature shall be indicated. The fact that a member refuses to sign the report shall be recorded therein.

Rule 33

Communication of the Report

- (1) Upon signature by the last conciliator to sign, the Secretary-General shall promptly:
 - (a) authenticate the original text of the report and deposit it in the archives of the Centre; and
 - (b) dispatch a certified copy to each party, indicating the date of dispatch on the original text and on all copies.
- (2) The Secretary-General shall, upon request, make available to a party additional certified copies of the report.
- (3) The Centre shall not publish the report without the consent of the parties.

Chapter VI

General Provisions

Rule 34

Final Provisions

- (1) The texts of these Rules in each official language of the Centre shall be equally authentic.
- (2) These Rules may be cited as the “Conciliation Rules” of the Centre.

6. ICSID RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS
(ARBITRATION RULES) (2006)

Chapter I

Establishment of the Tribunal

Rule 1

General Obligations

- 1 Upon notification of the registration of the request for arbitration, the parties shall, with all possible dispatch, proceed to constitute a Tribunal, with due regard to Section 2 of Chapter IV of the Convention.
- (2) Unless such information is provided in the request, the parties shall communicate to the Secretary-General as soon as possible any provisions agreed by them regarding the number of arbitrators and the method of their appointment.
- (3) The majority of the arbitrators shall be nationals of States other than the State party to the dispute and of the State whose national is a party to the dispute, unless the sole arbitrator or each individual member of the Tribunal is appointed by agreement of the parties. Where the Tribunal is to consist of three members, a national of either of these States may not be appointed as an arbitrator by a party without the agreement of the other party to the dispute. Where the Tribunal is to consist of five or more members, nationals of either of these States may not be appointed as arbitrators by a party if appointment by the other party of the same number of arbitrators of either of these nationalities would result in a majority of arbitrators of these nationalities.
- (4) No person who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the dispute may be appointed as a member of the Tribunal.

Rule 2

Method of Constituting the Tribunal in the Absence of Previous Agreement

- (1) If the parties, at the time of the registration of the request for arbitration, have not agreed upon the number of arbitrators and the method of their appointment, they shall, unless they agree otherwise, follow the following procedure:
 - (a) the requesting party shall, within 10 days after the registration of the request, propose to the other party the appointment of a sole arbitrator or of a specified uneven number of arbitrators and specify the method proposed for their appointment;
 - (b) within 20 days after receipt of the proposals made by the requesting party, the other party shall:
 - accept such proposals; or

- make other proposals regarding the number of arbitrators and the method of their appointment;
- (c) within 20 days after receipt of the reply containing any such other proposals, the requesting party shall notify the other party whether it accepts or rejects such proposals.
- (2) The communications provided for in paragraph (1) shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General. The parties shall promptly notify the Secretary-General of the contents of any agreement reached.
- (3) At any time 60 days after the registration of the request, if no agreement on another procedure is reached, either party may inform the Secretary-General that it chooses the formula provided for in Article 37(2)(b) of the Convention. The Secretary-General shall thereupon promptly inform the other party that the Tribunal is to be constituted in accordance with that Article.

Rule 3

Appointment of Arbitrators to a Tribunal Constituted in Accordance with Convention Article 37(2)(b)

- (1) If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention:
 - (a) either party shall in a communication to the other party:
 - name two persons, identifying one of them, who shall not have the same nationality as nor be a national of either party, as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal; and
 - invite the other party to concur in the appointment of the arbitrator proposed to be the President of the Tribunal and to appoint another arbitrator;
 - (b) promptly upon receipt of this communication the other party shall, in its reply:
 - name a person as the arbitrator appointed by it, who shall not have the same nationality as nor be a national of either party; and
 - concur in the appointment of the arbitrator proposed to be the President of the Tribunal or name another person as the arbitrator proposed to be President;
 - (c) promptly upon receipt of the reply containing such a proposal, the initiating party shall notify the other party whether it concurs in the appointment of the arbitrator proposed by that party to be the President of the Tribunal.
- (2) The communications provided for in this Rule shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General.

Rule 4

Appointment of Arbitrators by the Chairman of the Administrative Council

- (1) If the Tribunal is not constituted within 90 days after the dispatch by the Secretary-General of the notice of registration, or such other period as the parties may agree, either party may, through the Secretary-General, address to the Chairman of the Administrative Council a request in writing to appoint the arbitrator or arbitrators not yet appointed and to designate an arbitrator to be the President of the Tribunal.
- (2) The provision of paragraph (1) shall apply *mutatis mutandis* in the event that the parties have agreed that the arbitrators shall elect the President of the Tribunal and they fail to do so.
- (3) The Secretary-General shall forthwith send a copy of the request to the other party.
- (4) The Chairman shall use his best efforts to comply with that request within 30 days after its receipt. Before he proceeds to make an appointment or designation, with due regard to Articles 38 and 40(1) of the Convention, he shall consult both parties as far as possible.
- (5) The Secretary-General shall promptly notify the parties of any appointment or designation made by the Chairman.

Rule 5

Acceptance of Appointments

- (1) The party or parties concerned shall notify the Secretary-General of the appointment of each arbitrator and indicate the method of his appointment.
- (2) As soon as the Secretary-General has been informed by a party or the Chairman of the Administrative Council of the appointment of an arbitrator, he shall seek an acceptance from the appointee.
- (3) If an arbitrator fails to accept his appointment within 15 days, the Secretary-General shall promptly notify the parties, and if appropriate the Chairman, and invite them to proceed to the appointment of another arbitrator in accordance with the method followed for the previous appointment.

Rule 6

Constitution of the Tribunal

- (1) The Tribunal shall be deemed to be constituted and the proceeding to have begun on the date the Secretary-General notifies the parties that all the arbitrators have accepted their appointment.

- (2) Before or at the first session of the Tribunal, each arbitrator shall sign a declaration in the following form: “To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between ____and____. “I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal. “I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and in the Regulations and Rules made pursuant thereto. “Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.”

Any arbitrator failing to sign a declaration by the end of the first session of the Tribunal shall be deemed to have resigned.

Rule 7

Replacement of Arbitrators

At any time before the Tribunal is constituted, each party may replace any arbitrator appointed by it and the parties may by common consent agree to replace any arbitrator. The procedure of such replacement shall be in accordance with Rules 1, 5 and 6.

Rule 8

Incapacity or Resignation of Arbitrators

- (1) If an arbitrator becomes incapacitated or unable to perform the duties of his office, the procedure in respect of the disqualification of arbitrators set forth in Rule 9 shall apply.
- (2) An arbitrator may resign by submitting his resignation to the other members of the Tribunal and the Secretary-General. If the arbitrator was appointed by one of the parties, the Tribunal shall promptly consider the reasons for his resignation and decide whether it consents thereto. The Tribunal shall promptly notify the Secretary-General of its decision.

Rule 9

Disqualification of Arbitrators

- (1) A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.
- (2) The Secretary-General shall forthwith:
 - (a) transmit the proposal to the members of the Tribunal and, if it relates to a sole arbitrator or to a majority of the members of the Tribunal, to the Chairman of the Administrative Council; and
 - (b) notify the other party of the proposal.
- (3) The arbitrator to whom the proposal relates may, without delay, furnish explanations to the Tribunal or the Chairman, as the case may be.
- (4) Unless the proposal relates to a majority of the members of the Tribunal, the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned. If those members are equally divided, they shall, through the Secretary-General, promptly notify the Chairman of the proposal, of any explanation furnished by the arbitrator concerned and of their failure to reach a decision.
- (5) Whenever the Chairman has to decide on a proposal to disqualify an arbitrator, he shall use his best efforts to take that decision within 30 days after he has received the proposal.
- (6) The proceeding shall be suspended until a decision has been taken on the proposal.

Rule 10

Procedure during a Vacancy on the Tribunal

- (1) The Secretary-General shall forthwith notify the parties and, if necessary, the Chairman of the Administrative Council of the disqualification, death, incapacity or resignation of an arbitrator and of the consent, if any, of the Tribunal to a resignation.
- (2) Upon the notification by the Secretary-General of a vacancy on the Tribunal, the proceeding shall be or remain suspended until the vacancy has been filled.

Rule 11**Filling Vacancies on the Tribunal**

- (1) Except as provided in paragraph (2), a vacancy resulting from the disqualification, death, incapacity or resignation of an arbitrator shall be promptly filled by the same method by which his appointment had been made.
- (2) In addition to filling vacancies relating to arbitrators appointed by him, the Chairman of the Administrative Council shall appoint a person from the Panel of Arbitrators:
 - (a) to fill a vacancy caused by the resignation, without the consent of the Tribunal, of an arbitrator appointed by a party; or
 - (b) at the request of either party, to fill any other vacancy, if no new appointment is made and accepted within 45 days of the notification of the vacancy by the Secretary-General.
- (3) The procedure for filling a vacancy shall be in accordance with Rules 1, 4(4), 4(5), 5 and, *mutatis mutandis*, 6(2).

Rule 12**Resumption of Proceeding after Filling a Vacancy**

As soon as a vacancy on the Tribunal has been filled, the proceeding shall continue from the point it had reached at the time the vacancy occurred. The newly appointed arbitrator may, however, require that the oral procedure be recommenced, if this had already been started.

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- (1) The Tribunal shall hold its first session within 60 days after its constitution or such other period as the parties may agree. The dates of that session shall be fixed by the President of the Tribunal after consultation with its members and the Secretary-General. If upon its constitution the Tribunal has no President because the parties have agreed that the President shall be elected by its members, the Secretary-General shall fix the dates of that session. In both cases, the parties shall be consulted as far as possible.
- (2) The dates of subsequent sessions shall be determined by the Tribunal, after consultation with the Secretary-General and with the parties as far as possible.

- (3) The Tribunal shall meet at the seat of the Centre or at such other place as may have been agreed by the parties in accordance with Article 63 of the Convention. If the parties agree that the proceeding shall be held at a place other than the Centre or an institution with which the Centre has made the necessary arrangements, they shall consult with the Secretary-General and request the approval of the Tribunal. Failing such approval, the Tribunal shall meet at the seat of the Centre.
- (4) The Secretary-General shall notify the members of the Tribunal and the parties of the dates and place of the sessions of the Tribunal in good time.

Rule 14

Sittings of the Tribunal

- (1) The President of the Tribunal shall conduct its hearings and preside at its deliberations.
- (2) Except as the parties otherwise agree, the presence of a majority of the members of the Tribunal shall be required at its sittings.
- (3) The President of the Tribunal shall fix the date and hour of its sittings.

Rule 15

Deliberations of the Tribunal

- (1) The deliberations of the Tribunal shall take place in private and remain secret.
- (2) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise.

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Decisions of the Tribunal

- (1) Decisions of the Tribunal shall be taken by a majority of the votes of all its members. Abstention shall count as a negative vote.
- (2) Except as otherwise provided by these Rules or decided by the Tribunal, it may take any decision by correspondence among its members, provided that all of them are consulted. Decisions so taken shall be certified by the President of the Tribunal.

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If at any time the President of the Tribunal should be unable to act, his functions shall be performed by one of the other members of the Tribunal, acting in the order in which the Secretary-General had received the notice of their acceptance of their appointment to the Tribunal.

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- (1) Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party.
- (2) For the purposes of these Rules, the expression “party” includes, where the context so admits, an agent, counsel or advocate authorized to represent that party.

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The Tribunal shall make the orders required for the conduct of the proceeding.

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- (1) As early as possible after the constitution of a Tribunal, its President shall endeavor to ascertain the views of the parties regarding questions of procedure. For this purpose he may request the parties to meet him. He shall, in particular, seek their views on the following matters:
 - (a) the number of members of the Tribunal required to constitute a quorum at its sittings;
 - (b) the language or languages to be used in the proceeding;
 - (c) the number and sequence of the pleadings and the time limits within which they are to be filed;
 - (d) the number of copies desired by each party of instruments filed by the other;
 - (e) dispensing with the written or the oral procedure;
 - (f) the manner in which the cost of the proceeding is to be apportioned; and

- (g) the manner in which the record of the hearings shall be kept.
- (2) In the conduct of the proceeding the Tribunal shall apply any agreement between the parties on procedural matters, except as otherwise provided in the Convention or the Administrative and Financial Regulations.

Rule 21

Pre-Hearing Conference

- (1) At the request of the Secretary-General or at the discretion of the President of the Tribunal, a pre-hearing conference between the Tribunal and the parties may be held to arrange for an exchange of information and the stipulation of uncontested facts in order to expedite the proceeding.
- (2) At the request of the parties, a pre-hearing conference between the Tribunal and the parties, duly represented by their authorized representatives, may be held to consider the issues in dispute with a view to reaching an amicable settlement.

Rule 22

Procedural Languages

- (1) The parties may agree on the use of one or two languages to be used in the proceeding, provided, that, if they agree on any language that is not an official language of the Centre, the Tribunal, after consultation with the Secretary-General, gives its approval. If the parties do not agree on any such procedural language, each of them may select one of the official languages (i.e., English, French and Spanish) for this purpose.
- (2) If two procedural languages are selected by the parties, any instrument may be filed in either language. Either language may be used at the hearings, subject, if the Tribunal so requires, to translation and interpretation. The orders and the award of the Tribunal shall be rendered and the record kept in both procedural languages, both versions being equally authentic.

Rule 23

Copies of Instruments

Except as otherwise provided by the Tribunal after consultation with the parties and the Secretary-General, every request, pleading, application, written observation, supporting documentation, if any, or other instrument shall be filed in the form of a signed original accompanied by the following number of additional copies:

- (a) before the number of members of the Tribunal has been determined: five;
- (b) after the number of members of the Tribunal has been determined: two more than the number of its members.

Rule 24

Supporting Documentation

Supporting documentation shall ordinarily be filed together with the instrument to which it relates, and in any case within the time limit fixed for the filing of such instrument.

Rule 25

Correction of Errors

An accidental error in any instrument or supporting document may, with the consent of the other party or by leave of the Tribunal, be corrected at any time before the award is rendered.

Rule 26

Time Limits

- (1) Where required, time limits shall be fixed by the Tribunal by assigning dates for the completion of the various steps in the proceeding. The Tribunal may delegate this power to its President.
- (2) The Tribunal may extend any time limit that it has fixed. If the Tribunal is not in session, this power shall be exercised by its President.
- (3) Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise.

Rule 27

Waiver

A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed – subject to Article 45 of the Convention – to have waived its right to object.

Rule 28

Cost of Proceeding

- (1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:
 - (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;
 - (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.
- (2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.

Chapter IV

Written and Oral Procedures

Rule 29

Normal Procedures

Except if the parties otherwise agree, the proceeding shall comprise two distinct phases: a written procedure followed by an oral one.

Rule 30

Transmission of the Request

As soon as the Tribunal is constituted, the Secretary-General shall transmit to each member a copy of the request by which the proceeding was initiated, of the supporting documentation, of the notice of registration and of any communication received from either party in response thereto.

Rule 31

The Written Procedure

- (1) In addition to the request for arbitration, the written procedure shall consist of the following pleadings, filed within time limits set by the Tribunal:

- (a) a memorial by the requesting party;
 - (b) a counter-memorial by the other party; and, if the parties so agree or the Tribunal deems it necessary:
 - (c) a reply by the requesting party; and
 - (d) a rejoinder by the other party.
- (2) If the request was made jointly, each party shall, within the same time limit determined by the Tribunal, file its memorial and, if the parties so agree or the Tribunal deems it necessary, its reply; however, the parties may instead agree that one of them shall, for the purposes of paragraph (1), be considered as the requesting party.
 - (3) A memorial shall contain: a statement of the relevant facts; a statement of law; and the submissions. A counter-memorial, reply or rejoinder shall contain an admission or denial of the facts stated in the last previous pleading; any additional facts, if necessary; observations concerning the statement of law in the last previous pleading; a statement of law in answer thereto; and the submissions.

Rule 32

The Oral Procedure

- (1) The oral procedure shall consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts.
- (2) Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.
- (3) The members of the Tribunal may, during the hearings, put questions to the parties, their agents, counsel and advocates, and ask them for explanations.

Rule 33

Marshalling of Evidence

Without prejudice to the rules concerning the production of documents, each party shall, within time limits fixed by the Tribunal, communicate to the Secretary-General, for transmission to the Tribunal and the other party, precise information regarding the evidence which it intends to produce and that which it intends to request the Tribunal to call for, together with an indication of the points to which such evidence will be directed.

Rule 34

Evidence: General Principles

- (1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.
- (2) The Tribunal may, if it deems it necessary at any stage of the proceeding:
 - (a) call upon the parties to produce documents, witnesses and experts; and
 - (b) visit any place connected with the dispute or conduct inquiries there.
- (3) The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.
- (4) Expenses incurred in producing evidence and in taking other measures in accordance with paragraph (2) shall be deemed to constitute part of the expenses incurred by the parties within the meaning of Article 61(2) of the Convention.

Rule 35

Examination of Witnesses and Experts

- (1) Witnesses and experts shall be examined before the Tribunal by the parties under the control of its President. Questions may also be put to them by any member of the Tribunal.
- (2) Each witness shall make the following declaration before giving his evidence:

“I solemnly declare upon my honour and conscience that I shall speak the truth, the whole truth and nothing but the truth.”

- (3) Each expert shall make the following declaration before making his statement:

“I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief.”

Rule 36

Witnesses and Experts: Special Rules

Notwithstanding Rule 35 the Tribunal may:

- (a) admit evidence given by a witness or expert in a written deposition; and
- (b) with the consent of both parties, arrange for the examination of a witness or expert otherwise than before the Tribunal itself. The Tribunal shall define the subject of the examination, the time limit, the procedure to be followed and other particulars. The parties may participate in the examination.

Rule 37

Visits and Inquiries; Submissions of Non-disputing Parties

- (1) If the Tribunal considers it necessary to visit any place connected with the dispute or to conduct an inquiry there, it shall make an order to this effect. The order shall define the scope of the visit or the subject of the inquiry, the time limit, the procedure to be followed and other particulars. The parties may participate in any visit or inquiry.
- (2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
 - (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
 - (b) the non-disputing party submission would address a matter within the scope of the dispute;
 - (c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

Rule 38

Closure of the Proceeding

- (1) When the presentation of the case by the parties is completed, the proceeding shall be declared closed.
- (2) Exceptionally, the Tribunal may, before the award has been rendered, reopen the proceeding on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points.

Chapter V

Particular Procedures

Rule 39

Provisional Measures

- (1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
- (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
- (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.
- (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.
- (5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.
- (6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.

Rule 40

Ancillary Claims

- (1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.
- (2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.

- (3) The Tribunal shall fix a time limit within which the party against which an ancillary claim is presented may file its observations thereon.

Rule 41

Preliminary Objections

- (1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder – unless the facts on which the objection is based are unknown to the party at that time.
- (2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.
- (3) Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.
- (4) The Tribunal shall decide whether or not the further procedures relating to the objection made pursuant to paragraph (1) shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.
- (5) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.
- (6) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect.

