

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

UNCTAD



INVESTOR-STATE DISPUTE SETTLEMENT

UNCTAD Series on Issues in International Investment Agreements II



A sequel



UNITED NATIONS

**UNITED NATIONS CONFERENCE ON TRADE AND
DEVELOPMENT**

INVESTOR-STATE DISPUTE SETTLEMENT

**UNCTAD Series on Issues in International Investment
Agreements II**



UNITED NATIONS
New York and Geneva, 2014

NOTE

As the focal point in the United Nations system for investment and technology, and building on 30 years of experience in these areas, UNCTAD, through the Division on Investment and Enterprise (DIAE), promotes understanding of key issues, particularly matters related to foreign direct investment (FDI). DIAE assists developing countries in attracting and benefiting from FDI by building their productive capacities, enhancing their international competitiveness and raising awareness about the relationship between investment and sustainable development. The emphasis is on an integrated policy approach to investment and enterprise development.

The term “country” as used in this study also refers, as appropriate, to territories or areas. The designations employed and the presentation of the material do not imply the expression of any opinion on the part of the United Nations concerning the legal status of any country, territory, city or area, or of authorities or concerning the delimitation of its frontiers or boundaries. In addition, the designations of country groups are intended solely for statistical or analytical convenience and do not necessarily express a judgement about the stage of development reached by a particular country or area in the development process.

The following symbols have been used in the tables:

Two dots (..) indicate that data are not available or are not separately reported.

Rows in tables have been omitted in those cases where no data are available for any of the elements in the row.

A dash (–) indicates that the item is equal to zero or its value is negligible.

A blank in a table indicates that the item is not applicable.

A slash (/) between dates representing years, e.g. 1994/1995, indicates a financial year.

Use of a dash (–) between dates representing years, e.g. 1994–1995, signifies the full period involved, including the beginning and end years.

Reference to “dollars” (\$) means United States dollars, unless otherwise indicated.

Annual rates of growth or change, unless otherwise stated, refer to annual compound rates.

Details and percentages in tables do not necessarily add to totals because of rounding.

Material in this study may be freely quoted or reprinted, but acknowledgement is requested, together with a copy of the publication containing the quotation or reprint to be sent to the UNCTAD secretariat.

UNCTAD/DIAE/IA/2013/2

UNITED NATIONS PUBLICATION

Copyright © United Nations, 2014
All rights reserved
Printed in Switzerland

PREFACE

This volume is part of a series of revised editions – sequels – to the UNCTAD Series on Issues in International Investment Agreements. The first generation of this series, also called the Pink Series, was published between 1999 and 2005 as part of UNCTAD’s work programme on international investment agreements (IIAs). It aimed at assisting developing countries in participating, as effectively as possible, in international investment rule making at the bilateral, regional, plurilateral and multilateral levels. The series sought to provide balanced analyses of issues that may arise in discussions about IIAs, and has since become a standard reference tool for IIA negotiators, policymakers, members of the private sector, academics and other stakeholders.

Since the publication of the first generation of the Pink Series, the world of IIAs has changed tremendously. In terms of numbers, the IIA universe has grown, and continues to do so — albeit at a slower rate. Further, the impact of IIAs has evolved.

Many investor-State dispute settlement (ISDS) cases have brought to light unanticipated — and partially undesired — side effects of IIAs. With its expansive, and sometimes contradictory, interpretations, the arbitral process has created a new learning environment for countries and, in particular, for IIA negotiators. Issues of transparency, predictability and policy space have come to the forefront of the debate — as has the objective of ensuring coherence between IIAs and other areas of public policy, including policies addressing global challenges, such as the protection of the environment (climate change) and public health and safety.

Finally, the underlying dynamics of IIA rule making have changed. A new investment landscape, where developing countries account for more than half of global foreign direct investment (FDI) inflows and almost one third of global FDI outflows, is beginning to alter the context and background against which IIAs are being negotiated.

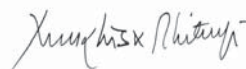
UNCTAD responded to these changes by presenting a comprehensive Investment Policy Framework for Sustainable Development (IPFSD), which examines the universe of national and international policies through the lenses of today's key investment policy challenges and from a sustainable development perspective.

It is the purpose of the sequels to complement the IPFSD, by considering how the issues described in the first-generation Pink Series have evolved with particular focus on treaty practice and the process of arbitral interpretation. Each of the sequels will have similar key elements, including: (a) an introduction explaining the issue in today's broader context; (b) a stocktaking of IIA practice and arbitral awards; and (c) a section on policy options for IIA negotiators.

The updates are conceptualized as sequels; that is to say, they aim at complementing rather than replacing the first-generation Pink Series. Compared with the first generation, the sequels offer a greater level of detail and move beyond a merely informative role. In line with the mandate entrusted to UNCTAD, they aim to analyse the development impact and strengthen the development dimension of IIAs. The sequels are finalized through a rigorous peer review process, which benefits from collective learning and sharing of experiences.

This sequel, the sixth in the series, focuses on the ISDS clause — or the ISDS chapter — regularly included in IIAs. In light of the increasing number of ISDS cases, the debate about the pros and cons of the ISDS mechanism has been gaining momentum,

especially in those countries and regions where ISDS is on the agenda of IIA negotiations and/or which have faced investor claims that have attracted public attention. This sequel aims at presenting a contribution to the debate by systematically analyzing the components of ISDS, taking stock of developments in the relevant IIA provisions and outlining policy options for reform.



Mukhisa Kituyi

December 2013

Secretary-General of UNCTAD

ACKNOWLEDGEMENTS

The sequels are produced by a team under the direction of Jörg Weber and the overall guidance of James Zhan. The members of the team include Bekele Amare, Hamed El-Kady, Natalia Guerra, Ventzislav Kotetzov, Sergey Ripinsky and Elisabeth Tuerk.

This paper is based on a study prepared by Andrea Bjorklund in collaboration with Sergey Ripinsky and under the supervision of Elisabeth Tuerk. Inputs were provided by Hamed El-Kady and Anna Joubin-Bret. Cletus Dordunoo, Kwaku Ganu and Kendra Magraw provided editorial assistance. The UNCTAD secretariat gratefully acknowledges the comments on the draft version of this paper received from Gary Born, Brooks Daly, Jörn Griebel, Laura Halonen, Meg Kinnear, Christina Knahr, Céline Lévesque, Armand de Mestral, Dirk Pulkowski, Monique Sasson and Sylvie Tabet. The paper does not represent the views of any of the aforementioned peer reviewers.

CONTENTS

PREFACE	4
EXECUTIVE SUMMARY	13
INTRODUCTION	18
I. EXPLANATION OF THE ISSUE.....	23
A. Historical context	23
B. Salient features of ISDS and criticisms of it	24
II. STOCKTAKING AND ANALYSIS	30
A. Consent to arbitration	31
1. Approaches to consent in IIAs	31
2. Conditions upon which State consent is granted.....	35
3. Consent to different arbitration forums/rules	36
4. Duration of consent	36
B. Scope of ISDS	37
1. Core provisions determining the scope of ISDS	38
2. Additional provisions limiting the scope of ISDS	41
3. Provisions determining the scope of the treaty	50
C. Waiting periods and amicable settlement.....	55
1. Waiting or “cooling-off” period.....	55
2. Period for negotiations and consultations	56
3. Notifying the host State of the dispute	57
4. Consequences of not following the amicable settlement procedure.....	58
5. Alternative dispute resolution	60
D. Forums for IIA cases	62
1. Available ISDS forums	62
2. ICSID and UNCITRAL: a brief comparison	69
3. Place (seat) of arbitration	78
E. Arbitration and domestic courts.....	79
1. Legal basis for a claim in domestic courts	81

2. Mandatory recourse to domestic courts and administrative tribunals.....	82
3. Preventing duplicative claims: “Fork-in-the-Road” and “No-U-turn” clauses.....	86
F. Arbitrator selection and arbitrator challenges.....	91
1. Nomination procedures	91
2. Arbitrator qualifications	92
3. Ethical standards of impartiality and independence.....	93
4. Challenges to arbitrators	94
G. Claims by investors on their own behalf and on behalf of an enterprise.....	96
H. Frivolous claims	99
I. Provisional measures	105
1. Types of provisional measures.....	105
2. Tribunal-ordered interim measures	106
3. Court-ordered interim measures.....	107
4. Relationship between tribunal-ordered and court-ordered interim measures	108
J. Consolidation of claims	110
1. Pros and cons of consolidation.....	111
2. Premises for consolidation	112
3. Consolidation provisions in arbitration rules	112
4. Consolidation provisions in IIAs	113
K. Counterclaims by respondent States.....	115
L. Transparency of proceedings.....	121
1. Access to documents	123
2. Open hearings	124
3. <i>Amicus curiae</i> participation in the proceedings	125
M. Applicable substantive law.....	127
1. Treaty provisions on applicable law.....	127
2. Roles of the different sources of applicable law	131
3. Issues related to multiple applicable laws	134
N. States’ involvement in the interpretative process	138
1. Joint interpretation by the contracting parties	138
2. Interpretation through IIA institutional processes.....	139

3. Obligation of a tribunal to refer certain matters to the contracting parties	140
4. Intervention by non-disputing Party.....	141
O. Available remedies.....	143
P. Costs of arbitration	145
1. Arbitrator fees	146
2. Cost allocation: arbitral rules and practice	147
3. Cost allocation: IIA provisions	149
Q. Review of arbitral awards.....	150
1. Set-aside in national courts of non-ICSID Convention awards	151
2. Annulment of ICSID Convention awards	153
R. Enforcement of arbitral awards	156
S. MFN clause: impact on ISDS	162
T. “Umbrella” clauses and appropriate ISDS forums.....	164
1. Varying interpretations.....	165
2. Treaty solutions	167
III. OUTLOOK AND POLICY OPTIONS.....	169
A. Improving ISDS treaty provisions.....	169
1. Minimalist vs. detailed approach to ISDS provisions	170
2. Policy options on specific ISDS issues	171
B. Options for reforming the institutional structure of the ISDS system.....	191
1. Introducing an appeals facility	192
2. Creating a standing international investment court.....	194
C. Promoting alternative dispute resolution and dispute prevention policies	195
REFERENCES.....	198
CASES AND ARBITRAL AWARDS	206

SELECTED UNCTAD PUBLICATIONS ON INTERNATIONAL INVESTMENT AGREEMENTS, TRANSNATIONAL CORPORATIONS AND FOREIGN DIRECT INVESTMENT	212
QUESTIONNAIRE	223

FIGURES

Figure 1. Known ISDS cases.....	19
Figure 2. Distribution of known ISDS cases.....	65

TABLES

Table 1. Treaty examples of limitation periods.....	48
Table 2. Types of ISDS forums found in IIAs.....	62
Table 3. Main distinctions between the ICSID and UNCITRAL arbitration rules.....	70
Table 4. Summary of ISDS policy options.....	173

BOXES

Box 1. Examples of costs in ISDS cases.....	148
---	-----

ABBREVIATIONS

ADR	alternative dispute resolution
BIT	bilateral investment treaty
CAFTA	Central America Free Trade Agreement
CEPA	comprehensive economic partnership agreement
COMESA	Common Market for Eastern and Southern Africa
DPPs	dispute prevention policies
ECT	Energy Charter Treaty
FDI	foreign direct investment
FET	fair and equitable treatment
FTA	free trade agreement
GSP	generalized system of tariff preferences
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IIA	international investment agreement
IPFSD	Investment Policy Framework for Sustainable Development
ISDS	investor-State dispute settlement
LCIA	London Court of International Arbitration
MFN	most-favoured nation
NAFTA	North American Free Trade Agreement
PCA	Permanent Court of Arbitration
SCC	Stockholm Chamber of Commerce
TNC	transnational corporation
UNCITRAL	United Nations Conference on International Trade Law

EXECUTIVE SUMMARY

Investor-state dispute settlement (ISDS) is a regular feature of international investment agreements (IIAs). The existing body of treaties and arbitral decisions, both of which have grown considerably over the past years, provides ample material for analysing countries' approaches to ISDS across different IIAs and the application of the relevant rules in arbitral practice.

By creating a system for the settlement of disputes between investors and host governments, countries had sought to create a neutral forum that offers the possibility of a fair hearing before a tribunal unencumbered by domestic political considerations. In addition to serving as a de-politicized forum for resolving disputes, international arbitration was expected to offer other advantages such as potentially swifter, cheaper, and more flexible than other dispute settlement mechanisms. In addition, arbitral awards are readily enforceable in most jurisdictions under international treaties.

In practice, however, the actual functioning of ISDS under IIAs has led to concerns about systemic deficiencies in the regime. Most disputes in ISDS are not mere commercial disputes, but involve issues of public policy as measures challenged by investors increasingly involve matters such as environmental protection, public health, or other issues of public governance. Decisions on these matters are taken by arbitral tribunals convened on an *ad hoc* basis and many question the qualifications of the arbitrators and the propriety of their deciding what are essentially issues of public policy. Although ISDS has become more transparent over the years, not all awards are made public and the existence of

proceedings can be kept confidential if the parties so wish. In addition, the awards are often inconsistent and existing review mechanisms do not have the capability of reconciling divergent positions or of effectively correcting erroneous decisions. Finally, cases are frequently protracted and expensive.

These concerns have prompted a debate about the challenges and opportunities of ISDS (*World Investment Report 2013*), and some States have started responding to these concerns through innovations in their treaties' ISDS clauses.

This paper traces the most significant ISDS features found in IIAs and analyses the options that States have when they negotiate these agreements. Most IIAs have a similar structure, but at the same time display significant variations in regulating ISDS. This paper seeks to review treaty practices of different States and explain the rationale for, and implications of, particular treaty approaches to specific ISDS issues. This analytical approach is meant to inform future policy decisions so that the paper may be used as a toolkit for IIA negotiators.

Specific ISDS issues reviewed include:

- forms of giving or withholding consent to arbitration in an IIA;
- the scope of ISDS, identifying the types of disputes that can be submitted to arbitration;
- waiting periods and amicable settlement procedures, including alternative dispute resolution;

-
- various arbitral rules and forums, such as ICSID, UNCITRAL and others;
 - the relationship between international arbitration proceedings and related proceedings in domestic courts or administrative tribunals;
 - the appointment of arbitrators and challenges to arbitrators;
 - claims by foreign investors on their own behalf and on behalf of their subsidiary enterprises;
 - the treatment of frivolous claims;
 - the imposition of provisional measures (interim measures of protection) by tribunals;
 - the consolidation of related proceedings;
 - counterclaims by respondent States;
 - issues relating to transparency and confidentiality of proceedings;
 - the substantive law applicable to resolution of claims;
 - States' involvement in the interpretation of IIAs;
 - remedies available in ISDS proceedings;
 - the costs of arbitration;
 - review and annulment of arbitral awards;
 - the enforcement of arbitral awards;
 - the impact of the most-favoured-nation (MFN) treatment clause on ISDS; and
 - issues raised by claims submitted to ISDS under the IIA "umbrella" clauses.

Broadly speaking, States have taken two approaches to devising ISDS clauses in their IIAs. The first is a minimalist

(and more traditional) approach, exemplified by most bilateral investment treaties (BITs) concluded by European countries. It allows for a broad range of ISDS claims and contains few procedural specifications, leaving virtually all procedural aspects to be determined by the selected rules of arbitration or by the arbitrators, in exercise of their discretion. The second, more recent, approach features a more circumscribed scope for ISDS claims and more detailed procedural rules with a view to setting out clear conditions of investors' access to ISDS and in the interests of a more effective, predictable, legitimate and cost-effective process. Under this approach, a number of new elements are addressed by the treaty itself, as opposed to being left to “outside” arbitration rules or to interpretation by the arbitral tribunal.

States can choose how to combine specific elements in order to craft an ISDS regime tailored to their interests. Some elements are indispensable to the crafting of an operational ISDS provision (consent to arbitration, scope of the ISDS clause, available arbitration forums). Other issues are complementary and will depend on the specific policies and concerns of the States negotiating the IIA. Some States may choose to limit investor access to ISDS with a view to slowing down the proliferation of ISDS proceedings, reducing the risk of States' significant financial liabilities and saving resources. A far-reaching version of this approach would be to abandon ISDS as a means of dispute resolution altogether, as some countries have done. Other States may be content with the status quo.

Section 6 of UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD), as well as section III of

this Sequel, offers a number of options for States to choose from in this regard. It should be noted that qualifying and/or introducing limitations to ISDS provisions or entirely excluding them from an IIA can contribute to reducing the protective coverage of the treaty in question, and thereby, undermine its quality as an investment promotion tool.

Going beyond the design of ISDS in individual IIAs, and in light of the concerns that the current system is seen by many as lacking legitimacy and effectiveness, policy makers may wish to explore various avenues to achieve medium- and longer-term goals. Ideas such as the introduction of an appeals facility or the creation of a standing international investment court merit particular consideration and can be explored further. In addition, following the conventional wisdom that the best way to resolve a dispute is to avoid it altogether or resolve it at an early stage, an increased resort to methods of alternative dispute resolution (ADR) and dispute prevention policies (DPPs) may be beneficial. These ideas are also explored in UNCTAD's *World Investment Report 2013* which sets out "Five Paths of Reform" for ISDS.

In closing, it should be reiterated that the ISDS mechanism serves as an enforcement tool for the substantive commitments States undertake in their IIAs. It is, therefore, critically important to thoroughly assess and clarify the key concepts and provisions in IIAs, to carefully define the scope of the treaty and the meaning of each obligation and exceptions thereto. These are essential steps that should be taken alongside well-thought-through and clear ISDS clauses, in line with countries' policy priorities in this regard.

INTRODUCTION

Since the conclusion of the first bilateral investment treaty (BIT) in 1959, the number of agreements designed to regulate a host of issues related to foreign investment has risen to nearly 3,200 by the end of 2012. In addition to setting forth substantive obligations undertaken by the State parties, the vast majority of BITs, as well as other international investment agreements (IIAs),¹ contain provisions for the settlement of disputes between investors and the host State through international arbitration. These dispute settlement provisions accompany traditional State-State dispute settlement mechanisms, also commonly included in IIAs. Notwithstanding increasing criticism of investor-State dispute settlement (ISDS),² the great majority of treaties continue to permit investors to bring direct international claims against host States.³

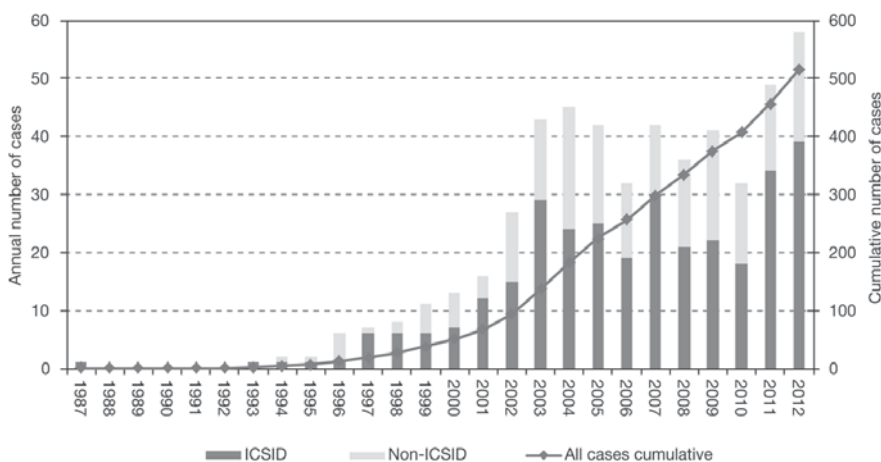
¹ “Other IIAs” (i.e. non-BIT IIAs) usually belong to one of the three different types. The first type consists of agreements that have investment chapters which include substantive obligations similar to those commonly found in BITs (e.g., free trade agreements, economic cooperation agreements and others). The second type consists of agreements with limited investment-related provisions, which usually focus on granting market access to foreign investors more than on the protection of investments after they are established. The third type only deals with investment cooperation, which may involve, for example, investment promotion activities, or record an intention to negotiate substantive commitments on investments in the future. Only “other IIAs” of the first type commonly include investor-State dispute settlement provisions.

² See, e.g., Waibel *et al.*, 2010; Eberhardt and Olivet, 2012; UNCTAD, 2013b, pp. 111–112.

³ According to an OECD study that examined 1,660 BITs, only 6.5 per cent of them do not provide for investor-State arbitration. (OECD, 2012, p.11). Recent examples of IIAs without ISDS provisions are the Australia-United

The number of investment disputes continues to rise. In 2012, the number of known treaty-based ISDS cases grew by 58, bringing the total known number of treaty-based cases to 514 at the end of that year.⁴ This constitutes the highest number of known treaty-based disputes ever filed in one year, with the general trend being 30–40 new cases annually since 2002 (figure 1). This is not altogether surprising given the large number of BITs now in force that provide for ISDS.

Figure 1. Known ISDS cases (cumulative, as of end 2012)



Source: UNCTAD

Developing countries continue to be the most frequent respondents in cases submitted to arbitration under IIAs, but

States FTA (2004), the Japan-Philippines EPA (2006) and the Australia-Malaysia FTA (2011).

⁴ UNCTAD, 2013a.

developed countries and economies in transition also have faced a large number of disputes.⁵

Against this background, it is not surprising that States continue to evaluate ISDS provisions in their agreements. Many ISDS provisions have grown in sophistication and complexity as States attempt to respond to problems they have encountered when arbitrating investor-State disputes under previously-concluded IIAs. Specifically, States have sought to increase the control they exercise over arbitration procedures, promote judicial economy, clarify the powers of arbitral tribunals and enhance the legitimacy of ISDS. A few countries have taken steps to remove themselves from the ISDS system altogether.⁶

At the same time, ISDS remains a regular feature in investment treaties and is viewed by many countries as a cornerstone of investment protection. It serves as a procedural enforcement mechanism for the core substantive provisions of the treaty. It is important for each government to fully understand the features and implications of the ISDS system and to make informed choices in order to tailor it, where desired, to the country's policy objectives.

This sequel to the first UNCTAD paper on ISDS⁷ does *not* address the fundamental question of whether an IIA should give

⁵ At least 95 governments have faced investor-State arbitration: 61 developing countries, 18 developed countries and 16 countries with economies in transition (*Ibid.*, annex 2).

⁶ Australia's government, in April 2011, issued a policy statement concluding that ISDS was neither necessary nor desirable and that Australia would no longer include it in its investment treaties. Three countries have denounced the ICSID Convention — the Plurinational State of Bolivia in 2007, Ecuador in 2009 and the Bolivarian Republic of Venezuela in 2012. The same three countries, and also South Africa, have also renounced some of their investment treaties.

⁷ UNCTAD, 2003.

investors direct access to international arbitration against host States. This is, however, a key initial decision to make, and contracting parties to a particular IIA should consider it carefully, weighing the pros and cons. Should they decide to include an ISDS mechanism in the treaty, this sequel can help to shape and tailor it in ways that would meet their requirements and policy objectives.

The sequel aims to systematically analyse the components of ISDS and to take stock of developments in the relevant IIA provisions. Most IIAs have a similar structure, yet provisions in different treaties often vary significantly. Those variations often have a significant effect on issues such as the breadth of the host State's consent to arbitration, venues where arbitration can be held, remedies available to claimants and many others. This paper seeks to explain the rationale for, and implications of, particular treaty approaches to relevant ISDS issues. Many of these issues are legal and technical in character; however, they may make a significant difference in specific disputes. The sequel's analytical approach is meant to inform future policy decisions so that the paper may serve as a toolkit for IIA negotiators.⁸ In its closing section, the paper puts this technical discussion into the broader context and outlines five paths for the reform of the ISDS system.⁹

This paper is structured as follows. *Section I* briefly sets out the historical background of ISDS, and then identifies the salient features of the system and the main criticisms of it. *Section II* undertakes a review of treaty practice with respect to individual ISDS issues, such as consent to arbitration, the scope of ISDS, available dispute settlement forums, frivolous claims, applicable substantive law, the role of States in the interpretative process, remedies, and many others. It seeks to identify the rationales for,

⁸ Another useful tool is *International Investment Agreements Negotiators Handbook: APEC/UNCTAD Modules* (APEC, 2013).

⁹ See also UNCTAD, 2013b, pp. 112–117.

and implications of, particular treaty approaches to individual issues, and also to examine how IIAs have responded to problems revealed by the arbitral practice of the past decade. *Section III* sets out a menu of policy options for IIA negotiators and takes a broader look at the current state of the ISDS system in order to highlight possible improvements and alternatives. In this respect, the paper builds upon UNCTAD's *Investment Policy Framework for Sustainable Development (IPFSD)* and *World Investment Report 2013*.

I. EXPLANATION OF THE ISSUE

A. Historical context

States started to include ISDS in their investment treaties in the late 1960s and early 1970s; by the 1990s this treaty element had become standard. Without ISDS, a foreign investor had two avenues to pursue if a host State expropriated its property or otherwise interfered with its investment. The first was to seek relief in the local courts or administrative tribunals of the host State. Investors seeking such redress often encountered problems — such as domestic sovereign immunity or a non-independent judiciary that could be influenced by the host State's political officials — which prevented them from securing recovery for their losses.