Rule 42

Default

- (1) If a party (in this Rule called the “defaulting party”) fails to appear or to present its case at any stage of the proceeding, the other party may, at any time prior to the discontinuance of the proceeding, request the Tribunal to deal with the questions submitted to it and to render an award.
- (2) The Tribunal shall promptly notify the defaulting party of such a request. Unless it is satisfied that that party does not intend to appear or to present its case in the proceeding, it shall, at the same time, grant a period of grace and to this end:
 - (a) if that party had failed to file a pleading or any other instrument within the time limit fixed therefor, fix a new time limit for its filing; or
 - (b) if that party had failed to appear or present its case at a hearing, fix a new date for the hearing.The period of grace shall not, without the consent of the other party, exceed 60 days.
- (3) After the expiration of the period of grace or when, in accordance with paragraph (2), no such period is granted, the Tribunal shall resume the consideration of the dispute. Failure of the defaulting party to appear or to present its case shall not be deemed an admission of the assertions made by the other party.
- (4) The Tribunal shall examine the jurisdiction of the Centre and its own competence in the dispute and, if it is satisfied, decide whether the submissions made are well-founded in fact and in law. To this end, it may, at any stage of the proceeding, call on the party appearing to file observations, produce evidence or submit oral explanations.

Rule 43

Settlement and Discontinuance

- (1) If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding.
- (2) If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award.

Rule 44**Discontinuance at Request of a Party**

If a party requests the discontinuance of the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall in an order fix a time limit within which the other party may state whether it opposes the discontinuance. If no objection is made in writing within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal, or if appropriate the Secretary-General, shall in an order take note of the discontinuance of the proceeding. If objection is made, the proceeding shall continue.

Rule 45**Discontinuance for Failure of Parties to Act**

If the parties fail to take any steps in the proceeding during six consecutive months or such period as they may agree with the approval of the Tribunal, or of the Secretary-General if the Tribunal has not yet been constituted, they shall be deemed to have discontinued the proceeding and the Tribunal, or if appropriate the Secretary-General, shall, after notice to the parties, in an order take note of the discontinuance.

Chapter VI**The Award****Rule 46****Preparation of the Award**

The award (including any individual or dissenting opinion) shall be drawn up and signed within 120 days after closure of the proceeding. The Tribunal may, however, extend this period by a further 60 days if it would otherwise be unable to draw up the award.

Rule 47**The Award**

- (1) The award shall be in writing and shall contain:
 - (a) a precise designation of each party;
 - (b) a statement that the Tribunal was established under the Convention, and a description of the method of its constitution;
 - (c) the name of each member of the Tribunal, and an identification of the appointing authority of each;
 - (d) the names of the agents, counsel and advocates of the parties;
 - (e) the dates and place of the sittings of the Tribunal;
 - (f) a summary of the proceeding;

- (g) a statement of the facts as found by the Tribunal;
 - (h) the submissions of the parties;
 - (i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; and
 - (j) any decision of the Tribunal regarding the cost of the proceeding.
- (2) The award shall be signed by the members of the Tribunal who voted for it; the date of each signature shall be indicated.
- (3) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

Rule 48

Rendering of the Award

- (1) Upon signature by the last arbitrator to sign, the Secretary-General shall promptly:
- (a) authenticate the original text of the award and deposit it in the archives of the Centre, together with any individual opinions and statements of dissent; and
 - (b) dispatch a certified copy of the award (including individual opinions and statements of dissent) to each party, indicating the date of dispatch on the original text and on all copies.
- (2) The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.
- (3) The Secretary-General shall, upon request, make available to a party additional certified copies of the award.
- (4) The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.

Rule 49

Supplementary Decisions and Rectification

- (1) Within 45 days after the date on which the award was rendered, either party may request, pursuant to Article 49(2) of the Convention, a supplementary decision on, or the rectification of, the award. Such a request shall be addressed in writing to the Secretary-General. The request shall:
- (a) identify the award to which it relates;
 - (b) indicate the date of the request;
 - (c) state in detail:
 - any question which, in the opinion of the requesting party, the Tribunal omitted to decide in the award; and

- any error in the award which the requesting party seeks to have rectified; and
- (d) be accompanied by a fee for lodging the request.
- (2) Upon receipt of the request and of the lodging fee, the Secretary-General shall forthwith:
 - (a) register the request;
 - (b) notify the parties of the registration;
 - (c) transmit to the other party a copy of the request and of any accompanying documentation; and
 - (d) transmit to each member of the Tribunal a copy of the notice of registration, together with a copy of the request and of any accompanying documentation.
- (3) The President of the Tribunal shall consult the members on whether it is necessary for the Tribunal to meet in order to consider the request. The Tribunal shall fix a time limit for the parties to file their observations on the request and shall determine the procedure for its consideration.
- (4) Rules 46–48 shall apply, *mutatis mutandis*, to any decision of the Tribunal pursuant to this Rule.
- (5) If a request is received by the Secretary-General more than 45 days after the award was rendered, he shall refuse to register the request and so inform forthwith the requesting party.

Chapter VII

Interpretation, Revision and Annulment of the Award

Rule 50

The Application

- (1) An application for the interpretation, revision or annulment of an award shall be addressed in writing to the Secretary-General and shall:
 - (a) identify the award to which it relates;
 - (b) indicate the date of the application;
 - (c) state in detail:
 - in an application for interpretation, the precise points in dispute;
 - in an application for revision, pursuant to Article 51(1) of the Convention, the change sought in the award, the discovery of some fact of such a nature as decisively to affect the award, and evidence that when the award was rendered that fact was unknown to the Tribunal and to the applicant, and that the applicant's ignorance of that fact was not due to negligence;
 - in an application for annulment, pursuant to Article 52(1) of the Convention, the grounds on which it is based. These grounds are limited to the following:

- that the Tribunal was not properly constituted;
 - that the Tribunal has manifestly exceeded its powers;
 - that there was corruption on the part of a member of the Tribunal;
 - that there has been a serious departure from a fundamental rule of procedure;
 - that the award has failed to state the reasons on which it is based;
- (d) be accompanied by the payment of a fee for lodging the application.
- (2) Without prejudice to the provisions of paragraph (3), upon receiving an application and the lodging fee, the Secretary-General shall forthwith:
- (a) register the application;
 - (b) notify the parties of the registration; and
 - (c) transmit to the other party a copy of the application and of any accompanying documentation.
- (3) The Secretary-General shall refuse to register an application for:
- (a) revision, if, in accordance with Article 51(2) of the Convention, it is not made within 90 days after the discovery of the new fact and in any event within three years after the date on which the award was rendered (or any subsequent decision or correction);
 - (b) annulment, if, in accordance with Article 52(2) of the Convention, it is not made:
 - within 120 days after the date on which the award was rendered (or any subsequent decision or correction) if the application is based on any of the following grounds:
 - the Tribunal was not properly constituted;
 - the Tribunal has manifestly exceeded its powers;
 - there has been a serious departure from a fundamental rule of procedure;
 - the award has failed to state the reasons on which it is based;
 - in the case of corruption on the part of a member of the Tribunal, within 120 days after discovery thereof, and in any event within three years after the date on which the award was rendered (or any subsequent decision or correction).
- (4) If the Secretary-General refuses to register an application for revision, or annulment, he shall forthwith notify the requesting party of his refusal.

Rule 51

Interpretation or Revision: Further Procedures

- (1) Upon registration of an application for the interpretation or revision of an award, the Secretary-General shall forthwith:
- (a) transmit to each member of the original Tribunal a copy of the notice of registration, together with a copy of the application and of any accompanying documentation; and

- (b) request each member of the Tribunal to inform him within a specified time limit whether that member is willing to take part in the consideration of the application.
- (2) If all members of the Tribunal express their willingness to take part in the consideration of the application, the Secretary-General shall so notify the members of the Tribunal and the parties. Upon dispatch of these notices the Tribunal shall be deemed to be reconstituted.
 - (3) If the Tribunal cannot be reconstituted in accordance with paragraph (2), the Secretary-General shall so notify the parties and invite them to proceed, as soon as possible, to constitute a new Tribunal, including the same number of arbitrators, and appointed by the same method, as the original one.

Rule 52

Annulment: Further Procedures

- (1) Upon registration of an application for the annulment of an award, the Secretary-General shall forthwith request the Chairman of the Administrative Council to appoint an ad hoc Committee in accordance with Article 52(3) of the Convention.
- (2) The Committee shall be deemed to be constituted on the date the Secretary-General notifies the parties that all members have accepted their appointment. Before or at the first session of the Committee, each member shall sign a declaration conforming to that set forth in Rule 6(2).

Rule 53

Rules of Procedure

The provisions of these Rules shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee.

Rule 54

Stay of Enforcement of the Award

- (1) The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.
- (2) If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award.

As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.

- (3) If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).
- (4) A request pursuant to paragraph (1), (2) (second sentence) or (3) shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.
- (5) The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay, which shall become effective on the date on which he dispatches such notification.

Rule 55

Resubmission of Dispute after an Annulment

- (1) If a Committee annuls part or all of an award, either party may request the resubmission of the dispute to a new Tribunal. Such a request shall be addressed in writing to the Secretary-General and shall:
 - (a) identify the award to which it relates;
 - (b) indicate the date of the request;
 - (c) explain in detail what aspect of the dispute is to be submitted to the Tribunal; and
 - (d) be accompanied by a fee for lodging the request.
- (2) Upon receipt of the request and of the lodging fee, the Secretary-General shall forthwith:
 - (a) register it in the Arbitration Register;
 - (b) notify both parties of the registration;
 - (c) transmit to the other party a copy of the request and of any accompanying documentation; and
 - (d) invite the parties to proceed, as soon as possible, to constitute a new Tribunal, including the same number of arbitrators, and appointed by the same method, as the original one.
- (3) If the original award had only been annulled in part, the new Tribunal shall not reconsider any portion of the award not so annulled. It may, however, in

accordance with the procedures set forth in Rule 54, stay or continue to stay the enforcement of the unannulled portion of the award until the date its own award is rendered.

- (4) Except as otherwise provided in paragraphs (1)–(3), these Rules shall apply to a proceeding on a resubmitted dispute in the same manner as if such dispute had been submitted pursuant to the Institution Rules.

Chapter VIII

General Provisions

Rule 56

Final Provisions

- (1) The texts of these Rules in each official language of the Centre shall be equally authentic.
- (2) These Rules may be cited as the “Arbitration Rules” of the Centre.

7. REPORT OF THE WORLD BANK EXECUTIVE DIRECTORS ON THE ICSID CONVENTION (1965)

International Bank for Reconstruction and Development

18 March 1965

- (1) Resolution No. 214, adopted by the Board of Governors of the International Bank for Reconstruction and Development on September 10, 1964, provides as follows:

“RESOLVED:

- (a) The report of the Executive Directors on “Settlement of Investment Disputes,” dated August 6, 1964, is hereby approved.
 - (b) The Executive Directors are requested to formulate a convention establishing facilities and procedures which would be available on a voluntary basis for the settlement of investment disputes between contracting States and Nationals of other contracting States through conciliation and arbitration.
 - (c) In formulating such a convention, the Executive Directors shall take into account the views of member governments and shall keep in mind the desirability of arriving at a text which could be accepted by the largest possible number of governments.
 - (d) The Executive Directors shall submit the text of such a convention to member governments with such recommendations as they shall deem appropriate.”
- (2) The Executive Directors of the Bank, acting pursuant to the foregoing Resolution, have formulated a Convention on the Settlement of Investment Disputes between States and Nationals of Other States and, on March 18, 1965, approved the submission of the text of the Convention, as attached hereto, to member governments of the Bank. This action by the Executive Directors does not, of course, imply that the governments represented by the individual Executive Directors are committed to take action on the Convention.
- (3) The action by the Executive Directors was preceded by extensive preparatory work, details of which are given in paragraphs 6–8 below. The Executive Directors are satisfied that the Convention in the form attached hereto represents a broad consensus of the views of those governments which accept the principle of establishing by inter-governmental agreement facilities and procedures for the settlement of investment disputes which States and foreign investors wish to submit to conciliation or arbitration. They are also satisfied that the Convention constitutes a suitable framework for such facilities and procedures. Accordingly, the text of the Convention is submitted to member governments for consideration with a view to signature and ratification, acceptance or approval.

- (4) The Executive Directors invite attention to the provision of Article 68(2) pursuant to which the Convention will enter into force as between the Contracting States 30 days after deposit with the Bank, the depositary of the Convention, of the twentieth instrument of ratification, acceptance or approval.
- (5) The attached text of the Convention in the English, French and Spanish languages has been deposited in the archives of the Bank, as depositary, and is open for signature.

II

- The question of the desirability and practicability of establishing institutional facilities, sponsored by the Bank, for the settlement through conciliation and arbitration of investment disputes between States and foreign investors was first placed before the Board of Governors of the Bank at its Seventeenth Annual Meeting, held in Washington, D.C. in September 1962. At that Meeting the Board of Governors, by Resolution No. 174, adopted on September 18, 1962, requested the Executive Directors to study the question.
- After a series of informal discussions on the basis of working papers prepared by the staff of the Bank, the Executive Directors decided that the Bank should convene consultative meetings of legal experts designated by member governments to consider the subject in greater detail. The consultative meetings were held on a regional basis in Addis Ababa (December 16–20, 1963), Santiago de Chile (February 3–7, 1964), Geneva (February 17–21, 1964) and Bangkok (April 27–May 1, 1964), with the administrative assistance of the United Nations Economic Commissions and the European Office of the United Nations, and took as the basis for discussion a Preliminary Draft of a Convention on Settlement of Investment Disputes between States and Nationals of Other States prepared by the staff of the Bank in the light of the discussions of the Executive Directors and the views of governments. The meetings were attended by legal experts from 86 countries.
- In the light of the preparatory work and of the views expressed at the consultative meetings, the Executive Directors reported to the Board of Governors at its Nineteenth Annual Meeting in Tokyo, in September 1964, that it would be desirable to establish the institutional facilities envisaged, and to do so within the framework of an inter-governmental agreement. The Board of Governors adopted the Resolution set forth in paragraph 1 of this Report, whereupon the Executive Directors undertook the formulation of the present Convention. With a view to arriving at a text which could be accepted by the largest possible number of governments, the Bank invited its members to designate representatives to a Legal Committee which would assist the Executive Directors in their task. This Committee met in Washington from November 23 through December 11, 1964, and the Executive Directors gratefully acknowledge the valuable advice they received from the representatives of the 61 member countries who served on the Committee.

III

- In submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.
- The Executive Directors recognize that investment disputes are as a rule settled through administrative, judicial or arbitral procedures available under the laws of the country in which the investment concerned is made. However, experience shows that disputes may arise which the parties wish to settle by other methods; and investment agreements entered into in recent years show that both States and investors frequently consider that it is in their mutual interest to agree to resort to international methods of settlement.
- The present Convention would offer international methods of settlement designed to take account of the special characteristics of the disputes covered, as well as of the parties to whom it would apply. It would provide facilities for conciliation and arbitration by specially qualified persons of independent judgment carried out according to rules known and accepted in advance by the parties concerned. In particular, it would ensure that once a government or investor had given consent to conciliation or arbitration under the auspices of the Centre, such consent could not be unilaterally withdrawn.
- The Executive Directors believe that private capital will continue to flow to countries offering a favorable climate for attractive and sound investments, even if such countries did not become parties to the Convention or, having joined, did not make use of the facilities of the Centre. On the other hand, adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.
- While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States. Moreover, the Convention permits the institution of proceedings by host States as well as by investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases.
- The provisions of the attached Convention are for the most part self-explanatory. Brief comment on a few principal features may, however, be useful to member governments in their consideration of the Convention.

IV

The International Centre for Settlement of Investment Disputes**General**

- (1) The Convention establishes the International Centre for Settlement of Investment Disputes as an autonomous international institution (Articles 18–24). The purpose of the Centre is “to provide facilities for conciliation and arbitration of investment disputes * * *” (Article 1(2)). The Centre will not itself engage in conciliation or arbitration activities. This will be the task of Conciliation Commissions and Arbitral Tribunals constituted in accordance with the provisions of the Convention.
- (2) As sponsor of the establishment of the institution the Bank will provide the Centre with premises for its seat (Article 2) and, pursuant to arrangements between the two institutions, with other administrative facilities and services (Article 6(d)).
- (3) With respect to the financing of the Centre (Article 17), the Executive Directors have decided that the Bank should be prepared to provide the Centre with office accommodation free of charge as long as the Centre has its seat at the Bank’s headquarters and to underwrite, within reasonable limits, the basic overhead expenditure of the Centre for a period of years to be determined after the Centre is established.
- (4) Simplicity and economy consistent with the efficient discharge of the functions of the Centre characterize its structure. The organs of the Centre are the Administrative Council (Articles 4–8) and the Secretariat (Articles 9–11). The Administrative Council will be composed of one representative of each Contracting State, serving without remuneration from the Centre. Each member of the Council casts one vote and matters before the Council are decided by a majority of the votes cast unless a different majority is required by the Convention. The President of the Bank will serve *ex officio* as the Council’s Chairman but will have no vote. The Secretariat will consist of a Secretary-General, one or more Deputy Secretaries-General and staff. In the interest of flexibility the Convention provides for the possibility of there being more than one Deputy Secretary-General, but the Executive Directors do not now foresee a need for more than one or two full time high officials of the Centre. Article 10, which requires that the Secretary-General and any Deputy Secretary-General be elected by the Administrative Council by a majority of two-thirds of its members, on the nomination of the Chairman, limits their terms of office to a period not exceeding six years and permits their re-election. The Executive Directors believe that the initial election, which will take place shortly after the Convention will have come into force, should be for a short term so as not to deprive the States which ratify the Convention after its entry into force of the possibility of participating in the selection of the high officials of the Centre. Article 10 also limits the extent to which these officials may engage in activities other than their official functions.

Functions of the Administrative Council

- (1) The principal functions of the Administrative Council are the election of the Secretary-General and any Deputy Secretary-General, the adoption of the budget of the Centre and the adoption of administrative and financial regulations, rules governing the institution of proceedings and rules of procedure for conciliation and arbitration proceedings. Action on all these matters requires a majority of two-thirds of the members of the Council.

Functions of the Secretary-General

- The Convention requires the Secretary-General to perform a variety of administrative functions as legal representative, registrar and principal officer of the Centre (Articles 7(1), 11, 16(3), 25(4), 28, 36, 49(1), 50(1), 51(1), 52(1), 54(2), 59, 60(1), 63(b) and 65). In addition, the Secretary-General is given the power to refuse registration of a request for conciliation proceedings or arbitration proceedings, and thereby to prevent the institution of such proceedings, if on the basis of the information furnished by the applicant he finds that the dispute is *manifestly* outside the jurisdiction of the Centre (Articles 28(3) and 36(3)). The Secretary-General is given this limited power to “screen” requests for conciliation or arbitration proceedings with a view to avoiding the embarrassment to a party (particularly a State) which might result from the institution of proceedings against it in a dispute which it had not consented to submit to the Centre, as well as the possibility that the machinery of the Centre would be set in motion in cases which for other reasons were obviously outside the jurisdiction of the Centre e.g., because either the applicant or the other party was not eligible to be a party in proceedings under the Convention.