Secondly, if domestic courts were ineffective, a foreign investor's remaining hope was to convince its home government to espouse its claim (i.e. exercise diplomatic protection).¹⁰ For investors from "powerful" States this could be an effective weapon; yet even "powerful" States would often prove reluctant to intervene on behalf of an investor should higher political considerations dictate. For a small investor lacking political clout in a discrete dispute, the hurdle to obtain espousal could be very high indeed. Even if an investor did obtain espousal, the claim would then belong to the investor's home State, which could decide how to prosecute it and even whether to settle. Further, proceeds from the dispute would technically belong to the State, rather than the investor. Moreover, transnational corporations (TNCs) with affiliates in numerous countries (each possessing, in all probability, a different legal nationality) and a highly international shareholder profile might find it difficult to accurately define the firm's nationality for the purposes of establishing the right of diplomatic protection.

¹⁰ See Borchard, 1915.

Through ISDS, countries sought to create a neutral forum that would offer investors the possibility of a fair hearing before a tribunal unencumbered by domestic political considerations and able to focus on the legal issues in the dispute. ISDS also offered investors the possibility of submitting a claim to international arbitration without the need to convince their home State to espouse the claim. Host States with less political power saw neutral dispute settlement as a better alternative than submitting to the strong-arm tactics of a powerful home State. Advance consent to this form of adjudication, given by States in IIAs, solved the problem of sovereign immunity.

The goal of establishing a neutral forum for ISDS led to the conclusion in 1965 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). The ICSID Convention established an “a-national” forum — the International Centre on Settlement of Investment Disputes (ICSID) — to administer disputes between investors and host States.

IIAs often include ICSID arbitration as one of the options for hearing an investment dispute, but many treaties permit arbitration under other arbitral rules as well (see section II.D.1).

B. Salient features of ISDS and criticisms of it

In addition to serving as a de-politicized forum, international arbitration was expected to offer other advantages for settling investor-State disputes. Investors could have their claims heard by an independent and qualified tribunal and be assured of adjudicative neutrality and independence. Both parties could exercise control over the procedure by selecting arbitrators according to their expertise in the issues likely to arise in the case. Arbitration is often described as swifter, cheaper, and more flexible than other dispute settlement mechanisms. In addition, arbitral awards are readily enforceable in most jurisdictions under the ICSID Convention and

under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. And, finally, international arbitration had been used for centuries to resolve international commercial disputes.

However, the actual functioning of ISDS under investment treaties has led to concerns about systemic deficiencies in the regime. They have been well documented in literature and can be summarized as follows.¹¹

Legitimacy and transparency. In many cases foreign investors have used ISDS claims to challenge measures adopted by States in the public interest (for example, policies to promote social equity, foster environmental protection or protect public health). Questions have been raised whether three individuals, appointed on an *ad hoc* basis, have sufficient legitimacy to assess the validity of States' acts, particularly if the dispute involves sensitive public policy issues.

Host countries have faced ISDS claims of up to \$114 billion¹² and awards of up to \$1.77 billion.¹³ Although in most cases the amounts claimed and awarded are lower than that, they can still exert significant pressures on public finances and create potential

¹¹ See further, M. Waibel *et al.*, 2010; Gaukrodger and Gordon, 2012; Eberhardt and Olivet, 2012; UNCTAD, 2013, pp. 111–112.

¹² This figure is the aggregate amount of compensation sought by the three claimants constituting the majority shareholders of the former Yukos Oil Company in the ongoing arbitration proceedings against Russia. See *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228.

¹³ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012.

disincentives for public-interest regulation, posing obstacles to countries' sustainable economic development.

In addition, even though the transparency of the system has improved since the early 2000s,¹⁴ ISDS proceedings can still be kept fully confidential — if both disputing parties so wish — even in cases where the dispute involves matters of public interest.¹⁵

Further concerns relate to so-called “nationality planning”, whereby investors structure their investments through intermediary countries with the sole purpose of benefitting from IIAs, including their ISDS mechanism.

Arbitral decisions: problems of consistency and erroneous decisions. Those arbitral decisions that have entered into the public domain have exposed recurring episodes of inconsistent findings. These have included divergent legal interpretations of identical or similar treaty provisions as well as differences in the assessment of the merits of cases involving the same facts. Some legal standards,

¹⁴ See for example, the 2006 amendments to the ICSID Arbitration Rules and the 2013 rules on transparency in ISDS proceedings adopted by UNCITRAL. In the case of UNCITRAL, the new rules have a limited effect in that they are designed to apply not to all future arbitrations but only to arbitrations under future IIAs. At the same time, UNCITRAL instructed the relevant working group to consider the possibility of an international convention that would extend the new UNCITRAL transparency rules to ISDS proceedings under *existing* IIAs — in respect of those States who join the convention.

¹⁵ This applies to cases brought under arbitration rules other than ICSID (only ICSID keeps a public registry of arbitrations) and that do not involve Canada or the United States, each of which makes publicly available detailed information about all cases brought against it. It is indicative that of the 85 cases under the UNCITRAL Arbitration Rules administered by the Permanent Court of Arbitration (PCA), only 18 were public (as of end 2012). *Source:* the Permanent Court of Arbitration International Bureau. See further UNCTAD, 2012c.

such as the obligation to provide fair and equitable treatment (FET), are at a relatively high level of abstraction and can give rise to different interpretations. Inconsistent interpretations have led to uncertainty about the meaning of key treaty obligations and a lack of predictability of how they will be applied in future cases.¹⁶

Erroneous decisions are another concern: arbitrators decide important questions of law without the possibility of effective review. Existing review mechanisms, namely, the ICSID annulment process or national-court review at the seat of arbitration (for non-ICSID cases), operate within narrow jurisdictional limits. It is noteworthy that an ICSID annulment committee may find itself unable to annul or correct an award, even after having identified “manifest errors of law”.¹⁷ Furthermore, given that annulment committees — like arbitral tribunals — are created on an *ad hoc* basis for the purpose of a single dispute, they may also arrive (and have indeed arrived) at inconsistent conclusions, thus further undermining predictability of international investment law.

Arbitrators: concerns about party appointments and undue incentives. An increasing number of challenges to arbitrators may indicate that disputing parties perceive them as biased or predisposed to a particular outcome, despite the fact that arbitrators

¹⁶ Sometimes, divergent outcomes can be explained by the differences in wording of a specific IIA applicable in a particular case; however, often they represent differences in the views of individual arbitrators.

¹⁷ See *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the application for annulment, 25 September 2007, paras. 97, 127, 136, 150, 157–159. Article 52(1) of the ICSID Convention enumerates the following grounds for annulment: (a) improper constitution of the arbitral Tribunal; (b) manifest excess of power by the arbitral Tribunal; (c) corruption of a member of the arbitral Tribunal; (d) serious departure from a fundamental rule of procedure; or (e) absence of a statement of reasons in the arbitral award.

are subject to ethical rules requiring independence and impartiality. Particular concerns have arisen from a perceived tendency of each disputing party to appoint individuals sympathetic to their case. Arbitrators' interest in being re-appointed in future cases and their frequent "changing of hats" (serving as arbitrators in some cases and counsel in others) amplify these concerns.¹⁸

Cost- and time-intensity of arbitrations. Actual ISDS practice has put into doubt the oft-quoted notion that arbitration represents a speedy and low-cost method of dispute resolution. On average, costs, including legal fees (which on average amount to approximately 82% of total costs) and tribunal expenses, have exceeded \$8 million per party per case.¹⁹ For any country, but especially for poorer ones, this is a significant burden on public finances. Even if the government ends up winning the case, tribunals have mostly refrained from ordering the claimant investor to pay the respondent's costs. At the same time, high costs are also a concern for investors, especially small- and medium-sized enterprises.

Large law firms, who dominate the field, tend to mobilise a team of attorneys for each case who charge high rates and employ expensive litigation techniques, which include intensive research on each arbitrator candidate, far-reaching and burdensome document discovery and lengthy arguments about the minutest case details.²⁰ The fact that many legal issues remain unsettled contributes to the need to invest extensive resources to develop a legal position by closely studying numerous previous arbitral awards. Some of the same reasons are also responsible for the long duration of arbitrations, most of which take several years to conclude. It is not

¹⁸ For further details, see Gaukrodger and Gordon, 2012, pp. 43–51.

¹⁹ *Ibid.*, p. 19.

²⁰ Lawyers' fees may in some instances reach as high a figure as \$1,000 per hour for senior partners in top-tier law firms. *Ibid.*, pp. 19–21.

altogether surprising that disputes take some time to resolve; they tend to be factually and legally complex. Yet it is also true that investment arbitration does not offer a speedy alternative to local dispute resolution.

Innovations in treaties' ISDS provisions have been designed to address some of these concerns. The relevant treaty practice is reviewed in section II. Section III highlights some further paths for a systemic reform of ISDS that go beyond modifications to individual IIAs.

II. STOCKTAKING AND ANALYSIS

This section reviews essential institutional and procedural aspects of the ISDS system. It identifies main treaty approaches to each specific issue, seeking to explain their rationale as well as their implications in arbitral practice.

Treaty language addressing ISDS has been undergoing a significant evolution. A number of countries have been moving away from the minimalistic regulation of ISDS — confined to one relatively short article (traditional for BITs concluded by Western European countries) — towards more detailed coverage of various ISDS issues (typical of the North American Free Trade Agreement’s (NAFTA) Chapter 11 and NAFTA-inspired IIAs). A number of recent treaties have taken a median position between these two approaches: such treaties address the ISDS issues which are important to the contracting parties to the specific treaty.

Any IIA that includes the ISDS mechanism is bound to regulate a number of *primary*, or fundamental, issues. These include consent to arbitration and the conditions attached thereto, the scope of ISDS and arbitral forums available to investors. Other ISDS-related issues may be referred to as *secondary*, or optional. The relevant secondary issues include, in particular, “fork-in-the-road” or “no-U-turn” provisions, applicable substantive law, appointment of arbitrators, frivolous claims and preliminary objections, provisional measures, consolidation of claims, the role of States in the interpretative process, the limitation of remedies available to the claimants and others. A treaty may address them, but if it does not, this will not paralyze the ISDS mechanism.

States might find that it is in their best interest to address at least some of these secondary issues if they wish to enhance their control over the arbitral process, foster the effectiveness and legitimacy of the ISDS mechanism and/or prevent undesirable consequences. When a particular treaty does not address certain secondary issues,

they will often be governed by the applicable arbitral rules, such as the ICSID Convention and its associated arbitration rules²¹ and United Nations Commission on International Trade Law (UNCITRAL) rules, which are the two mechanisms used most frequently in ISDS. The remainder of this section takes up individual ISDS issues, both primary and secondary.

A. Consent to arbitration

International arbitration is a voluntary and consent-based method of settling disputes. This means that both disputing parties must give their prior consent to arbitration to enable an arbitral tribunal to hear and decide their dispute.

The host State's consent to arbitration is usually expressed in one of three places. The first is in a contract between the foreign investor and the host State. The second is in national legislation regarding foreign investment. The third is in an IIA between the host State and the home State of a foreign investor. Of late, IIAs have been the main source of States' consent, with the majority of investor-State disputes brought pursuant to ISDS provisions in IIAs. The rest of this section will thus focus on IIAs.

1. Approaches to consent in IIAs

Given that IIAs are agreements concluded between States, only States (not investors) can give their consent to arbitration in an IIA itself. According to the leading school of thought, the relevant clauses in IIAs represent a *unilateral offer of consent* to arbitration by the contracting States, which can be accepted by the other party

²¹ Both of the States party to the IIA must be party to the ICSID Convention in order for its mechanism to be available to resolve a dispute under the IIA.

to the dispute, i.e. an investor.²² Investors typically express their consent to arbitration by filing a request for arbitration. When this happens, the consent is “perfected” and can no longer be revoked unilaterally.

From the point of view of a State’s consent, IIAs can be classified into several groups, examined below.

(i) **Explicit consent**

One approach is to give explicit consent to arbitration, as illustrated in the Kenya-Slovak Republic BIT (2011):

“Article 10

Disputes between an Investor and a Contracting Party

[...]

*5. Each Contracting Party **hereby gives its unconditional consent** to the submission of a dispute between it and an investor of the other Contracting Party to arbitration in accordance with this Article.”* (Emphasis added).

(ii) **Implicit consent**

Some treaties do not contain an explicit reference to consent, yet the implication of consent is clear, as shown by this example from the Chile-Indonesia BIT (1999):

“Article IX. Settlement of Disputes between a Contracting Party and an Investor of the other Contracting Party

(1) With a view to an amicable solution of disputes, which arise within the terms of this Agreement, between a Contracting Party and an investor of the other Contracting

²² Paulsson, 1995, pp. 236–241, 255–257.

Party consultations and negotiations will take place between the parties concerned.

*(2) If these consultations and negotiations do not result in a solution within four months from the date of a written notification [sic] for settlement, **the investor may submit the dispute** either:*

(a) to the competent tribunal of the Contracting Party in whose territory the investment was made, or

(b) to international arbitration of the International Centre for Settlement of Investment Disputes (ICSID) [...].” (Emphasis added).

The ICSID Convention requires that the disputing parties unambiguously intend to submit their dispute to ICSID. This requirement is fulfilled if, as in the above example, the treaty provision allows the foreign investor to submit the case to arbitration. Therefore, although the provision does not expressly set out the contracting Parties’ consent to arbitration, the consent is inferred from the language.

(iii) Agreement to provide consent in the future

Some IIAs provide that a State “shall agree” to give its consent in the future. For example, the 1998 BIT between Australia and Lithuania provides in Article 13 that if an investor of one Party refers a claim to arbitration before ICSID, “*the other Party shall consent in writing to the submission of the dispute to the Centre within thirty days of receiving such a request from the investor [...].*” Read narrowly, this clause means that the arbitration forum shall not have jurisdiction until the contracting party involved gives its consent. Refusing to give such consent, however, would be a violation of the BIT and would give rise to State-to-State dispute settlement. Further, an investor-State tribunal might rule that it had jurisdiction notwithstanding the failure of the State to give explicit

consent due to the apparently unequivocal nature of the obligation undertaken in the treaty to provide consent in the future.

(iv) Reservation of consent to arbitration

In some treaties States explicitly withhold their consent to arbitration. The BIT between Argentina and New Zealand (1999) is an example:

“Article 12. Disputes between a Contracting Party and an investor of the other Contracting Party

[...]

(3) In the case of international arbitration, unless the parties to the dispute agree otherwise, the dispute shall be submitted to either:

(a) The International Centre for the Settlement of Investment Disputes (ICSID) [...] or,

(b) If both parties to the dispute agree, arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law, as then in force.

(4) Paragraph (3) of this Article shall not constitute, by itself, the consent of the Contracting Party required in Article 25(1) of the [ICSID] Convention [...].” (Emphasis added).

Thus, under this type of provision, an investor cannot initiate arbitral proceedings on the basis of the BIT alone. In order to do so, the investor must obtain the consent of the host State in relation to the specific dispute concerned. This approach gives host States full control in deciding which investment disputes they wish to settle through international arbitration.

2. Conditions upon which State consent is granted

An IIA may make a State's consent subject to certain conditions. Some treaties require that an investor (i) seek relief in one forum only (usually via a “fork-in-the-road” provision);²³ (ii) seek relief in only one forum at a time (i.e., it must waive the right to pursue domestic litigation once it has started an international arbitration);²⁴ or (iii) pursue local remedies before arbitration.²⁵ Failure to comply with these conditions may foreclose the investor's ability to obtain relief in international arbitral proceedings.

The 2012 United States Model BIT, for example, provides: “*Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Treaty.*” (Article 25(1), emphasis added.) This language is found in many BITs and FTAs concluded by the United States and has been the basis for arguments, sometimes successful, that the treaty's procedural requirements must be satisfied in order for a tribunal to have jurisdiction. For example, in *Railroad Development Corporation v. Guatemala*, brought under the DR-CAFTA, the claimant's waivers of its right to initiate or continue arbitration in other forums were deficient, and the tribunal held that these deficiencies precluded the perfection of the consent to arbitration.²⁶ In other cases, however, particularly when deficiencies could be easily remedied, tribunals have been less strict about requiring precise compliance with the conditions States have imposed on their consent to arbitration. In many early NAFTA cases, for example, the respondent States argued to no avail that the claimants had failed to seek an amicable settlement, that the time periods governing the submission of the

²³ See section II.E.3.ii.

²⁴ See *ibid.*

²⁵ See section II.E.3.i.

²⁶ *RDC v. Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction: CAFTA Article 10.20.5, 17 November 2008, para. 56.

notice of intent to submit a claim to arbitration and the notice of arbitration had not been satisfied, and that the notice of arbitration had been impermissibly amended after it had been filed.²⁷

The more explicit the language in the treaty is, the more likely a tribunal will require strict compliance with the conditions upon which a respondent State offered its consent to arbitration. Canada, for example, has put very clear language in Article 26(5) of its 2004 Model BIT: “*Failure to meet any of the conditions precedent provided for in paragraphs 1 through 3 shall nullify the consent of the Parties given in Article 28 (Consent to Arbitration).*”

3. Consent to different arbitration forums/rules

The State’s offer to arbitrate will often identify two or more possible sets of arbitration rules under which the arbitration may be conducted. The investor will make its preferred choice when it submits a claim to arbitration. Various forums and arbitration rules available under IIAs are examined in more detail in section II.D below.

4. Duration of consent

IIAs typically include so-called “survival clauses”, which guarantee that the provisions of the treaty remain in effect for a specified period of years — 5, 10, and sometimes 15 or even 20 years — after its termination.²⁸ Thus, even though a State may

²⁷ Kinnear, Bjorklund and Hannaford, 2009, pp. 1122–1125.

²⁸ Note that where an investment chapter is integrated into a broader economic agreement, such as an FTA, it sometimes does and sometimes does not include a survival clause. See, for example, the India-Korea Comprehensive Economic Partnership Agreement (CEPA) (2009), which includes a survival clause in Article 10.22, and the Canada-Chile FTA (2008), which contains only a general provision that either Party can terminate the agreement on six months’ notice in Article P-05.

unilaterally terminate an IIA, its consent to investor-State arbitration will not usually terminate at the same time.

A different issue is raised by a State's decision to withdraw from the ICSID Convention. In fact, recent withdrawals by three States (the Plurinational State of Bolivia, Ecuador and the Bolivarian Republic of Venezuela) from ICSID have given rise to the question of whether these States remain bound by the Convention only in relation to disputes initiated before their withdrawal became effective, or also in relation to *future* disputes as long as the State's consent to ICSID arbitration remains in the country's IIAs. The former is clear: so long as consent to the arbitration was perfected before the withdrawal became effective, an ICSID tribunal would have jurisdiction. The latter is more controversial. Interpreting the IIAs' offer to arbitrate under the ICSID Convention as irrevocable for purposes of claims brought under that IIA would effectively mean that for a State to prevent future ICSID claims, it must not only terminate the ICSID Convention but also terminate all of its IIAs that contain an ICSID arbitration option. To date, this question has not been addressed by an arbitral tribunal. Even though there are good reasons to believe that after withdrawing from ICSID new arbitration claims cannot be initiated against the withdrawing State in that forum, there is still some uncertainty in this respect.²⁹

B. Scope of ISDS

A State's offer to arbitrate found in an investment treaty has certain limits. IIAs vary as to the types of disputes that States have agreed to submit to arbitration. The scope of ISDS is determined in different places in the agreement and may take various forms. For example, there are provisions that specifically delineate the scope of

²⁹ For a full discussion of this issue, see UNCTAD, 2010b.

the ISDS provisions. There are also broader provisions that set forth the scope of the treaty as a whole. These provisions work together to demarcate the disputes a tribunal has the authority to hear.

In recent IIAs, States have been asserting a greater degree of control over the disputes that can be brought against them — thereby enhancing predictability — by adding and tailoring provisions that delimit the scope of the agreement and of the ISDS mechanism.

This chapter groups relevant issues into the following sections:

1. Core provisions determining the scope of ISDS;
2. Additional provisions that limit the scope of ISDS; and
3. Provisions determining the scope of the treaty.

1. Core provisions determining the scope of ISDS

States have taken a variety of approaches to delineating the types of disputes that will be subject to ISDS. These range from very broad language submitting “all disputes” to arbitration to a much narrower category.

(i) All disputes

Some IIAs extend ISDS to all kinds of disputes arising between an investor and the host contracting party. For example, Article 139 of the China-Peru Free Trade Agreement (FTA) (2009) enables an arbitral tribunal to hear “[a]ny *dispute between an investor of one Party and the other Party in connection with an investment in the territory of the other Party*” (emphasis added). This approach is very common, notwithstanding some differences in detail. For instance, IIAs may provide that the ISDS procedures apply to disputes “*arising out*” of an investment, “*with respect to*” an investment, “*concerning*” an investment or “*related to*” an investment. All of these formulations may be sufficiently broad to

include disputes *not* involving an alleged violation of the IIA. Depending on other limitations on a tribunal's authority, such as those that might be found in the applicable law clause, these disputes could include alleged violations of customary international law, investment contracts and possibly even the domestic law of the host State.

(ii) Claims alleging a violation of an IIA

Other ISDS clauses are worded more narrowly and refer only to those disputes where an investor alleges the breach of the treaty. For example, the India-Republic of Korea FTA (2009), Article 10.21, provides:

*“This Article shall apply to disputes between a Party and an investor of the other Party **concerning an alleged breach of an obligation of the former Party** under this Chapter, which causes loss or damage to the investor or its investments.”*
(Emphasis added).

This is a more circumscribed formulation that precludes a tribunal's jurisdiction over those non-treaty-based claims that reference to “all disputes” may allow. The causes of action that a tribunal will have jurisdiction over will ordinarily be those obligations found in the investment agreement, such as the obligation to accord national treatment to investments, to accord fair and equitable treatment, and to expropriate property only upon payment of compensation and certain other conditions. In addition, it imposes the requirement that State conduct must cause loss or damage to the investor, a condition that must ordinarily be met in any case for an investor to be entitled to compensation.

(iii) Naming specific obligations that can be subject to ISDS

Some treaties identify, by means of a positive list, specific obligations whose violation can be a cause of action in an investor's

claim. This list can be broad or narrow, depending on the agreement of the contracting parties. For example, Article 22 of the Canada-Jordan BIT (2009) enumerates those IIA obligations for which an investor can claim a breach. This list does *not* include Article 6(3), which governs temporary entry of the other Party's nationals in certain categories of employment, Article 11 "Health, Safety and Environmental Measures" or Article 19 "Transparency".

A few BITs contain a narrow ISDS provision that covers only one obligation — to pay compensation for expropriation of an investment. Thus, the Mauritius-Swaziland BIT (2000) provides:

"Article 8. Settlement of disputes between an investor and a Contracting Party

[...]

(3) If a dispute involving the amount of compensation resulting from expropriation, nationalisation, or other measures having effect equivalent to nationalisation or expropriation, mentioned in Article 6 cannot be settled within six months after resort to negotiation as specified in paragraph (1) of this Article by the investor concerned, it may be submitted to an international arbitral tribunal established by both parties." (Emphasis added).

(iv) Claims alleging a violation of an IIA, investment contract or investment authorization

A number of IIAs, in particular those concluded by the United States, contain ISDS provisions that are not limited to allegations of treaty breaches but at the same time avoid an open-ended reference to "all" or "any" disputes. The Singapore-United States FTA (2003) provides an illustration:

"Article 15.15: Submission of a Claim to Arbitration

[...]

(a) *the claimant, on its own behalf, may submit to arbitration under this Section a claim:*

(i) *that the respondent has breached*

(A) *an obligation under Section B,*

(B) *an investment authorization, or*

(C) *an investment agreement; and*

(ii) *that the claimant has incurred loss or damage by reason of, or arising out of, that breach”*

This provision explicitly mentions three causes of action — breach of the treaty, breach of an investment authorization and breach of an investment contract. The treaty defines the terms “investment authorization” and “investment agreement”.³⁰ Thus, this is a median approach between the broad scope (“all disputes relating to an investment”) and the approach limiting arbitrable disputes to those involving an alleged violation of the IIA. It contains a closed list of permitted causes of action under the ISDS mechanism.

2. Additional provisions limiting the scope of ISDS

Some IIAs apply further techniques to circumscribe the scope of ISDS. They are reviewed in turn.

³⁰ “**Investment authorization** means an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of the other Party”;

“**investment agreement** means a written agreement [...] between a national authority of a Party and a covered investment or an investor of the other Party (i) that grants rights with respect to natural resources or other assets that a national authority controls, and (ii) that the covered investment or the investor relies on in establishing or acquiring the covered investment” (Article 15.1, footnotes omitted).

(i) Exclusion of disputes in a particular sector or industry

There may be sensitive industries or sectors in relation to which a State does not wish to forego the jurisdictional monopoly of its national courts. Those sectors can be explicitly excluded from the scope of ISDS. For example, Article 9(4) of the Turkey Model BIT (2009) does that in relation to disputes concerning real estate:

“[T]he disputes, related to the property and real rights upon the real estates [sic] are totally under the jurisdiction of the Turkish courts and therefore shall not be submitted to jurisdiction of the International Center for Settlement of Investment Disputes (ICSID) or any other international dispute settlement mechanism.”

Some IIAs specify a limited number of provisions under which investors in a particular sector or industry can make claims. For instance, while the Canada-Jordan BIT (2009) does not totally exclude financial institutions and investments therein from ISDS claims, it greatly reduces the number of obligations that can serve as a cause of action in this sector:

“Article 21

Limitation of Claims with Respect to Financial Institutions

With respect to:

*(a) **financial institution** of a Party; and*
*(b) investors of a Party, and investments of such investors, in **financial institutions** in the other Party’s territory, this Section [on ISDS] applies only in respect of claims that the other Party has breached an obligation under **Articles 13 [“Expropriation”], 14 [“Transfers”], or 18 [“Denial of Benefits”]**.” (Emphasis added).*

(ii) Exclusion of disputes in a particular regulatory area or relating to specific obligations

States will exclude from the scope of their IIAs those areas where countries wish to preserve full regulatory autonomy, subject to the control of national courts. For example, Annex IV “Exclusions from Dispute Settlement” of the Canada-Jordan BIT (2009) excludes from arbitral review: decisions taken under the Investment Canada Act relating to acquisitions that are subject to review; decisions relating to the administration or enforcement of Canada’s Competition Act; and decisions under certain Jordanian regulations regarding participation in large development projects.

Some treaties exclude certain obligations from the scope of ISDS. Thus, the Malaysia-Pakistan Closer Economic Partnership Agreement (2007) excludes all disputes concerning national treatment and performance requirements:

“This Article [on ISDS] shall not apply to any dispute arising between a Party and an investor of the other Party on any right or privileges conferred or created by Article 89 [National Treatment] and 92 [Performance Requirements].”
(Article 98(13), emphasis added)

This means that a foreign investor may not use ISDS to seek redress for an alleged violation of the named obligations by the host State. These obligations are thus subject to State-State dispute settlement only, or to resolution by local courts in Malaysia and Pakistan, assuming they are able to consider claims based on international law.

The Belgium/Luxembourg-Colombia BIT (2009) provides in Article VII(5) that the dispute settlement measures of the agreement “shall not apply to any obligation undertaken in accordance with [Article VII, which deals with environmental protection]”. In particular, Article VII(4) provides:

“Nothing in this Agreement shall be construed [so] as to prevent a Contracting Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that an investment activity in its territory is undertaken in accordance with the environmental law of the Party.”

Another area that has been excluded from some recent treaties is of special relevance given the financial crises that many countries had gone through in the early 21st century. Specifically, a treaty may fully exclude, or narrow down, causes of action for claims relating to sovereign debt obligations, in order to limit State exposure to investor claims in case of debt default and/or restructuring.³¹ Thus, an annex to the Peru-Republic of Korea FTA (2011) provides *“an investor of the other Party may not submit a claim under the ISDS Chapter that a restructuring of debt issued by a Party breaches an obligation under this Chapter (other than Article 9.3 or 9.4) [national treatment and most-favoured-nation treatment].”*

In a somewhat similar fashion, many IIAs preserve the authority of host States to take acts essential to their **national security** interests.³² Some of those treaties make it clear that the national security provision is “self-judging”: the State is entitled to take measures “it considers necessary” to preserve its essential security interests. Even confronted with such a clause, however, some tribunals have concluded that a State’s action must be reviewed against the principle of good faith. Some agreements have sought to eliminate the possibility of the good-faith review too. For example, certain IIAs concluded by India expressly deprive tribunals of the power to review measures that are allegedly taken on national

³¹ See further UNCTAD, 2011e.

³² This is often done by way of a “non-precluded-measures” clause, which usually states that nothing in the treaty precludes a State’s resort to measures necessary for achieving certain objectives listed in the provision. See UNCTAD, 2009, pp. 96–109.

security grounds.³³ Thus, Article 6.12 of the India-Singapore Comprehensive Economic Cooperation Agreement (2005) entitles each Contracting Party to derogate from any investment protection obligation by taking actions which the Party considers necessary for the protection of its essential security interests. A special annex to the Investment chapter further provides that when a respondent State invokes the security exception to justify the measure being challenged by the claimant, a tribunal cannot question the validity of this invocation:

“Annex 5. Non-justiciability of Security Exceptions

1. The Parties confirm the following understanding [...]:

*(a) in respect of disputes submitted to arbitration [...], where the disputing Party asserts as a defence that the measure alleged to be a breach is within the scope of a security exception as set out in Article 6.12 of the Agreement, any decision of the disputing Party taken on such security considerations **shall be non-justiciable in that it shall not be open to any arbitral tribunal to review the merits of any such decision**, even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation, or an adjudication of any other issues referred to the tribunal.”*
(Emphasis added).

It follows from this formulation that any measure falling within the scope of the security exceptions, as outlined in Article 6.12, is immune from being questioned by a tribunal. The intent of the

³³ This is also true of recent United States IIAs. The Peru-U.S. FTA contains a footnote to its essential security provision that says, “*For greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies.*”

provision is that any such measure will be automatically excused, will not be subject even to good-faith review, and will not give rise to a claim for damages. This approach potentially allows a State to justify *any* measure so long as it maintains that there is a connection between the measure and the protection of security interests.³⁴ It is as yet unclear how this approach will work in practice.

(iii) Exclusion of “pre-establishment” issues

Traditional investment treaties are of the “post-establishment” type; they apply to investments *after* the latter are established in the host State. Under such treaties, States retain full discretion in the matter of admitting investments. By contrast, a growing number of IIAs include — in addition to post-establishment protections — *pre*-establishment obligations that guarantee non-discriminatory access to the host country market to investors from the other contracting party. However, some of these pre-establishment IIAs have nevertheless excluded certain pre-establishment issues from the scope of ISDS. The Japan-Mexico FTA (2004) provides an example:

“Article 95. Exceptions from Dispute Settlement Procedure

1. Without prejudice to the applicability or non- applicability of the dispute settlement provisions of this Section or of Chapter 15 to other actions taken by a Party pursuant to Article 169, a decision by a Party to prohibit or restrict the acquisition of an investment in its Area by an investor of the other Party, or its investment, pursuant to that Article shall not be subject to such provisions.

³⁴ The security exception itself is drafted in a rather detailed manner and does not leave much room for extensive interpretation. An additional Annex 4, “Security Exceptions for Investment”, further clarifies the scope of the exception.

2. *In the case of Mexico, the dispute settlement provisions of this Section and of Chapter 15 shall not apply to a decision by the National Commission on Foreign Investment (“Comision Nacional de Inversiones Extranjeras”) following a review pursuant to Annex 6, reservation 3 set out in the Schedule of Mexico, with respect to whether or not to permit an acquisition that is subject to review.”* (Emphasis added).

In the Canada-Colombia FTA (2008), which grants pre-establishment rights, Annex 837 excludes the following measures from dispute settlement (both investor-State and State-State):

“A decision by Canada under the Investment Canada Act, with respect to whether or not to permit an acquisition that is subject to review;³⁵

A decision by a Party to prohibit or restrict the acquisition of an investment in its territory by an investor of the other Party pursuant to Article 2202 (National Security Exceptions).”

Where an IIA does not specifically exclude pre-establishment obligations from the scope of ISDS, it will enable investors who have encountered obstacles in making their investments to seek redress through the IIA’s ISDS mechanism.

³⁵ Under the *Investment Canada Act*, the Canadian Government reviews all direct acquisitions by non-Canadians of Canadian businesses with assets above certain thresholds: for WTO member States that number (as of June 2012) is Can\$330 million, and is scheduled to increase to Can\$1 billion over a four-year period; for non-WTO member States and for the acquisitions of cultural industries, that number is Can\$5 million or more, and extends to all indirect acquisitions by non-Canadians of Canadian businesses with assets of Can\$50 million or more. An investment subject to review may not be implemented unless the Canadian Government decides that the investment is “likely to be of net benefit to Canada” on the basis of criteria laid down by the Act.

(iv) Limitation periods

Many recent IIAs include a limitation period, which is a regular feature in domestic laws. A limitation period is the maximum time after an event that legal proceedings based on that event may be initiated. The triggering event for the running of the limitation period is generally when the investor first knew, or should have known, of the alleged breach and of the loss or damage arising there-from. It is important to clearly specify whether the limitation period runs from the date of the measure or from the time the investor discovered, or reasonably should have discovered, the loss or damage.

Though in many cases the limitation period is self-evident, difficult questions arise in cases involving a “continuing breach”, when the initial act occurs outside the limitations period but is continued or renewed within the period.³⁶

Often IIAs limit the relevant time period to three years, but sometimes it can be equal to five years (relevant examples are provided in Table 1).

Table 1. Treaty examples of limitation periods

ASEAN-China Investment Agreement (2009)	Japan-Switzerland Agreement on Free Trade and Economic Partnership (2009)
Article 14(6)(a) <i>“The submission of a dispute to conciliation or arbitration [...] shall be conditional upon: (a) the submission of the dispute to such conciliation or arbitration</i>	Article 94.5 <i>“[N]o investment dispute may be submitted to conciliation or arbitration under paragraph 3, if more than five years have elapsed since the date on which</i>

³⁶ This was the case in *UPS v. Canada* (UNCITRAL), Award on the Merits, 11 June 2007, paras. 23–30.

<p><i>taking place within three (3) years of the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation under this Agreement causing loss or damage to the investor or its investment.” (Emphasis added).</i></p>	<p><i>the disputing investor acquired or should have first acquired, whichever is the earlier, knowledge of the incurred loss or damage referred to in paragraph 1.” (Emphasis added).</i></p>
---	--

A limitation period would normally include the time that the investor spends pursuing its claim in domestic courts.

It may be useful to clarify, when drafting an IIA, the event which stops the running of the limitation period. Should it be calculated by reference to the moment when an investor notifies the host State of the alleged treaty breach and requests consultations (i.e. starts the amicable settlement / waiting period); the date when the investor notifies of its intention to submit the claim to arbitration (e.g., submits its “notice of intent”); or the date when the arbitration itself is formally commenced (i.e. when a request for arbitration (ICSID) or a notice of arbitration (UNCITRAL)) is submitted. Depending on the length of the amicable settlement period, the latter option might be too restrictive for investors.

Another question to consider relates to encouraging investors to seek local remedies. A short limitation period, or one that continues to run while an investor seeks relief locally, might discourage the pursuit of local remedies due to the fear that relief will not be forthcoming prior to the expiration of the limitation period.

Many (older) IIAs do not contain limitation periods. This increases the exposure of States to investor claims, which in this case can be lodged within an unlimited period of time after the events giving rise to the dispute, subject to general international law principles regarding the pursuit of stale claims.

3. Provisions determining the scope of the treaty

The elements reviewed so far have been specific to the scope of ISDS. In addition, the ISDS scope very much depends on the *scope of the treaty as a whole*. The latter is composed of:

- i) Subject-matter coverage of the treaty;
- ii) Range of persons benefitting from the treaty;
- iii) Geographical application of the treaty; and
- iv) Temporal application of the treaty.

Each of these topics is extremely important and has been addressed in detail in other studies.³⁷ This paper does not discuss the numerous facets of each of these topics; instead, it only briefly identifies the impact that they have on the scope of the treaty, and thus on the scope of ISDS.

(i) Subject-matter of the treaty

Covered investments. An important aspect of establishing the material scope of treaty coverage is determining what qualifies as an “investment”. The treaty’s definition of “investment” identifies the range of transactions and assets to which the treaty applies, i.e. towards which the host State has undertaken obligations. Most BITs have very broad and open-ended definitions of “investment”, which has prompted tribunals to take an expansive approach towards the kinds of transactions and assets that qualify as investments. Other IIAs have defined “investment” more carefully, creating a closed list of covered assets, and furthermore specifically excluding particular assets such as: claims arising from purely commercial contracts; trade finance operations; short-term loans; public debt securities; bonds of, and loans to, state enterprises; and portfolio investment. In addition, many treaties require that investments be made in

³⁷ See further UNCTAD, 2011d; UNCTAD, 2007b, pp. 4–21; UNCTAD, 2012a, pp. 48–49.

accordance with the law of the host State; non-compliance with this requirement precludes an investor's protection by the treaty and its access to ISDS. The definition of investment thus delineates the range of assets protected under the treaty, including those protected through the ISDS mechanism.³⁸

Exclusion of certain policy areas from treaty scope. IIAs apply to an extremely broad range of State conduct encompassing practically any action or inaction of any governmental body. Some treaties, however, remove particular policy areas from the treaty's coverage. Frequently excluded areas are taxation, government procurement and subsidies. A treaty may also exclude specific sectors or industries (e.g., essential social services such as healthcare or education, or industries deemed sensitive such as cultural industries, fisheries, nuclear energy and so forth). Government conduct falling within those policy areas or applicable to the excluded industries is thus not subject to arbitral review under the IIA.

Pre-establishment v. post-establishment. As briefly mentioned above,³⁹ some IIAs start applying once an investment is established in the host country ("post-establishment" IIAs), while others contain obligations relating to acquisition and establishment

³⁸ A claim brought under the ICSID Convention must additionally satisfy the jurisdictional limitations of the Convention. In particular, the transaction/assets concerned must qualify as an "investment" under the Convention. Tribunals have offered different interpretations as to what constitutes an investment under the Convention. Some tribunals find it sufficient when an investment satisfies the definition in the applicable IIA; others would add additional requirements, including: a requirement that the investment contribute to the economic development of the host State, last a certain duration, require an investor to undertake a certain amount of risk, generate regular profit and return, and encompass a substantial commitment of capital. For details, see UNCTAD, 2011d, pp. 48–65.

³⁹ See section II.B.2.iii.

of investments (pre-establishment” IIAs). Agreements of the latter type have wider breadth of coverage.

IIA substantive obligations. The potential for IIA claims depends on the specific IIA obligations found in the treaty (for example, whether or not it includes a prohibition of performance requirements, an umbrella clause or the FET standard) as well as on the specific content of these obligations (whether or not the free-transfer provision is qualified by exceptions, whether the FET standard is qualified by reference to the customary international law minimum standard of treatment of aliens, etc.). The fewer and more circumscribed the obligations are, the less scope there is for ISDS.

IIAs’ substantive obligations can be delineated by general exceptions. The latter allow States to derogate from the IIA obligations when such derogation pursues a policy objective included in the general-exceptions clause. Such policy may include public health and safety, national security, environmental protection and some others. A number of treaties now contain general exceptions, but how they will work in practice is yet to be tested.

(ii) Range of persons benefitting from the treaty

ISDS involves a national or company of one State submitting a claim against another State. The underlying issue is whether the protections and rights contained in an IIA should be extended to a specific claimant. Through its definition of “investor”, an IIA typically covers both natural and legal persons — but there are a number of options to make the range of covered persons broader or narrower.

Natural persons. IIAs typically apply to natural persons who are recognized by the domestic law of the relevant contracting party as a national or citizen. An IIA may, however, also extend beyond nationals to cover permanent residents of the State and thereby increase the scope of coverage.

Another issue is dual nationals — persons with citizenship in more than one States. Many treaties do not address the status of dual nationals, which can lead to the conclusion that they are entitled to the protection of the treaty. One might compare Article 25(2)(a) of the ICSID Convention, which explicitly precludes claims by persons with the nationality of both the home and host State. A number of IIAs also exclude dual nationals from treaty coverage. In the absence of such an exclusion, it might be possible for a national of the host State to bring an IIA claim against that State because he/she also has the nationality of the other contracting State.

Legal persons. In terms of the range of entities covered, IIAs may include or exclude certain specific categories of entities, for instance: branches of enterprises, non-profit entities and/or government-owned entities or entities without legal personality. Of even greater importance are the criteria used to define the nationality of a legal entity. These may be the place of company's incorporation, the location of the company's seat or principal place of business and the nationality of ownership or control. Each of these different criteria has an effect on whether a particular entity will be covered by the treaty.

Furthermore, some IIAs expressly recognize subsidiaries of foreign investors established in the host State as “covered investors” and, therefore, enable them to bring ISDS claims.

Finally, denial-of-benefits clauses play a role in this context. They are designed to deny treaty protection to “shell”, or “mailbox”, companies established in a contracting State party by third-country nationals without any real business activities in the country of establishment. Denying protection to such “mailbox” companies equips States with an additional instrument to narrow the range of covered corporate entities.

(iii) Geographical application of the treaty

The issue of geographical application of the treaty has two aspects. The first is that most IIAs cover investments “*in the territory*” of the contracting Party and thus exclude assets that may have some characteristics of an investment but are not physically located in its territory. Second, the geographical scope depends on the IIA’s definition of the term “territory”, in particular on whether the definition extends coverage beyond the boundaries of the territorial waters of a State to the continental shelf and exclusive economic zone.

(iii) Temporal application of the treaty

The main issue here is whether treaty protection extends to investments made *before* the entry into force of the agreement. Including them can significantly enlarge the number of covered investments. However, this approach does not mean that an IIA acquires retroactive effect as the IIA obligations apply only with respect to acts or facts occurring (or continuing to exist) after its entry into force.⁴⁰ To reinforce this principle, IIAs that apply to investments made both before and after their entry into force specifically exclude claims arising out of events which occurred, and disputes which had been settled, prior to that date.⁴¹

A related issue is the exclusion of existing non-conforming measures. For example, the Canada-Czech Republic BIT (2009) specifies that protections do not apply to “*any existing non-conforming measure*” (Article IV(1)).

⁴⁰ Article 28 of the Vienna Convention on the Law of Treaties.

⁴¹ E.g., Mexico-Singapore BIT (2009), Article 27.

C. Waiting periods and amicable settlement

Traditionally, IIAs provide for an attempt to resolve the dispute amicably between the disputing parties as a preliminary step before the formal procedure starts. A treaty will often contain a general provision that expresses a preference for amicable settlement, as illustrated by Article 9(1) of the China-Germany BIT (2003):

“Any dispute concerning investments between a Contracting Party and an investor of the other Contracting Party should as far as possible be settled amicably between the parties in dispute.”

Specific approaches to, and even to some extent the rationale for, this procedural step vary.

1. Waiting or “cooling-off” period

Some treaties provide for a waiting period, also called a “cooling-off” period, which must elapse before the arbitration procedure can start. There is no requirement that the disputing parties engage in negotiations. It is more of a last chance for them to consider whether they want to pursue the arbitration. The China-Germany BIT (2003) illustrates this approach:

“If the dispute cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the investor of the other Contracting State, be submitted for arbitration.” (Article 9(2))

A six-month waiting period is common in IIAs, but it can also be shorter or longer: for example, three months as in the Chile-Netherlands BIT (1998) or 12 months as in the Lebanon-Slovakia BIT (2009).

2. Period for negotiations and consultations

Other IIAs have put more emphasis on a genuine attempt by the parties to consult and negotiate in order to come to an actual amicable settlement. The Ethiopia-Spain BIT (2006), for example, provides:

*“As far as possible, the parties concerned shall endeavor to settle their disputes amicably **through negotiations.**”* (Article 10(1), emphasis added).

Similarly, according to the Lebanon-Slovakia BIT of 2009, investor-State disputes *“shall be subject to **amicable consultations between the parties to the dispute**”* (Article 8(1), emphasis added). While this type of provision clearly encourages the disputing parties to engage in negotiations, what constitutes “negotiations” is not clearly defined. For example, it is debatable whether an exchange of letters is adequate to constitute a negotiation, or whether something more is required.

Some provisions are more detailed than others with respect to procedural requirements for negotiations, as illustrated by the Canada-Colombia FTA (2008):

“The disputing parties shall hold consultations and negotiations in an attempt to settle a claim amicably before a disputing investor may submit a claim to arbitration. Consultations shall be held within 30 days of the submission of the Notice of Intent to Submit a Claim to Arbitration under subparagraph 2(c), unless the disputing parties otherwise agree. Consultations and negotiations may include the use of non-binding, third-party procedures. The place of consultations shall be the capital of the disputing Party, unless the disputing parties otherwise agree.” (Article 821, emphasis added).

3. Notifying the host State of the dispute

The IIAs which suggest amicable settlement within six months from the date the dispute arises often do not specify how or when the respondent State should be notified of the existence of a dispute. Other treaties, however, impose a specific requirement of written notification of the dispute. Some of these IIAs do not mention what such a written notification should contain,⁴² while others, such as the Mexico-Singapore BIT (2009), include specific requirements in this regard:

“With a view to settling the claim amicably, the disputing investor shall deliver to the disputing Contracting Party written notice of its intention to submit a claim to arbitration at least six months before the claim is submitted under Article 11. Such notice shall specify:

(a) the name and address of the disputing investor [...];

(b) the provisions of Chapter II alleged to have been breached;

(c) the factual and legal basis of the claim;

(d) the kind of investment involved pursuant to the definition set out in Article 1; and

(e) the relief sought and the approximate amount of damages claimed.” (Article 10(2), emphasis added).

Requiring that investors file a notice of dispute or a notice of intent to submit a claim to arbitration is a useful procedural mechanism. It signals the intention of the investor prior to the formal commencement of a claim, which enables the State to begin

⁴² See, for example, Belgium/Luxembourg-Tajikistan BIT (2009), Article 12(1); Ethiopia-United Kingdom BIT (2009), Article 8(1).

its responsive preparations. It puts on notice that branch of the government that will be defending the State against the claim, so that it can begin investigating the circumstances behind the case and assessing its strength, or lack thereof. Those investigations can also affect settlement consultations.⁴³ It also simplifies the calculation of time-periods and prevents disputes as to whether the amicable settlement procedure envisaged by the treaty has been respected.

4. Consequences of not following the amicable settlement procedure

A number of ISDS cases have dealt with situations where the claimant had not complied with the amicable settlement procedure. Tribunal decisions on this issue have differed from case to case. For example, in *Western NIS Enterprise Fund v. Ukraine*, the tribunal issued an order stating that “*proper notice is an important element of the State’s consent to arbitration, as it allows the State, acting through its competent organs, to examine and possibly resolve the dispute by negotiations.*”⁴⁴ Hence, the proceedings were suspended to require the investor to adhere to the appropriate proceedings by giving proper advance notice to the State.

Similarly, in *Burlington v. Ecuador*, the tribunal held:

*“[T]he Request for Arbitration is too late a time to apprise Respondent of a dispute. The six-month waiting period requirement of Article VI is **designed precisely to provide the State with an opportunity to redress the dispute before the investor decides to submit the dispute to arbitration.** Claimant has only informed Respondent of this dispute with the submission of the dispute to ICSID arbitration, thereby **depriving Respondent of the opportunity, accorded by the***

⁴³ See Legum, 2010, pp. 91, 93.

⁴⁴ *Western NIS Enterprise Fund vs. Ukraine*, ICSID Case No. ARB/04/2, Order of 16 March 2006, para. 5.

*Treaty, to redress the dispute before it is submitted to arbitration. [...] That suffices to defeat jurisdiction.*⁴⁵
(Underlined (as Italics) in the original, bold added).

The *Burlington v. Ecuador* tribunal's approach was also endorsed in *Murphy v. Ecuador* (“[the six-month period] constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules.”).⁴⁶ In another case, *Wintershall v. Argentina*, the tribunal had to interpret the Argentina-Germany BIT that provided for (i) a six-month negotiations period, and (ii) an 18-month period for mandatory pursuit of local remedies. The tribunal found that the claimant had failed to comply with these requirements, and consequently declined jurisdiction.⁴⁷

In the opposing line of awards, tribunals have held that waiting periods are “a mere formality”, “merely procedural rules”, “procedural and directory in nature, rather than jurisdictional and mandatory”, and that they may be disregarded particularly where it follows from the facts of the case that any attempted consultation or negotiation would have been futile.⁴⁸

⁴⁵ *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, paras. 312, 315.

⁴⁶ *Murphy Exploration and Production Co. Int'l v. Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, para. 149.

⁴⁷ *Wintershall v. Argentina*, ICSID Case No. ARB/04/14, Award, 8 December 2008, paras. 114–156. See also *Enron v. Argentina*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2006, para. 88.

⁴⁸ See *Ethyl Corporation v. Canada*, UNCITRAL, Decision on Jurisdiction, 24 June 1998, para. 85; *SGS v Pakistan*, Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, para. 184; *Biwater Gauff v. Tanzania*, Award, 24 July 2008, paras. 343–344; *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction, 9 September 2008, para. 94.

Therefore, the wording of the provision matters and the intention of the contracting parties in this respect should be made clear in order that their wishes be respected by arbitral tribunals.⁴⁹

5. Alternative dispute resolution⁵⁰

Aside from amicable settlement through negotiations and consultations between the disputing parties, there exist the so-called alternative dispute resolution (ADR) methods — conciliation and mediation. Compared to arbitration, ADR methods put less emphasis on legal rights and obligations. They involve the assistance of a third party neutral (conciliator or mediator), whose main objective is not the strict application of the law but finding a solution that would be accepted as just and reasonable by the disputing parties.

Mediation is an informal and flexible procedure: a mediator's role can vary from helping the parties establish a dialogue to effectively proposing and arranging a workable settlement to the dispute. It is often referred to as “assisted negotiations”.

Conciliation procedures follow formal rules (there are several sets of conciliation rules — e.g. ICSID, UNCITRAL, International Chamber of Commerce (ICC), etc.). At the end of the procedure, conciliators usually draw up terms of an agreement that, in their view, represent a just compromise to a dispute but are not binding on the parties involved. Due to the formality of the procedure, some call conciliation a “non-binding arbitration”.

⁴⁹ Additional complications in this respect may arise if an investor tries to rely on an IIA's most-favoured nation obligation to invoke more favourable ISDS provisions from other IIAs concluded by the respondent State. See section II.S below.