The Panels

- (1) Article 3 requires the Centre to maintain a Panel of Conciliators and a Panel of Arbitrators, while Articles 12–16 outline the manner and terms of designation of Panel members. In particular, Article 14(1) seeks to ensure that Panel members will possess a high degree of competence and be capable of exercising independent judgment. In keeping with the essentially flexible character of the proceedings, the Convention permits the parties to appoint conciliators and arbitrators from outside the Panels but requires (Articles 31(2) and 40(2)) that such appointees possess the qualities stated in Article 14(1). The Chairman, when called upon to appoint a conciliator or arbitrator pursuant to Article 30 or 38, is restricted in his choice to Panel members.

V

Jurisdiction of the Centre

- The term “jurisdiction of the Centre” is used in the Convention as a convenient expression to mean the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available for conciliation and arbitration proceedings. The jurisdiction of the Centre is dealt with in Chapter II of the Convention (Articles 25–27).

Consent

- Consent of the parties is the cornerstone of the jurisdiction of the Centre. Consent to jurisdiction must be in writing and once given cannot be withdrawn unilaterally (Article 25(1)).
- Consent of the parties must exist when the Centre is seized (Articles 28(3) and 36(3)) but the Convention does not otherwise specify the time at which consent should be given. Consent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a *compromis* regarding a dispute which has already arisen. Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.
- While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto.

Nature of the Dispute

- Article 25(1) requires that the dispute must be a “legal dispute arising directly out of an investment.” The expression “legal dispute” has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.
- No attempt was made to define the term “investment” given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).

Parties to the Dispute

- For a dispute to be within the jurisdiction of the Centre one of the parties must be a Contracting State (or a constituent subdivision or agency of a Contracting State) and the other party must be a “national of another Contracting State.” The latter term as defined in paragraph (2) of Article 25 covers both natural persons and juridical persons.
- It should be noted that under clause (a) of Article 25(2) a natural person who was a national of the State party to the dispute would not be eligible to be a party in proceedings under the auspices of the Centre, even if at the same time he had the nationality of another State. This ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent.
- Clause (b) of Article 25(2), which deals with juridical persons, is more flexible. A juridical person which had the nationality of the State party to the dispute would be eligible to be a party to proceedings under the auspices of the Centre if that State had agreed to treat it as a national of another Contracting State because of foreign control.

Notifications by Contracting States

- (1) While no conciliation or arbitration proceedings could be brought against a Contracting State without its consent and while no Contracting State is under any obligation to give its consent to such proceedings, it was nevertheless felt that adherence to the Convention might be interpreted as holding out an expectation that Contracting States would give favorable consideration to requests by investors for the submission of a dispute to the Centre. It was pointed out in that connection that there might be classes of investment disputes which governments would consider unsuitable for submission to the Centre or which, under their own law, they were not permitted to submit to the Centre. In order to avoid any risk of misunderstanding on this score, Article 25(4) expressly permits Contracting States to make known to the Centre in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre. The provision makes clear that a statement by a Contracting State that it would consider submitting a certain class of dispute to the Centre would serve for purposes of information only and would not constitute the consent required to give the Centre jurisdiction. Of course, a statement excluding certain classes of disputes from consideration would not constitute a reservation to the Convention.

Arbitration as Exclusive Remedy

- It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy. This rule of

interpretation is embodied in the first sentence of Article 26. In order to make clear that it was not intended thereby to modify the rules of international law regarding the exhaustion of local remedies, the second sentence explicitly recognizes the right of a State to require the prior exhaustion of local remedies.

Claims by the Investor's State

- When a host State consents to the submission of a dispute with an investor to the Centre, thereby giving the investor direct access to an international jurisdiction, the investor should not be in a position to ask his State to espouse his case and that State should not be permitted to do so. Accordingly, Article 27 expressly prohibits a Contracting State from giving diplomatic protection, or bringing an international claim, in respect of a dispute which one of its nationals and another Contracting State have consented to submit, or have submitted, to arbitration under the Convention, unless the State party to the dispute fails to honor the award rendered in that dispute.

VI

Proceedings under the Convention

Institution of Proceedings

- Proceedings are instituted by means of a request addressed to the Secretary-General (Articles 28 and 36). After registration of the request the Conciliation Commission or Arbitral Tribunal, as the case may be, will be constituted. Reference is made to paragraph 20 above on the power of the Secretary-General to refuse registration.

Constitution of Conciliation Commissions and Arbitral Tribunals

- Although the Convention leaves the parties a large measure of freedom as regards the constitution of Commissions and Tribunals, it assures that a lack of agreement between the parties on these matters or the unwillingness of a party to cooperate will not frustrate proceedings (Articles 29–30 and 37–38, respectively).
- Mention has already been made of the fact that the parties are free to appoint conciliators and arbitrators from outside the Panels (see paragraph 21 above). While the Convention does not restrict the appointment of conciliators with reference to nationality, Article 39 lays down the rule that the majority of the members of an Arbitral Tribunal should not be nationals of the State party to the dispute or of the State whose national is a party to the dispute. This rule is likely to have the effect of excluding persons having these nationalities from serving on a Tribunal

composed of not more than three members. However, the rule will not apply where each and every arbitrator on the Tribunal has been appointed by agreement of the parties.

Conciliation Proceedings; Powers and Functions of Arbitral Tribunals

- In general, the provisions of Articles 32–35 dealing with conciliation proceedings and of Articles 41–49, dealing with the powers and functions of Arbitral Tribunals and awards rendered by such Tribunals, are self-explanatory. The differences between the two sets of provisions reflect the basic distinction between the process of conciliation which seeks to bring the parties to agreement and that of arbitration which aims at a binding determination of the dispute by the Tribunal.
- Article 41 reiterates the well-established principle that international tribunals are to be the judges of their own competence and Article 32 applies the same principle to Conciliation Commissions. It is to be noted in this connection that the power of the Secretary-General to refuse registration of a request for conciliation or arbitration (see paragraph 20 above) is so narrowly defined as not to encroach on the prerogative of Commissions and Tribunals to determine their own competence and, on the other hand, that registration of a request by the Secretary-General does not, of course, preclude a Commission or Tribunal from finding that the dispute is outside the jurisdiction of the Centre.
- In keeping with the consensual character of proceedings under the Convention, the parties to conciliation or arbitration proceedings may agree on the rules of procedure which will apply in those proceedings. However, if or to the extent that they have not so agreed the Conciliation Rules and Arbitration Rules adopted by the Administrative Council will apply (Articles 33 and 44).
- Under the Convention an Arbitral Tribunal is required to apply the law agreed by the parties. Failing such agreement, the Tribunal must apply the law of the State party to the dispute (unless that law calls for the application of some other law), as well as such rules of international law as may be applicable. The term “international law” as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes.¹⁰⁷⁵

1075. Article 38(1) of the Statute of the International Court of Justice reads as follows:

- (1) The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
 - (b) international custom, as evidence of a general practice accepted as law;
 - (c) the general principles of law recognized by civilized nations;
 - (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Recognition and Enforcement of Arbitral Awards

- (1) Article 53 declares that the parties are bound by the award and that it shall not be subject to appeal or to any other remedy except those provided for in the Convention. The remedies provided for are revision (Article 51) and annulment (Article 52). In addition, a party may ask a Tribunal which omitted to decide any question submitted to it, to supplement its award (Article 49(2)) and may request interpretation of the award (Article 50).
- (2) Subject to any stay of enforcement in connection with any of the above proceedings in accordance with the provisions of the Convention, the parties are obliged to abide by and comply with the award and Article 54 requires every Contracting State to recognize the award as binding and to enforce the pecuniary obligations imposed by the award as if it were a final decision of a domestic court. Because of the different legal techniques followed in common law and civil law jurisdictions and the different judicial systems found in unitary and federal or other non-unitary States, Article 54 does not prescribe any particular method to be followed in its domestic implementation, but requires each Contracting State to meet the requirements of the Article in accordance with its own legal system.
- (3) The doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States or against the State in which execution is sought. Article 54 requires Contracting States to equate an award rendered pursuant to the Convention with a final judgment of its own courts. It does not require them to go beyond that and to undertake forced execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed. In order to leave no doubt on this point Article 55 provides that nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

VII

Place of Proceedings

- In dealing with proceedings away from the Centre, Article 63 provides that proceedings may be held, if the parties so agree, at the seat of the Permanent Court of Arbitration or of any other appropriate institution with which the Centre may enter into arrangements for that purpose. These arrangements are likely to vary with the type of institution and to range from merely making premises available for the proceedings to the provision of complete secretariat services.

VIII

Disputes Between Contracting States

- Article 64 confers on the International Court of Justice jurisdiction over disputes between Contracting States regarding the interpretation or application of the Convention which are not settled by negotiation and which the parties do not agree to settle by other methods. While the provision is couched in general terms, it must be read in the context of the Convention as a whole. Specifically, the provision does not confer jurisdiction on the Court to review the decision of a Conciliation Commission or Arbitral Tribunal as to its competence with respect to any dispute before it. Nor does it empower a State to institute proceedings before the Court in respect of a dispute which one of its nationals and another Contracting State have consented to submit or have submitted to arbitration, since such proceedings would contravene the provisions of Article 27, unless the other Contracting State had failed to abide by and comply with the award rendered in that dispute.

IX

Entry into Force

- The Convention is open for signature on behalf of States members of the Bank. It will also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign. No time limit has been prescribed for signature. Signature is required both of States joining before the Convention enters into force and those joining thereafter (Article 67). The Convention is subject to ratification, acceptance or approval by the signatory States in accordance with their constitutional procedures (Article 68). As already stated, the Convention will enter into force upon the deposit of the twentieth instrument of ratification, acceptance or approval.

8. ICSID ADDITIONAL FACILITY RULES (1978)

RULES GOVERNING THE ADDITIONAL FACILITY FOR THE ADMINISTRATION OF PROCEEDINGS BY THE SECRETARIAT OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

(ADDITIONAL FACILITY RULES)

April 2006

Article 1**Definitions**

- (1) “Convention” means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, submitted to Governments by the Executive Directors of the International Bank for Reconstruction and Development on March 18, 1965, which entered into force on October 14, 1966.
- (2) “Centre” means the International Centre for Settlement of Investment Disputes established pursuant to Article 1 of the Convention.
- (3) “Secretariat” means the Secretariat of the Centre.
- (4) “Contracting State” means a State for which the Convention has entered into force.
- (5) “Secretary-General” means the Secretary-General of the Centre or his deputy.
- (6) “National of another State” means a person who is not, or whom the parties to the proceeding in question have agreed not to treat as, a national of the State party to that proceeding.

Article 2

Additional Facility

The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules, proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State, falling within the following categories:

- (a) conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State;
- (b) conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State; and

(c) fact-finding proceedings.

The administration of proceedings authorized by these Rules is hereinafter referred to as the Additional Facility.

Article 3

Convention Not Applicable

Since the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein.

Article 4

Access to the Additional Facility in Respect of Conciliation and Arbitration Proceedings subject to Secretary-General's Approval

- (1) Any agreement providing for conciliation or arbitration proceedings under the Additional Facility in respect of existing or future disputes requires the approval of the Secretary-General. The parties may apply for such approval at any time prior to the institution of proceedings by submitting to the Secretariat a copy of the agreement concluded or proposed to be concluded between them together with other relevant documentation and such additional information as the Secretariat may reasonably request.
- (2) In the case of an application based on Article 2(a), the Secretary-General shall give his approval only if (a) he is satisfied that the requirements of that provision are fulfilled at the time, and (b) both parties give their consent to the jurisdiction of the Centre under Article 25 of the Convention (in lieu of the Additional Facility) in the event that the jurisdictional requirements *ratione personae* of that Article shall have been met at the time when proceedings are instituted.
- (3) In the case of an application based on Article 2(b), the Secretary-General shall give his approval only if he is satisfied (a) that the requirements of that provision are fulfilled, and (b) that the underlying transaction has features which distinguish it from an ordinary commercial transaction.
- (4) If in the case of an application based on Article 2(b) the jurisdictional requirements *ratione personae* of Article 25 of the Convention shall have been met and the Secretary-General is of the opinion that it is likely that a Conciliation Commission or Arbitral Tribunal, as the case may be, will hold that the dispute arises directly out of an investment, he may make his approval of the application conditional upon consent by both parties to submit any dispute in the first instance to the jurisdiction of the Centre.
- (5) The Secretary-General shall as soon as possible notify the parties whether he approves or disapproves the agreement of the parties. He may hold discussions with the parties or invite the parties to a meeting with the officials of the

Secretariat either at the parties' request or at his own initiative. The Secretary-General shall, upon the request of the parties or any of them, keep confidential any or all information furnished to him by such parties or party in connection with the provisions of this Article.

- (6) The Secretary-General shall record his approval of an agreement pursuant to this Article together with the names and addresses of the parties in a register to be maintained at the Secretariat for that purpose.

Article 5

Administrative and Financial Provisions

The responsibilities of the Secretariat in operating the Additional Facility and the financial provisions regarding its operation shall be as those established by the Administrative and Financial Regulations of the Centre for conciliation and arbitration proceedings under the Convention. Accordingly, Regulations 14 through 16, 22 through 30 and 34(1) of the Administrative and Financial Regulations of the Centre shall apply, *mutatis mutandis*, in respect of fact-finding, conciliation and arbitration proceedings under the Additional Facility.

Article 6

Schedules

Fact-finding, conciliation and arbitration proceedings under the Additional Facility shall be conducted in accordance with the respective Fact-finding (Additional Facility), Conciliation (Additional Facility) and Arbitration (Additional Facility) Rules set forth in Schedules A, B and C.

Schedule A

Fact-Finding (Additional Facility) Rules

Chapter I

Institution of Proceedings

Article 1

The Request

- (1) Any State or national of a State wishing to institute an inquiry under the Additional Facility to examine and report on facts (hereinafter called a “fact-finding proceeding”) shall send a request to that effect in writing to the Secretariat at the seat of the Centre. It shall be drawn up in an official language of the Centre, shall be dated and shall be signed by the requesting party or its duly authorized representative.
- (2) The request may be made jointly by the parties to the fact-finding proceeding.

Article 2

Contents of the Request

- (1) The request shall:
 - (a) designate precisely each party to the fact-finding proceeding and state the address of each;
 - (b) set forth the agreement between the parties providing for recourse to the fact-finding proceeding; and
 - (c) state the circumstances to be examined and reported on.
 - (d) The request shall in addition set forth any provisions agreed by the parties regarding the number of commissioners, their qualifications, appointment, replacement, resignation and disqualification, the extent of the powers of the Committee, the appointment of its President, and the place of its sessions, as well as the procedure to be followed in the fact-finding proceeding (hereinafter called the “Procedural Arrangement”).
 - (e) The request shall be accompanied by five additional signed copies and by the fee prescribed pursuant to Regulation 16 of the Administrative and Financial Regulations of the Centre.

Article 3

Registration of the Request

- (1) As soon as the Secretary-General has satisfied himself that the request conforms in form and substance to the provisions of Article 2 of these Rules he shall register the request in the Fact-finding (Additional Facility) Register, notify the requesting party and the other party of the registration and transmit to the other party a copy of the request and of the accompanying documentation, if any.
- (2) The notice of registration of a request shall:
 - (a) record that the request is registered and indicate the date of the registration and of the dispatch of that notice;
 - (b) notify each party that all communications in connection with the proceeding will be sent to the address stated in the request, unless another address is indicated to the Secretariat; and
 - (c) request the other party to inform the Secretary-General in writing within 30 days after receipt of the notice whether it agrees with the request or it objects thereto.
- (3) In agreeing with the request, the other party may state additional circumstances which it wishes to be examined and reported on within the scope of the agreement between the parties for recourse to fact-finding proceedings. In that event, the Secretary-General shall request the requesting party to inform him promptly in writing whether it agrees to the inclusion of the additional facts or whether it objects thereto.

Article 4

Objections to the Request

- (1) Any objection by the other party pursuant to Article 3(2)(c) of these Rules shall be filed by it in writing with the Secretary-General and shall indicate on which of the following grounds it is based and the reasons therefor:
 - (a) the other party is under no obligation to have recourse to fact-finding;
 - (b) the circumstances indicated in the request as the circumstances to be examined and reported on are wholly or partly outside the scope of the agreement between the parties for recourse to fact-finding.
- (2) The provisions of paragraph (1) of this Article shall apply *mutatis mutandis* to an objection by the requesting party pursuant to Article 3(3) of these Rules.

Article 5**Settlement of Objections to the Request; Appointment of Special Commissioner**

- (1) Promptly upon receipt of the notice of objections, the Secretary-General shall send a copy thereof to the requesting party or the other party, as the case may be, and shall invite the parties to meet with him in order to seek to resolve the objections by agreement.
- (2) Failing such agreement, he shall invite the parties to designate within 30 days a third party (hereinafter called the “Special Commissioner”) to rule on the objections.
- (3) If the parties shall not have designated the Special Commissioner within the period specified in paragraph (2) of this Article, or such other period as the parties may agree, and if they or either one of them shall not be willing to request the Chairman of the Administrative Council (hereinafter called the “Chairman”) or any other authority to designate the Special Commissioner, the Secretary-General shall inform the parties that the fact-finding proceeding cannot be held, recording the failure of the parties or one of them to cooperate.
- (4) The Special Commissioner shall rule on the objections only after hearing both parties and in his ruling shall decide whether or not the fact-finding proceeding is to continue, stating the reasons for his decision. If he decides that the proceeding is to continue, he shall determine the scope thereof.

Article 6**Absence of Procedural Arrangement**

- (1) If, or to the extent that, the request does not set forth an agreement between the parties regarding the matters referred to in Article 2(2) of these Rules, the Secretary-General shall invite the parties to conclude in writing and furnish to the Secretariat within 30 days a Procedural Arrangement. The Procedural Arrangement may include any other matter or matters the parties may agree.
- (2) If the Procedural Arrangement cannot be concluded within the period referred to in paragraph (1) of this Article, or such other period as the parties may agree, the Procedural Arrangement shall be drawn up by the Chairman after consulting with the parties and shall be binding upon the parties.
- (3) Unless the parties agree otherwise, the Procedural Arrangement drawn up by the Chairman shall provide for the appointment of three commissioners. Other provisions made by the Chairman relating to: (a) qualifications, appointment, replacement, resignation, and disqualification of the commissioners, filling up of the vacancies and consequential resumption of proceeding; and (b) incapacity of the President of the Committee and procedural matters, including

procedural languages, shall, to the extent practicable, be similar to those applicable to conciliators and conciliation proceedings under the Conciliation (Additional Facility) Rules.

- (4) Notwithstanding the provisions of paragraph (3) of this Article, the Chairman may, whenever he is satisfied that the circumstances so warrant, include within the Procedural Arrangement provisions similar to written and oral procedures set forth in Chapter VII of the Arbitration (Additional Facility) Rules.

Chapter II

The Committee and Its Working

Article 7

Number of Commissioners

- (1) Except as the parties may otherwise agree, the Committee shall consist of a sole commissioner or any uneven number of commissioners.
- (2) If the Committee is to consist of three or more commissioners, one person shall be appointed the President of the Committee. References in these Rules to a Committee or a President of a Committee shall include a sole commissioner.