⁵⁰ See also section III.C below.

IAs rarely explicitly mention the possibility of using ADR techniques. However, some treaties refer to them as part of the negotiation and consultation process. Thus, the Colombia-Japan BIT (2011) provides:

*“In the event of an investment dispute, the disputing parties shall, as far as possible, settle the dispute amicably through consultations and negotiations **which may include the use of non-binding and third-party procedures.**”* (Article 26, emphasis added).

Only a few treaties suggest conciliation procedures as a separate step preceding the arbitration (i.e. not part of the amicable settlement period), even though this step is voluntary. One example is the India-Sweden BIT (2000), which provides in Article 9:

*“2. If such a dispute has not been amicably settled within a period of six months the Investor that is a party to the dispute **may** submit the dispute for resolution according to the following provisions:*

(a) to the courts or administrative tribunals of the Contracting Party that is a party to the dispute; or

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

*(c) to **international conciliation under the [UNCITRAL] Rules.***

*3. Should the investor fail to exercise the options in paragraph 2(a) and (b) of this Article or **where the conciliation proceedings under Article 2 (c) of the paragraph are terminated other than by the signing of a settlement agreement**, the dispute shall be referred to binding*

international arbitration according to the following provisions [...].” (Emphasis added).

Clearly, if an IIA does not mention ADR methods, this does not mean that their use is prohibited. However, more specific language encouraging or authorizing the use of ADR would be an additional signal to both parties that these procedures are a viable option worth much consideration.⁵¹

D. Forums for IIA cases

1. Available ISDS forums

IIAs are not uniform as to the types of forums to which investors may submit their treaty claims. Table 2 sets out a number of examples of venues and arbitral rules encountered in ISDS clauses. Arbitration under the ICSID and UNCITRAL rules are the two options that appear most frequently in IIAs. Due to their importance, the main differences between these two sets of rules are reviewed in section II.D.2 below.

Table 2. Types of ISDS forums found in IIAs

Treaty	Available forums/rules
ASEAN Comprehensive Investment Agreement (2009)	<ul style="list-style-type: none"> • Courts or administrative tribunals of the host State; • ICSID; • ICSID Additional Facility; • UNCITRAL Rules; • Regional Centre for Arbitration at Kuala Lumpur or any other

⁵¹ For a more detailed discussion of ADR in the context of IIA arbitration, see UNCTAD, 2010a; UNCTAD, 2011f.

	regional arbitration centre in ASEAN.
Belgium/Luxembourg-Colombia BIT (2009)	<ul style="list-style-type: none"> • “Competent jurisdiction” of the host State; • Domestic arbitration; • UNCITRAL Rules; • ICSID; • ICSID Additional Facility; • The Arbitral Court of the ICC; • Conciliation and Arbitration Centre of the Chamber of Commerce of Bogotá.
Japan-Switzerland Economic Partnership Agreement (2009)	<ul style="list-style-type: none"> • ICSID; • ICSID Additional Facility; • UNCITRAL Rules.
Russia-Venezuela BIT (2008)	<ul style="list-style-type: none"> • Competent court of the host State; • UNCITRAL Rules; • Arbitration Institute of the Stockholm Chamber of Commerce.
Azerbaijan-Croatia BIT (2007)	<ul style="list-style-type: none"> • Competent court of the host State; • ICSID; • UNCITRAL Rules.
Croatia-Republic of Korea BIT (2005)	<ul style="list-style-type: none"> • ICSID.
Jordan-Syria BIT (2001)	<ul style="list-style-type: none"> • Competent judicial authority in the host State; • Arab Investment Court (established under the Unified Agreement for the Investment of Arab Capital in the Arab States).
Egypt-Pakistan BIT (2000)	<ul style="list-style-type: none"> • ICSID; • UNCITRAL Rules; • Regional Centre for International Commercial Arbitration in Cairo.

Haiti-United Kingdom BIT (1985)	<ul style="list-style-type: none"> • Court of Arbitration of ICC; • UNCITRAL Rules.
------------------------------------	---

Despite this variety, all available international forums can be categorized into three dispute settlement tracks:

- (i) ICSID — a system specifically designed for adjudicating investor-State disputes;
- (ii) UNCITRAL Arbitration Rules; and
- (iii) Venues commonly used for international commercial arbitration (Arbitration Institute of the Stockholm Chamber of Commerce (SCC)), Court of Arbitration of the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), regional/national arbitration centres).

When a dispute arises, States typically have no influence on the choice of the arbitral forum/rules since they have given their advance consent to all of the forums/rules included in the applicable IIA.⁵² The forum is usually chosen by the claimant alone.

The ICSID Convention and the UNCITRAL Arbitration Rules are the two sets of rules which are by far most often mentioned as possible forums for ISDS.⁵³ The majority of known investor-State claims have been arbitrated under them. At the end of 2012 there were a total of 514 known IIA-based claims.⁵⁴ Of these, 314 were filed at ICSID (including cases under the ICSID Additional Facility Rules) and 131 known cases were filed under the UNCITRAL

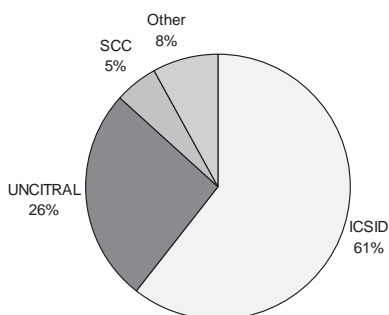
⁵² On consent, see section II.A above.

⁵³ Pohl, Mashigo and Nohen, 2012, pp. 20–21. The survey was based on 1,660 BITs.

⁵⁴ UNCTAD, 2013a, p. 3.

rules.⁵⁵ The exact number of UNCITRAL proceedings is unknown, given that many UNCTRAL disputes are entirely confidential.⁵⁶

Figure 2. Distribution of known ISDS cases



(i) ICSID and ICSID Additional Facility

A common venue for arbitration of investment disputes is ICSID, at the World Bank. ICSID was established in 1965 by the ICSID Convention, which is in force for 149 States (as of 20 May

⁵⁵ *Ibid.* Other venues have been used much more rarely, with 27 known cases at the Stockholm Chamber of Commerce, eight at the International Chamber of Commerce and three at the Cairo Regional Centre for International Commercial Arbitration. A number of proceedings are governed by *ad hoc* rules; in some other disputes the applicable rules are not known.

⁵⁶ That is, not only arbitral decisions remain undisclosed but the very existence of the dispute as well.

2013).⁵⁷ Arbitration under the ICSID Convention is available when both the host State and the home State of the investor are party to the Convention.⁵⁸

ICSID is not a judicial body in the sense that it does not have tenured “judges” who adjudicate claims. Arbitration is *ad hoc* — that is, arbitrators are appointed by the disputing parties (or with participation of the ICSID Secretary-General) for the resolution of each specific dispute.

ICSID's unique feature is that arbitration under the Convention is “de-localized”, meaning that while the ICSID Secretariat is physically located in Washington D.C., arbitrations are not subject to the laws of the United States. (If hearings take place in a different State, which is possible, the arbitration will not be subject to the laws of that State.) Arbitral awards rendered under the ICSID Convention may not be reviewed or set aside by domestic courts of the seat of arbitration; they are subject only to special annulment procedure under the ICSID Convention itself. The Convention also provides for “automatic” enforcement of arbitral awards in all States that are parties to the Convention.⁵⁹

Adherence to the ICSID Convention does not in itself qualify as consent to arbitration under the Convention; that consent must be found elsewhere, whether in a concession contract, in national legislation, or in an investment treaty. The majority of ICSID cases have been filed on the basis of ISDS provisions in IIAs.

The ICSID Secretariat offers institutional support for arbitrations. In particular, it assigns a legal secretary to each case,

⁵⁷ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 U.N.T.S. 159.

⁵⁸ *Ibid.*, Article 25(1).

⁵⁹ For an overview of various features of arbitration under the ICSID Convention, see also section II.D.2 below.

makes arrangements for the hearings, and administers logistical and financial aspects of the proceedings.

The ICSID Additional Facility Rules can be utilized when either the host State or the home State of the investor, but not both, is party to the ICSID Convention.⁶⁰ In such a case the ICSID Convention does not apply to the dispute and ICSID simply serves as an institution administering the proceedings. The Additional Facility Rules are very similar to the ICSID Arbitration Rules. However, there are also important differences: for arbitral awards rendered under the Additional Facility Rules, there is no recourse to the ICSID annulment procedure; rather, awards can be challenged in domestic courts in the place of arbitration and are enforced in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the ICSID Convention itself does not apply to the dispute. In these important aspects, the Additional Facility Rules are no different from the UNCITRAL Rules.

(ii) UNCITRAL Arbitration Rules

Many IIAs offer arbitration under the UNCITRAL Arbitration Rules. After ICSID, it is the second-most popular set of rules used in investor-State arbitrations to date. Proceedings under the UNCITRAL Rules may, but do not have to, take advantage of institutional support: for example, many UNCITRAL arbitrations are administered by the Permanent Court of Arbitration (PCA) in The Hague,⁶¹ and some are administered by the ICSID Secretariat.

⁶⁰ ICSID Additional Facility Rules, Article 2.

⁶¹ At the end of 2012, the total number of investor-State cases administered by the PCA under the UNCITRAL Rules was 85, of which 47 were pending. Of these 85 cases, only 18 were public at the end of 2012. *Source*: the PCA International Bureau.

UNCITRAL (United Nations Commission on International Trade Law) was established by the UN General Assembly and works under the supervision of Member States from all UN regional groups. The UNCITRAL Rules were initially created for the purposes of commercial arbitration between private parties, but they served as the basis for the rules governing the proceedings of the Iran-US Claims Tribunal and there demonstrated their usefulness in investor-State and inter-State arbitration.

The UNCITRAL Rules, initially adopted in 1976, were revised in 2010. At present, most IIA arbitration under the UNCITRAL Rules will likely be governed by the 1976 Rules.⁶² While the revision took into account the applicability of the Rules to ISDS, the UNCITRAL Working Group is considering the advisability of developing an annex to the Rules that would apply specifically to ISDS.⁶³ As a separate matter, the Working Group has agreed that the Rules shall provide for increased transparency of investor-State arbitrations under IIAs.⁶⁴

(iii) Commercial arbitration venues

Some IIAs permit investors to lodge their claims under the rules of commercial arbitration centres, including, for example, the Arbitration Institute of the Stockholm Chamber of Commerce, the London Court of International Arbitration, and the International

⁶² The 2010 Rules are presumed to apply to arbitration agreements referring to the UNCITRAL Rules established after 15 August 2010. For arbitrations based on offers extended prior to 15 August 2010, but accepted after that date, the 1976 Rules presumptively apply. Thus, unless the applicable IIA refers to the UNCITRAL Rules in force on the date of commencement of the claim, IIAs that entered into force prior to 15 August 2010 will be deemed to refer to the 1976 Rules and arbitration will take place pursuant to them.

⁶³ *Ibid.*, pp. 405–408.

⁶⁴ See section II.L below.

Chamber of Commerce’s Court of International Arbitration (Paris). These institutions can administer arbitrations whether those arbitrations are “sited” in the State within which they are located or whether the place of arbitration is elsewhere. A number of IIAs refer to *regional* arbitration centres such as the Cairo Regional Centre for International Commercial Arbitration, the Regional Centre for Arbitration at Kuala Lumpur and others. Some IIAs refer to domestic arbitration venues such the Malta Arbitration Centre (Albania-Malta BIT, 2011). Each of these centres has its own arbitration rules and offers institutional support for administering the proceedings (secretarial support, venues and logistics for the hearings, coordination of the proceedings, etc.).

These arbitration venues and their associated rules, which were created primarily for use in commercial dispute resolution, have certain features that distinguish them from the ICSID Convention and ICSID Additional Facility Rules in particular. They often contain fairly stringent presumptions about confidentiality. They often maintain rosters of arbitrators, some with very wide-ranging qualifications, but usually those arbitrators are not chosen due to their expertise in public international law or investment law in particular. Arbitral awards may be reviewed and potentially set aside by the competent domestic court at the seat of arbitration. Recognition and enforcement of arbitral awards is carried out through national courts, usually in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

2. ICSID and UNCITRAL: a brief comparison

The ICSID and UNCITRAL Rules are similar in many respects. Thus, the practical differences between an ICSID proceeding and an UNCITRAL proceeding should not be overstated. There is a significant amount of overlap in the pool of arbitrators who preside over the proceedings, and each set of rules grants significant

discretion to those arbitrators to tailor proceedings to suit the needs of the individual dispute. The same BIT will provide the applicable law, and the general conduct of the arbitration in terms of procedural steps will likely be similar. However, as summarized in Table 3, there are certain distinctions that can be quite important depending on the circumstances of a specific case. Perhaps most importantly, the ICSID has been designed as a self-contained and delocalized system with automatic enforcement of arbitral awards, while the UNCITRAL rules — similar to other rules and venues created for arbitrating commercial disputes between private parties — have more links to national laws and domestic court systems, particularly with respect to judicial assistance to arbitration, review and set-aside arbitral awards, and their recognition and enforcement.

Governments need to be aware of the particular features of both the ICSID and UNCITRAL Rules in order to decide whether they wish to include them in their IIAs, as well as to have realistic expectations, to take advantage of the opportunities offered by the rules, and to foresee possible pitfalls and challenges.

In an IIA, the contracting parties may also introduce particular rules governing various aspects of the arbitral proceedings, thereby overriding the default provisions of the relevant arbitral rules.⁶⁵

Table 3. Main distinctions between the ICSID and UNCITRAL arbitration rules

Issue	ICSID Convention	UNCITRAL⁶⁶
Jurisdictional requirements	Imposes additional jurisdictional	Does not impose additional jurisdictional

⁶⁵ See sections II.F–II.P.

⁶⁶ As noted above, the UNCITRAL Rules were initially adopted in 1976 and revised in 2010. For clarity, the table refers to both editions of the Rules.

	requirements that any dispute must meet. A claim must qualify the following criteria: (a) a legal dispute; (b) arising directly out of an <i>investment</i> (the notion of “investment” in the ICSID context is an unsettled question); ⁶⁷ (c) between a Contracting State and <i>national</i> of another Contracting State (claims by dual nationals, where one of the nationalities is that of the host State, are precluded).	requirements (1976 and 2010 Rules).
Institutional support for the proceedings	Administrative and legal support provided by the ICSID Secretariat based in Washington D.C.	<i>Ad hoc</i> arbitration with no institutional support, although the parties may agree to use one of the available institutions such as the Permanent Court of Arbitration in the Hague or the ICSID Secretariat (1976 and 2010 Rules).
Appointment of	The parties may agree	Each party appoints one

⁶⁷ See Section II.B.3.i.

<p>arbitrators in three-arbitrator proceeding</p>	<p>on the appointment process; generally each party appoints one arbitrator and the parties together choose the third arbitrator.</p> <p>In case a party fails to appoint an arbitrator or the parties cannot agree on the president of the tribunal, the relevant appointments are made by the Chairman of the ICSID Administrative Council.</p>	<p>arbitrator and those two arbitrators choose the presiding arbitrator (1976 and 2010 Rules)</p> <p>In case a party fails to appoint an arbitrator or the appointed arbitrators cannot agree on the president of the tribunal, the relevant appointments are made by the “appointing authority”. The appointing authority may be designated in the IIA, chosen by the disputing parties, or, failing such agreement, designated by the Secretary-General of the PCA at the request of a party.</p>
<p>Nationality of arbitrators</p>	<p>For a three-arbitrator panel, a party may not select an arbitrator of the nationality of either party, unless the other party agrees. (For a five-arbitrator panel, each party may choose one arbitrator of its own nationality.)</p>	<p>No restrictions. (Where an arbitrator is appointed by an appointing authority, the latter “shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties”.) (1976 and 2010 Rules).</p>

Challenge to Arbitrators	The remaining members of the tribunal decide the challenge in the first instance; should they be unable to come to a decision (or in the event the challenge is to a sole arbitrator or a majority of the arbitrators), the President of the Administrative Council makes the decision.	The appointing authority decides the challenge (1976 and 2010 Rules)
Seat of the proceedings	Arbitration is de-localized and not subject to the laws of the State of the seat of arbitration. Any open question of procedure is within the tribunal's discretion.	Seat chosen by the parties. If the parties do not agree, the tribunal decides in its discretion (1976 and 2010 Rules). National laws of the seat will apply to the arbitration. Local courts of the seat perform supervisory and support functions (e.g., may order provisional measures and review the award).
Provisional measures	Formally are of recommendatory nature. Some arbitral interpretations suggest that they are orders having binding force.	Are binding on the parties and can be enforced as an arbitral award (1976 and 2010 Rules).

	<p>No recourse to domestic courts for provisional measures during the proceeding unless the parties agree otherwise.</p>	<p>In addition, interim relief can be sought through a domestic court of the seat of arbitration.</p>
<p>Confidentiality, transparency and third party participation</p>	<p>Due to the public registry, the existence of all disputes is known, as well as the economic sector to which the dispute relates, the names of the appointed arbitrators and the counsel representing the disputing parties.</p> <p>Non-parties can attend the hearings in the absence of objections from either of the parties.</p> <p>Any disputing party can make an arbitral award public. In any event, ICSID may publish excerpts of the legal reasoning of the tribunal.</p> <p>Has a mechanism for <i>amicus curiae</i></p>	<p>Usually characterized by the higher level of confidentiality typical for commercial arbitration. The very existence of a dispute can be kept secret if both parties so wish. The law of the seat of arbitration can impose additional confidentiality requirements.</p> <p>Arbitral hearings are closed unless the parties agree otherwise.</p> <p>The final award can be published only with consent of both parties (1976 Rules) or “where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other</p>

	submissions.	<p>competent authority” (2010 Rules).</p> <p>In 2013 a special Working Group agreed on a set of improved transparency rules that provide for opening oral hearings and publication of key arbitration documents, including all decisions and awards. These rules will apply only to arbitrations under <i>future</i> investment treaties, unless States parties to specific existing treaties separately agree to their application to these existing treaties.</p> <p>No explicit mechanism for <i>amicus curiae</i> submissions, though they have been permitted in practice.</p>
Jurisdictional Objections and Frivolous Claims Provisions	Jurisdictional objections should be made as soon as possible and in any event not later than the counter-memorial; the tribunal within its discretion may	Plea of lack of jurisdiction shall be raised no later than statement of defence or, with respect to a counterclaim, in the reply to the counterclaim. In

	<p>suspend proceeding on the merits.</p> <p>A party may, no later than 30 days after the constitution of the tribunal and before the first session, file an objection that a claim is manifestly without legal merit. The tribunal shall “at its first session or promptly thereafter, notify the parties of its decision on the objection”.</p>	<p>general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question or in an award on the merits (1976 and 2010 Rules).</p>
Applicable Law	<p>In accordance with the law agreed to by the parties. In the absence of such agreement, a tribunal shall apply the law of the Contracting State Party to the dispute and such rules of international law as may be applicable.</p>	<p>As designated by the parties or, if there is no such agreement, as determined by the tribunal according to the choice-of-law rules it considers applicable (1976 Rules) or the law “it considers appropriate” (2010 Rules).</p>
Review of arbitral awards	<p>Through the ICSID annulment process with very limited grounds for the annulment of the award.</p>	<p>Review by national courts in the place of arbitration against the standards set forth in domestic law (1976 and 2010 Rules).</p>

	Review by national courts is excluded.	
Recognition and enforcement of arbitral awards	All ICSID Contracting States are obliged to recognize an award as binding and enforce it as if it were a final judgment of the State's own courts.	Awards are enforced through national courts, usually in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In the course of this procedure, a national court may refuse to enforce the award on any one of the grounds listed in the Convention (1976 and 2010 Rules).
Costs	<p>Arbitrators' fees are set according to the ICSID schedule — currently US\$3,000 per day per arbitrator. The parties may agree to different arbitrators' fees, with the Secretary-General's permission.</p> <p>Additional institutional fees to ICSID include a US\$25,000 fee for lodging the request for arbitration and a</p>	Arbitrators generally set their own fees. They are to be "reasonable", taking into account the amount in dispute, the complexity of the subject-matter, and the amount of time spent by the arbitrators. Fees may be fixed in the agreement to arbitrate, often by reference to a schedule of fees. Otherwise, arbitrators propose their fees to the parties. In the event the parties and the arbitrators cannot agree

	<p>US\$32,000 annual maintenance fee.</p> <p>No assumption with respect to allocation of costs; left to the discretion of the arbitrators.</p>	<p>on them, the appointing authority will determine the appropriate fees, which is binding on the parties and the tribunal (1976 and 2010 Rules).</p> <p>Arbitrators' fees are often higher than those in the ICSID schedule.</p> <p>There is a presumption that costs will be awarded against the losing party; however, the arbitral tribunal may apportion costs between the parties if it concludes apportionment is reasonable (1976 and 2010 Rules).</p>
--	--	--

3. Place (seat) of arbitration

The parties to investment arbitration, with the exception of arbitrations under the ICSID Convention, must choose a legal seat of arbitration (actual hearings do not necessarily take place at the legal seat of arbitration). If the parties do not agree on the seat of arbitration, the seat will be determined by the applicable arbitration rules. Usually the tribunal will make the decision, though some arbitral rules provide otherwise: in SCC arbitrations the decision is made by the SCC board. Some IIAs, such as NAFTA Chapter 11, limit the authority of a tribunal to choose the place of arbitration by specifying that the arbitration must be sited in one of the States

party to the treaty, in the absence of agreement of the disputing parties. A common specification, frequently found in IIAs for non-ICSID Convention cases, is that the seat be in a State party to the New York Convention on the Recognition and Enforcement of Arbitral Awards, a choice that facilitates enforcement of the award.⁶⁸

National laws of the seat apply to the arbitration, e.g., they can impose additional requirements concerning the arbitration's confidentiality. Local courts of the seat perform supervisory and support functions, e.g., ordering provisional measures.⁶⁹ An arbitral award can be subject to set-aside proceedings in the place of arbitration in accordance with the laws of that State.⁷⁰

Arbitrations proceeding under the ICSID Convention are “de-localized” in that they proceed entirely under the auspices of the Convention. They are subject only to annulment under the terms of the ICSID Convention, which provides for the appointment of *ad hoc* committees to review ICSID Convention awards. Hence, the notion of the seat of arbitration is irrelevant for arbitrations under the ICSID Convention.

E. Arbitration and domestic courts

Often IIAs explicitly include domestic tribunals as one of the options for resolving investor-State controversies. Even if they do not, domestic courts are usually available for settling these disputes, although the investor's claim might be based on domestic law rather than an alleged violation of an IIA.

⁶⁸ An illustrative example can be found in Article 16(11) of the Japan-Papua New Guinea BIT (2011): “*Unless the disputing parties agree otherwise, the arbitration shall be held in a country that is a party to the [1958 New York] Convention*”.

⁶⁹ On provisional measures, see section II.I.

⁷⁰ See section II.Q.1.

In many circumstances, it may be beneficial for both parties to have their case heard in a national court that has more expertise in the application of domestic law and can correct obvious misconduct of the host-country government. Further, the decision of a national court may have more legitimacy in the eyes of the respondent State than an award of an international arbitral tribunal and may be easier to enforce.⁷¹ Depending on the country concerned, domestic courts may be faster and cheaper. They will often have the authority to order more varied types of relief, such as declaratory or injunctive relief, in addition to monetary damages. On the other hand, for reasons mentioned above,⁷² an investor may view local proceedings in its host State as undesirable and/or futile. IIAs often try to balance out these competing interests.

Many IIAs condition an investor's right to have recourse to international arbitration upon the fulfillment by the investor of certain requirements connected to domestic courts. These include:

- mandatory recourse to domestic remedies in the host State;
- “fork-in-the-road” clauses; and
- “no-U-turn” provisions.

Such domestic-court-related requirements can be imposed in IIAs regardless of whether the treaty explicitly names domestic courts as an ISDS option.

⁷¹ In theory, an ICSID Convention award should be as easy to enforce as a judgment of a local court in any ICSID Convention State, given that Articles 53 and 54 of the ICSID Convention require all State Parties to treat awards as if they were judgments rendered by the local courts in their country. See section II.R for a more detailed discussion of enforcement.

⁷² See section I.A.

1. Legal basis for a claim in domestic courts

One important preliminary question is the legal basis for the claim, i.e. whether the relevant local-court claim would be based on domestic law or international law. While a right to claim a violation of the host State's domestic law is self-evident (aside from any barrier posed by State immunity), an investor's ability to submit a claim based on an alleged breach of an IIA will depend on the host State's approach to international law. Many countries, especially those with civil law systems, are "monist" and treat international law, including treaties, as domestic law. Other countries, especially those with common law systems, are generally "dualist" in their approach to international law and often require a legislative act to turn the international obligation into a national-law obligation.

Thus, in monist countries an investor will often be able to submit a claim based on an alleged violation of an investment treaty to domestic courts, and the court will be able to apply the treaty directly, alongside domestic law. In a dualist country those rights would be dependent on the existence of national legislation implementing the treaty.⁷³ Nonetheless, even monist countries may not consider all treaties to be "self-executing" (i.e. forming part of domestic law upon entry into force and providing a private right of action under the treaty) just as all dualist countries do not treat all treaties as non-self executing. The practice to date has been that investors' claims in domestic courts, even in monist countries, have been based solely on domestic law while the subsequent ISDS

⁷³ For example, NAFTA implementing legislation in Canada and the United States precludes individuals from submitting treaty-based claims in domestic courts. (For Canada, see North American Free Trade Agreement Implementation Act, SC 1993, c 44, sec 6(2); for the United States, see North American Free Trade Agreement Implementation Act, Pub. L. 103–82, sec 102(c).) By contrast, NAFTA Annex 1120.1(b), applicable only to Mexico, makes it clear that such claims are possible in Mexican courts.

claims have been grounded in international law. Some possible reasons for that are highlighted in the discussion of “fork-in-the-road” and “no-U-turn” clauses below.

2. Mandatory recourse to domestic courts and administrative tribunals

Customary international law requires an injured foreign person to exhaust all effective domestic legal remedies before his claim becomes admissible at the international level.⁷⁴ Most investment treaties waive the exhaustion of local remedies rule, and permit the investor to have direct recourse to international arbitration. However, a number of IIAs require investors to pursue local remedies (judicial or administrative) in the host State for a certain period of time, or — in rare circumstances — even to exhaust local remedies. Under such treaties, an investor can refer the dispute to arbitration only after complying with these conditions.

The relevant provisions typically impose a time limit for the domestic proceedings. The BIT between Belgium/Luxembourg and Botswana (2003) provides an example:

“Article 12. Settlement of Investment Disputes

[...]

2. In the absence of an amicable settlement by direct agreement between the parties to the dispute or by conciliation through diplomatic channels within six months from the notification, the dispute shall be submitted, at the first instance to a court of competent jurisdiction of the latter Contracting Party for a decision. Either party may, six months after the submission of the dispute to a court of competent jurisdiction, refer the dispute to international arbitration.” (Emphasis added).

⁷⁴ See Dugan *et al.*, 2011, pp. 347–348.

Clearly, in most circumstances, six months is not sufficient for a case to run its full course. However, this period may give an investor “a feel” for whether the judges are independent and impartial, and whether it is worth continuing the domestic proceedings. Some IIAs contain longer periods: for example, the BIT between Argentina and the Republic of Korea (1994) contains an 18-month period for settling the dispute in national courts:

“Article 8

[...]

(3) *The aforementioned dispute [between an investor of one Contracting Party and the other Contracting Party] may be submitted to international arbitration in the following circumstances:*

- (a) *if one of the parties so requests, where, after a period of eighteen (18) months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision, or where the final decision has been made but the parties are still in dispute;*
- (b) *where the Contracting Party and the investor of the other Contracting Party have so agreed.”* (Emphasis added).

Neither of the cited provisions requires the claimant to go through all levels of the judicial system or even await the decision of the court of first instance. Indeed, at any moment after the lapse of the set time-period, the claimant can seek redress in international

arbitration.⁷⁵ In fact, when a treaty includes a limitation period, investors would compromise their ability to submit a claim to international arbitration by continuing for too long in domestic courts.⁷⁶

Administrative review procedures. A relatively new feature in ISDS provisions is the reference to administrative review procedures. Relevant formulations point to the availability of an internal procedure within public administrative institutions to bring a problem or dispute to the attention of the higher authority within the administration in order to resolve the problem. A reference to this provision in a treaty is meant to highlight this avenue and encourage investors to make use of it. It is not a requirement to exhaust local administrative remedies; some treaties are express on this point. For example, the FTA between Canada and Colombia (2008) encourages foreign investors to make every effort to exhaust administrative recourse under Colombian law:

“With a view to encouraging the review, confirmation or modification of administrative acts prior to such acts becoming final, the Parties recognize that disputing investors should make every effort to exhaust administrative recourse under Colombian law. A disputing investor that fails to exhaust administrative recourse, where applicable, shall submit its Notice of Intent nine months prior to submitting a claim to arbitration.” (Article 821, n. 8).

Under this provision, the failure to exhaust administrative recourse results in the extension of the notice-of-intent period from six to nine months. The provision notably only applies to the

⁷⁵ Depending on the text of the specific IIA (primarily, whether it has a “no-U-turn” provision), the investor may need to discontinue the domestic proceedings when referring the claim to arbitration.

⁷⁶ On limitation periods, see section II.B.2.

relevant administrative remedies in Colombia and not in Canada, pointing to the possibility of asymmetrical solutions in this sphere.

The Trilateral Investment Agreement between China, Japan and the Republic of Korea (2012) contains a four-month administrative-review requirement:

“7. When the disputing investor submits a written request for consultation to the disputing Contracting Party under paragraph 2 [a pre-requisite for filing an ISDS claim], the disputing Contracting Party may require, without delay, the investor concerned to go through the domestic administrative review procedure specified by the laws and regulations of that Contracting Party before the submission to the arbitration set out in paragraph 3. The domestic administrative review procedure shall not exceed four months from the date on which an application for review is filed. If the procedure is not completed by the end of the four months, it shall be deemed to be completed and the disputing investor may submit the investment dispute to the arbitration set out in paragraph 3.” (Article 15).

This approach does not make recourse to administrative procedure mandatory; rather, it leaves it to the respondent State to decide in each case whether it wishes the particular investor to go through domestic administrative review before the ISDS proceedings are commenced.

A limited number of agreements require that an investor must first *exhaust* the host State’s administrative remedies. The BIT between China and Côte d’Ivoire (2002) is a case in point:

“Article 9. Settlement of disputes between investors and One Contracting Party

[...]

3. *If such dispute cannot be settled amicably through negotiations, any legal dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall have exhausted the domestic administrative review procedure specified by the laws and regulations of that Contracting Party, before submission of the dispute the aforementioned arbitration procedure [...].*” (Emphasis added).

When an investor fails to meet mandatory domestic-review requirements, the international arbitral tribunal may dismiss the IIA claim as inadmissible.

If the relevant administrative review procedures do not exist in the respective State or are not functional, the investor might be able to avoid this stage by arguing that the local remedies are not *effective*.

3. Preventing duplicative claims: “Fork-in-the-Road” and “No-U-turn” clauses

One concern evinced by treaty drafters has been the possibility that investors can seek relief in multiple forums for the same violation. In particular, investors may submit disputes to the domestic courts of the host State and simultaneously, or subsequently, submit the same dispute to international arbitration. Duplicative claims could require the host country to respond to the same claims more than once, result in contradictory decisions, and in some circumstances even permit double recovery by claimants.

Most IIAs address this potential problem in one of two ways. The first is by requiring an investor to decide, at the very beginning, whether the dispute will be adjudicated in domestic courts or through international arbitration (“fork-in-the-road” provision). The investor has no recourse to the other forum after it has selected one

of the options. The second approach permits an investor to make a final decision on the venue at a later stage, e.g. after starting proceedings in the host State courts. Once the investor has opted for international arbitration, however, it cannot shift back to domestic courts (“no-U-turn” provisions). While “fork-in-the-road” clauses may discourage recourse to local courts, “no-U-turn” provisions do not have this effect. Each type of clause will be examined in more detail in turn.

“Fork-in-the-road” clauses require investors to choose between domestic courts and international arbitration at the outset. Once an investor starts domestic proceedings, it loses the right to resort to arbitration, and vice versa. An example of a “fork-in-the-road” provision is Article XIII.3 of the Chile-Indonesia BIT (1999), which provides that:

*“Once an investor has submitted the dispute to the competent tribunal of the Contracting Party in whose territory **the investment was made or to international arbitration, that election shall be final.**”* (Emphasis added).

“Fork-in-the-road” clauses may be a disincentive for the investor to use national courts. Indeed, if an investor wishes to preserve its right to resort to international arbitration, it is likely to avoid domestic litigation. This, in turn, is not in the interest of host States; governments normally have a preference to settle the dispute in their own courts.

In practice, however, “fork-in-the-road” clauses have often not prevented investors from seeking relief in two forums. *Litis pendens* principles suggest that a party will be prevented from seeking relief in a second forum if there is “identity of the parties, object and cause of action in the proceeding pending before two or more tribunals”; i.e. the parties, object and cause of action must be the

same in the two suits.⁷⁷ Domestic proceedings often involve a claim by the investor's local subsidiary, rather than the investor itself, thereby defeating the identity-of-the-parties requirement. A variation of this problem is that the domestic claim will be submitted against a sub-national government unit or other State entity, rather than the State itself.

Litis pendens also requires identity of the cause of action. Domestic procedures will usually involve a claim for breach of contract or domestic law, rather than for breach of an investment treaty obligation, thereby defeating the requirement that the cause of action in the two cases be identical. It follows that an international tribunal will be able to hear the case if the causes of action or the formal identity of the parties in the arbitration proceedings are not the same as those of the parties in the domestic courts.⁷⁸

Some States have attempted to address this problem by amending the fork-in-the-road provision. For example, Article 28(3) of the Common Market for Eastern and Southern Africa (COMESA) Investment Agreement (2007) provides:

*“If the COMESA investor elects to submit a claim at one of the forums set out in paragraph 1 of this Article, that election shall be definitive and the investor may not thereafter submit a claim relating to the **same subject matter or underlying measure** to other forums.”* (Emphasis added).

⁷⁷ *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, para. 88, quoting *S.A.R.L. Benvenuti & Bonfant v. Congo*, ICSID Case No. ARB/77/2, Award, 8 August 1989, para. 1.14.

⁷⁸ For a more detailed explanation of cases holding that the “fork-in-the-road” provision had not been triggered in various circumstances, see UNCTAD, 2007a, pp. 30–32.

This provision refers the “subject matter” and the “underlying measure”, which means that the cause of action (contract, national or international law) is irrelevant as long the State conduct at issue is the same. However, even with this particular formulation, a State’s attempt to invoke the “fork-in-the-road” clause may be unsuccessful if the identities of the claimant in the domestic litigation and international arbitration are different.

“**No-U-turn**”, or “**waiver**”, clauses take a different approach to prevent duplicative claims. They permit investors to opt for international arbitration after commencing a claim for relief in domestic courts or tribunals. However, if the investor decides to submit a claim regarding the same measure to international arbitration under the ISDS provision of an IIA, then it must abandon its right to pursue local remedies.

Agreements of Canada and the United States have tended to follow this approach.⁷⁹ An illustrative example may be found in the Canada-Jordan BIT (2009):

“Article 26. Conditions Precedent to Submission of a Claim to Arbitration

1. A disputing investor may submit a claim to arbitration under Article 22 (Claim by an Investor of a Party on Its Own Behalf) only if:

[...]

*e. the investor and, where the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise **wave their right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement***

⁷⁹ See, for example, United States Model BIT (2012), Articles 24(1) and 26(2)(b); Canada’s Model BIT (2004), Articles 26(1)(e) and 26(2)(e).

procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 22, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.” (Emphasis added).

This approach gives domestic courts the opportunity to redress wrongs before they are raised to the international plane and permits investors to try that venue first. Once the investor decides to seek relief before an international tribunal, however, it may not shift back to domestic courts, except in cases where the investor seeks “*injunctive, declaratory or other extraordinary relief*”.⁸⁰

The article above focuses on the *measure* that is alleged to be in breach, and precludes duplicate proceedings regarding that measure.⁸¹ It also requires that the investor’s investment (i.e. a host-State enterprise owned or controlled by the investor) waive its right to initiate or continue proceedings with respect to the measure at issue. This circumvents the narrow traditional *litis pendens* requirement of identity of the cause of action and of the parties. In other words, it attempts to preclude a simultaneous international claim by an investor alleging breaches of the IIA, and domestic proceedings by the investor’s subsidiary alleging breaches of a contract or domestic law.

⁸⁰ The exception is included because the agreement explicitly precludes the tribunal from awarding non-monetary relief.

⁸¹ Questions about whether the domestic litigation and international arbitration related to the same measure have arisen in a few cases in the NAFTA context. See *Mark Roy Feldman Karpa v. Mexico*, ICSID ARB(AF)/99/1, Award, 16 December 2002, paras. 70–84; *Waste Management Inc. v. Mexico*, ARB(AF)/98/2, Arbitral Award, 2 June 2000, paras. 23–29.

F. Arbitrator selection and arbitrator challenges

Choosing arbitrators is an important step in any international arbitration. Most treaties are silent in that regard, and selection of arbitrators is governed by the applicable arbitration rules. A few recent treaties have included more specific details about the kinds of characteristics an arbitrator should possess, but this is still the exception rather than the rule.

1. Nomination procedures

The common practice in international arbitration is that disputes are decided by a three-arbitrator panel. Each disputing party appoints an arbitrator and then — depending on the applicable arbitration rules — either the parties (e.g. ICSID Rules) or the party-appointed arbitrators (e.g. UNCITRAL Rules) agree on a presiding arbitrator. In the event the parties cannot agree on the presiding arbitrator, the IIA may name an appointing authority to make the selection, often, but not always, from a specified roster of panelists. The appointing authority will likely have the authority to appoint a disputing party’s arbitrator in the event the disputing party has not named its own arbitrator within the requisite time period.

The Canada-Panama FTA (2010) contains the following provision, which supplements (and overrides, in case of inconsistency) the applicable arbitration rules:

“Article 9.25: Arbitrators

1. Except in respect of a Tribunal established under Article 9.27 [“Consolidation”], and unless the disputing parties agree otherwise, the Tribunal shall be composed of three arbitrators. One arbitrator shall be appointed by each of the disputing parties and the third, who will be the presiding arbitrator, shall be appointed by agreement of the disputing parties.

[...]

3. *If the disputing parties do not agree on the remuneration of the arbitrators before the constitution of the Tribunal, the prevailing ICSID rate for arbitrators shall apply.*

4. *If a Tribunal, other than a Tribunal established under Article 9.27 [“Consolidation”], has not been constituted within 90 days from the date that a claim is submitted to arbitration, the Secretary-General of ICSID, on the request of either disputing party, shall appoint the arbitrator or arbitrators not yet appointed. The Secretary-General shall make the appointment in its discretion and, to the extent practicable, do so in consultation with the disputing parties. The Secretary-General may not appoint as presiding arbitrator a national of either Party.”*

Paragraph three of the above article is a default provision regarding the arbitrators’ remuneration. Arbitrator fees can be very high. The ICSID Rules cap the arbitrators’ remuneration rate (currently at US\$3,000 per day per arbitrator) absent the permission of the Secretary-General to increase the rate. By contrast, the UNCITRAL Rules do not, leaving the issue of remuneration for negotiations between the parties and the arbitrators. Setting a fee schedule that will apply in the absence of party agreement helps avoid prolonged negotiations with the disputing parties or with the arbitrators themselves.

2. Arbitrator qualifications

Most treaties do not specify the desired characteristics of an arbitrator. Article 14(1) of the ICSID Convention requires that arbitrators 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*”.

One of the advantages of arbitration has always been that arbitrators can be chosen with an eye to their suitability for deciding a particular case. Investment arbitrations frequently involve matters relating to the public interest — such as the propriety of government regulations — and involve the application of, inter alia, public international law. Thus, a few recent treaties have laid out general qualities that should guide the selection of arbitrators. For example, Article 9.25 of the Canada-Panama FTA (2010) provides:

“2. Arbitrators shall have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements. They shall be independent of, and not be affiliated with or take instructions from, either Party or the disputing investor.”

Some treaties have laid down particular qualifications — an expertise in financial services law or practice — for arbitrators deciding disputes relating to financial institutions.⁸²

3. Ethical standards of impartiality and independence

Arbitrators, including party-appointed arbitrators, should be independent and impartial. These requirements apply regardless whether they are specifically mentioned in a treaty. In addition, certain rules apply regarding the nationality of the different arbitrators. A frequent requirement is that the presiding arbitrator not be a national of either party. Party-appointed arbitrators can sometimes hold the nationality of the party appointing them depending on the applicable arbitration rules, but must be independent and impartial.

The requirement that arbitrators be independent means that they must not have a relationship with either of the disputing parties or

⁸² See, for example, Article 29(3) of the Canadian Model BIT (2004).

related persons or entities — whether social, economic or otherwise — that suggests some dependence. The requirement of impartiality relates to the ability of the arbitrator to come to the case without favouring one of the parties and without preconceptions in relation to the subject-matter of the dispute.

A lack of independence can suggest a lack of impartiality, and even an appearance of bias can be sufficient to disqualify an arbitrator.⁸³ Appearance of bias is impermissible because of the important principle that justice “must not only be done, but must be seen to be done.”⁸⁴ This does not mean that *de minimis* contacts between an arbitrator and a party demonstrate an appearance of bias; the usual concern is whether the contacts are such that a reasonable observer would have justifiable doubts about the arbitrator’s impartiality. Arbitrators ordinarily have an on-going duty to disclose any information or activities that could give rise to justifiable doubts about their independence or impartiality.⁸⁵

4. Challenges to arbitrators

Most investment agreements do not include specific challenge procedures. Those matters are governed by the applicable arbitral rules. For example, the UNCITRAL Rules (1976 and 2010) provide that arbitrators can be challenged “*if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence*”.

Challenges must be made within a certain number of days of the arbitrator’s appointment or, in the case of later-acquired knowledge, within a specified period — often 15 or 30 days from the date that the challenging party learns of the facts supporting the challenge. In some cases an arbitrator will resign when faced with a challenge,

⁸³ Park, 2009, pp. 636–38; 670–72.

⁸⁴ *Ibid.*, p. 684.

⁸⁵ See generally Malintoppi, 2008, p. 789.

though that resignation does not imply acceptance of the validity of the challenge. If there is no resignation, the applicable rules differ over who decides whether the challenge should succeed. The UNCITRAL Rules (1976 and 2010) provide that the appointing authority decides the challenge; Rule 9(4) of the ICSID Arbitration Rules provides that when there is a three-person tribunal, the other two arbitrators shall decide the challenge. In the event those individuals cannot agree, the Chairman of the ICSID Administrative Council takes the decision.⁸⁶

A challenge may allege, for example, that an arbitrator has some kind of financial link to an affiliate of one of the parties or that an arbitrator has made public statements that allegedly demonstrate bias. To date, challenges have not often been successful.⁸⁷

Issue conflicts. Unique characteristics of investment arbitration have given rise to a special category of conflicts of interest known as “issue” conflicts. They involve arbitrators who also act as counsel in other cases or those individuals who sit repeatedly as arbitrators in cases that raise similar issues.⁸⁸ For instance, one of the first issue-conflict cases involved a claim against a sitting arbitrator who would be deciding an issue related to expropriation; as counsel in an unrelated case he would be taking a strong pro-investor position on a virtually identical issue. Such a situation may be seen as casting doubts on his ability to hear the case impartially and could at the least give rise to the appearance of impropriety.⁸⁹ One of the reasons behind issue conflicts is that there is a relatively small pool of

⁸⁶ See ICSID Convention Articles 57–58; ICSID Convention Arbitration Rule 9.

⁸⁷ For more information about arbitrator ethics and challenges, see C. Rogers, forthcoming.

⁸⁸ See Levine, 2006, pp. 61–65 (describing various cases involving issue conflicts); Sands, 2011, pp. 19, 22–23.

⁸⁹ Levine, 2006, pp. 61–65.

lawyers who serve as arbitrators and counsel in IIA-based proceedings. An additional factor is that previous arbitral awards are referred to as persuasive authority in subsequent cases. Hence there could be an incentive to decide a case in a way that would be beneficial to an arbitrator's client in the second case.

A separate facet of this problem stems from the fact that IIA disputes are governed by a relatively uniform legal field and that a few problematic IIA questions keep arising again and again. By researching the record of a particular arbitrator in earlier cases, one can predict in advance the position he or she is likely to take on a given issue. If arbitrators sit repeatedly in cases that address similar vexing issues, this gives rise to concerns that they have already taken a position on an issue (whether pro-State or pro-investor) and thus might not be in a position to be open-minded. Somewhat similarly, an individual's expressing an opinion on a particular issue in academic writings may be interpreted as evidence of "pre-judging" that issue. These matters are novel and in the process of development; so far, known attempts to challenge arbitrators on these grounds have been unsuccessful.⁹⁰

G. Claims by investors on their own behalf and on behalf of an enterprise

Most IIAs only authorize foreign investors to bring ISDS claims against host States. The investor, however, is only entitled to submit

⁹⁰ A claimant's challenge alleging "pre-judgment" of an issue due to a position taken by the arbitrator in a prior case, as expressed in her separate opinion, was reportedly dismissed (*EURAM v. Slovak Republic*, UNCITRAL, decision not public). A challenge based on academic writings was unsuccessful to the extent the author (arbitrator) expressed only a view about a legal principle and not an opinion about its application to the case under review (*Urbaseer v. Argentina*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, 12 August 2010).

a claim because it has an investment in the host State. Offering protection to an investor frequently implicates the treatment accorded to the investment. Further, that investment will often take the form of a company established by the investor under the host State law.

In the simplest case, if an investor holds a majority shareholding in a local enterprise, the investor would initiate arbitral proceedings about mistreatment of the investment (strictly speaking, its shareholding) and claim damages arising therefrom. This may pose challenges in terms of calculating compensation because the damage to the enterprise and the prorated damage to the shareholder are not the same and may depend, for example, on the dividend policy of the enterprise and on other factors.⁹¹

Some IIAs accord the status of an “investor” to the local enterprise itself. For instance, Article 8(3) of the Lebanon-Slovakia BIT (2009) provides:

*“For the purposes of this Article [on ISDS] and Article 25(2)(b) of the said Washington Convention,^[92] any legal person which is constituted in accordance with the laws and regulations of the Contracting Party and which, before the dispute arises, was **controlled** by an investor of the other Contracting Party, **shall be treated as a national of the other Contracting Party.**”* (Emphasis added).

⁹¹ On the relevant issues and the way they have been approached in practice, see Ripinsky with Williams, 2008, pp. 148–161.

⁹² Article 25(2)(b) of the ICSID Convention allows States to agree that, for the purposes of ICSID arbitration, a company holding the nationality of the Contracting State party to the dispute shall be considered to be a company of the other Contracting State if, immediately prior to the action giving rise to dispute, nationals of that State controlled it.

Under this approach, the local subsidiary may itself bring a claim against the host State as long as it is “controlled” by the foreign investor, i.e. the investor has the power to exercise decisive influence over the management and operation of the subsidiary.⁹³

Another technique used to achieve essentially the same result — employed in the NAFTA and a number of subsequent IIAs — is to allow foreign investors to bring claims not only on their own behalf but also *on behalf of the local enterprises which they own or control, directly or indirectly*. The Australia-Mexico BIT (2005) provides an example:

“Article 13. Arbitration: Scope and Standing and Time Periods

An Investor of a Contracting Party on its own, or on behalf of an enterprise of the other Contracting Party that the Investor owns or controls, directly or indirectly, may submit to arbitration a claim that the other Contracting Party has breached an obligation under this Agreement and that the Investor or such enterprise has incurred loss or damage by reason of, or arising out of, that breach.” (Emphasis added).

Article 13 effectively enables enterprises that are even *partially* foreign-owned (as long as they are foreign-controlled) to recover *all* of the damage that has been caused to the enterprise by the IIA

⁹³ In order to add further clarity to what constitutes ownership and/or control, some IIAs specifically define these terms as it is done in Article 1(3) of the Japan-Peru BIT (2008):

“An enterprise is:

- (a) ‘owned’ by an investor if more than 50 percent of the equity interest in it is owned by the investor;*
- (b) ‘controlled’ by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions”* (emphasis added).

violation (i.e. the claim is not limited to the damage that is proportionate to the investor's shareholding).

In cases brought on behalf of an enterprise, any resulting damages award should be payable to the enterprise itself.⁹⁴ This might have important tax consequences for the award. If the award is paid to the enterprise, it will be subject to taxation by the jurisdiction whose laws apply to the enterprise; if it is paid to the investor, it will be subject to taxation by the jurisdiction whose laws apply to the investor.

It might also have distributional consequences. The controlling entity should not receive the entire amount of the damage; rather, the damaged investment on whose behalf the case was brought should be made whole first, with further distribution of those monies dependent on how the particular enterprise is structured and the relationship among various interest-holders in the investment. All those with ownership interests in that enterprise would thus receive some benefit.

H. Frivolous claims

An arbitration proceeding can turn into a protracted undertaking that exerts a heavy toll in terms of time, effort, legal fees and other costs. In an attempt to minimize those costs where they are unwarranted, several States have included in their IIAs a procedure to avoid "frivolous claims", that is, claims that evidently lack a sound legal basis. This expedited procedure requires the arbitral tribunal to address and decide, as a preliminary question, any objection by the respondent State that the investor's claim is legally defective.

⁹⁴ See, for example, Article 10.26(2) of the Central America-Dominican Republic-United States FTA (2004).

When deciding an objection under this procedure, the arbitral tribunal assumes that the claimant's factual allegations in support of the claims are true, and issues a decision or award on the objection on an expedited basis. The United States Model BIT demonstrates this approach, which is found in recent IIAs concluded by the United States and some other countries:⁹⁵

“Article 28. Conduct of the Arbitration

[...]

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 34 [“Awards”].

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefore.

⁹⁵ See, e.g., Australia-Chile FTA (2008) Article 10.20(3)–(5). Like the ICSID rules, this article refers to claims “manifestly without legal merit”.

(c) *In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.*

(d) *The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.*

5. *In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefore, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.*" (Emphasis added).