Article 8

Constitution of the Committee

- (1) The Committee shall be deemed to be constituted and the proceeding to have begun on the date the Secretary-General notifies the parties that all the commissioners have accepted their appointments.
- (2) Before or at the first session of the Committee, each commissioner shall sign a declaration in the following form: “To the best of my knowledge there is no reason why I should not serve on the Fact-finding Committee constituted to examine certain facts under the Additional Facility pursuant to an agreement between _____ and _____.” “I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any report drawn up by the Committee.” “I shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Administrative and Financial Regulations of the Centre.” “A statement of my past and present professional, business and other relevant relationships (if any) with the parties is attached hereto.”

Any commissioner failing to sign such a declaration by the end of the first session of the Committee shall be deemed to have resigned.

Article 9

Sessions of the Committee

- (1) The Committee shall meet for its first session within 60 days after its constitution or such other period as the parties may agree. The dates of the first and subsequent sessions shall be fixed by the President of the Committee after consultation with its members and the Secretary-General, and with the parties as far as possible. If, upon its constitution, the Committee has no President, such dates shall be fixed by the Secretary-General after consultation with the members of the Committee, and with the parties as far as possible.
- (2) The President of the Committee shall: (a) convene its subsequent sessions within time limits determined by the Committee; (b) conduct its hearings and preside at its deliberations; and (c) fix the date and hour of its sittings.
- (3) The Secretary-General shall notify the members of the Committee and the parties of the dates and place of the sessions of the Committee in good time.
- (4) The sessions of the Committee shall not be public.

Article 10

Conduct of Investigations and Examinations

Each investigation, and each examination of a locality, must be made in the presence of agents and counsel of the parties or after they have been duly notified.

Article 11

Decisions of the Committee

- (1) Except as the parties shall otherwise agree, all decisions of the Committee shall be taken by a majority of the votes of all its members.
- (2) Abstention by any member of the Committee shall count as a negative vote.

Article 12

Notices to be Served by the Committee

The Secretary-General shall, to the extent possible, make necessary arrangements for the serving of notices by the Committee.

Article 13**Determinations of Questions of Procedure**

Subject to the provisions of this Chapter, the constitution of the Committee and its procedure shall be governed by the Procedural Arrangement. Any matters not provided for in these Rules or in the Procedural Arrangement shall be determined by agreement of the parties or, failing such agreement, by the Committee.

Chapter III**Termination of the Proceedings****Article 14****Closure of the Proceeding**

- (1) After the parties have presented all the explanations and evidence, and the witnesses (if any) have all been heard, the President of the Committee shall declare the fact-finding proceeding closed, and the Committee shall adjourn to deliberate and draw up its report (hereinafter called the “Report”).
- (2) If one party fails to appear or participate in the proceeding or cooperate with the Committee at any stage, and the Committee determines that as a result thereof it is unable to carry out its task, it shall, after notice to the parties, close the proceeding and draw up its Report, noting the reference to fact-finding under the Additional Facility and recording the failure of that party to appear, participate or cooperate.

Article 15**The Report**

- (1) The Report of the Committee shall be adopted by a majority of all the commissioners.
- (2) The Report shall be signed by all the commissioners. The refusal by a commissioner to sign the Report shall not invalidate the Report. The fact of such refusal shall be recorded.
- (3) If a commissioner dissents from the Report that fact will be noted in the Report. The commissioner may in addition attach a statement to the Report explaining the reasons for his dissent.
- (4) The Report shall be limited to findings of fact. The Report shall not contain any recommendations to the parties nor shall it have the character of an award.

Article 16

Effect to be Given to the Report

The parties shall be entirely free as to the effect to be given to the Report.

Chapter IV

Miscellaneous

Article 17

Cooperation with the Committee

The parties undertake to facilitate the work of the Committee and to supply it with all means and facilities necessary to enable it to become fully acquainted with, and to accurately understand, the facts in question. Without prejudice to the generality of the foregoing, the parties in particular undertake to supply the Committee to the greatest possible extent with all relevant documents and information, as well as to use the means at their disposal to allow the Committee to visit the localities in question and to summon and hear witnesses or experts.

Article 18

Cost of the Proceeding

The fees and expenses of the members of the Committee and of any Special Commissioner, as well as the charges for the use of the facilities of the Centre, shall be borne equally by the parties. Each party shall bear any other expenses it incurs in connection with the proceeding.

Article 19

Final Provision

The text of these Rules in each official language of the Centre shall be equally authentic.

Schedule B

Conciliation (Additional Facility) Rules

Chapter I**Introduction****Article 1****Scope of Application**

Where the parties to a dispute have agreed that it shall be referred to conciliation under the Conciliation (Additional Facility) Rules, the dispute shall be settled in accordance with these Rules.

Chapter II**Institution of Proceedings****Article 2****The Request**

- (1) Any State or any national of a State wishing to institute conciliation proceedings under the Additional Facility shall send a request to that effect in writing to the Secretariat at the seat of the Centre. It shall be drawn up in an official language of the Centre, shall be dated and shall be signed by the requesting party or its duly authorized representative.
- (2) The request may be made jointly by the parties to the dispute.

Article 3**Contents of the Request**

- (1) The request shall:
 - (a) designate precisely each party to the dispute and state the address of each;
 - (b) set forth the relevant provisions embodying the agreement of the parties to refer the dispute to conciliation;
 - (c) contain information concerning the issues in dispute;
 - (d) indicate the date of approval by the Secretary-General pursuant to Article 4 of the Additional Facility Rules of the agreement of the parties providing for access to the Additional Facility; and

- (e) state, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request.
- (2) The request may in addition set forth any provisions agreed by the parties regarding the number of conciliators and the method of their appointment, as well as any other provisions agreed concerning the settlement of the dispute.
- (3) The request shall be accompanied by five additional signed copies, and by the fee prescribed pursuant to Regulation 16 of the Administrative and Financial Regulations of the Centre.

Article 4

Registration of the Request

As soon as the Secretary-General shall have satisfied himself that the request conforms in form and substance to the provisions of Article 3 of these Rules, he shall register the request in the Conciliation (Additional Facility) Register and on the same day dispatch to the parties a notice of registration. He shall also transmit a copy of the request and of the accompanying documentation (if any) to the other party to the dispute.

Article 5

Notice of Registration

The notice of registration of a request shall:

- (a) record that the request is registered and indicate the date of the registration and of the dispatch of the notice;
- (b) notify each party that all communications in connection with the proceeding will be sent to the address stated in the request, unless another address is indicated to the Secretariat;
- (c) unless such information has already been provided, invite the parties to communicate to the Secretary-General any provisions agreed by them regarding the number and the method of appointment of the conciliators;
- (d) remind the parties that the registration of the request is without prejudice to the powers and functions of the Conciliation Commission in regard to competence and the merits; and
- (e) invite the parties to proceed, as soon as possible, to constitute a Conciliation Commission in accordance with Chapter III of these Rules.

Chapter III**The Commission****Article 6****General Provisions**

- (1) Upon the dispatch of the notice of registration of the request for conciliation, the parties shall promptly proceed to constitute a Conciliation Commission.
- (2) The Commission shall consist of a sole conciliator or any uneven number of conciliators appointed as the parties shall agree.
- (3) In the absence of agreement between the parties regarding the number of conciliators and the method of their appointment, the Commission shall consist of three conciliators, one conciliator appointed by each party and the third, who shall be the President of the Commission, appointed by agreement of the parties.
- (4) If the Commission shall not have been constituted within 90 days after the notice of registration of the request for conciliation has been dispatched by the Secretary-General, or such other period as the parties may agree, the Chairman of the Administrative Council (hereinafter called the “Chairman”) shall, at the request in writing of either party transmitted through the Secretary-General, appoint the conciliator or conciliators not yet appointed and, unless the President shall already have been designated or is to be designated later, designate a conciliator to be President of the Commission.

Article 7**Qualifications of Conciliators**

Conciliators shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.

Article 8**Method of Constituting the Commission in the Absence of Previous Agreement between the Parties**

- (1) If the parties, at the time of the registration of the request for conciliation, have not agreed upon the number of conciliators and the method of their appointment, they shall, unless they agree otherwise, follow the following procedures:

- (a) the requesting party shall, within 10 days after the registration of the request, propose to the other party the appointment of a sole conciliator or of a specified uneven number of conciliators and specify the method proposed for their appointment;
 - (b) within 20 days after receipt of the proposals made by the requesting party, the other party shall:
 - accept such proposals; or
 - make other proposals regarding the number of conciliators and the method of their appointment; and
 - (c) within 20 days after receipt of the reply containing any such proposals, the requesting party shall notify the other party whether it accepts or rejects such proposals.
- (2) The communications provided for in paragraph (1) of this Article shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General. The parties shall promptly notify the Secretary-General of the contents of any agreement reached.
- (3) At any time 60 days after the registration of the request, if no agreement on another procedure is reached, either party may inform the Secretary-General that it chooses the formula provided for in Article 6(3) of these Rules. The Secretary-General shall thereupon promptly inform the parties that the Commission is to be constituted in accordance with that provision.

Article 9

Appointment of Conciliators to Commission Constituted in Accordance with Article 6(3) of These Rules

- (1) If the Commission is to be constituted in accordance with Article 6(3) of these Rules:
- (a) either party shall, in a communication to the other party:
 - name two persons, identifying one of them as the conciliator appointed by it and the other as the conciliator proposed to be the President of the Commission; and
 - invite the other party to concur in the appointment of the conciliator proposed to be the President of the Commission and to appoint another conciliator;
 - (b) promptly upon receipt of this communication the other party shall, in its reply:
 - name a person as the conciliator appointed by it; and
 - concur in the appointment of the conciliator proposed to be the President of the Commission or name another person as the conciliator proposed to be the President; and

- (c) promptly upon receipt of the reply containing such a proposal, the initiating party shall notify the other party whether it concurs in the appointment of the conciliator proposed by that party to be the President of the Commission.
- (2) The communications provided for in this Article shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General.

Article 10

Appointment of Conciliators and Designation of President of the Commission by the Chairman

- (1) Promptly upon receipt of a request by a party to the Chairman to make an appointment or designation pursuant to Article 6(4) of these Rules, the Secretary-General shall send a copy thereof to the other party.
- (2) The Chairman shall use his best efforts to comply with that request within 30 days after its receipt. Before he proceeds to make appointments or a designation, he shall consult both parties as far as possible.
- (3) The Secretary-General shall promptly notify the parties of any appointment or designation made by the Chairman.

Article 11

Acceptance of Appointments

- (1) The party or parties concerned shall notify the Secretary-General of the appointment of each conciliator and indicate the method of his appointment.
- (2) As soon as the Secretary-General has been informed by a party or the Chairman of the appointment of a conciliator, he shall seek an acceptance from the appointee.
- (3) If a conciliator fails to accept his appointment within 15 days, the Secretary-General shall promptly notify the parties, and if appropriate the Chairman, and invite them to proceed to the appointment of another conciliator in accordance with the method followed for the previous appointment.

Article 12

Replacement of Conciliators prior to Constitution of the Commission

At any time before the Commission is constituted, each party may replace any conciliator appointed by it and the parties may by common consent agree to replace any conciliator.

Article 13

Constitution of the Commission

- (1) The Commission shall be deemed to be constituted and the proceeding to have begun on the date the Secretary-General notifies the parties that all the conciliators have accepted their appointment.
- (2) Before or at the first session of the Commission, each conciliator shall sign a declaration in the following form: “To the best of my knowledge there is no reason why I should not serve on the Conciliation Commission constituted with respect to a dispute between _____ and _____.” “I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any report drawn up by the Commission.” “I shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Administrative and Financial Regulations of the Centre.” “A statement of my past and present professional, business and other relevant relationships (if any) with the parties is attached hereto.”

Any conciliator failing to sign such a declaration by the end of the first session of the Tribunal shall be deemed to have resigned.

Article 14

Replacement of Conciliators after Constitution of the Commission

- (1) After a Commission has been constituted and proceedings have begun, its composition shall remain unchanged; provided, however, that if a conciliator should die, become incapacitated, resign or be disqualified, the resulting vacancy shall be filled as provided in this Article and Article 17 of these Rules.
- (2) If a conciliator becomes incapacitated or unable to perform the duties of his office, the procedure in respect of the disqualification of conciliators set forth in Article 15 shall apply.
- (3) A conciliator may resign by submitting his resignation to the other members of the Commission and the Secretary-General. If the conciliator was appointed by one of the parties, the Commission shall promptly consider the reasons for his resignation and decide whether it consents thereto. The Commission shall promptly notify the Secretary-General of its decision.

Article 15**Disqualification of Conciliators**

- (1) A party may propose to a Commission the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by Article 7 of these Rules.
- (2) A party proposing the disqualification of a conciliator shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.
- (3) The Secretary-General shall forthwith:
 - (a) transmit the proposal to the members of the Commission and, if it relates to a sole conciliator or to a majority of the members of the Commission, to the Chairman; and
 - (b) notify the other party of the proposal.
- (4) The conciliator to whom the proposal relates may, without delay, furnish explanations to the Commission or the Chairman, as the case may be.
- (5) The decision on any proposal to disqualify a conciliator shall be taken by the other members of the Commission except that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator, or a majority of the conciliators, the Chairman shall take that decision.
- (6) Whenever the Chairman has to decide on a proposal to disqualify a conciliator, he shall use his best efforts to take that decision within 30 days after he has received the proposal.
- (7) The proceeding shall be suspended until a decision has been taken on the proposal.

Article 16**Procedure during a Vacancy on the Commission**

- (1) The Secretary-General shall forthwith notify the parties and, if necessary, the Chairman of the disqualification, death, incapacity or resignation of a conciliator and of the consent, if any, of the Commission to a resignation.
- (2) Upon the notification by the Secretary-General of a vacancy on the Commission, the proceeding shall be or remain suspended until the vacancy has been filled.

Article 17

Filling Vacancies on the Commission

- (1) Except as provided in paragraph (2) of this Article, a vacancy resulting from the disqualification, death, incapacity or resignation of a conciliator shall be promptly filled by the same method by which his appointment has been made.
- (2) In addition to filling vacancies relating to conciliators appointed by him, the Chairman shall:
 - (a) fill a vacancy caused by the resignation, without the consent of the Commission, of a conciliator appointed by a party; or
 - (b) at the request of either party, fill any other vacancy, if no new appointment is made and accepted within 45 days of the notification of the vacancy by the Secretary-General.
- (3) In filling a vacancy the party or the Chairman, as the case may be, shall observe the provisions of these Rules with respect to the appointment of conciliators. Article 13(2) of these Rules shall apply *mutatis mutandis* to the newly appointed conciliator.

Article 18

Resumption of Proceeding after Filling a Vacancy

As soon as a vacancy on the Commission has been filled, the proceeding shall continue from the point it had reached at the time the vacancy occurred. The newly appointed conciliator may, however, require that the oral procedure be recommenced, if this had already been started.

Chapter IV

Place of Proceedings

Article 19

Determination of Place of Conciliation Proceeding

Unless the parties have agreed upon the place where the conciliation proceeding is to be held, such place shall be determined by the Secretary-General in consultation with the President of the Commission, or if there is no President, with the single conciliator, having regard to the circumstances of the proceeding and the convenience of the parties.

Chapter V**Working of the Commission****Article 20****Sessions of the Commission**

- (1) The Commission shall meet for its first session within 60 days after its constitution or such other period as the parties may agree. The dates of that session shall be fixed by the President of the Commission after consultation with its members and the Secretariat, and with the parties as far as possible. If, upon its constitution, the Commission has no President, such dates shall be fixed by the Secretary-General after consultation with the members of the Commission, and with the parties as far as possible.
- (2) Subsequent sessions shall be convened by the President within time limits determined by the Commission. The dates of such sessions shall be fixed by the President of the Commission after consultation with its members and the Secretariat, and with the parties as far as possible.
- (3) The Secretary-General shall notify the members of the Commission and the parties of the dates and place of the sessions of the Commission in good time.

Article 21**Sittings of the Commission**

- (1) The President of the Commission shall conduct its hearings and preside at its deliberations.
- (2) Except as the parties otherwise agree, the presence of a majority of the members of the Commission shall be required at its sittings.
- (3) The President of the Commission shall fix the date and hour of its sittings.

Article 22**Deliberations of the Commission**

- (1) The deliberations of the Commission shall take place in private and remain secret.
- (2) Only members of the Commission shall take part in its deliberations. No other person shall be admitted unless the Commission decides otherwise.

Article 23

Decisions of the Commission

- (1) The decisions of the Commission shall be taken by a majority of the votes of all its members. Abstention by any member of the Commission shall count as a negative vote.
- (2) Except as otherwise provided by these Rules or decided by the Commission, it may take any decision by correspondence among its members, provided that all of them are consulted. Decisions so taken shall be certified by the President of the Commission.

Article 24

Incapacity of the President

If at any time the President of the Commission should be unable to act, his functions shall be performed by one of the other members of the Commission, acting in the order in which the Secretariat had received the notice of their acceptance of their appointment to the Commission.

Article 25

Representation of the Parties

- (1) Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretariat, which shall promptly inform the Commission and the other party.
- (2) For the purposes of these Rules, the expression “party” includes, where the context so admits, an agent, counsel or advocate authorized to represent that party.

Chapter VI

General Procedural Provisions

Article 26

Procedural Orders

The Commission shall make the orders required for the conduct of the proceeding.

Article 27**Preliminary Procedural Consultation**

- (1) As early as possible after the constitution of a Commission, its President shall endeavor to ascertain the views of the parties regarding questions of procedure. For this purpose he may request the parties to meet him. He shall, in particular, seek their views on the following matters:
 - (a) the number of members of the Commission required to constitute a quorum at its sittings;
 - (b) the language or languages to be used in the proceeding;
 - (c) the evidence, oral or written, which each party intends to produce or to request the Commission to call for, and the written statements which each party intends to file, as well as the time limits within which such evidence should be produced and such statements filed;
 - (d) the number of copies desired by each party of instruments filed by the other; and
 - (e) the manner in which the record of the hearings shall be kept.
- (2) In the conduct of the proceeding the Commission shall apply any agreement between the parties on procedural matters, which is not inconsistent with any provisions of the Additional Facility Rules and the Administrative and Financial Regulations of the Centre.

Article 28**Procedural Languages**

- (1) The parties may agree on the use of one or two languages to be used in the proceeding, provided that, if they agree on any language that is not an official language of the Centre, the Commission, after consultation with the Secretary-General, gives its approval. If the parties do not agree on any such procedural language, each of them may select one of the official languages (i.e., English, French and Spanish) for this purpose. Notwithstanding the foregoing, one of the official languages of the Centre shall be used for all communications to and from the Secretariat.
- (2) If two procedural languages are selected by the parties, any instrument may be filed in either language. Either language may be used at the hearings, subject, if the Commission so requires, to translation and interpretation. The recommendations and the report of the Commission shall be rendered and the record kept in both procedural languages, both versions being equally authentic.