The legal test employed in this provision is a broad one: the objecting State must show that the claim "*is not a claim for which an award in favour of the claimant may be made*". This must refer to some circumstance that deprives the claim of a sound legal foundation and makes it "fatally flawed".⁹⁶ The range of possible

⁹⁶ Caplan and Sharpe, 2013, p. 835.

objections is not defined. Conceivable objections could relate, for example, to cases where the claim is time-barred, or does not involve an “investment” as defined in the applicable IIA, or does not concern conduct attributable to the respondent State.

The objective of the expedited procedure is to avoid spending time and resources on full proceedings for claims that can be dismissed at an early stage. This intention is also evidenced by the specific time frames provided in paragraph 5 of Article 28 above. However, if on the basis of available evidence, a tribunal decides that it cannot rule on the matter or that the issues are inextricably intertwined with the merits, it may decide that a hearing of the full case is warranted.

A clear provision on discharge of frivolous claims helps to avoid potentially lengthy arguments between disputing parties on the matter of whether the proceedings should be bifurcated, i.e. whether the preliminary objections should be considered separately, prior to the full merits procedure.⁹⁷

The approach described above is markedly different from other treaty clauses that simply allow, but do not mandate, separate consideration of preliminary objections by respondent States. For example Canada’s Model BIT (2004) provides:

“Article 37. Preliminary Objections to Jurisdiction or Admissibility

Where issues relating to jurisdiction or admissibility are raised as preliminary objections, a Tribunal shall, wherever possible, decide the matter before proceeding to the merits.”

⁹⁷ For a discussion of issues relating to bifurcation, see, for example, *Glamis Gold v. United States*, Procedural Order No.2 (Revised), 31 May 2005; *Mesa Power v. Canada*, Procedural Order No.2, 18 January 2013; Procedural Order No. 3, 28 March 2013.

In contrast to Article 28 of the Uruguay-United States BIT quoted above, this clause covers a narrower range of possible objections (only those relating to “jurisdiction or admissibility”) and leaves to the tribunal the ultimate decision on whether it will consider preliminary objections before the merits.⁹⁸

Having a provision on frivolous claims in an IIA is particularly important in arbitrations conducted under rules *other* than the ICSID Arbitration Rules (and ICSID Additional Facility Rules), as the latter contain their own stipulations on this matter. In 2006, ICSID amended its arbitration rules to provide for an expedited decision on an objection that a claim is “*manifestly without legal merit.*”⁹⁹ Rule 41 of the ICSID Arbitration Rules provides in the relevant part:

“(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

⁹⁸ Lévesque and Newcombe, 2013, p. 118. A similar provision can be found in the Belgium/Luxemburg-Colombia BIT (2009), Article XII (14).

⁹⁹ The ICSID Additional Facility Arbitration Rules contain an analogous provision in Article 45(6–7).

that all claims are manifestly without legal merit, it shall render an award to that effect." (Emphasis added).

The respondent State's objection does not have to relate to the jurisdiction of the tribunal. However, the preliminary objection procedure can also be used to expedite an objection to the jurisdiction of the tribunal. As one tribunal noted:

*"There exist no objective reasons why the intent not to burden the parties with a possibly long and costly proceeding when dealing with such unmeritorious claims should be limited to an evaluation of the merits of the case and should not also englobe an examination of the jurisdictional basis on which the tribunal's powers to decide the case rest."*¹⁰⁰

The word "manifestly" in the phrase "manifestly without legal merit" has been interpreted that setting a high standard of proof. As stated by the tribunal in *Trans-Global Petroleum v. Jordan*, "an award under Rule 41(5) can only apply to a clear and obvious case, i.e. [...] 'patently unmeritorious claims'."¹⁰¹

These revisions to the ICSID Rules mean that States can make frivolous-claims objections in proceedings under the ICSID Convention or under the aegis of the Additional Facility Rules even if the operative investment treaty itself does not contain a specific provision authorizing the expedited preliminary procedure. Neither the 1976 nor the 2010 UNCITRAL Rules contain a similar mechanism.

¹⁰⁰ *Brandes v. Venezuela*, ICSID Case No. ARB/08/3, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, 2 February 2009, para. 52. See also *Globex Trading v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010, para. 30.

¹⁰¹ *Trans-Global Petroleum, Inc. v. Jordan*, ICSID Case No. ARB/07/25, The Tribunal's Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008, para. 92.

I. Provisional measures

Investment tribunals have the authority to order provisional measures, also frequently referred to as interim measures of protection. A provisional measure is “*a remedy or a relief that is aimed at safeguarding the rights of parties to a dispute pending its final resolution.*”¹⁰²

1. Types of provisional measures

Provisional measures can be grouped into three broad categories: (i) measures related to the preservation of evidence; (ii) measures related to the conduct of the arbitration and the relations between the parties; and (iii) measures designed to facilitate the enforcement of any eventual award.¹⁰³

An example of the first category would be a tribunal ordering a party to preserve certain evidence that could otherwise be destroyed, either deliberately to frustrate the collection of evidence or inadvertently in the course of a regular document purging process. In investment arbitration, this might involve requesting that documents in the control of an expropriated company be preserved.¹⁰⁴

The second category of provisional measures is broader, and usually involves protecting a legal right. This might involve an order requiring a party to continue to perform a contract pending the outcome of any award in order to prevent further damage, or an order not to alienate property so that it can be restored to the complaining party if necessary.

¹⁰² A. Yeşilirmak, 2005, p. 5.

¹⁰³ *Ibid.*, pp. 11–12.

¹⁰⁴ Malintoppi, 2009, pp. 157, 162–164.

As regards the third category, if there is convincing evidence that a party will engage in a bad-faith attempt to hide assets in order to stymie the enforcement of an award, a tribunal might order the posting of security. In ICSID cases these requests have not met with success.¹⁰⁵

Provisional measures are appropriate only in the limited circumstances where failure to order them would likely result in a tribunal's inability to order appropriate final relief.¹⁰⁶ Encompassed in these requirements is the notion of urgency (that interim measures be essential to preserve the rights of one of the parties) and necessity (that failure to order the measures would prevent an appropriate award from being entered).

2. Tribunal-ordered interim measures

The ICSID Convention and the UNCITRAL Arbitration Rules both empower the tribunal to order provisional measures.¹⁰⁷ These rules can be complemented by special provisions in the IIA addressing this issue, as found in many recent agreements.¹⁰⁸ The Mexico-Singapore BIT (2009) serves as an example:

“Article 19. Interim Measures of Protection

1. An arbitral tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to

¹⁰⁵ *Ibid.*, pp. 168–170.

¹⁰⁶ Other characteristics typical of interim measures are that they presuppose the existence of a dispute, are temporary and should be periodically reviewed to ascertain their continued relevance, and are limited so as not to exceed the final relief that might eventually be given.

¹⁰⁷ Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules; Article 26 of the UNCITRAL Arbitration Rules.

¹⁰⁸ See, for example, Australia-Chile FTA (2008) Article 10.20(7); Canada-Jordan BIT (2009) Article 43; Rwanda-United States BIT (2008) Article 28(8); Brunei-Japan FTA (2009) Article 67(19).

ensure that the arbitral tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the arbitral tribunal's jurisdiction.

2. An arbitral tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 11. For purposes of this paragraph, an order includes a recommendation.”

This provision grants limited authority as it specifies what a tribunal both may and may not order as interim measures. Consistent with that BIT's limitation of authority to award non-monetary remedies,¹⁰⁹ this provision prevents a tribunal from ordering a State to cease the application of a measure. Rather, the purpose behind interim measures is to ensure a tribunal's ability to conduct fair proceedings and preserve its jurisdiction, for example, in the event that one of the parties tries to seek parallel relief in local courts, which is not permitted under the BIT.¹¹⁰

The reason that arbitral tribunals tend to have limited authority to award provisional measures is that they have limited coercive powers. They have authority over the parties to the dispute, but have no authority over third parties. Moreover, even with respect to the disputing parties, they lack the ability to compel compliance with orders, save for their ability to draw adverse inferences against a party that has failed to abide by its orders, or to take into account that party's acts when determining the allocation of costs.

3. Court-ordered interim measures

The inherent limitations on arbitral tribunal authority mean that domestic courts often play a role in ordering interim measures of protection in support of arbitration. Parties to an arbitration may

¹⁰⁹ On the limitation of available remedies, see section II.O.

¹¹⁰ See Kaufmann-Kohler and Antonietti, 2010, pp. 507, 523–526.

thus seek provisional measures from a court in place of arbitration, in the host State, or even from a third State if there is a jurisdictional connection to that forum. The types of assistance available will depend on the arbitral law of the place of the court whose assistance is sought. Domestic court assistance is particularly likely to be sought when the order would be directed against a third party — such as a bank — over whom an arbitral tribunal would have no authority, or when the arbitral tribunal has not yet been constituted. Some domestic courts will enforce interim awards made by arbitral tribunals; other courts require that relief first be sought in them.¹¹¹

4. Relationship between tribunal-ordered and court-ordered interim measures

Interim measures from domestic courts are not available in ICSID Convention arbitration (though they would be available in an arbitration under the Additional Facility Rules). The self-contained nature of arbitration under the ICSID Convention precludes relief from national courts, unless the parties have specifically agreed otherwise in their agreement to arbitrate.¹¹²

Entrusting provisional measures solely to arbitral tribunals means that provisional measures are not available from an ICSID Convention tribunal prior to its constitution. In order to address potential problems caused by this delay, the 2006 amendments to the ICSID Arbitration Rules provided for an expedited process under which a party can seek provisional measures in parallel with the constitution of the tribunal; by the time the tribunal is constituted, it would have before it a request, as well as the other party's observations, and should be in a position to decide on the issue promptly.¹¹³

¹¹¹ Sherwin and Rennie, 2009, pp. 325–327.

¹¹² Rule 39(6) of the ICSID Arbitration Rules.

¹¹³ Rule 39(5) of the ICSID Arbitration Rules.

In non-ICISID Convention cases it is increasingly accepted, although not universally true, that national courts and international arbitral tribunals can have concurrent jurisdiction to grant interim measures, so it is not out of the question that an investor could seek interim relief in both forums simultaneously.¹¹⁴ In practice, however, the type of relief sought in a court is likely to be quite different from the relief sought before a tribunal. Concerns about limiting costs suggest that parties will go to a court when the court's stronger and more wide-ranging coercive authority is necessary.

The above-quoted Mexico-Singapore BIT contains a passage that specifies an investor's retention of the ability to seek injunctive relief in domestic courts:

“Article 11. Submission of a Claim

[...]

4. A disputing investor may submit a claim to arbitration only if:

[...]

(b) the investor [...] waives its right to initiate or continue before any administrative tribunal or court under the laws of the disputing Contracting Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Contracting Party that is alleged to be a breach of Chapter II, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the laws of the disputing Contracting Party.”
(Emphasis added).

The assumption underlying this provision is that a disputing party will seek from a court relief that is not available from an

¹¹⁴ Kinnear, Bjorklund and Hannaford, 2009, Art. 1134.12–1134.13.

arbitral tribunal. A party may seek such relief without jeopardizing its ability to pursue its claim for damages before the arbitral tribunal itself.

J. Consolidation of claims

Given the huge number of bilateral and regional IIAs, the participants in a single investor-State relationship may be governed by multiple treaties. For example, one IIA may apply to a foreign company investing in a host State, while several other IIAs may separately cover the shareholders (of various nationalities) in the company, who thus participate in the investment indirectly.¹¹⁵ Even if the shareholders and the investing company are protected under the same treaty, their ability to file separate claims could result in the formation of multiple tribunals hearing essentially the same claim. In other situations, two or more investment claims can be closely linked simply because a governmental measure affects a large range of foreign investors. For example, after the Argentinean economic crisis of 2001, claimants filed over 40 investment cases, all relating to the same actions of the Argentinean Government, but based on several different BITs. Several complex cases have been treated as effectively “mass claims”, with multiple claimants

¹¹⁵ A real-life example of this possibility is the *CME/Lauder* dispute where one claim was brought against the Czech Republic by CME, a Dutch company, under the Czech Republic-Netherlands BIT, and another claim was brought by Mr. Lauder, the American owner of CME, under the Czech Republic-United States BIT. The cases — running concurrently and relating to the conduct of the Czech Government, but adjudicated by two different arbitral tribunals — famously resulted in divergent outcomes. See *Ronald S. Lauder v. The Czech Republic*, UNCITRAL Rules, Final Award, 3 September 2001 and *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL Rules, Partial Award, 12 September 2001.

seeking relief under the same treaty against the same respondent for the same measures.¹¹⁶

1. Pros and cons of consolidation

Consolidation of proceedings helps to deal with the problem of related proceedings, contributes to the uniform application of the law and reduces the costs of proceedings. The fact that consolidation increases coherence and consistency in arbitral awards is of particular importance for investment arbitration, where arbitrators are not bound by prior awards and their awards are not subject to appeal. In addition, consolidation may greatly decrease the cost and time of arbitral proceedings. At the same time, in some circumstances, a respondent State may feel that consolidation is not in its interests. The State might hope that at least one of the claimants would fail to press its case or that, strategically, if the proceedings remain separate, it would have a better chance of prevailing in at least one of them.¹¹⁷ Investors may oppose consolidation if they are competitors in the relevant market because joining proceedings may require disclosing sensitive business information to their co-claimants.¹¹⁸

¹¹⁶ See, e.g., *Canadian Cattlemen for Fair Trade v. United States*, UNCITRAL, Award on Jurisdiction, 28 January 2008; *Bayview Irrigation District et al. v. Mexico*, ICSID ARB(AF)/05/1, Award, 29 June 2007. More controversially, in *Abaclat et al. v. Argentina*, an ICSID tribunal determined it had jurisdiction over a mass claim of some 60,000 bondholders notwithstanding Argentina's argument that it had not agreed to arbitrate such mass claims. ICSID No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011.

¹¹⁷ For instance, in the *CME/Lauder* dispute, the Czech Republic refused to consent to the consolidation of the two cases, as proposed by the claimants, and prevailed in one of the cases.

¹¹⁸ This was the case in the high-fructose corn syrup cases, in which the claimants opposed consolidation. Although the tribunal had the authority

2. Premises for consolidation

Not all disputes may be suitable for consolidation even though they may relate to similar subject matter. The relevant factors include:

- a) Consolidation pre-supposes ongoing or early-stage proceedings. If subsequent proceedings relating to a similar subject matter occur, obviously they cannot be consolidated with a case that has already finished its course or is far-advanced.
- b) Only those proceedings challenging the same or similar government measures can be consolidated. In other words, the fact patterns of two disputes must be sufficiently similar.
- c) The most problematic condition is that of common legal ground. Consolidating claims based on different IIAs can prove difficult because they may contain differing substantive obligations, as well as diverging time limits, procedural obligations and dispute settlement forums.

3. Consolidation provisions in arbitration rules

There is no uniform practice with regard to consolidation. It will generally depend on the consent of all parties and the discretionary powers of the arbitral tribunal to decide on the issue. The most widely used arbitration rules in investment disputes — ICSID and

to consolidate the claims notwithstanding the claimants' opposition, the tribunal noted the complexity that would ensue if the cases were to be consolidated because of the requisite confidentiality procedures that would need to be established to protect the proprietary information of fierce market competitors. *Corn Products Int'l v. Mexico*, ICSID Case No. ARB(AF)/04/1 and *Archer Daniels Midland Co. & Tate & Lyle Ingredients Americas, Inc. v. Mexico*, ICSID Case No ARB(AF)/04/5, Order of the Consolidation Tribunal, 20 May 2005, paras. 7–13.

UNCITRAL 1976 — do not contain rules on the consolidation of disputes.¹¹⁹ Importantly, they do not preclude such a motion either. The UNCITRAL Rules were amended in 2010 to address joinder and now explicitly allow “*one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds [...] that joinder should not be permitted because of prejudice to any of those parties.*” (Article 17.5). However, the UNCITRAL Rules still do not address consolidation in situations when not all parties have consented to the same arbitration agreement.

4. Consolidation provisions in IIAs

A number of recent IIAs have included consolidation provisions. However, the practice is neither widespread nor uniform. Two kinds of provisions can be identified. The first is a restatement of the general rule found in arbitration that consolidation is possible, if all of the parties concerned agree. For example, the Malaysia-New Zealand FTA (2009) provides in Article 10.27:

“Where two or more investors notify an intention to submit claims, or have submitted claims, separately to arbitration under Article 10.21 (Submission of a Claim to Arbitration) and the claims have a question of law or fact in common and arise out of the same or similar events or circumstances, all concerned disputing parties may agree to consolidate those claims in any manner they deem appropriate, including with respect to the forum chosen.”

The practical significance of such a provision is limited. First, although helpfully drawing attention to the possibility of consolidation, it does not create, but merely restates, a right already

¹¹⁹ Some other sets of arbitral rules do have provisions on consolidation. See, in particular, Article 4(6) of the ICC Rules of Arbitration and Article 11 of the SCC Arbitration Rules.

available to parties. Second, it requires the consensus of all parties involved and does not give tribunals independent power to decide on consolidation. Third, it is silent on the specific mechanism by which consolidation would be achieved.

The second kind of consolidation provision found in IIAs is modeled on NAFTA Article 1126. These clauses set out a very detailed consolidation mechanism. Under this type of provision, any disputing party to the related, ongoing proceedings can request the consolidation of proceedings. This request triggers a quasi-automatic process that involves the establishment of a consolidation tribunal. This tribunal must hear the parties' arguments regarding the desirability of consolidation, but can decide independently whether the proceedings should be consolidated. Thus, no consensus of the parties is required.

However, the tribunal's discretion in this scenario is limited by two conditions. First, and very importantly, only claims made under the dispute settlement mechanism of the *same* treaty can be consolidated.¹²⁰ Second, claims must have “*a question of law or fact in common*”. Other treaties, such as Article 11(3) of the COMESA Common Investment Area, provide that claims have to “*arise out of the same events or circumstances*”.

If these conditions are met, the consolidation tribunal, after hearing the parties, can assume jurisdiction over all or part of the claims. If it does so, the original tribunals then lose jurisdiction over these matters. Some treaties provide for the possibility of referring the consolidated claims back to one of the original tribunals (e.g., Article 33(6) of the Rwanda-United States BIT (2008)).

¹²⁰ Thus, IIA consolidation provisions do not help resolve the problem of a foreign company and its shareholders bringing separate claims under different IIAs.

Another way to manage parallel proceedings is to appoint the same arbitrators in the related proceedings.¹²¹ This approach can work whether the cases are brought under the same or under different treaties. Appointing the same arbitrators would likely contribute to the consistency of the arbitral rulings, though it would be of less assistance in reducing costs. Yet there would still likely be some economies of scale because the arbitrators would only have to become familiar with the relevant facts once.

K. Counterclaims by respondent States

A treaty-based investor-State dispute can only be initiated by investors who allege that a host State breached the applicable IIA. Over the past few years, however, in a growing number of IIA cases, respondent States have attempted to advance counterclaims against the claimant investor. Such counterclaims have been usually based on an allegation that the investor had violated its own obligations relating to the investment.

The main rationale for counterclaims is procedural economy and the sound administration of justice: the idea is that all claims connected to the dispute could be dealt with in a single proceeding by the same tribunal. This would prevent unnecessary delays and costs related to double or multiple fact-finding endeavours, and written and oral submissions. Smooth adjudication of counterclaims could be in the interest of investors because the alternative for them

¹²¹ The cases *Salini v. Morocco* and *Consortium R.F.C.C. v. Morocco* involved similar factual and legal issues and were both based on the same BIT between Spain and Morocco. The ICSID Secretariat recommended appointing the same arbitrators in both proceedings. While separate awards were rendered, coherence in the application of the law was assured by this approach. See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001; and *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Final Award, 22 December 2003.

would be to face the same claims in the host State's national courts which they often try to avoid.

While the idea of permitting ISDS tribunals to hear counterclaims is appealing in many ways, its practical realization has turned out to be fraught with difficulties. In fact, in no IIA dispute to date has a State's counterclaim been accepted on the merits. In most cases, tribunals — while recognizing that in principle arbitral rules permit counterclaims — for various reasons have decided that they were without jurisdiction to entertain them.

The ICSID Convention and other sets of arbitral rules used in investment treaty arbitration (such as UNCITRAL) generally allow counterclaims.¹²² Notwithstanding the different wording of the relevant rules, in practice two fundamental requirements for the admission of counterclaims by an arbitral tribunal have emerged: (1) The counterclaim must be within the jurisdiction of the tribunal; and (2) the counterclaim must be connected to the primary claim.

Important obstacles for the effective use of counterclaims in ISDS proceedings find their roots in the design of investment treaties. IIAs were conceived as instruments regulating the behaviour of host States towards investors. The obligations of *investors* do not stem from IIAs but usually from the domestic law of the host State and from investment contracts (when such a contract is concluded with a State or State agency). For example, in *Paushok v. Mongolia*, which concerned mineral extraction, Mongolia's counterclaims contained, amongst others, allegations of tax evasion on the part of the investor, violation of the license agreement which lead to a loss in tax revenue and loss of employment of Mongolian nationals, violation of Mongolian environmental law and claims for damages relating to gold

¹²² See Article 46 of the ICSID Convention; Article 21(3) of the UNCITRAL 2010 Rules, Article 19(3) of the UNCITRAL 1976 Rules.

smuggling.¹²³ The tribunal refused to hear the counterclaims on the grounds that they were not closely related to the investor's primary claim.

However, some IIAs do impose obligations on investors. For instance, Article 13 of the COMESA Investment Agreement (2007) requires that investors and their investments “*comply with all applicable domestic measures of the Member State in which their investment is made*”.¹²⁴ A provision of this type, a rarity in IIAs,¹²⁵ does not create any *new* obligations but raises the investors' general obligation to comply with national law to the international treaty level. This, in turn, puts that obligation on an equal footing with the obligations of the host State, and thereby gives a tribunal constituted under the treaty jurisdiction over possible counterclaims.

To remove any uncertainty, the COMESA Agreement additionally spells out the right of a State to bring counterclaims

¹²³ *Sergei Paushok et al. v. Mongolia*, UNCITRAL Rules, Award on Jurisdiction and Liability, 28 April 2011, para. 678.

¹²⁴ The term “measure” is defined as “*any legal, administrative, judicial or policy decision that is taken by a Member State, directly relating to and affecting an investment in its territory*” (Article 1.10).

¹²⁵ See also Article 10 of the SADC Protocol on Finance and Investment (2006): “*Foreign investors shall abide by the laws, regulations, administrative guidelines and policies of the Host State*”; Article 12 of the Ghana Model BIT (2008): “*Nationals and companies of one Contracting Party in the territory of the other Contracting Party shall be bound by the laws and regulations in force in the host State, including its laws and regulations on labour, health and the environment.*” Recent Indian BITs include a provision that goes in the same direction; Article 12(1) of the India-Nepal BIT (2011) and Article 15(1) of India-Slovenia BIT (2011) state: “*Except as otherwise provided in this Agreement, all investments shall be governed by the laws in force in the territory of the Contracting Party in which such investments are made.*” The idea of including investors' domestic-law obligations in the treaty scope was explored in UNCTAD, 2012a, Policy Options for IIAs, Section 7.

arising out of investor non-compliance with domestic laws and regulations:

“A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages.” (Article, 28(9), emphasis added).

One of the consequences of this approach is that States acquire the ability to enforce relevant investor obligations through the IIAs’ dispute settlement procedures. This allows governments, for example, to seek redress from investors that have ceased business operations and withdrawn their assets from the host State, and whose prosecution in the host State has low chances of successful enforcement.

The case of *Goetz v. Burundi* was the first IIA arbitration where the tribunal affirmed its jurisdiction over a respondent State’s counterclaim. Specifically, Burundi sought US\$ 1 million from the claimants for their bank’s failure to honour the terms of a local operating certificate. The tribunal found that despite the applicable Belgium/Luxembourg-Burundi BIT’s silence on the matter, it was competent to consider the counterclaim pursuant to Article 46 of the ICSID Convention as the counterclaim fell within the jurisdiction of ICSID (i.e., related to the investment), was covered by the consent of the parties and directly related to the object of the dispute. Having

admitted the counterclaim, the tribunal went on to dismiss it on the merits.¹²⁶

Impact of the ISDS clause. The formulation of the treaty’s ISDS clause has an important influence on the admissibility of counterclaims. This clause delineates the scope of ISDS, thereby setting the boundaries for a tribunal’s jurisdiction. As discussed in section II.B, some ISDS provisions are quite broad and give tribunals the authority to hear “*any dispute between an investor of one Party and the other Party in connection with an investment*”, or contain a similar formulation. Arbitral tribunals have decided that such clauses are in principle broad enough to give them the power to hear States’ counterclaims, even if they arise out of alleged violations of the host State’s domestic law or investment contract.¹²⁷ By contrast, narrow ISDS clauses that limit arbitrable claims to those alleging the breach of a treaty provision make a counterclaim argument difficult given that most treaties do not impose obligations on investors. Indeed, based on this argument, the *Roussalis v. Romania* tribunal refused to entertain counterclaims against the foreign investor.¹²⁸

Applicable law. The question of applicable law might also be relevant to the issue of counterclaims. In particular, there may be a difference between IIAs that provide for the application of the treaty itself (and relevant international law) and IIAs that list the domestic

¹²⁶ *Antoine Goetz & Others and S.A. Affinage des Metaux v. Republic of Burundi*, ICSID Case No. ARB/01/2, Award, 21 June 2012, paras. 267–287.