Article 29

Supporting Documentation

Supporting documentation shall ordinarily be filed together with the instrument to which it relates, and in any case within the time limit for the filing of such instrument.

Chapter VII

Conciliation Procedures

Article 30

Functions of the Commission

- (1) It shall be the duty of the Commission to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms.
- (2) In order to clarify the issues in dispute between the parties, the Commission shall hear the parties and shall endeavour to obtain any information that might serve this end. The parties shall be associated with its work as closely as possible.
- (3) In order to bring about agreement between the parties, the Commission may, from time to time at any stage of the proceeding, make recommendations to the parties, together with arguments in favor thereof, including recommendations to the effect that the parties accept specific terms of settlement or that they refrain, while it seeks to bring about agreement between them, from specific acts that might aggravate the dispute. It may fix time limits within which each party shall inform the Commission of its decision concerning the recommendations made. The parties shall give their most serious consideration to such recommendations.
- (4) The Commission, in order to obtain information that might enable it to discharge its functions, may at any stage of the proceeding:
 - (a) request from either party oral explanations, documents and other information;
 - (b) request evidence from other persons; and
 - (c) with the consent of the party concerned, visit any place connected with the dispute or conduct inquiries there, provided that the parties may participate in any such visits and inquiries.

Article 31**Cooperation of the Parties**

The parties shall cooperate in good faith with the Commission in order to enable the Commission to carry out its functions, and shall give their most serious consideration to its recommendations. Without prejudice to the generality of the foregoing, the parties shall (a) at the request of the Commission, furnish all relevant documents, information and explanations as well as use the means at their disposal to enable the Commission to hear witnesses and experts whom it desires to call; (b) facilitate visits to and inquiries at any place connected with the dispute that the Commission desires to undertake; and (c) comply with any time limits agreed with or fixed by the Commission.

Article 32**Transmission of the Request**

As soon as the Commission is constituted, the Secretary-General shall transmit to each member of the Commission a copy each of:

- (a) the request by which the proceeding was commenced;
- (b) the supporting documentation;
- (c) the notice of registration of the request; and
- (d) any communication received from either party in response thereto.

Article 33**Written Statements**

- (1) Upon the constitution of the Commission, its President shall invite each party to file, within 30 days or such longer time as the President may fix, a written statement of its position. If, upon its constitution, the Commission has no President, such invitation shall be issued and any such longer time limit shall be fixed by the Secretary-General. At any stage of the proceeding, within such time limits as the Commission shall fix, either party may file such other written statements as it deems useful and relevant.
- (2) Except as otherwise provided by the Commission after consultation with the parties and the Secretary-General, every written statement or other instrument shall be filed in the form of a signed original accompanied by additional copies whose number shall be two more than the number of members of the Commission.

Article 34

Hearings

- (1) The hearings of the Commission shall take place in private and, except as the parties otherwise agree, shall remain secret.
- (2) The Commission shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Commission may attend the hearings.

Article 35

Witnesses and Experts

- (1) Each party may, at any stage of the proceeding, request that the Commission hear the witnesses and experts whose evidence the party considers relevant. The Commission shall fix a time limit within which such hearing shall take place.
- (2) Witnesses and experts shall, as a rule, be examined before the Commission by the parties under the control of its President. Questions may also be put to them by any member of the Commission.
- (3) If a witness or expert is unable to appear before it, the Commission, in agreement with the parties, may make appropriate arrangements for the evidence to be given in a written deposition or to be taken by examination elsewhere. The parties may participate in any such examination.

Chapter VIII

Termination of the Proceeding

Article 36

Objections to Competence

- (1) The Commission shall have the power to rule on its competence.
- (2) Any objection that the dispute is not within the competence of the Commission, shall be filed by a party with the Secretary-General as soon as possible after the constitution of the Commission and in any event no later than in its first written statement or at the first hearing if that occurs earlier, unless the facts on which the objection is based are unknown to the party at that time.
- (3) The Commission may on its own initiative consider, at any stage of the proceeding, whether the dispute before it is within its competence.

- (4) Upon the formal raising of an objection, the proceeding on the merits shall be suspended. The Commission may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Commission overrules the objection or joins it to the merits, the proceedings on the merits shall be resumed. If the Commission decides that the dispute is not within its competence, it shall close the proceeding and draw up a report to that effect, in which it shall state its reasons.

Article 37

Closure of the Proceeding

- (1) If one party fails to appear or participate in the proceeding, the Commission shall, after notice to the parties, close the proceeding and draw up its report noting the reference of the dispute to conciliation and recording the failure of that party to appear or participate.
- (2) If at any stage of the proceeding it appears to the Commission that there is no likelihood of settlement between the parties, the Commission shall, after notice to the parties, close the proceeding and draw up its report noting the reference of the dispute to conciliation and recording the failure of the parties to reach a settlement.
- (3) If the parties reach agreement on the issues in dispute, the Commission shall close the proceeding and draw up its report noting the issues in dispute and recording that the parties have reached agreement. At the request of the parties, the report shall record the detailed terms and conditions of their agreement.
- (4) Except as the parties otherwise agree, neither party to a conciliation proceeding may in any other proceeding before arbitrators, courts or otherwise invoke or rely on any views expressed or statements or admissions or offers of settlement made by the other party in the conciliation proceeding, or the report or any recommendations made by the Commission.

Article 38

The Report

- (1) The report of the Commission shall be drawn up and signed as soon as possible after the closure of the proceeding. It shall contain, in addition to the material specified in Article 37 of these Rules, as appropriate:
 - (a) a precise designation of each party;
 - (b) a description of the method of constitution of the Commission;
 - (c) the names of the members of the Commission, and an identification of the appointing authority of each;
 - (d) the names of the agents, counsel and advocates of the parties;

- (e) the dates and place of the sittings of the Commission; and
- (f) a summary of the proceeding.
- (2) The report shall also record any agreement of the parties, referred to in Article 37(4) of these Rules.
- (3) The report shall be signed by the members of the Commission; the date of each signature shall be indicated. The fact that a member refuses to sign the report shall be recorded therein.

Article 39

Communication of the Report

- (1) Upon signature of the last conciliator to sign, the Secretary-General shall promptly:
 - (a) authenticate the original text of the report and deposit it in the archives of the Secretariat; and
 - (b) dispatch a certified copy of the report to each party, indicating the date of dispatch on the original text and on all copies.
- (2) The Secretary-General shall, upon request, make available to a party additional certified copies of the report.

Chapter IX

Costs

Article 40

Cost of Proceeding

The fees and expenses of the members of the Commission, as well as the charge for the use of facilities of the Centre, shall be borne equally by the parties. Each party shall bear any other expenses it incurs with the proceeding. The Secretariat shall provide the Commission and the parties all information in its possession to facilitate the division of the costs.

Chapter X

General Provisions

Article 41

Final Provision

The text of these Rules in each official language of the Centre shall be equally authentic.

Schedule C

Arbitration (Additional Facility) Rules

Chapter I**Introduction****Article 1****Scope of Application**

Where the parties to a dispute have agreed that it shall be referred to arbitration under the Arbitration (Additional Facility) Rules, the dispute shall be settled in accordance with these Rules, save that if any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

Chapter II**Institution of Proceedings****Article 2****The Request**

- (1) Any State or any national of a State wishing to institute arbitration proceedings shall send a request to that effect in writing to the Secretariat at the seat of the Centre. It shall be drawn up in an official language of the Centre, shall be dated and shall be signed by the requesting party or its duly authorized representative.
- (2) The request may be made jointly by the parties to the dispute.

Article 3**Contents of the Request**

- (1) The request shall:
 - (a) designate precisely each party to the dispute and state the address of each;
 - (b) set forth the relevant provisions embodying the agreement of the parties to refer the dispute to arbitration;

- (c) indicate the date of approval by the Secretary-General pursuant to Article 4 of the Additional Facility Rules of the agreement of the parties providing for access to the Additional Facility;
 - (d) contain information concerning the issues in dispute and an indication of the amount involved, if any; and
 - (e) state, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request.
- (2) The request may in addition set forth any provisions agreed by the parties regarding the number of arbitrators and the method of their appointment, as well as any other provisions agreed concerning the settlement of the dispute.
- (3) The request shall be accompanied by five additional signed copies and by the fee prescribed pursuant to Regulation 16 of the Administrative and Financial Regulation of the Centre.

Article 4

Registration of the Request

As soon as the Secretary-General shall have satisfied himself that the request conforms in form and substance to the provisions of Article 3 of these Rules, he shall register the request in the Arbitration (Additional Facility) Register and on the same day dispatch to the parties a notice of registration. He shall also transmit a copy of the request and of the accompanying documentation (if any) to the other party to the dispute.

Article 5

Notice of Registration

The notice of registration of a request shall:

- (a) record that the request is registered and indicate the date of the registration and of the dispatch of the notice;
- (b) notify each party that all communications in connection with the proceeding will be sent to the address stated in the request, unless another address is indicated to the Secretariat;
- (c) unless such information has already been provided, invite the parties to communicate to the Secretary-General any provisions agreed by them regarding the number and the method of appointment of the arbitrators;
- (d) remind the parties that the registration of the request is without prejudice to the powers and functions of the Arbitral Tribunal in regard to competence and the merits; and
- (e) invite the parties to proceed, as soon as possible, to constitute an Arbitral Tribunal in accordance with Chapter III of these Rules.

Chapter III**The Tribunal****Article 6****General Provisions**

- (1) In the absence of agreement between the parties regarding the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the President of the Tribunal, appointed by agreement of the parties, all in accordance with Article 9 of these Rules.
- (2) Upon the dispatch of the notice of registration of the request for arbitration, the parties shall promptly proceed to constitute a Tribunal.
- (3) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.
- (4) If the Tribunal shall not have been constituted within 90 days after the notice of registration of the request for arbitration has been dispatched by the Secretary-General, or such other period as the parties may agree, the Chairman of the Administrative Council (hereinafter called the “Chairman”) shall, at the request in writing of either party transmitted through the Secretary-General, appoint the arbitrator or arbitrators not yet appointed and, unless the President shall already have been designated or is to be designated later, designate an arbitrator to be President of the Tribunal.
- (5) Except as the parties shall otherwise agree, no person who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the dispute or as a member of any fact-finding committee relating thereto may be appointed as a member of the Tribunal.

Article 7**Nationality of Arbitrators**

- (1) The majority of the arbitrators shall be nationals of States other than the State party to the dispute and of the State whose national is a party to the dispute, unless the sole arbitrator or each individual member of the Tribunal is appointed by agreement of the parties. Where the Tribunal is to consist of three members, a national of either of these States may not be appointed as an arbitrator by a party without the agreement of the other party to the dispute. Where the Tribunal is to consist of five or more members, nationals of either of these States may not be appointed as arbitrators by a party if appointment by the other party of the same number of arbitrators of either of these nationalities would result in a majority of arbitrators of these nationalities.

- (2) Arbitrators appointed by the Chairman shall not be nationals of the State party to the dispute or of the State whose national is a party to the dispute.

Article 8

Qualifications of Arbitrators

Arbitrators shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.

Article 9

Method of Constituting the Tribunal in the Absence of Agreement Between the Parties

- (1) If the parties have not agreed upon the number of arbitrators and the method of their appointment within 60 days after the registration of the request, the Secretary-General shall, upon the request of either party promptly inform the parties that the Tribunal is to be constituted in accordance with the following procedure:
 - (a) either party shall, in a communication to the other party:
 - name two persons, identifying one of them, who shall not have the same nationality as nor be a national of either party, as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal; and
 - invite the other party to concur in the appointment of the arbitrator proposed to be the President of the Tribunal and to appoint another arbitrator;
 - (b) promptly upon receipt of this communication the other party shall, in its reply:
 - name a person as the arbitrator appointed by it, who shall not have the same nationality as nor be a national of either party; and
 - concur in the appointment of the arbitrator proposed to be the President of the Tribunal or name another person as the arbitrator proposed to be President; and
 - (c) promptly upon receipt of the reply containing such a proposal, the initiating party shall notify the other party whether it concurs in the appointment of the arbitrator proposed by that party to be the President of the Tribunal.
- (2) The communications provided for in paragraph (1) of this Article shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General.

Article 10**Appointment of Arbitrators and Designation of President of Tribunal by the Chairman of the Administrative Council**

- (1) Promptly upon receipt of a request by a party to the Chairman to make an appointment or designation pursuant to Article 6(4) of these Rules, the Secretary-General shall send a copy thereof to the other party.
- (2) The Chairman shall use his best efforts to comply with that request within 30 days after its receipt. Before he proceeds to make appointments or a designation, he shall consult both parties as far as possible.
- (3) The Secretary-General shall promptly notify the parties of any appointment or designation made by the Chairman.

Article 11**Acceptance of Appointments**

- (1) The party or parties concerned shall notify the Secretary-General of the appointment of each arbitrator and indicate the method of his appointment.
- (2) As soon as the Secretary-General has been informed by a party or the Chairman of the appointment of an arbitrator, he shall seek an acceptance from the appointee.
- (3) If an arbitrator fails to accept his appointment within 15 days, the Secretary-General shall promptly notify the parties, and if appropriate the Chairman, and invite them to proceed to the appointment of another arbitrator in accordance with the method followed for the previous appointment.

Article 12**Replacement of Arbitrators prior to Constitution of the Tribunal**

At any time before the Tribunal is constituted, each party may replace any arbitrator appointed by it and the parties may by common consent agree to replace any arbitrator.

Article 13**Constitution of the Tribunal**

- (1) The Tribunal shall be deemed to be constituted and the proceeding to have begun on the date the Secretary-General notifies the parties that all the arbitrators have accepted their appointment.

- (2) Before or at the first session of the Tribunal, each arbitrator shall sign a declaration in the following form: “To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted with respect to a dispute between _____ and _____.” “I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal.” “I shall judge fairly as between the parties and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Administrative and Financial Regulations of the Centre.” “Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.”

Any arbitrator failing to sign such a declaration by the end of the first session of the Tribunal shall be deemed to have resigned.

Article 14

Replacement of Arbitrators after Constitution of the Tribunal

- (1) After a Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged; provided, however, that if an arbitrator should die, become incapacitated, resign or be disqualified, the resulting vacancy shall be filled as provided in this Article and Article 17 of these Rules.
- (2) If an arbitrator becomes incapacitated or unable to perform the duties of his office, the procedure in respect of the disqualification of arbitrators set forth in Article 15 shall apply.
- (3) An arbitrator may resign by submitting his resignation to the other members of the Tribunal and the Secretary-General. If the arbitrator was appointed by one of the parties, the Tribunal shall promptly consider the reasons for his resignation and decide whether it consents thereto. The Tribunal shall promptly notify the Secretary-General of its decision.

Article 15

Disqualification of Arbitrators

- (1) A party may propose to a Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by

Article 8 of these Rules, or on the ground that he was ineligible for appointment to the Tribunal under Article 7 of these Rules.

- (2) A party proposing the disqualification of an arbitrator shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.
- (3) The Secretary-General shall forthwith:
 - (a) transmit the proposal to the members of the Tribunal and, if it relates to a sole arbitrator or to a majority of the members of the Tribunal, to the Chairman; and
 - (b) notify the other party of the proposal.
- (4) The arbitrator to whom the proposal relates may, without delay, furnish explanations to the Tribunal or the Chairman, as the case may be.
- (5) The decision on any proposal to disqualify an arbitrator shall be taken by the other members of the Tribunal except that where those members are equally divided, or in the case of a proposal to disqualify a sole arbitrator, or a majority of the arbitrators, the Chairman shall take that decision.
- (6) Whenever the Chairman has to decide on a proposal to disqualify an arbitrator, he shall use his best efforts to take that decision within 30 days after he has received the proposal.
- (7) The proceeding shall be suspended until a decision has been taken on the proposal.

Article 16

Procedure during a Vacancy on the Tribunal

- (1) The Secretary-General shall forthwith notify the parties and, if necessary, the Chairman of the disqualification, death, incapacity or resignation of an arbitrator and of the consent, if any, of the Tribunal to a resignation.
- (2) Upon the notification by the Secretary-General of a vacancy on the Tribunal, the proceeding shall be or remain suspended until the vacancy has been filled.

Article 17

Filling Vacancies on the Tribunal

- (1) Except as provided in paragraph (2) of this Article, a vacancy resulting from the disqualification, death, incapacity or resignation of an arbitrator shall be promptly filled by the same method by which his appointment had been made.
- (2) In addition to filling vacancies relating to arbitrators appointed by him, the Chairman shall:
 - (a) fill a vacancy caused by the resignation, without the consent of the Tribunal, of an arbitrator appointed by a party; or

- (b) at the request of either party, fill any other vacancy, if no new appointment is made and accepted within 45 days of the notification of the vacancy by the Secretary-General.
- (3) In filling a vacancy the party or the Chairman, as the case may be, shall observe the provisions of these Rules with respect to the appointment of arbitrators. Article 13(2) of these Rules shall apply *mutatis mutandis* to the newly appointed arbitrator.

Article 18

Resumption of Proceeding after Filling a Vacancy

As soon as a vacancy on the Tribunal has been filled, the proceeding shall continue from the point it had reached at the time the vacancy occurred. The newly appointed arbitrator may, however, require that the oral procedure be recommenced, if this had already been started.

Chapter IV

Place of Arbitration

Article 19

Limitation on Choice of Forum

Arbitration proceedings shall be held only in States that are parties to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Article 20

Determination of Place of Arbitration

- (1) Subject to Article 19 of these Rules the place of arbitration shall be determined by the Arbitral Tribunal after consultation with the parties and the Secretariat.
- (2) The Arbitral Tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. It may also visit any place connected with the dispute or conduct inquiries there. The parties shall be given sufficient notice to enable them to be present at such inspection or visit.
- (3) The award shall be made at the place of arbitration.

Chapter V**Working of the Tribunal****Article 21****Sessions of the Tribunal**

- (1) The Tribunal shall meet for its first session within 60 days after its constitution or such other period as the parties may agree. The dates of that session shall be fixed by the President of the Tribunal after consultation with its members and the Secretariat, and with the parties as far as possible. If, upon its constitution, the Tribunal has no President, such dates shall be fixed by the Secretary-General after consultation with the members of the Tribunal, and with the parties as far as possible.
- (2) Subsequent sessions shall be convened by the President within time limits determined by the Tribunal. The dates of such sessions shall be fixed by the President of the Tribunal after consultation with its members and the Secretariat, and with the parties as far as possible.
- (3) The Secretary-General shall notify the members of the Tribunal and the parties of the dates and place of the sessions of the Tribunal in good time.

Article 22**Sittings of the Tribunal**

- (1) The President of the Tribunal shall conduct its hearings and preside at its deliberations.
- (2) Except as the parties otherwise agree, the presence of a majority of the members of the Tribunal shall be required at its sittings.
- (3) The President of the Tribunal shall fix the date and hour of its sittings.

Article 23**Deliberations of the Tribunal**

- (1) The deliberations of the Tribunal shall take place in private and remain secret.
- (2) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise.