¹²⁷ *Saluka Investments BV v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic’s Counterclaim, 7 May 2004, para. 39; *Sergei Paushok et al. v. Mongolia*, UNCITRAL Rules, Award on Jurisdiction and Liability, 28 April 2011, para. 689.

¹²⁸ *Roussalis v. Romania*, ICSID ARB/06/01, Award, 7 December 2011, paras. 869–972. Arbitrator Michael Reisman disagreed with the conclusion of the majority.

law of the host State as one of the sources of applicable law.¹²⁹ In the first scenario, it is not clear what claims a State could submit against an investor as the latter is unlikely to have obligations under the treaty or international law. In the second scenario, allegations of breaches of host State law might more readily be brought before an investment tribunal regardless of whether the investor's duty to comply with domestic law is specifically mentioned in the treaty.

Umbrella clauses. Another situation might arise when an IIA contains an “observance of undertakings” clause, also called an “umbrella” clause.¹³⁰ An umbrella clause requires a host State to respect any obligation assumed by it with regard to a specific investment (for example, in an investment contract). The clause thus brings contractual and other individual obligations of the host State under the “umbrella” of the IIA, making them potentially enforceable through ISDS.

An investment treaty tribunal hearing a claim brought under the umbrella clause will often effectively be hearing a breach of contract claim, which suggests that counterclaims with respect to the contract would appropriately be heard as well. Yet, if the umbrella clause is understood as imposing obligations only on the State (not on the investor), one could argue that the tribunal's jurisdiction encompasses the umbrella clause claim only to the extent it involved a breach by the State.

To remedy this uncertainty, one option for treaty drafters is to replace a one-way umbrella clause with a two-way one; that is, one that requires both the State and the investor to observe their specific

¹²⁹ For further discussion of applicable law, see section II.M.

¹³⁰ See the discussion of umbrella clauses in section II.T. A typical umbrella clause is one found in Article 2.2 of the Bahrain-Turkmenistan BIT (2011): “*Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.*”

obligations related to the investment. This would give States an opportunity to bring counterclaims against investors in the relevant ISDS proceedings.¹³¹

L. Transparency of proceedings¹³²

One of the key issues in ISDS is the question of transparency. Providing increased and better access to information about ongoing disputes and about the ISDS process generally is one of the primary tools available to respond to concerns about the legitimacy of ISDS. Traditionally, confidentiality has been the hallmark of international commercial arbitration. The relevant arbitral rules provide that proceedings and awards remain confidential in the absence of the agreement of the parties to disclose information. Some recent IIAs, particularly those concluded by Canada and the United States, have introduced additional rules for increased transparency of arbitral proceedings.

Among the arbitral institutions and arbitral rules currently in force, ICSID has the highest level of transparency. Due to its public registry, disputes administered by it are known, as well as the economic sector to which the dispute relates, the names of the arbitrators appointed and the counsel representing the disputing parties. As part of the revisions to its Arbitration Rules in 2006,¹³³ ICSID included a provision authorizing it to include in its publications excerpts of tribunals' legal reasoning. Awards themselves remain confidential in the absence of the agreement of the parties.

¹³¹ See further UNCTAD (forthcoming); Bjorklund, 2013.

¹³² For the detailed treatment of the topic of transparency, see UNCTAD, 2012c.

¹³³ ICSID Convention Arbitration Rule 48(4) and ICSID Additional Facility Rules Article 53(3).

The UNCITRAL Arbitration Rules leave the matter of disclosure or confidentiality to the discretion of the disputing parties. That is why the very existence of a dispute can be kept secret if both parties so wish. In 2010, the United Nation Commission on International Trade Law (UNCITRAL) started the preparation of a legal standard on transparency in treaty-based investor-State arbitrations and adopted in July 2013 a set of Transparency Rules that provide for open oral hearings in IIA-based cases as well as the publication of key documents, including notices of arbitration, pleadings, transcripts, and all decisions and awards issued by the tribunal.¹³⁴ However, these rules will apply only to arbitrations under *future* IIAs (if they are referred to in such IIAs), and thus exclude the multitude of pre-existing IIAs (those concluded before 1 April 2014) from their coverage. State parties to pre-2014 treaties may change this default position by separately agreeing to apply the new transparency rules to these non-covered treaties, if they so wish.¹³⁵

The word “transparency” is used to mean different things. The three most frequently discussed issues falling under the notion of “transparency” have been: (1) the access to information about disputes, including awards and sometimes the submissions of the disputing parties; (2) the opening of arbitral hearings to the public; and (3) the ability of third parties to participate as *amici curiae* in the disputes.

¹³⁴ See <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>.

¹³⁵ In order to address this last possibility in the most efficient way, UNCITRAL is currently working on the preparation of a convention on transparency in treaty-based investor-State arbitration. Note also that disputing parties themselves may agree to apply the Transparency Rules in their specific arbitration proceeding, regardless of the base treaty's date of conclusion and of whether such proceeding is governed by UNCITRAL Arbitration rules or some other arbitration rules.

1. Access to documents

The United States and Canada have been the most inclined to include in their IIAs requirements that certain documents be made public. For instance, Article 29 of the BIT between the United States and Uruguay (2005) requires the respondent to transmit certain documents to the investor's home State and to make them available to the public, including the notice of arbitration, memorials, transcripts of hearings and arbitral awards. These rules do not require the parties to make public any negotiations about the settlement of the dispute, nor do they interfere with the confidentiality of the tribunal's deliberations.

Even States that provide for ready access to documents limit the obligation to disclose sensitive information belonging to the State, to the investor, or to third parties. Thus, the Canada — Czech Republic BIT (2009), in its general exceptions provision, provides:

“[n]othing in this Agreement shall be construed to require a Contracting Party to furnish or allow access to information the disclosure of which [...] would be contrary to the Contracting Party's law protecting Cabinet confidences, personal privacy or the confidentiality of the financial affairs and accounts of individual customers of financial institutions.”

The same agreement specifies that tribunals shall establish procedures to ensure the protection of confidential information of either Party, but with the caveat that, in the event of a conflict between a tribunal's confidentiality order and a State's access-to-information laws, the latter should prevail (Annex B.I).

States that have made information about disputes public have ordinarily done so via official websites.¹³⁶

2. Open hearings

Civil society groups and others have also pressed for public access to hearings. They have met with some success. Again Canada and the United States have been the most receptive to providing open hearings. For example, the Canadian Model BIT (2004) provides:

“Article 38

Public Access to Hearings and Documents

1. Hearings held under this Section shall be open to the public. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings in camera.

2. The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties.”

The Canada-Czech Republic BIT of 2009 (Annex B.I.1) contains a slight variation on this theme: hearings will be open to the public when the Contracting Party determines that it would be in the public interest, but portions of the hearing will be held in camera to protect confidential information.

¹³⁶ See, e.g., <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/nafta.aspx?lang=eng> (website of Canada); <http://www.state.gov/s/l/c3433.htm> (website of the United States).

The ICSID Arbitration Rules permit a tribunal to hold open hearings if neither party objects (Rule 32(2)).¹³⁷ They also provide for the protection of privileged or proprietary information. Several hearings have been open to the public, often via closed-circuit television and sometimes via web-streaming.¹³⁸

3. *Amicus curiae* participation in the proceedings

Another issue, often discussed in the context of transparency, is the ability of third parties (*amici curiae*, or “friends of the court”) to participate in the arbitral process. The first requests of *amici curiae* to participate in investment arbitrations were in cases under the NAFTA. Since then, several tribunals, both those convened under NAFTA Chapter 11 and under other IIAs, have concluded that they had the authority to permit *amici* to participate, subject to various limitations. The NAFTA parties issued guidance to tribunals about the criteria they should use to decide whether particular aspiring *amici* should participate, including the extent to which:

“(a) the submission would assist the tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) the submission would address matters within the scope of the dispute;

(c) the non-disputing party has a significant interest in the arbitration; and

¹³⁷ The same provision can be found in ICSID Additional Facility Arbitration Rules, Article 39(2).

¹³⁸ For instance, the hearings were webcast in *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12) and *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23). Webstreaming is available to the parties in all ICSID cases should they wish to avail themselves of it.

(d) *there is a public interest in the subject-matter of the arbitration.*¹³⁹

The Canadian and United States Model BITs include provisions allowing parties that are not involved in the dispute to submit memorials, and authorizing arbitral tribunals to consider such submissions. These agreements stipulate in detail the procedures by which such *amicus curiae* briefs are to be submitted and administered in order to prevent them from negatively affecting the normal conduct of the arbitration. This explains, for instance, the screening mechanism included in Article 39 of the 2004 Canadian Model BIT, which provides certain criteria which the arbitral tribunal should use to decide whether a non-disputing party may file a submission, and, if the authorization is granted, provides guidance as to the weight that such submission should have in the proceedings. ICSID, too, amended its rules in 2006 to make explicit a tribunals' authority to permit *amicus* participation in ICSID Convention and ICSID Additional Facility cases.¹⁴⁰

The ability of *amici* to participate in the arbitration is not inevitably linked to the availability of information. In a case brought under the ICSID Convention, for example, an *amicus curiae* that is granted the ability to participate in a case will not have any right to receive the submissions of the disputing parties, though they may receive such documentation after redaction of any confidential information if the parties agree. There is increasing pressure from civil society to make the documents available even in the absence of the agreement of the disputing parties, at least to those third parties who have been granted *amicus curiae* status, so that they might better tailor their submissions in light of the parties' arguments.

¹³⁹ Statement of the NAFTA Free Trade Commission on non-disputing party participation, 7 October 2004, para. 6.

¹⁴⁰ ICSID Convention Arbitration Rule 37(2); ICSID Additional Facility Arbitration Rules Article 41(3).

Most tribunals have resisted this pressure, but it was successful in one known case.¹⁴¹

M. Applicable substantive law

This section discusses the sources of substantive law applied in ISDS disputes and the ways these sources relate to each other. Applicable *substantive* law should not be confused with applicable *procedural* law.¹⁴²

1. Treaty provisions on applicable law

There is no consistent approach to the question of applicable law in IIAs. The majority of treaties can be placed in one of four categories with respect to the sources of law that they instruct tribunals to apply: (i) the IIA and applicable international law; (ii) the IIA, applicable international law and host State's domestic laws; (iii) the law agreed upon by the disputing parties; and (iv) no provision that instructs tribunals on the applicable law. Examples of each are given below.

(i) The treaty and applicable international law

The Energy Charter Treaty (ECT), in Article 26(6), provides that a tribunal “*shall decide the issues in dispute in accordance with*

¹⁴¹ *Piero Foresti et al. v. South Africa*, ICSID Case No. ARB(AF)/07/1, Letter Regarding Non-Disputing Parties, 5 October 2009.

¹⁴² The procedural law governing the arbitration is primarily drawn from the applicable arbitration rules as complemented or modified by the ISDS provisions in the treaty itself. In addition, the law of the place of arbitration is a relevant source of procedural law in non-ICSID Convention cases. The law of the place of arbitration governs, in particular, imposition of provisional measures (see section II.I) and setting aside the arbitral award by courts at the place of arbitration (see section II.Q.1). In an ICSID Convention case, the Convention itself governs those matters as ICSID Convention arbitrations are de-localized.

this Treaty and applicable rules and principles of international law". The NAFTA States took the same approach in Article 1131 by referring to the NAFTA itself and applicable rules of international law.¹⁴³ Both the ECT and NAFTA Chapter 11 limit claims made by investors to allegations of violations of substantive protections found in the treaty. The applicable law provisions in each emphasize that the tribunal is limited to deciding those matters.

(ii) The treaty, applicable international law and domestic laws of the host State

This type of provision makes explicit reference to host State law. For example, Article 13(5) of the Azerbaijan-Croatia BIT (2007) provides:

*"Dispute[s] shall be resolved in accordance with law, applying the terms of this Agreement, **national legislation of the Contracting Party to the dispute**, and principles of public international law."* (Emphasis added).

Another example is Article 11(5) of the Nigeria-Turkey BIT (2011):

*"The arbitration tribunal shall take its decisions in accordance with the provisions of this Agreement, **the laws and regulations of the Contracting Party involved in the dispute on which territory the investment is made** (including its rules on the conflict of laws) and the relevant principles of international law as accepted by both Contracting Parties."* (Emphasis added).

¹⁴³ This formulation begs the question of what rules are "applicable". This is left to be determined by an arbitral tribunal adjudicating a specific dispute.

On its face, this type of provision gives greater prominence to host State law. Usually, it goes together with a broad ISDS clause that permits all disputes relating to/connected with the investment to be submitted to arbitration. Host State law may be relevant, for example, if an investor's claim alleges a violation of domestic law or of an investment contract (which chooses the host State law as the law governing the contract).

Post-2004 IIAs concluded by the United States present an interesting example as they prescribe different applicable laws depending on the claimant's cause of action: (1) where a claimant alleges a violation of a treaty obligation, the applicable law consists of the treaty and applicable international law; (2) where a claim is based on the alleged violation of an investment authorization or an investment contract, the applicable law is specified by the relevant authorization or contract — but if they do not specify the governing law, then it is the law of the respondent State complemented by applicable rules of international law (e.g., Article 30 of the Uruguay-United States BIT (2005)). These provisions emphasize the link between applicable law and the authority of the tribunal to consider particular claims.

(iii) Law agreed by the disputing parties

Article 10(4) of the China-Netherlands BIT (2004) states:

*“The ad hoc tribunal shall decide a dispute **in accordance with such rules of law as may be agreed by the parties**. In absence of such agreement the tribunal shall apply the law of the Contracting Party to the dispute (including its rules on the conflict of laws), the provisions of this Agreement and such rules of international law as may be applicable.”* (Emphasis added).

This provision's approach reflects the frequent practice in international transactions between private parties in which they

choose a law to govern their relations. The same principle of party autonomy manifests itself in contracts concluded between investors and host States. Such contracts may designate the law of the host State, of the investor's home State, or of a third State, as the governing law. The provision also contains a default choice-of-law regime that applies in the absence of a special agreement between the parties (domestic law of the host State, the treaty and applicable rules of international law), which is helpful in situations where there is no underlying contract between the investor and the host State.

(iv) No provision on applicable law

Some IIAs are silent regarding the applicable law in ISDS cases. In this situation, the applicable arbitration rules will provide a default solution. For instance, Article 42(1) of the ICSID Convention provides that:

“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.”

The ICSID Convention thus gives primacy to the domestic law of the host State unless the parties otherwise agree. This is typically the case in investment arbitration, where the investment treaty (including its applicable-law clause, if any) represents the law agreed to by the parties.

The UNCITRAL Rules provide that in the absence of agreement between the parties, the tribunal shall apply the law “*which it*

determines to be appropriate".¹⁴⁴ The same provision is found in the ICC Rules (Article 17).

The UNCITRAL and ICC rules are used in private commercial disputes as well as in investor-State arbitration. These rules give tribunals more discretion to determine the applicable law, which is often seen as desirable because it is difficult to foresee the appropriate law applicable to all situations in advance.¹⁴⁵ At the same time, arbitral practice to date shows that such broad clauses are unlikely to lead to any significant changes in result, compared with situations governed by Article 42(1) of the ICSID Convention.

2. Roles of the different sources of applicable law

It follows from the above typologies that IIAs and the applicable arbitration rules identify three main sources of substantive law relevant for the adjudication of ISDS cases:

- the applicable IIA itself;
- general international law; and
- domestic law of the host State.

It is likely that all three sources of law will play some role in resolving an investment treaty dispute. Thus, decisions regarding choice-of-law based on applicable-law clauses in IIAs have not been very different from choices made in the absence of such clauses. This is not to suggest that the application of different rules of law (e.g., national vs. international) might not make a difference in the

¹⁴⁴ Article 35(1) of the UNCITRAL 2010 Rules; Article 33(1) of the UNCITRAL 1976 Rules directs the tribunal to apply the choice-of-law rules it considers applicable.

¹⁴⁵ For an attempt to distill principles relating to applicable law in different situations, see Douglas, 2009, pp. 39–133.

outcome of any given case; it can and it has.¹⁴⁶ The relevance and role of each source of law is examined in turn.

(i) Investment treaty

Some IIAs permit investors only to bring claims that a State has failed to abide by the substantive protections it promised in the treaty.¹⁴⁷ Even if the ISDS provision is wider than that and permits, for example, “any dispute relating to an investment” to be submitted to arbitration, allegations of violations of IIA obligations typically form the crux of the investor’s claim against the host State. In such cases, a tribunal is required to assess whether the respondent State’s conduct is consistent with the relevant treaty provisions. Thus, the treaty itself serves as the primary source of applicable substantive law.

(ii) Applicable rules and principles of international law

Each investment treaty is part of international law and thus the application and interpretation of IIAs is further affected by international law, including general principles of international law and customary international law. These encompass various issues such as the attribution of conduct to a State, denial of justice, the minimum standard of treatment of aliens, circumstances precluding wrongfulness of State conduct, the calculation of compensation, etc. Importantly, the customary international rules on treaty interpretation, codified in the Vienna Convention on the Law of

¹⁴⁶ The application of domestic rather than international law was decisive in *Libananco v. Turkey*, in which the Turkish property law concept of “teslim” determined whether the shares have been validly transferred to Libananco. Under Turkish law, which the tribunal applied, the answer was no, while under international law the transfer might well have been yes. See *Libananco v. Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, paras. 133–173.

¹⁴⁷ On the scope-of-ISDS clauses, see section II.B.

Treaties, serve as a guide to interpreting the provisions of the relevant IIA.

When an IIA refers to other international treaties, for example the ICSID Convention, the New York Convention, the WTO Agreements (e.g., the GATT, GATS or TRIMs), or the Articles of Agreement of the International Monetary Fund, such conventions are also incorporated into the IIA by reference.

(iii) Domestic law of the host State

Some IIA substantive provisions themselves refer to the domestic law of the host State. For instance, IIAs often contain a requirement for covered investments to be made in accordance with the law of the host State; an obligation on States to admit investments in accordance with its laws and regulations; and a requirement that an expropriation be carried out in accordance with domestic legal procedures. In such cases, the application of IIA provisions mandates consideration of host State law regardless of whether the IIA in question indicates that domestic law is one of the sources of applicable law.

Even when domestic law is not expressly mentioned anywhere in the IIA, it is quite likely to play a role in the decision. For example, there is no international law of property; to the extent that “shares” are an investment, domestic law defines what shares are and how they can be legally transferred.

In addition, as previously mentioned, some IIAs contain broad ISDS clauses that allow for arbitration of any disputes “related to an investment”, “in connection with an investment” or other similar formulations. Where such a broad ISDS provision is complemented by an applicable-law provision allowing for the application of host State law, this is likely to mean that an investor may bring a claim which is partially or fully based on the host State’s alleged violations of its own domestic laws (as opposed to violation of the

IIA). To date, however, ISDS claims have almost invariably been based on alleged violations of IIAs.

Some IIAs permit investors to submit claims arising out of investment contracts, or contain umbrella clauses that might elevate breach of contract claims to the treaty level. In those instances, the host State's domestic law will likely be the basis for the tribunal's decision, as investment contracts often select it as the law governing the contract.

Finally, investors are subject to all of the laws and regulations of the host State. In this regard, corporate law, tax law, administrative law and practice, labour law, and many other relevant areas of law will apply to the investor and to the investment. The failure of an investor to comply with applicable domestic laws and regulations could justify State acts and generally play a significant role in determining the extent of State liability. In the event that counterclaims are permissible, an investor's failure to comply with domestic law can serve as a ground for a respondent State's counterclaim (see section II.K).

3. Issues related to multiple applicable laws

Given the multiplicity of potentially relevant sources of applicable substantive law, arbitral tribunals have had to deal with the relationship between the applicable laws, including possibly inconsistent or conflicting rules.¹⁴⁸ The *Occidental v. Ecuador* case presents an example of where several sources of law were applicable to the same situation. As the tribunal summarized:

“[The dispute] is first related to the Contract [between the claimant and Petroecuador, a State-owned corporation]; it is next related to Ecuadorian tax legislation; this is followed by

¹⁴⁸ For a survey of different interactions between municipal and international law in investment arbitration, see Sasson, 2010; Kjos, 2013.

specific Decisions adopted by the Andean Community and issues that arise under the law of the WTO. In particular the dispute is related to the rights and obligations of the parties under the Treaty and international law."¹⁴⁹

Domestic law and international law. The tribunal in *AAPL v. Sri Lanka*¹⁵⁰ pointed to the provisions of the 1980 Sri Lanka-UK BIT (which did not have an applicable-law clause) as being the “*primary source of the applicable legal rules*” and *lex specialis*, while the relevant international and domestic rules served “*as a supplementary source*”.¹⁵¹ The tribunal further found that the BIT was not a

*“self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it ha[d] to be envisaged within a wider juridical context in which rules from other sources [were] integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature”.*¹⁵²

An early award rendered in *Goetz v. Burundi* offered another solution for combining different sources of law.¹⁵³ The tribunal grouped the four categories of applicable law¹⁵⁴ into two: Burundian

¹⁴⁹ *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, para. 93.

¹⁵⁰ *Asian Agricultural Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990.

¹⁵¹ *Ibid.*, paras. 20, 24.

¹⁵² *Ibid.*, para. 21.

¹⁵³ *Antoine Goetz et al. v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award (Embodying the Parties' Settlement Agreement), 10 February 1999.

¹⁵⁴ The BIT between the Belgium/Luxembourg Economic Union and Burundi stated in Article 8.5 that the law applicable to the dispute was:

- National law of the host state, including the conflict of law rules;

domestic law and international law. It took the view that instead of applying a hierarchical order between domestic and international law, each of them should prevail in its own sphere of application and, in case of conflict, the provision more favourable to the investor should prevail.¹⁵⁵ Under this approach, each law must be applied in its own ambit.

In cases to date, international arbitral tribunals have tended to use international law to serve “supplementary” and “corrective” functions. The supplementary function means that in the event of a gap in the applicable domestic law, arbitrators might turn to international law to fill the gap. The corrective function authorizes arbitrators, in their application of international law, to set aside the applicable domestic law when it, or an action taken under it, violates international law.¹⁵⁶

Yet, there is no clear hierarchy in the application of various rules and much depends on how a particular tribunal exercises its discretion in this regard.

-
- The provisions of the BIT;
 - Dispositions of any specific engagement undertaken with the investor;
 - General rules and principles of international law.

¹⁵⁵ *Ibid.*, para. 99.

¹⁵⁶ ICSID, 1968, pp. 803, 984–985. The following references provide useful insight into the different views of and on-going discussion among commentators on the relationship between domestic laws and international law: Reisman, 2000 (suggesting that international law should be used only to supplement domestic laws); *Klöckner v. Cameroon*, ICSID Case No. ARB/81/2, Decision on the Application for Annulment, 3 May 1985; *Amco Asia v. Indonesia*, ICSID Case No. ARB/81/1, Decision on the Application for Annulment, 16 May 1986 (discussing the doctrine of the supplemental and corrective function of international law vs. domestic law); Gaillard and Banifatemi, 2008.

Interaction between different sources of international law. A separate issue that may arise is the interaction between obligations under international treaties covering different areas of international law. A case in point is the possible role in ISDS cases of EU law, WTO law, and international conventions on the environment, climate change, public health or human rights. IIAs usually provide that more favourable treatment of investors granted under another international treaty (such as a multilateral treaty to which both IIA signatories are parties, e.g. the GATS Agreement) would take precedence. It is much less usual to address a relationship between an IIA and a treaty that governs a different policy area (e.g., protection of the environment, human rights, etc.).

Cases of outright conflict have been rare, but may become more common in the future. For example, a measure taken by a State to implement its obligations under an environmental protection treaty might have an adverse effect on a foreign investor. Whether that adverse effect rises to a breach of an investment obligation might be assessed in light of the State's other obligations. Article 31(3)(c) of the Vienna Convention gives some direction regarding the appropriate method to interpret an IIA provision against the backdrop of other treaties. It directs the interpreting body to consider, in addition to the context of the provision, "*any relevant rules of international law applicable in the relations between the parties*".¹⁵⁷

Further, where investment provisions are located in a chapter which forms part of a broader economic treaty such as an FTA, they may come into conflict with other provisions in the same treaty, for example those contained in the chapter regulating trade in services (the latter applies *inter alia* to investment in services). Certain treaties have attempted to prevent internal conflict by specifying which treaty provisions have precedence. NAFTA, for example,

¹⁵⁷ See, e.g. McLachlan, 2005; Kriebaum, 2007.

directs in Article 1112 that “[i]n the event of any inconsistency between this Chapter [on Investment] and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.”

N. States’ involvement in the interpretative process

The application of IIAs in an increasing number of cases has exposed a problem that the often-vague IIA provisions can give rise to inconsistent, sometimes contradictory, interpretations. An interpretation of a particular obligation by an arbitral tribunal may be contrary to the parties’ original intentions in drafting the IIA. To prevent misconstruction of IIA norms by arbitral tribunals, IIA parties may provide authentic and authoritative interpretations of their IIAs.¹⁵⁸

Some IIAs have introduced mechanisms for the contracting parties to exercise a more active role in interpreting IIA obligations and gain increased control over interpretation issues. This has been done in a number of ways, as discussed below.¹⁵⁹

1. Joint interpretation by the contracting parties

The contracting parties can provide a joint interpretation of the IIA regardless of whether the IIA expressly authorizes them to do

¹⁵⁸ Interpretation needs to be distinguished from treaty amendments. Interpretation is, in principle, confined to clarifying the terms of a treaty and not aimed at filling them with a new meaning. In contrast, amendments may add to or modify existing obligations and typically require formal adoption both at the international level and through domestic ratification. In practice, however, the line between interpretation and amendment can be sometimes difficult to draw.