Article 24

Decisions of the Tribunal

- (1) Any award or other decision of the Tribunal shall be made by a majority of the votes of all its members. Abstention by any member of the Tribunal shall count as a negative vote.
- (2) Except as otherwise provided by these Rules or decided by the Tribunal, it may take any decisions by correspondence among its members, provided that all of them are consulted. Decisions so taken shall be certified by the President of the Tribunal.

Article 25

Incapacity of the President

If at any time the President of the Tribunal should be unable to act, his functions shall be performed by one of the other members of the Tribunal, acting in the order in which the Secretariat had received the notice of their acceptance of their appointment to the Tribunal.

Article 26

Representation of the Parties

- (1) Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretariat, which shall promptly inform the Tribunal and the other party.
- (2) For the purposes of these Rules, the expression “party” includes, where the context so admits, an agent, counsel or advocate authorized to represent that party.

Chapter VI

General Procedural Provisions

Article 27

Procedural Orders

The Tribunal shall make the orders required for the conduct of the proceeding.

Article 28**Preliminary Procedural Consultation**

- (1) As early as possible after the constitution of a Tribunal, its President shall endeavor to ascertain the views of the parties regarding questions of procedure. For this purpose he may request the parties to meet him. He shall, in particular, seek their views on the following matters:
 - (a) the number of members of the Tribunal required to constitute a quorum at its sittings;
 - (b) the language or languages to be used in the proceeding;
 - (c) the number and sequence of the pleadings and the time limits within which they are to be filed;
 - (d) the number of copies desired by each party of instruments filed by the other;
 - (e) dispensing with the written or oral procedure;
 - (f) the manner in which the cost of the proceeding is to be apportioned; and
 - (g) the manner in which the record of the hearings shall be kept.
- (2) In the conduct of the proceeding the Tribunal shall apply any agreement between the parties on procedural matters, which is not inconsistent with any provisions of the Additional Facility Rules and the Administrative and Financial Regulations of the Centre.

Article 29**Pre-Hearing Conference**

- (1) At the request of the Secretary-General or at the discretion of the President of the Tribunal, a prehearing conference between the Tribunal and the parties may be held to arrange for an exchange of information and the stipulation of uncontested facts in order to expedite the proceeding.
- (2) At the request of the parties, a prehearing conference between the Tribunal and the parties, duly represented by their authorized representatives, may be held to consider the issues in dispute with a view to reaching an amicable settlement.

Article 30**Procedural Languages**

- (1) The parties may agree on the use of one or two languages to be used in the proceeding, provided that if they agree on any language that is not an official language of the Centre, the Tribunal, after consultation with the Secretary-General, gives its approval. If the parties do not agree on any such procedural

language, each of them may select one of the official languages (i.e., English, French and Spanish) for this purpose. Notwithstanding the foregoing, one of the official languages of the Centre shall be used for all communications to and from the Secretariat.

- (2) If two procedural languages are selected by the parties, any instrument may be filed in either language. Either language may be used at the hearing subject, if the Tribunal so requires, to translation and interpretation. The orders and the award of the Tribunal shall be rendered and the record kept in both procedural languages, both versions being equally authentic.

Article 31

Copies of Instruments

Except as otherwise provided by the Tribunal after consultation with the parties and the Secretariat, every request, pleading, application, written observation or other instrument shall be filed in the form of a signed original accompanied by the following number of additional copies:

- (a) before the number of members of the Tribunal has been determined: five; and
- (b) after the number of members of the Tribunal has been determined: two more than the number of its members.

Article 32

Supporting Documentation

Supporting documentation shall ordinarily be filed together with the instrument to which it relates, and in any case within the time limit fixed for the filing of such instrument.

Article 33

Time Limits

- (1) Where required, time limits shall be fixed by the Tribunal by assigning dates for the completion of the various steps in the proceeding. The Tribunal may delegate this power to its President.
- (2) The Tribunal may extend any time limit that it has fixed. If the Tribunal is not in session, this power shall be exercised by its President.
- (3) Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise.

Article 34**Waiver**

A party which knows or ought to have known that a provision of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed to have waived the right to object.

Article 35**Filling of Gaps**

If any question of procedure arises which is not covered by these Rules or any rules agreed by the parties, the Tribunal shall decide the question.

Chapter VII**Written and Oral Procedures****Article 36****Normal Procedures**

Except if the parties otherwise agree, the proceeding shall comprise two distinct phases: a written procedure followed by an oral one.

Article 37**Transmission of the Request**

As soon as the Tribunal is constituted, the Secretary-General shall transmit to each member of the Tribunal a copy of the request by which the proceeding was commenced, of the supporting documentation, of the notice of registration of the request and of any communication received from either party in response thereto.

Article 38**The Written Procedure**

- (1) In addition to the request for arbitration, the written procedure shall consist of the following pleadings, filed within time limits set by the Tribunal:
 - (a) a memorial by the requesting party;
 - (b) a counter-memorial by the other party; and, if the parties so agree or the Tribunal deems it necessary:
 - (c) a reply by the requesting party; and
 - (d) a rejoinder by the other party.
- (2) If the request was made jointly, each party shall, within the same time limit determined by the Tribunal, file its memorial. However, the parties may

instead agree that one of them shall, for the purposes of paragraph (1) of this Article, be considered as the requesting party.

- (3) A memorial shall contain a statement of the relevant facts; a statement of law; and the submissions. A counter-memorial, reply or rejoinder shall contain an admission or denial of the facts stated in the last previous pleading; any additional facts, if necessary; observations concerning the statement of law in the last previous pleading; a statement of law in answer thereto; and the submissions.

Article 39

The Oral Procedure

- (1) The oral procedure shall consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts.
- (2) Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.
- (3) The members of the Tribunal may, during the hearings, put questions to the parties, their agents, counsel and advocates, and ask them for explanations.

Article 40

Marshalling of Evidence

Without prejudice to the rules concerning the production of documents, each party shall, within time limits fixed by the Tribunal, communicate to the Secretary-General, for transmission to the Tribunal and the other party, precise information regarding the evidence which it intends to produce and that which it intends to request the Tribunal to call for, together with an indication of the points to which such evidence will be directed.

Article 41

Evidence: General Principles

- (1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.
- (2) The Tribunal may, if it deems it necessary at any stage of the proceeding, call upon the parties to produce documents, witnesses and experts.
- (3) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Article called the “non-disputing party”) to

file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the non-disputing party submission would address a matter within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

Article 42

Examination of Witnesses and Experts

Witnesses and experts shall be examined before the Tribunal by the parties under the control of its President. Questions may also be put to them by any member of the Tribunal.

Article 43

Witnesses and Experts: Special Rules

The Tribunal may:

- (a) admit evidence given by a witness or expert in a written deposition;
- (b) with the consent of both parties, arrange for the examination of a witness or expert otherwise than before the Tribunal itself. The Tribunal shall define the procedure to be followed. The parties may participate in the examination; and
- (c) appoint one or more experts, define their terms of reference, examine their reports and hear from them in person.

Article 44

Closure of the Proceeding

- (1) When the presentation of the case by the parties is completed, the proceeding shall be declared closed.
- (2) Exceptionally, the Tribunal may, before the award has been rendered, reopen the proceeding on the ground that new evidence is forth-coming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points.

Chapter VIII

Particular Procedures

Article 45

Preliminary Objections

- (1) The Tribunal shall have the power to rule on its competence. For the purposes of this Article, an agreement providing for arbitration under the Additional Facility shall be separable from the other terms of the contract in which it may have been included.
- (2) Any objection that the dispute is not within the competence of the Tribunal shall be filed with the Secretary-General as soon as possible after the constitution of the Tribunal and in any event no later than the expiration of the time limit fixed for the filing of the counter-memorial or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.
- (3) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute before it is within its competence.
- (4) Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.
- (5) The Tribunal shall decide whether or not the further procedures relating to the objection made pursuant to paragraph (2) shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.
- (6) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (2) or to object, in the course of the proceeding, that a claim lacks legal merit.
- (7) If the Tribunal decides that the dispute is not within its competence or that all claims are manifestly without legal merit, it shall issue an award to that effect.

Article 46**Provisional Measures of Protection**

- (1) Unless the arbitration agreement otherwise provides, either party may at any time during the proceeding request that provisional measures for the preservation of its rights be ordered by the Tribunal. The Tribunal shall give priority to the consideration of such a request.
- (2) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.
- (3) The Tribunal shall order or recommend provisional measures, or any modification or revocation thereof, only after giving each party an opportunity of presenting its observations.
- (4) The parties may apply to any competent judicial authority for interim or conservatory measures. By doing so they shall not be held to infringe the agreement to arbitrate or to affect the powers of the Tribunal.

Article 47**Ancillary Claims**

- (1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim, provided that such ancillary claim is within the scope of the arbitration agreement of the parties.
- (2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.

Article 48**Default**

- (1) If a party fails to appear or to present its case at any stage of the proceeding, the other party may request the Tribunal to deal with the questions submitted to it and to render an award.
- (2) Whenever such a request is made by a party the Tribunal shall promptly notify the defaulting party thereof. Unless the Tribunal is satisfied that that party does not intend to appear or to present its case in the proceeding, it shall, at the same time, grant a period of grace and to this end:
 - (a) if that party had failed to file a pleading or any other instrument within the time limit fixed therefor, fix a new time limit for its filing; or

(b) if that party had failed to appear or present its case at a hearing, fix a new date for the hearing.

The period of grace shall not, without the consent of the other party, exceed 60 days.

- (3) After the expiration of the period of grace or when, in accordance with paragraph (2) of this Article, no such period is granted, the Tribunal shall examine whether the dispute is within its jurisdiction and, if it is satisfied as to its jurisdiction, decide whether the submissions made are well-founded in fact and in law. To this end, it may, at any stage of the proceeding, call on the party appearing to file observations, produce evidence or submit oral explanations.

Article 49

Settlement and Discontinuance

- (1) If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, or has not yet met, shall, at their written request, in an order take note of the discontinuance of the proceeding.
- (2) If requested by both parties and accepted by the Tribunal, the Tribunal shall record the settlement in the form of an award. The Tribunal shall not be obliged to give reasons for such an award. The parties will accompany their request with the full and signed text of their settlement.

Article 50

Discontinuance at Request of a Party

If a party requests the discontinuance of the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall in an order fix a time limit within which the other party may state whether it opposes the discontinuance. If no objection is made in writing within the time limit, the Tribunal, or if appropriate the Secretary-General, shall in an order take note of the discontinuance of the proceeding. If objection is made, the proceeding shall continue.

Article 51

Discontinuance for Failure of Parties to Act

If the parties fail to take any steps in the proceeding during six consecutive months or such period as they may agree with the approval of the Tribunal, or of the Secretary-General if the Tribunal has not yet been constituted, they shall be deemed to have discontinued the proceeding and the Tribunal, or if appropriate the Secretary-General, shall, after notice to the parties, in an order take note of the discontinuance.

Chapter IX**The Award****Article 52****The Award**

- (1) The award shall be made in writing and shall contain:
 - (a) a precise designation of each party;
 - (b) a statement that the Tribunal was established under these Rules, and a description of the method of its constitution;
 - (c) the name of each member of the Tribunal, and an identification of the appointing authority of each;
 - (d) the names of the agents, counsel and advocates of the parties;
 - (e) the dates and place of the sittings of the Tribunal;
 - (f) a summary of the proceeding;
 - (g) a statement of the facts as found by the Tribunal;
 - (h) the submissions of the parties;
 - (i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; and
 - (j) any decision of the Tribunal regarding the cost of the proceeding.
- (2) The award shall be signed by the members of the Tribunal who voted for it; the date of each signature shall be indicated. Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.
- (3) If the arbitration law of the country where the award is made requires that it be filed or registered by the Tribunal, the Tribunal shall comply with this requirement within the period of time required by law.
- (4) The award shall be final and binding on the parties. The parties waive any time limits for the rendering of the award which may be provided for by the law of the country where the award is made.

Article 53**Authentication of the Award; Certified Copies; Date**

- (1) Upon signature by the last arbitrator to sign, the Secretary-General shall promptly:
 - (a) authenticate the original text of the award and deposit it in the archives of the Secretariat, together with any individual opinions and statements of dissent; and
 - (b) dispatch a certified copy of the award (including individual opinions and statements of dissent) to each party, indicating the date of dispatch on the original text and on all copies, provided, however, that if the original text

of the award must be filed or registered as contemplated by Article 52(3) of these Rules the Secretary-General shall do so on behalf of the Tribunal or return the award to the Tribunal for this purpose.

- (2) The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.
- (3) Except to the extent required for any registration or filing of the award by the Secretary-General under paragraph (1) of this Article, the Secretariat shall not publish the award without the consent of the parties. The Secretariat shall, however, promptly include in the publications of the Centre excerpts of the legal reasoning of the Tribunal.

Article 54

Applicable Law

- (1) The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply (a) the law determined by the conflict of laws rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable.
- (2) The Tribunal may decide *ex aequo et bono* if the parties have expressly authorized it to do so and if the law applicable to the arbitration so permits.

Article 55

Interpretation of the Award

- (1) Within 45 days after the date of the award either party, with notice to the other party, may request that the Secretary-General obtain from the Tribunal an interpretation of the award.
- (2) The Tribunal shall determine the procedure to be followed.
- (3) The interpretation shall form part of the award, and the provisions of Articles 52 and 53 of these Rules shall apply.

Article 56

Correction of the Award

- (1) Within 45 days after the date of the award either party, with notice to the other party, may request the Secretary-General to obtain from the Tribunal a correction in the award of any clerical, arithmetical or similar errors. The Tribunal may within the same period make such corrections on its own initiative.

- (2) The provisions of Articles 52 and 53 of these Rules shall apply to such corrections.

Article 57

Supplementary Decisions

- (1) Within 45 days after the date of the award either party, with notice to the other party may request the Tribunal, through the Secretary-General, to decide any question which it had omitted to decide in the award.
- (2) The Tribunal shall determine the procedure to be followed.
- (3) The decision of the Tribunal shall become part of the award and the provisions of Articles 52 and 53 of these Rules shall apply thereto.

Chapter X

Costs

Article 58

Cost of Proceeding

- (1) Unless the parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne. The Tribunal may, to that end, call on the Secretariat and the parties to provide it with the information it needs in order to formulate the division of the cost of the proceeding between the parties.
- (2) The decision of the Tribunal pursuant to paragraph (1) of this Article shall form part of the award.

Chapter XI

General Provisions

Article 59

Final Provision

The text of these Rules in each official language of the Centre shall be equally authentic.

9. INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
SCHEDULE OF FEES (2020)

(Effective July 1, 2020)

Fee for Lodging Requests

1. Subject to paragraph 2 below, the fee prescribed pursuant to Administrative and Financial Regulation 16 is US\$25,000. This non-refundable fee is payable to the Centre by a party: (a) requesting the institution of conciliation or arbitration proceedings under the Convention or the Additional Facility Rules; (b) applying for annulment of an arbitral award rendered pursuant to the Convention; or (c) requesting the institution of fact-finding proceedings under the Additional Facility Rules.
2. A non-refundable fee of US\$10,000 is payable to the Centre by any party: (a) requesting a supplementary decision to, or the rectification, interpretation or revision of, an arbitral award rendered pursuant to the Convention; (b) requesting a supplementary decision to, or the correction or interpretation of, an arbitral award rendered pursuant to the Additional Facility Rules; or (c) requesting the resubmission of a dispute to a new Tribunal after the annulment of an arbitral award rendered pursuant to the Convention.

**Fees and Expenses of Conciliators, Arbitrators, Commissioners and ad hoc
Committee Members**

3. In addition to receiving reimbursement for any direct expenses reasonably incurred, conciliators, arbitrators, commissioners and ad hoc Committee members are entitled to receive a fee of US\$3,000 per day of meetings or other work performed in connection with the proceedings, as well as subsistence allowances and reimbursement of travel expenses within limits set forth in Administrative and Financial Regulation 14. Any request for a higher amount shall be made through the Secretary-General.

Administrative Charges

4. An administrative charge of US\$42,000 is levied by the Centre upon the registration of a request for arbitration, conciliation or post award proceeding, and annually thereafter. For cases registered before July 1, 2016, the annual administrative charge is levied by the Centre on the date of the constitution of the Conciliation Commission, Arbitral Tribunal, Fact-Finding Committee or ad hoc Committee concerned. The same annual charge applies to proceedings administered by the Centre under rules other than the ICSID Convention or Additional Facility Rules.

5. Additional charges include: US\$200 hourly when the Secretary of the Commission, Tribunal or Committee attends meetings; reimbursement of the travel and subsistence expenses of the Secretary when the meetings are held away from the seat of the Centre; and any charges by the host of the meetings.
6. The administrative charges, the direct expenses incurred in connection with the proceedings, and the fees and expenses of the Commission, Tribunal or Committee, are met from advance payments that the parties are periodically requested to make to the Centre under Administrative and Financial Regulation 14.

Appointment and Challenge of Arbitrators, Conciliators or Mediators in Proceedings Not Conducted under the Convention or Additional Facility Rules

7. A non-refundable fee of US\$10,000 is payable to the Centre by a party requesting that the Secretary-General appoint an arbitrator, conciliator or mediator in proceedings not conducted under the Convention or Additional Facility Rules. This fee will be credited to that party's share of the administrative charge if ICSID administers the proceeding.
8. A non-refundable fee of US\$10,000 is payable to the Centre by a party requesting that the Secretary-General decide a challenge to an arbitrator, conciliator or mediator in proceedings not conducted under the Convention or Additional Facility Rules.

Charges for Special Services

9. Under Administrative and Financial Regulation 15, a party asking the Centre to perform a special service must deposit in advance an amount sufficient to cover the resulting charges. The charges for such services are determined on the basis of rates established by the World Bank under its normal administrative procedures.

10. WORLD BANK GUIDELINES ON THE TREATMENT OF FOREIGN DIRECT INVESTMENT (1992)

*The Development Committee**Recognizing*

that a greater flow of foreign direct investment brings substantial benefits to bear on the world economy and on the economies of developing countries in particular, in terms of improving the long term efficiency of the host country through greater competition, transfer of capital, technology and managerial skills and enhancement of market access and in terms of the expansion of international trade;

that the promotion of private foreign investment is a common purpose of the International Bank for Reconstruction and Development, the International Finance Corporation and the Multilateral Investment Guarantee Agency;

that these institutions have pursued this common objective through their operations, advisory services and research;

that at the request of the Development Committee, a working group established by the President of these institutions and consisting of their respective General Counsel has, after reviewing existing legal instruments and literature, as well as best available practice identified by these institutions, prepared a set of guidelines representing a desirable overall framework which embodies essential principles meant to promote foreign direct investment in the common interest of all members;

that these guidelines, which have benefitted from a process of broad consultation inside and outside these institutions, constitute a further step in the evolutionary process where several international efforts aim to establish a favorable investment environment free from non-commercial risks in all countries, and thereby foster the confidence of international investors; and that these guidelines are not ultimate standards but an important step in the evolution of generally acceptable international standards which complement, but do not substitute for, bilateral investment treaties,

therefore *calls the attention* of member countries to the following Guidelines as useful parameters in the admission and treatment of private foreign investment in their territories, without prejudice to the binding rules of international law at this stage of its development.

I**SCOPE OF APPLICATION**

1. These Guidelines may be applied by members of the World Bank Group institutions to private foreign investment in their respective territories, as a complement to applicable bilateral and multilateral treaties and other international instruments, to the extent that these Guidelines do not conflict with such treaties and binding instruments, and as a possible source on which national legislation governing the treatment of private foreign investment may draw. Reference to the “State” in these Guidelines, unless the context otherwise indicates, includes the State or any constituent subdivision, agency or instrumentality of the State and reference to “nationals” includes natural and juridical persons who enjoy the nationality of the State.

2. The application of these Guidelines extends to existing and new investments established and operating at all times as bona fide private foreign investments, in full conformity with the laws and regulations of the host State.
3. These Guidelines are based on the general premise that equal treatment of investors in similar circumstances and free competition among them are prerequisites of a positive investment environment.

Nothing in these Guidelines therefore suggests that foreign investors should receive a privileged treatment denied to national investors in similar circumstances.

II

ADMISSION

- (1) Each State will encourage nationals of other States to invest capital, technology and managerial skill in its territory and, to that end, is expected to admit such investments in accordance with the following provisions.
- (2) In furtherance of the foregoing principle, each State will:
 - (a) facilitate the admission and establishment of investments by nationals of other States, and
 - (b) avoid making unduly cumbersome or complicated procedural regulations for, or imposing unnecessary conditions on, the admission of such investments.
- (3) Each State maintains the right to make regulations to govern the admission of private foreign investments. In the formulation and application of such regulations, States will note that experience suggests that certain performance requirements introduced as conditions of admission are often counterproductive and that open admission, possibly subject to a restricted list of investments (which are either prohibited or require screening and licensing), is a more effective approach. Such performance requirements often discourage foreign investors from initiating investment in the State concerned or encourage evasion and corruption. Under the restricted list approach, investments in non-listed activities, which proceed without approval, remain subject to the laws and regulations applicable to investments in the State concerned.
- (4) Without prejudice to the general approach of free admission recommended in Section 3 above, a State may, as an exception, refuse admission to a proposed investment:
 - (i) which is, in the considered opinion of the State, inconsistent with clearly defined requirements of national security; or
 - (ii) which belongs to sectors reserved by the law of the State to its nationals on account of the State's economic development objectives or the strict exigencies of its national interest.
- (5) Restrictions applicable to national investment on account of public policy (ordre public), public health and the protection of the environment will equally apply to foreign investment.

- (6) Each State is encouraged to publish, in the form of a handbook or other medium easily accessible to other States and their investors, adequate and regularly updated information about its legislation, regulations and procedures relevant to foreign investment and other information relating to its investment policies including, *inter alia*, an indication of any classes of investment which it regards as falling under Sections 4 and 5 of this Guideline.

III

TREATMENT

- (1) For the promotion of international economic cooperation through the medium of private foreign investment, the establishment, operation, management, control, and exercise of rights in such an investment, as well as such other associated activities necessary therefor or incidental thereto, will be consistent with the following standards which are meant to apply simultaneously to all States without prejudice to the provisions of applicable international instruments, and to firmly established rules of customary international law.
- (2) Each State will extend to investments established in its territory by nationals of any other State fair and equitable treatment according to the standards recommended in these Guidelines.
- (3) (a) With respect to the protection and security of their person, property rights and interests, and to the granting of permits, import and export licenses and the authorization to employ, and the issuance of the necessary entry and stay visas to their foreign personnel, and other legal matters relevant to the treatment of foreign investors as described in Section 1 above, such treatment will, subject to the requirement of fair and equitable treatment mentioned above, be as favorable as that accorded by the State to national investors in similar circumstances. In all cases, full protection and security will be accorded to the investor's rights regarding ownership, control and substantial benefits over his property, including intellectual property.
(b) As concerns such other matters as are not relevant to national investors, treatment under the State's legislation and regulations will not discriminate among foreign investors on grounds of nationality.
- (4) Nothing in this Guideline will automatically entitle nationals of other States to the more favorable standards of treatment accorded to the nationals of certain States under any customs union or free trade area agreement.
- (5) Without restricting the generality of the foregoing, each State will:
 - (a) promptly issue such licenses and permits and grant such concessions as may be necessary for the uninterrupted operation of the admitted investment; and
 - (b) to the extent necessary for the efficient operation of the investment, authorize the employment of foreign personnel. While a State may require the foreign investor to reasonably establish his inability to recruit the required personnel locally, e.g., through local advertisement, before he resorts to the recruitment of foreign personnel, labor market flexibility in this and

other areas is recognized as an important element in a positive investment environment. Of particular importance in this respect is the investor's freedom to employ top managers regardless of their nationality.

- (6) (1) Each State will, with respect to private investment in its territory by nationals of the other States:
 - (a) freely allow regular periodic transfer of a reasonable part of the salaries and wages of foreign personnel; and, on liquidation of the investment or earlier termination of the employment, allow immediate transfer of all savings from such salaries and wages;
 - (b) freely allow transfer of the net revenues realized from the investment;
 - (c) allow the transfer of such sums as may be necessary for the payment of debts contracted, or the discharge of other contractual obligations incurred in connection with the investment as they fall due;
 - (d) on liquidation or sale of the investment (whether covering the investment as a whole or a part thereof), allow the repatriation and transfer of the net proceeds of such liquidation or sale and all accretions thereto all at once; in the exceptional cases where the State faces foreign exchange stringencies, such transfer may as an exception be made in instalments within a period which will be as short as possible and will not in any case exceed five years from the date of liquidation or sale, subject to interest as provided for in Section 6 (3) of this Guideline; and
 - (e) allow the transfer of any other amounts to which the investor is entitled such as those which become due under the conditions provided for in Guidelines IV and V.
- (2) Such transfer as provided for in Section 6 (1) of this Guideline will be made
 - (a) in the currency brought in by the investor where it remains convertible, in another currency designated as freely usable currency by the International Monetary Fund or in any other currency accepted by the investor, and (b) at the applicable market rate of exchange at the time of the transfer.
- (3) In the case of transfers under Section 6 (1) of this Guideline, and without prejudice to Sections 7 and 8 of Guideline IV where they apply, any delay in effecting the transfers to be made through the central bank (or another authorized public authority) of the host State will be subject to interest at the normal rate applicable to the local currency involved in respect of any period intervening between the date on which such local currency has been provided to the central bank (or the other authorized public authority) for transfer and the date on which the transfer is actually effected.
- (4) The provisions set forth in this Guideline with regard to the transfer of capital will also apply to the transfer of any compensation for loss due to war, armed conflict, revolution or insurrection to the extent that such compensation may be due to the investor under applicable law.
- (7) Each State will permit and facilitate the reinvestment in its territory of the profits realized from existing investments and the proceeds of sale or liquidation of such investments.

- (8) Each State will take appropriate measures for the prevention and control of corrupt business practices and the promotion of accountability and transparency in its dealings with foreign investors, and will cooperate with other States in developing international procedures and mechanisms to ensure the same.
- (9) Nothing in this Guideline suggests that a State should provide foreign investors with tax exemptions or other fiscal incentives. Where such incentives are deemed to be justified by the State, they may to the extent possible be automatically granted, directly linked to the type of activity to be encouraged and equally extended to national investors in similar circumstances. Competition among States in providing such incentives, especially tax exemptions, is not recommended. Reasonable and stable tax rates are deemed to provide a better incentive than exemptions followed by uncertain or excessive rates.
- (10) Developed and capital surplus States will not obstruct flows of investment from their territories to developing States and are encouraged to adopt appropriate measures to facilitate such flows, including taxation agreements, investment guarantees, technical assistance and the provision of information. Fiscal incentives provided by some investors' governments for the purpose of encouraging investment in developing States are recognized in particular as a possibly effective element in promoting such investment.

IV

EXPROPRIATION AND UNILATERAL ALTERATIONS OR TERMINATION OF CONTRACTS

- (1) A State may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects, except where this is done in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, without discrimination on the basis of nationality and against the payment of appropriate compensation.
- (2) Compensation for a specific investment taken by the State will, according to the details provided below, be deemed "appropriate" if it is adequate, effective and prompt.
- (3) Compensation will be deemed "adequate" if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known.
- (4) Determination of the "fair market value" will be acceptable if conducted according to a method agreed by the State and the foreign investor (hereinafter referred to as the parties) or by a tribunal or another body designated by the parties.
- (5) In the absence of a determination on agreed by, or based on the agreement of, the parties, the fair market value will be acceptable if determined by the State according to reasonable criteria related to the market value of the investment, i.e., in an amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in

which it would operate in the future and its specific characteristics, including the period in which it has been in existence, the proportion of tangible assets in the total investment and other relevant factors pertinent to the specific circumstances of each case.

- (6) Without implying the exclusive validity of a single standard for the fairness by which compensation is to be determined and as an illustration of the reasonable determination by a State of the market value of the investment under Section 5 above, such determination will be deemed reasonable if conducted as follows:
- (i) for a going concern with a proven record of profitability, on the basis of the discounted cash flow value;
 - (ii) for an enterprise which, not being a proven going concern, demonstrates lack of profitability, on the basis of the liquidation value;
 - (iii) for other assets, on the basis of (a) the replacement value or (b) the book value in case such value has been recently assessed or has been determined as of the date of the taking and can therefore be deemed to represent a reasonable replacement value.

For the purpose of this provision:

- a “going concern” means an enterprise consisting of income-producing assets which has been in operation for a sufficient period of time to generate the data required for the calculation of future income and which could have been expected with reasonable certainty, if the taking had not occurred, to continue producing legitimate income over the course of its economic life in the general circumstances following the taking by the State;”
- “discounted cash flow value” means the cash receipts realistically expected from the enterprise in each future year of its economic life as reasonably projected minus that year’s expected cash expenditure, after discounting this net cash flow for each year by a factor which reflects the time value of money, expected inflation, and the risk associated with such cash flow under realistic circumstances. Such discount rate may be measured by examining the rate of return available in the same market on alternative investments of comparable risk on the basis of their present value;
- “liquidation value” means the amounts at which individual assets comprising the enterprise or the entire assets of the enterprise could be sold under conditions of liquidation to a willing buyer less any liabilities which the enterprise has to meet;
- “replacement value” means the cash amount required to replace the individual assets of the enterprise in their actual state as of the date of the taking; and
- “book value” means the difference between the enterprise’s assets and liabilities as recorded on its financial statements or the amount at which the taken tangible assets appear on the balance sheet of the enterprise, representing their cost after deducting accumulated depreciation in accordance with generally accepted accounting principles.

- (7) Compensation will be deemed “effective” if it is paid in the currency brought in by the investor where it remains convertible, in another currency designated as freely usable by the International Monetary Fund or in any other currency accepted by the investor.
- (8) Compensation will be deemed to be “prompt” in normal circumstances if paid without delay. In cases where the State faces exceptional circumstances, as reflected in an arrangement for the use of the resources of the International Monetary Fund or under similar objective circumstances of established foreign exchange stringencies, compensation in the currency designated under Section 7 above may be paid in installments within a period which will be as short as possible and which will not in any case exceed five years from the time of the taking, provided that reasonable, market-related interest applies to the deferred payments in the same currency.
- (9) Compensation according to the above criteria will not be due, or will be reduced in case the investment is taken by the State as a sanction against an investor who has violated the State’s law and regulations which have been in force prior to the taking, as such violation is determined by a court of law. Further disputes regarding claims for compensation in such a case will be settled in accordance with the provisions of Guideline V.
- (10) In case of comprehensive non-discriminatory nationalizations effected in the process of large scale social reforms under exceptional circumstances of revolution, war and similar exigencies, the compensation may be determined through negotiations between the host State and the investors’ home State and failing this, through international arbitration. The provisions of Section I of this Guideline will apply with respect to the conditions under which a State may unilaterally terminate, amend or otherwise disclaim liability under a contract with a foreign private investor for other than commercial reasons, i.e., where the State acts as a sovereign and not as a contracting party. Compensation due to the investor in such cases will be determined in the light of the provisions of Sections 2 to 9 of this Guideline. Liability for repudiation of contract for commercial reasons, i.e., where the State acts as a contracting party, will be determined under the applicable law of the contract.

V

SETTLEMENT OF DISPUTES

- (1) Disputes between private foreign investors and the host State will normally be settled through negotiations between them and failing this, through national courts or through other agreed mechanisms including conciliation and binding independent arbitration.
- (2) Independent arbitration for the purpose of this Guideline will include any ad hoc or institutional arbitration agreed upon in writing by the State and the investor or between the State and the investor’s home State where the majority of the arbitrators are not solely appointed by one party to the dispute.

- (3) In case of agreement on independent arbitration, each State is encouraged to accept the settlement of such disputes through arbitration under the Convention establishing the International Centre for Settlement of Investment Disputes (ICSID) if it is a party to the ICSID Convention or through the “ICSID Additional Facility” if it is not a party to the ICSID Convention.

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Selected Bibliography

- Alexandrov, Stanimir. 'Enforcement of ICSID Awards: Arts 53 and 54 of the ICSID Convention'. *Transnational Dispute Management* 6 (2009): 1.
- Amerasinghe, Chittharanjan Felix. 'Interpretation of Article 25(2)(b) of the ICSID Convention'. In *International Arbitration in the 21st Century: Towards 'Judicialization' and Uniformity?*, edited by Richard Lillich & Charles Brower (1994): 223.
- Amerasinghe, Chittharanjan Felix. 'Jurisdiction Ratione Personae under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States'. *British Yearbook of International Law* 47 (1975): 227.
- Baldwin, Edward, Mark Kantor & Michael Nolan. 'Limits to Enforcement of ICSID Awards'. *Journal of International Arbitration* 23 (2006): 1.
- Beharry, Christina L. 'Objections to Requests for Documents in International Arbitration: Emerging Practices from NAFTA Chapter 11'. *ICSID Review* 27 (2014): 33.
- Baetens, Freya (ed.). *Investment Law Within International Law. Integrationist Perspectives*. Cambridge: Cambridge University Press, 2013.
- Begic, Taida. *Applicable law in International Investment Disputes*. Eleven International Publishing, 2005.
- Bernardini, Piero. 'Reforming Investor–State Dispute Settlement: The Need to Balance Both Parties' Interests'. *ICSID Review* 32 (2017): 38.
- Bilanova, Anna & Jaroslav Kudrna. 'Achmea: The End of Investment Arbitration as We Know It?'. *European Investment Law and Arbitration Review Online* 3 (2018): 261.
- Blessing, Mac. 'Mandatory Rules of Law Versus Party Autonomy in International Arbitration'. *Journal of International Arbitration* 14 (1997): 23.
- Bodenhorn, Diran. 'A Cash-Flow Concept of Profit'. *The Journal of Finance* 19 (1964): 16.
- Born, Gary. *International Commercial Arbitration*. Kluwer Law International, 2014.
- Broches, Aron. 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution'. *ICSID Review* 2 (1987): 287.
- Broches, Aron. 'On the Finality of Awards: A Reply to Michael Reisman'. *ICSID Review* 8 (1993): 102.
- Broches, Aron. *Selected Essays: World Bank, ICSID and Other Subjects of Public and Private International Law*. Springer, 1995.

Selected Bibliography

- Broches, Aron. 'The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction'. *Columbia Journal of Transnational Law* 5 (1966): 263.
- Brower, Charles & Michael Ottolenghi. 'Damages in Investor-State Arbitration'. *Transnational Dispute Management* 4 (2007): 6.
- Brownlie, Ian. *Principles of Public International Law*. OUP Oxford, 2008.
- Bjorklund, Andrea, Yaraslau Kryvoi & Jean-Michel Marcoux. Investment Promotion and Protection in the Canada-UK Trade Relationship. SSRN, 2019.
- Bucheler, Gebhard. *Proportionality in Investor-State Arbitration*. OUP Oxford, 2015.
- Carreteiro, Mateus Aimore. 'Burden and Standard of Proof in International Arbitration: Proposed Guidelines for Promoting Predictability'. *Revista Brasileira de Arbitragem* 49 (2016): 92.
- Cate, Irene M. Ten. 'The Costs of Consistency: Precedent in Investment Treaty Arbitration'. *Columbia Journal of Transnational Law* 51 (2013): 418.
- Clapham, Jason. 'Finality of Investor-State Arbitral Awards'. *Journal of International Arbitration* 26 (20019): 437.
- Cleis, Maria Nicole. *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions*. Brill, 2017.
- Cheng, Bin. *General Principles of Law as Applied by International Courts and Tribunals*. CUP Cambridge, 1953.
- Christie, George. 'What Constitutes a Taking of Property under International Law?'. *British Yearbook of International Law* 38 (1962): 307.
- Colorado, Orlando Federico Cabrera. 'The Freedom of Arbitrators to Conduct Collective Proceedings When the Rules Are Silent: Considerations in the Wake of the Abaclat Decision'. *Journal of International Dispute Settlement* 6 (2015): 163.
- Commission, Jeffery & Rahim Moloo. *Procedural Issues in International Investment Arbitration*. OUP Oxford, 2018.
- Commission, Jeffrey. 'Precedent in Investment Treaty Arbitration – A Citation Analysis of a Developing Jurisprudence'. *Journal of International Arbitration* 24 (2007): 129.
- Crawford, James. 'Investment Arbitration and the ILC Articles on State Responsibility'. *ICSID Review* 25 (2010): 127.
- Crawford, James. 'Challenges to Arbitrators in ICSID Arbitration'. In *Practising Virtue: Inside International Arbitration*, edited by David Caron and others. OUP Oxford, 2015.
- Crawford, James & Paul Mertenskotter. 'The Use of the ILC's Attribution Rules in Investment Treaty Arbitration'. In *Building International Investment Law: The First 50 Years of ICSID*, edited by Meg Kinnear, Geraldine R. Fischer, Jara Minguez Almeida, Luisa Fernanda Torres & Mairée Uran Bidegain. Kluwer Law International, 2015.
- De Brabandere, Eric & Julia Lepeltak. 'Third-Party Funding in International Investment Arbitration'. *ICSID Review* 27 (2012): 379.
- Diel-Gligor, Katharina. *Towards Consistency in International Investment Jurisprudence*. Brill, 2017.
- Dolzer, Rudolf & Margrete Stevens. *Bilateral Investment Treaties*. Brill, 1995.

Selected Bibliography

- Fabri, H  l  ne Ruiz. ‘The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for Regulatory Expropriations of the Property of Foreign Investors’. *NYU Environmental Law Journal* 11 (2002): 148.
- Fauchald, Ole Kristian. ‘The Legal Reasoning of ICSID Tribunals – An Empirical Analysis’. *European Journal of International Law* 19 (2008): 301.
- Feit, Michael. ‘Attribution and the Umbrella Clause – Is There a Way out of the Deadlock?’. *Minnesota Journal of International Law* 21 (2012): 21.
- Feldman, Mark. ‘State-Owned Enterprises as Claimants in International Investment Arbitration’. *ICSID Review* 31 (2016): 24.
- Footer, Mary. ‘BITS and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment’. *Michigan State Journal of International Law* 19 (2009): 33.
- Footer, Mary. ‘Umbrella Clauses and Widely-Formulated Arbitration Clauses: Discerning the Limits of ICSID Jurisdiction’. *The Law & Practice of International Courts and Tribunals* 16 (2017): 87.
- Fouret, Julien, R  my Gerbay & Alvarez Gloria (eds). *The ICSID Convention, Regulations and Rules. A Practical Commentary*. Edward Edgar Publishing, 2019.
- Franck, Susan. ‘Development and Outcomes of Investment Treaty Arbitration’. *Harvard International Law Journal* 50 (2009): 435.
- Franck, Susan. ‘Empirically Evaluating Claims About Investment Treaty Arbitration’. *North Carolina Law Review* 86 (2007): 1.
- Franck, Susan. *Myths and Realities in Investment Treaty Arbitration*. OUP Oxford, 2019.
- Freyer, Dana H. ‘Assessing Expert Evidence’. In *The Leading Arbitrators’ Guide to International Arbitration*, edited by Lawrence Newman & Richard Hill. Juris Publishing Inc, 2008.
- Fry, James. ‘International Human Rights Law in Investment Arbitration: Evidence of International Law’s Unity’. *Duke Journal of Comparative and International Law* 18 (2007): 77.
- Fray, James & Odysseas G. Repousis. ‘Towards a New World for Investor-State Arbitration Through Transparency’. *New York Journal of International Law and Politics* 48 (2015–2016): 795.
- Gaillard, Emmanuel. *Legal Theory of International Arbitration*. Brill, 2010.
- Gaillard, Emmanuel & Yas Banifatemi (eds). *The Precedent in International Arbitration*. Juris Net, 2008.
- Gallus, Nick. ‘An Umbrella Just for Two? BIT Obligations Observance Clauses and the Parties to a Contract’. *Arbitration International* 24 (2008): 157.
- Gastrell, Lindsay & Paul-Jean Le Cannu. ‘Procedural Requirements of ‘Denial-of-Benefits’ Clauses in Investment Treaties: A Review of Arbitral Decisions’. *ICSID Review* 30 (2015): 78.
- Gilbert, Christopher & David Vines (eds). *The World Bank: Structure and Policies*. Global Economic Institutions, 1996.
- Gill, Judith. ‘Inconsistent Decisions: An Issue to Be Addressed or a Fact of Life?’. *Transnational Dispute Management* 2 (2015): 2.
- Goldberg, David, Yarik Kryvoi & Ivan Philippov. *Empirical Study: Provisional Measures in Investor-State Arbitration*. BIICL/White & Case, 2019.

Selected Bibliography

- Hafner-Burton, Emilie M. & David G. Victor. 'Secrecy in International Investment Arbitration: An Empirical Analysis'. *Journal of International Dispute Settlement* 7 (2016): 161.
- Hamamoto, Shotaro. 'Parties to the "Obligations" in the Obligations Observance ("Umbrella") Clause'. *ICSID Review* 30 (2015): 449.
- Harrison, Ann. *Do Polluters Head Overseas: Testing the Pollution Haven Hypothesis ARE Update*. University of California, 2002.
- Hart, Tim. 'Study of Damages in International Center for the Settlement of Investment Disputes Cases'. Credibility International. *Transnational Dispute Management* 11 (2014): 12.
- Heath, J Benton & Simon Batifort. 'The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralisation'. *American Journal of International Law* 111 (2017): 873.
- Hepburn, Jarrod. *Domestic Law in International Investment Arbitration*. OUP Oxford, 2017.
- Hirsch, Moshe. 'Explaining Compliance and Non-Compliance with ICSID Awards: The Argentine Case Study and a Multiple Theoretical Approach'. *Journal of International Economic Law* 19 (2016): 681.
- Hodgson, Matthew. 'Costs in Investment Treaty Arbitration: The Case for Reform'. *Transnational Dispute Management* 11 (2014): 1.
- Hodgson, Matthew & Alastair Campbell. *Damages and Costs in Investment Treaty Arbitration Revisited*. Global Arbitration Review, 2017.
- Honlet, Jean-Christophe. 'Recent Decisions on Third-Party Funding in Investment Arbitration'. *ICSID Review* 30 (2015): 699.
- Hudec, Robert E. 'The Judicialization of GATT Dispute Settlement'. In *In Whose Interest? Due Process and Transparency in International Trade*, edited by Michael M. Hart & Debra P. Steger. Centre for Trade Policy and Law, 1992.
- Ireton, Jessica O. 'The Admissibility of Evidence in ICSID Arbitration: Considering the Validity of WikiLeaks Cables as Evidence'. *ICSID Review* 30 (2014): 231.
- James, Harold. *International Monetary Cooperation since Bretton Woods*. OUP Oxford, 1996.
- Jennings, Robert & Arthur Watts (eds). *Oppenheim's International Law*. OUP Oxford, 1997.
- Junngam, Nartnirun. 'The Full Protection and Security Standard in International Investment Law: What and Who Is Investment Fully(?) Protected and Secured From?'. *American University Business Law Review* 7 (2018): 1.
- Kaufmann-Kohler, Gabrielle. 'In Search of Transparency and Consistency: ICSID Reform Proposal'. *Transnational Dispute Management* 2 (2005): 1.
- Kabra, Ridhi. 'Has *Abaclat v Argentina* left the ICSID with a "massive problem"?'. *Arbitration International* 31 (2015): 425.
- Kantor, Mark. *Valuation for Arbitration: Compensation Standards, Valuation Methods, and Expert Evidence*. Kluwer Law International, 2008.
- Kelsen, Hans. *Principles of International Law*. Rinehart & Co, 1966.
- Kidane, Won. 'China and India's Different Investment Treaty Dispute Resolution Experiences and Implications for Africa'. *Loyola University Chicago Law Journal* 49 (2018): 405.

Selected Bibliography

- Kinnear, Meg & Aïssatou Diop. 'Use of the Media by Counsel in Investor-State Arbitration'. *ICCA Congress Series* No. 13 (2006).
- Knull III, William H. 'Accounting for Uncertainty in Discounted Cash Flow Valuation of Upstream Oil and Gas Investments'. *Journal of Energy and Natural Resources Law* 25 (2007): 3.
- Kolo, Abba. 'Witness intimidation, Tampering and Other Related Abuses of Process in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal'. *Arbitration International* 26 (2010): 43.
- Kryvoi, Yaraslau. 'Can an Arbitration Award Be Expropriated? Introductory Note to European Court of Human Rights: Kin-Stib and Majkic v. Serbia'. *International Legal Materials* 49 (2010): 1181.
- Kryvoi, Yaraslau. 'Counterclaims in Investor-State Disputes'. *Minnesota Journal of International Law* 21 (2012): 216.
- Kryvoi, Yarik. 'Economic Crimes in International Investment Law'. *International and Comparative Law Quarterly* 67 (2018): 577.
- Kryvoi, Yarik. 'ICSID Arbitration Reform: Mapping Concerns of Users and How to Address Them'. British Institute of International and Comparative Law, 2018.
- Kryvoi, Yarik. 'The Path of Investor-State Disputes: From Compensation Commissions to Arbitral Institutions'. *ICSID Review – Foreign Investment Law Journal* 33 (2018): 743.
- Kryvoi, Yarik & Dmitry Davydenko. 'Consent Awards in International Arbitration: From Settlement to Enforcement'. *Brooklyn Journal of International Law* 40 (2014): 827.
- Kube, Vivian & E.U. Petersmann. 'Human Rights Law in International Investment Arbitration'. In *General Principles of Law and International Investment Arbitration*, edited by Andrea Gattini, Attila Tanzi & Filippo Fontanelli. Brill, 2018.
- Lalive, Pierre & Laura Halonen. 'On the Availability of Counterclaims in Investment Treaty Arbitration'. *Czech Yearbook of International Law* 2 (2011): 141.
- Lamb, Sophie, Daniel Harrison & Jonathan Hew. 'Recent developments in the Law and Practice of Amicus Curiae Briefs in Investor-State Arbitration'. *Indian Journal of Arbitration Law* 5 (2017): 72.
- Lamm, Carolyn, Brody K. Greenwald & Kristen M. Young. 'From World Duty Free to Metal-Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption'. *ICSID Review* 29 (2014): 328.
- Langford, Malcom, Daniel Behn & Runar Hilleren Lie. 'The Revolving Door in International Investment Arbitration'. *Journal of International Economic Law* 20 (2017): 301.
- Lauterpacht, Elihu. *Aspects of Administration of International Justice*. CUP Cambridge, 1991.
- Levashova, Yulia. 'The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law'. *Utrecht Law Review* 14 (2018): 40.
- Levine, Eugene. 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation'. *Berkeley Journal of International Law* 29 (2011): 200.

Selected Bibliography

- Lilich, Richard. 'The Law Governing Disputes under Economic Development Agreements: Reexamining the Concept of "Internationalization"'. In *International Arbitration in the 21st Century: Towards 'Judicialization' and Uniformity?*, edited by Richard Lillich & Charles Brower. Transnational Publishers Inc, 1994.
- Lipstein, Kent. 'International Arbitration between Individuals and Governments and the Conflict of Laws'. In *Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger*, edited by Bin Cheng and Edward Duncan Brown. Stevens & Sons, 1988.
- Maupin, Julie. 'Transparency in International Investment Law: The Good, the Bad and the Murky'. In *Transparency in International Law*, edited by Andrea Bianchi and Anne Peters. CUP Cambridge, 2013.
- McWhinney, Edward. *The World Court and the Contemporary International Law-Making Process*. Brill, 1979.
- Miles, Kate. *The Origins of International Investment Law: Empire, Environment, and the Safeguard of Capital*. CUP Cambridge, 2013.
- Nakagawa, Junji. *Transparency in International Trade and Investment Dispute Settlement*. Routledge, 2013.
- Newcombe, Andrew Paul & Lluís Paradell. *Law and Practice of Investment Treaties: Standards of Treatment*. Kluwer Law International, 2009.
- Nowrot, Karsten. 'How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?'. *The Journal of World Investment and Trade* 15 (2014): 612.
- Olleson, Simon. 'Attribution in Investment Treaty Arbitration'. *ICSID Review* 31 (2016): 457.
- Ortino, Federico. 'Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing'. *Leiden Journal of International Law* 30 (2017): 71.
- Parra, Antonio. '25 Advancing Reform at ICSID'. In *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century*, edited by Jean E. Kalicki and Anna Joubin-Bret. Brill, 2015.
- Parra, Antonio. 'Applicable Law in Investor-State Arbitration in Contemporary Issues'. In *Contemporary Issues in International Arbitration and Mediation*, edited by Arthur W Rovine. Brill, 2008.
- Parra, Antonio. 'Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment'. *ICSID Review - Foreign Investment Law Journal* 12 (1997): 287.
- Parra, Antonio. 'The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes'. *International Law* 41 (2007): 47.
- Parra, Antonio & Ibrahim Shihata. 'Applicable Substantive Law in Disputes between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention'. *ICSID Review - Foreign Investment Law Journal* 9 (1994): 183.
- Paulsson, Jan. 'Arbitration Without Privity'. *ICSID Review - Foreign Investment Law Journal* 10 (1995): 232.
- Paulsson, Jan. *Denial of Justice in International Law*. CUP Cambridge, 2005.

Selected Bibliography

- Paulsson, Jan. 'Jurisdiction and Admissibility'. In *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner*, edited by Gerald Aksen & Robert Briner. ICC, 2005.
- Paulsson, Jan, et al. *The Freshfields Guide to Arbitration and ADR*. Kluwer Law International, 1999.
- Paulsson, Jan, Lucy Reed & Nigel Blackaby. *Guide to ICSID Arbitration*. Kluwer Law International, 2010.
- Petrochilos, Georgios. 'Case Comment: Bosh International, Inc and B&P Ltd Foreign Investment Enterprise v Ukraine – When Is Conduct by a University Attributable to the State'. *ICSID Review* 28 (2013): 262.
- Pohl, Jens Hillebrand. 'Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?'. *European Constitutional Law Review* 14 (2018): 767.
- Poulton, Ed, Yarik Kryvoi,, Ekaterina Finkel & Janek Bednarz. *Empirical Study: Corporate Restructuring and Investment Treaty Protections*. BIICL/Baker McKenzie, 2020.
- Ranjan, Prabhash & Pushkar Anand. 'Determination of Indirect Expropriation and Doctrine of Police Power in International Investment Law'. In *Judging the State in International Trade and Investment Law*, edited by Leïla Choukroune. Springer, 2018.
- Reinisch, August. 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration'. *Journal of International Economic Law* 19 (2016): 761.
- Riddell, Anna & Brendan Plant. *Evidence before the International Court of Justice*. BIICL, 2009.
- Roberts, Anthea. 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System'. *American Journal of International Law* 107 (2013): 45.
- Salacuse, Jeswald W. *The Law of Investment Treaties*. OUP Oxford, 2015.
- Schill, Stephan. 'MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J Benton Heath'. *American Journal of International Law* 111 (2017): 914.
- Schreuer, Christoph. 'Decisions *Ex Aequo et Bono* under the ICSID Convention'. *ICSID Review - Foreign Investment Law Journal* 1 (1996): 37.
- Schreuer, Christoph. 'Full Protection and Security'. *Journal of International Dispute Settlement* 1 (2010): 353.
- Schreuer, Christoph. 'Non-pecuniary Remedies in ICSID Arbitration'. *Arbitration International* 20 (2004): 325.
- Schreuer, Christoph. 'The Development of International Law by ICSID Tribunals'. *ICSID Review - Foreign Investment Law Journal* 31 (2016): 728.
- Schreuer, Christopher, Loretta Malintoppi, August Reinisch & Anthony Sinclair. *The ICSID Convention: A Commentary*. CUP Cambridge, 2009.
- Schwebel, Stephen. 'Is Mediation of Foreign Investment Disputes Plausible?'. *ICSID Review* 22 (2007): 237.
- Seidl-Hohenveldern, Ignaz. *International Economic Law*. Kluwer Law International, 1999.

Selected Bibliography

- Shirlow, Esmé. 'Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration'. *ICSID Review* 31 (2016): 622.
- Smutny, Abby, Anne Smith & McCoy Pitt. 'Enforcement of ICSID Convention Arbitral Awards in US Courts'. *Pepperdine Law Review* 43 (2016): 649.
- Snell, Susan. *Private Power, Public Law: The Globalisation of Intellectual Property Rights*. CUP Cambridge, 2003.
- Sornarajah, M. *The International Law on Foreign Investment*. 4th ed. CUP Cambridge, 2007.
- Sourgens, Frederic, Kabir Duggal & Ian Laird. *Evidence in International Investment Arbitration*. OUP Oxford, 2018.
- St. Korowicz, Marek. 'The Problem of the International Personality of Individuals'. *American Journal of International Law* 50 (1956): 533.
- Šturma, Pavel. 'Goodbye, Maffezini? On the Recent Developments of Most-Favoured-Nation Clause Interpretation in International Investment Law'. *The Law and Practice of International Courts and Tribunals* 15 (2016): 81.
- Szczudlik, Katarzyna Barbara. 'Mass Claims under ICSID'. *Wroclaw Review of Law, Administration & Economics* 4 (2014): 70.
- Titi, Catharine. 'Police Powers Doctrine and International Investment Law'. In *General Principles of Law and International Investment Arbitration*, edited by Andrea Gattini, Attila Tanzini & Filippo Fontanelli. Brill, 2018.
- Titi, Catharine & Katia Fach Gomez (eds). *Mediation in International Commercial and Investment Disputes*. OUP Oxford, 2019.
- Trakman, Leon. 'The ICSID under Siege'. *Cornell International Law Journal* 45 (2013): 603.
- Trenor, John (ed). *Guide to Damages in International Arbitration*. Global Arbitration Review, 2018.
- Townsend, John. 'The Initiation of Arbitration Proceedings: "My Story Had Been Longer"'. *ICSID Review - Foreign International Law Journal* 13 (1998): 21.
- Tudor, Ioana. *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*. OUP Oxford, 2008.
- Uchkunova, Inna & Oleg Temnikov. 'Enforcement of Awards under ICSID Convention – What Solutions to the Problem of State Immunity'. *ICSID Review* 29 (2014): 187.
- Vadi, Valentina. *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration*. Edgar Publishing, 2018.
- Van der Zee, Eva. 'Incorporating the OECD Guidelines in International Investment Agreements: Turning a Soft Law Obligation into Hard Law?'. *Legal Issues of Economic Integration* 40 (2013): 33.
- Van Harten, Gus. *Investment Treaty Arbitration and Public Law*. OUP Oxford, 2007.
- Vasani, Baiju & Shaun Palmer. 'Challenge and Disqualification of Arbitrators at ICSID: A New Dawn'. *ICSID Review* 30 (2015): 194.
- Vinuales, Jorge E & Florian Grisel. 'L'amicus curiae dans l'arbitrage d'investissement'. *ICSID Review* 22 (2007): 380.
- Wälde, Thomas & Borzu Sabahi, 'Compensation, Damages and Valuation in International Investment Law'. *Translational Dispute Management* 4, no. 6 (2007): 1.

Selected Bibliography

- Webster, Thomas H. 'Efficiency in Investment Arbitration: Recent Decisions on Preliminary and Costs Issues'. *Arbitration International* 25 (2009): 469.
- Wiessner, Siegfried. 'Democratizing International Arbitration? Mass Claims Proceedings in *Abaclat v. Argentina*'. *Journal of International and Comparative Law* 1 (2014): 55.
- Wongkaew, Teerawat. *Protection of Legitimate Expectations in Investment Treaty Arbitration: A Theory of Detrimental Reliance*. CUP Cambridge, 2019.
- Wouters, Jan & Nicolaz Hachez. 'The Institutionalisation of Investment Arbitration and Sustainable Development'. In *Sustainable Development in World Investment Law*, edited by Marie-Claire Cordonnier Segger, Markus W. Gehring & Andrew Paul Newcombe. Kluwer, 2011.
- Wouters, Jan & Nicolaz Hachez. 'When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights be Ensured?'. *Human Rights and International Legal Discourse* 3 (2009): 301.
- Zeitler, Helge. 'Full Protection and Security'. In *International Investment Law and Comparative Public Law*, edited by Stephan Schill. OUP Oxford, 2010.

Web Links

- International Investment Law and Dispute Resolution (online course): biicl.org/isds.
- ICSID Cases and & Database of Bilateral Investment Treaties: icsid.worldbank.org/en.
- ICSID Bibliography on Investment Law and Procedure: <https://icsid.worldbank.org/en/Pages/resources/Bibliography-on-Investment-Law-and-Procedure.aspx>.
- Investment Arbitration Reporter: www.iareporter.com.
- Investment Claims (Oxford University Press): www.investmentclaims.com.
- Investment Treaty News: www.iisd.org/investment/itn.
- Investment Treaty Arbitration (ITA): www.italaw.com.
- Investor-State Law Guide: www.investorstatelawguide.com.
- Kluwer Arbitration (Kluwer Law International): www.kluwerarbitration.com.
- Transnational Dispute Management: www.transnational-dispute-management.com.
- UNCTAD Investment Policy Hub: investmentpolicy.unctad.org.

Selected Bibliography

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