¹⁵⁹ For a more in-depth treatment of this issue, see UNCTAD, 2011b.

so.¹⁶⁰ Nevertheless, some recent IIAs expressly address the issue of authoritative interpretations and emphasize their binding nature. For instance, Article 17(2) of the Mexico-Singapore BIT (2009) provides: “*An interpretation jointly formulated and agreed upon by the Contracting Parties with regard to any provision of this Agreement shall be binding on any tribunal established under this Section.*”

Other treaties specifically provide for “consultations” on any matter concerning interpretation. One example can be found in the Ghana-Netherlands BIT (1989): “*Either Contracting Party may propose [to] the other Party to consult on any matter concerning the interpretation or application of the Agreement. The other Party shall accord sympathetic consideration to and shall afford adequate opportunity for such consultation.*” (Article 12)

2. Interpretation through IIA institutional processes

Some IIAs provide for institutionalized cooperation between the contracting States. Joint commissions or committees consisting of representatives of the parties are charged with the task of monitoring the implementation of the treaty. Typically, such bodies may also issue interpretive statements on treaty provisions. For instance, the Japan-Mexico FTA (2004) creates a Joint Committee which is entitled to, *inter alia*, adopt interpretations of the FTA that are binding on tribunals (Articles 84 and 165).

The role of such bodies has been tested in the context of NAFTA. In light of the differing opinions surrounding the content of the FET standard, the NAFTA Free Trade Commission issued an

¹⁶⁰ See Roberts, 2010, p. 179. Argentina and Panama, for example, exchanged interpretive notes about the appropriate interpretation of the MFN clause contained in their investment treaty. See *National Grid Plc. v. Argentina*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, para. 85.

interpretative note clarifying the meaning of the obligation.¹⁶¹ Subsequent NAFTA tribunals have followed the guidance provided in the Note. In addition, all NAFTA parties (Canada, Mexico and the United States) have incorporated corresponding language into their model BITs.

The relevant interpretation can be issued at any time and will have binding force.

3. Obligation of a tribunal to refer certain matters to the contracting parties

Some treaties have introduced a referral mechanism that allows a tribunal — on its own initiative or at the request of the respondent State — to refer certain matters or provisions to the contracting parties (or the joint commission or committee established by the IIA) for a binding interpretation. Should the parties fail to agree on the interpretation, the tribunal regains the ability to interpret the relevant provisions.

For instance, Article 10.33 of the Panama-Taiwan FTA (2003) obliges a tribunal to seek clarification from a Commission established by said treaty on the interpretation of any reservations and exceptions to IIA obligations included in the Annexes.¹⁶² The Malaysia-New Zealand FTA (2009) applies this mechanism more broadly to the interpretation of *any* provision of the treaty:

“Article 10.26. Interpretation of Agreement

1. The Tribunal shall, on its own account or at the request of the disputing investor or the disputing Party, request a joint

¹⁶¹NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001.

¹⁶²These Annexes include country-specific reservations from certain treaty obligations, including national treatment, MFN and performance requirements.

interpretation of the Parties of any provision of this Agreement that is in issue in a dispute. The Parties shall submit in writing any joint decision declaring their interpretation to the Tribunal within 60 days of delivery of the request.

2. A joint decision issued under paragraph 1 by the Parties declaring their interpretation of any provision of this Agreement shall be binding on the Tribunal, and any award must be consistent with that joint decision. If the Parties fail to issue such a decision within 60 days, the Tribunal shall decide the issue on its own account.”

The word "shall" indicates that the tribunal *must* refer the question to the contracting parties.

4. Intervention by non-disputing Party

In addition to mechanisms enabling joint input on the correct interpretation of treaty provisions by IIA Parties, some IIAs allow for the possibility of unilateral intervention by a non-disputing contracting Party (i.e., a State party that is not a respondent in that particular dispute).

The non-disputing State or States may thus make submissions to a tribunal regarding questions of interpretation of the treaty. For this mechanism to function, the non-disputing Party must thoroughly understand the context of the dispute and the issues it raises. Thus, the Canada-Peru FTA (2008), allowing for such an intervention, also entitles the non-disputing Party to receive the dispute-related documents as well as to attend the hearings:

“Article 831: Documents

1. The non-disputing Party shall be entitled, at its cost, to receive from the disputing Party a copy of:

- a) the evidence that has been tendered to the Tribunal;^{163]}
- b) copies of all pleadings filed in the arbitration; and
- c) the written argument of the disputing parties.

2. The Party receiving information pursuant to paragraph 1 shall treat the information as if it were a disputing Party.

Article 832: Participation by the Non-Disputing Party

1. On written notice to the disputing parties, the non-disputing Party may make submissions to a Tribunal on a question of interpretation of this Agreement.

2. The non-disputing Party shall have the right to attend any hearings held under this Section, whether or not it makes submissions to the Tribunal.”

The right of a non-disputing party to make a written submission should arguably be implied, even when an IIA does not explicitly provide for it. Where interventions by all of the other treaty parties support the respondent State's interpretations, this may be seen as subsequent practice expressing a common intent in accordance with Article 31(3)(b) of the Vienna Convention on the Law of Treaties and thus should be given considerable weight.¹⁶⁴

There are other ways for States to influence the interpretative process, including the release of *travaux préparatoires*, statements adopted in the context of treaty ratification or the issuance of multilateral declarations.¹⁶⁵ These mechanisms should be available

¹⁶³ Since evidence in disputes can be extremely voluminous, some IIAs entitle the non-disputing party to receive only the notice of the claim and the written pleadings of the parties. An example is Article 10.28 of the Panama-Taiwan FTA (2003).

¹⁶⁴ Roberts, 2010, p. 219.

¹⁶⁵ See further, UNCTAD, 2011b.

regardless of whether any provisions in the applicable IIA specifically refers to them.

O. Available remedies

Under general international law, tribunals have the power to grant remedies that are suitable in the circumstances of the case and that would satisfactorily resolve the dispute.¹⁶⁶ Remedies can be divided into pecuniary (compensation) and non-pecuniary. Non-pecuniary remedies, and in particular restitution, may involve an order to the respondent to return certain property to the claimant (e.g., in the case of expropriation) as well as orders to revoke, annul or amend certain legislative, administrative or judicial acts. Governments may be less sensitive to payment of monetary compensation, as that type of remedy arguably interferes less with State sovereignty.

Some arbitral tribunals have affirmed their power to grant any remedy they consider appropriate and have ordered non-pecuniary remedies, solely or in combination with monetary compensation.¹⁶⁷ However, in practice, investors rarely request non-pecuniary remedies, often because of the difficulties with their enforcement against a sovereign State.¹⁶⁸

¹⁶⁶ See, e.g., *Case Concerning the Rainbow Warrior Affair (New Zealand v. France)*, Award, 30 April 1990, para. 114, where an inter-State tribunal held that this power was “inherent” in a tribunal’s competence. Similarly, the International Court of Justice has used a large range of remedies, including non-pecuniary ones.

¹⁶⁷ For details, see Ripinsky with Williams, 2008, pp. 51–52.

¹⁶⁸ For example, the ICSID Convention’s automatic enforcement mechanism applies only with respect to “pecuniary obligations” imposed by an award. Other reasons are discussed in Ripinsky with Williams, 2008, pp. 57–59.

Certain IIAs eliminate the possibility of non-pecuniary remedies by imposing a limitation on the relevant power of tribunals. The growing trend has been to limit the remedies available to claimants to two forms — monetary damages and restitution of property, with the latter often subject to the condition that a respondent State can choose to pay compensation instead of returning the property. An illustrative example can be found in Article 137(9) of the China-Peru FTA (2009):

“7. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:

- (a) monetary damages and any applicable interest; and*
- (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.”*

Similar provisions can be found in other IIAs.¹⁶⁹ This type of provision effectively prevents tribunals from declaring that the host country law is void, from ordering the respondent State to withdraw or amend a measure challenged by an investor, or from requiring the host country to take a particular remedial action other than the payment of compensation.

Some tribunals have accepted this limitation even in the absence of explicit language in the applicable IIA. Thus, in *LG&E v. Argentina*, where the claimants requested, as one of their alternative claims, that the tribunal order Argentina to re-establish its pre-breach legislative framework, the tribunal responded:

¹⁶⁹ See, for example, the Malaysia-New Zealand FTA (2009), Article 10.27; ASEAN Comprehensive Investment Agreement (2009), Article 41(2); Mexico-Singapore BIT (2009), Article 18(1); Rwanda-United States BIT (2008), Article 34(3); NAFTA, Article 1135(1); Brunei-Japan FTA (2009) Article 67(20)(b).

“The judicial restitution required in this case would imply modification of the current legal situation by annulling or enacting legislative and administrative measures that make over the effect of the legislation in breach. The Tribunal cannot compel Argentina to do so without a sentiment of undue interference with its sovereignty.”¹⁷⁰

Consequently, the tribunal concluded that it would award only monetary compensation.

A number of IIAs, in particular those concluded by Canada and the United States (but by other countries as well), explicitly prohibit awards of “punitive damages”. This is a precautionary measure. It is widely accepted that punitive damages are generally not available under international law, regardless of whether this is explicitly prohibited by the IIA.

P. Costs of arbitration

Investment arbitrations are expensive. In a case that goes through a jurisdictional, merits and damages phase, each of the disputing parties spends an amount equivalent to several million US dollars. Costs and expenses fall into one of the three categories: (i) arbitrators’ fees and applicable secretariat expenses (often referred to as “arbitration costs”); (ii) attorneys’, or legal fees (which typically account for the biggest share of the total costs of the case), and (iii) additional costs for the involvement of experts and witnesses, and hearing-related expenses for court reporters and interpreters, where necessary.

The most common practice as an arbitration progresses is for the disputing parties to contribute equally to the costs of the proceedings. Typical initial advance payments in NAFTA Chapter 11 proceedings have been in the range of US\$ 40,000 to US\$ 75,000

¹⁷⁰ *LG&E v. Argentina*, Award, 25 July 2007, para. 87.

per party.¹⁷¹ This equal allocation is without prejudice to the final allocation of costs by the tribunal.¹⁷²

1. Arbitrator fees

Remuneration of arbitrators can amount to a sizeable part of the overall arbitration costs. In the ICSID system, arbitrators' fees are set according to the schedule — currently US\$3,000 per day per arbitrator — in addition to subsistence allowances and reimbursement of travel expenses (although the parties may agree to different arbitrators' fees, with the Secretary-General's permission). Under the UNCITRAL Rules, arbitrators generally set their own fees. They are to be "reasonable", taking into account the monetary amount in dispute, the complexity of the subject-matter, and the amount of time spent by the arbitrators. The fees charged by arbitrators in proceedings governed by the UNCITRAL Rules tend to be higher than those in the ICSID schedule.

IIAs are typically silent on the matter of arbitrators' remuneration, although some recent treaties have addressed the issue. For example, the Colombia-Japan BIT (2011) states:

“The disputing parties may agree on the fees to be paid to the arbitrators. If the disputing parties do not reach an agreement on the fees to be paid to the arbitrators before the establishment of the Tribunal, the fees and expenses established from time to time in the ICSID and effective at the time of the establishment of the Tribunal shall apply.” (Article 30.6).

¹⁷¹ Kinnear, Bjorklund and Hannaford, 2009, p. 1135.

¹⁷² ICSID Convention Articles 59–61; ICISD Administrative and Financial Regulations 14(3) and 16.

This provision prompts the disputing parties to consult on the fees to be paid to arbitrators in advance of the establishment of the tribunal. If the disputing parties reach an agreement, arbitrators must accept the offered fees or decline appointment. Even if the parties fail to take advantage of this opportunity, the IIA caps arbitrator fees at the level set in the ISCID schedule.

2. Cost allocation: arbitral rules and practice

There is no uniform rule with respect to the final allocation of costs by the tribunal. Some arbitral rules contain presumptions about the allocation of costs. For example, Article 42(1) of the UNCITRAL Rules (2010) provides that:

“The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.”

The costs-follow-the-event presumption in the UNCITRAL Rules applies both to the prevailing party’s arbitration costs and attorney’s fees. In contrast, the 1976 UNCITRAL Rules distinguished between costs and fees, and did not establish the presumption that attorneys’ fees should be shifted to the losing party. The ICSID Arbitration Rules contain no presumption about the allocation of costs.

However, a presumption is only a presumption. Its existence notwithstanding, arbitral tribunals retain a great deal of discretion to decide the appropriate allocation of costs and have, on occasion, exercised this discretion to distribute the costs in accordance with the relative success of the parties’ arguments (see examples in box 1 below).

Tribunals have taken at least seven different approaches to costs: (1) costs follow the event — victor takes all; loser pays all costs of the arbitration and all attorneys’ fees; (2) costs follow the event “pro rata” — loser pays all costs and prevailing party’s attorneys’ fees proportional to the outcome; (3) costs follow the event “modified” — loser pays all costs but does not pay prevailing party’s attorneys’ fees; (4) costs shared equally, including attorneys’ fees and irrespective of differences in their amount; (5) costs shared equally, but attorneys’ fees borne by the party retaining the attorneys; (6) the “American Rule” — each party bears its own costs and attorneys’ fees; (7) the “American Rule” exception — if there is manifest fraud, corruption, or the like, the culpable party would bear some or all of the costs of arbitration and/or some or all of the opposing side’s attorneys’ fees.¹⁷³

Empirical evidence suggests that most investment tribunals have ordered parties to share equally in the costs of the proceedings and to bear their own legal fees;¹⁷⁴ although in some cases the losing party has been ordered to pay all, or some, of the costs incurred by the winning party (see examples in box 2).

Box 1. Examples of costs in ISDS cases

In *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15), the tribunal ordered the respondent to pay the claimants’ costs of the arbitration proceedings in the total sum of US\$ 7.9 million, which included legal fees, expert fees, administrative fees and the fees of the tribunal. Obviously, the respondent State also had to bear its own legal fees (approx. US\$ 4.8 million) and other costs (approx. US\$ 1.5 million).

In *Plama Consortium v. Bulgaria* (ICSID Case No.

¹⁷³ Kreindler, 2010.

¹⁷⁴ See Franck, 2011, pp. 843–844.

ARB/03/24), the claimant's legal costs amounted to US\$4.6 million, while the respondent's legal costs were US\$13.2 million. The tribunal ordered the claimant to pay all arbitration costs and half of the respondent's legal fees.

In *Pey Casado v. Chile* (ICSID Case No. ARB/98/2), the claimant's legal fees totaled approximately US\$11 million, while the respondent's legal fees amounted to US\$4.3 million. The respondent was ordered to pay 75 per cent of the arbitration costs and \$2 million of the claimant's legal fees.

In *ADC v. Hungary* (ICSID Case No. ARB/03/16), the tribunal ordered the respondent State, which had been found to have breached its BIT obligations, to pay the full costs of the arbitration totaling US\$7.6 million. This included the investor's legal fees.

In *Siag and Vecchi v. Egypt* (ICSID Case No. ARB/05/15), the tribunal found that the claimants were entitled to receive from Egypt the amount of US \$6 million to cover their legal fees, expert costs and other expenses.

3. Cost allocation: IIA provisions

Few investment treaties address arbitration costs or attorneys' fees. The allocation of costs and fees is thus left to tribunals to decide on a case-by-case basis, subject to any directives contained in the applicable arbitral rules. Some recent IIAs have added provisions regarding the allocation of fees and costs in the context of frivolous claims allegations (see section II.H above). Thus, the Belgium/Luxembourg-Colombia BIT (2009) provides in Article XII:

“14.1 When deciding about the objection of the respondent, the Tribunal may rule on the costs and fees of

attorneys incurred during the proceedings, considering whether or not the objection prevailed.

*14.2. [...] In the event of a **frivolous claim** the Tribunal shall award costs against the claimant.”* (Emphasis added).

The 2004 U.S. Model BIT, in Article 28(6), takes a similar approach, but leaves discretion to the tribunal:

“When it decides a respondent’s objection under paragraph 4 or 5, the tribunal 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.”

Q. Review of arbitral awards

Arbitration is premised on consent — that the parties have agreed to the resolution of the dispute by an arbitral body convened pursuant to certain rules. The legitimacy of international arbitral awards derives from that consent, but also depends on the control mechanisms ensuring that the arbitrations leading to those awards were conducted fairly and were not tainted by any kind of impropriety. Ensuring the legitimacy of the process also enhances enforcement of an award. Yet permitting another entity, usually a court, to review an arbitral award could compromise other goals of arbitration, such as finality and efficiency. The control mechanisms governing international arbitral awards attempt to find a middle ground by permitting review of the procedure to ensure that the arbitral proceedings respected due process without authorizing courts to engage in wholesale appellate review of the arbitral award.

1. Set-aside in national courts of non-ICSID Convention awards

The domestic law of the seat of arbitration¹⁷⁵ governs the set-aside of an arbitral award. National laws on set-aside have tended to be deferential towards arbitral awards, in keeping with the goal of facilitating the parties' choice of arbitration. Many States have adopted the UNCITRAL Model Law on International Commercial Arbitration. Article 34 of the Model Law provides the following grounds for setting aside an arbitral award:

“(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the

¹⁷⁵ On seat of arbitration, see section II.D.3.

agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.”

The conditions for set-aside under the UNCITRAL Model Law largely mirror the provisions of the New York Convention on the Recognition and Enforcement of Arbitral Awards (see section II.Q below). The first four grounds for setting aside an award must be argued by the party seeking set-aside of the award, while the latter two can be decided of the court's own volition. The first four reflect concerns about due process and the scope of consent given by the parties who agreed to the arbitration, while the second two reflect concerns about public policy in the enforcing State.

Not all States have adopted the UNCITRAL Model Law. Yet there is general agreement that, at the least, due process and legality are preconditions for arbitration, and a tribunal's violation of them is always grounds for setting aside an award.¹⁷⁶ Awards are subject to challenge in the event of the absence or invalidity of the initial agreement to arbitrate, if there was irregularity in the constitution of the arbitral tribunal, if there were serious procedural irregularities implicating the fundamental fairness of the procedure, or if the arbitral tribunal exceeded its jurisdiction or failed to honour the agreement of the parties.¹⁷⁷ A reviewing court might also set aside

¹⁷⁶ See, e.g., Lew, Mistelis and Kröll, 2003, p. 674.

¹⁷⁷ *Ibid.*, pp. 674–677.

an award on grounds of public policy. A few jurisdictions permit appeals on questions of law in very limited circumstances.¹⁷⁸

An award that has been set aside may or may not be enforced in another jurisdiction. The New York Convention (Article 5(e)) recognizes set-aside in the place of arbitration as a discretionary ground for determining whether or not to enforce an award. In practice, awards are rarely set aside; however, those that are set aside will often not be enforced in another jurisdiction as the enforcing court is quite likely to be influenced by another court's decision to set aside the award; it is nonetheless clear that the enforcing court has discretion to decide whether or not to enforce the award.¹⁷⁹

2. Annulment of ICSID Convention awards

The drafters of the ICSID Convention sought to create an a-national, or de-localized, process that would be removed from the control of any national courts. Thus, ICSID Convention proceedings can only be annulled according to the terms of the ICSID Convention itself and are not subject to set-aside in domestic courts. The ICSID Convention provides in 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*

¹⁷⁸ *Ibid.*, pp. 677–79.

¹⁷⁹ Born, 2009, pp. 2672–2699.

(e) that the award has failed to state the reasons on which it is based.”

The drafters of the ICSID Convention deliberately chose an annulment, rather than an appellate, mechanism. This choice reflected their preference for the finality of awards. The function of annulment is not to correct tribunals’ errors of fact or of law, but to police the integrity of the award and of the process leading to the award. The choices an *ad hoc* committee — i.e. the panel that oversees an annulment proceeding — are fairly stark: it can either annul the award (or a part thereof), or leave it intact. It cannot substitute its judgment for that of the original tribunal and correct the award. Once an award is annulled, it is no longer enforceable under the ICSID Convention; however, an annulment does not preclude the claimant from starting new ICSID proceedings in the same case.¹⁸⁰

Notwithstanding those apparent limits, however, some *ad hoc* annulment committees have been criticized for engaging in a more in-depth review of the award and issuing decisions that resemble appeals rather than annulments. The grounds most likely to give rise to such criticisms are ICSID Convention Article 52 (b) and (e). For example, some *ad hoc* committees have determined that a tribunal manifestly exceeded its powers by not applying the appropriate law, thereby acting outside its sphere of competence. Yet distinguishing between the non-application, rather than the misapplication, of law is not an exact science.¹⁸¹

The “failure to state reasons” language is subject to the criticism that, under its guise, *ad hoc* committees can very easily engage in a

¹⁸⁰ Examples of resubmitted cases are *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3 and *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16.

¹⁸¹ See, e.g., Schreuer *et al.*, 2009, paras. 363–388.

full review of the underlying award. While the standard makes clear that a total absence of reasoning would be grounds for annulment, it leaves open the question of just how persuasive, cogent, or comprehensive the reasoning actually given by a tribunal need be in order for an *ad hoc* committee to sustain the award.

Some *ad hoc* committees have criticized the legal reasoning of the underlying award but have stopped short of annulling the award on the grounds that they were not empowered to substitute their own reasoning for that of the arbitral tribunal.¹⁸² Others have criticized the legal reasoning of the award and have annulled the underlying decision.¹⁸³ Still others have declined to revisit the legal reasoning of the underlying tribunal at all.¹⁸⁴

An *ad hoc* committee has the ability to annul a tribunal's decision in the case before it, but it is not an appellate body and its decisions have no more precedential value than the decisions of other tribunals. An *ad hoc* committee is constituted to hear only one case, meaning that different *ad hoc* committees will be formed for each annulment proceeding; *ad hoc* committees do not always agree

¹⁸² *CMS v. Argentina*, ICSID ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, 25 September 2007; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award, 10 August 2010.

¹⁸³ *Mitchell v. Congo*, ICSID ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006; *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID ARB/05/10, Decision on the Application for Annulment, 16 April 2009; *Sempra Energy International v. Argentina*, ICSID ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 9 June 2010; *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID ARB/01/3, Decision on the Application for Annulment, 30 July 2010.

¹⁸⁴ Schreuer *et al.*, 2009, paras. 370–388.

with each other, leading to the same problems of inconsistency and contradiction of decisions as with arbitral tribunals. This is perhaps not surprising; the *ad hoc* committees are not charged with creating consistent interpretations of investment treaty provisions. Yet the lack of consistency is one of the reasons that an appellate mechanism might be desirable (see III.B.1 below).

R. Enforcement of arbitral awards

Most treaties make clear that the awards handed down by ISDS tribunals are binding on the parties to the proceedings. The BIT between Bosnia and Herzegovina and San Marino (2011) contains language typical in this regard: “*The arbitration award shall be final and binding on both parties to the dispute and shall be executed according to the law of the Contracting Party concerned*” (Article 10.6). Compliance with an arbitral decision rendered against a State under an investment treaty thus becomes an international obligation of the State whose violation can, for example, give grounds for countermeasures.

Most States have honoured their obligations and paid awards voluntarily, though there have been several known cases of non-payment.¹⁸⁵ In the event a State does not comply with an arbitral award, investors can seek enforcement in national courts and locate commercial assets in an enforcing jurisdiction. They can also seek the assistance of their home government. Article 27 of the ICSID Convention allows the exercise of diplomatic protection in such cases.¹⁸⁶ In consonance with Article 27, most IIAs also permit, or at

¹⁸⁵ Peterson and Hepburn, 2011. In addition to the preceding governments, Argentina, Russia, and Zimbabwe have been reluctant to honour awards against them. See Peterson, 2010.

¹⁸⁶ “*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*

least do not preclude, the assistance of an investor's home State in the event of a host State's refusal to pay. For example, the above-mentioned agreement between Bosnia and Herzegovina and San Marino allows a Party to exercise diplomatic protection if "*the other Contracting Party should fail to abide by or to comply with any award rendered by an arbitral tribunal*" (Article 10.4).

The Colombia-Japan BIT (2011) envisages a possibility of State-State proceedings in these situations:

"2. If the disputing Party fails to abide by or comply with an award, upon a request of the Contracting Party other than the disputing Party, an arbitration board in conformity with Article 24 [on State-State arbitration] may be established. The requesting Party may seek in such proceedings:

(a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and

(b) a recommendation to the disputing Party to abide by or comply with the award."

There are examples when home States have suspended advantages otherwise available to non-complying States and have exerted diplomatic pressure.¹⁸⁷

Contracting State shall have failed to abide by and comply with the award rendered in such dispute." (Article 27(1)).

¹⁸⁷ In March 2012, the United States suspended application of its generalized system of tariff preferences (GSP) to Argentina. The United States' GSP scheme allows exporters from eligible countries to pay lower customs duties on their exports to the United States. The US Government explained that the GSP benefits will be suspended until Argentina honours the outstanding arbitral awards rendered against it in favour of US claimants.

Enforcement procedures. Awards rendered under the ICSID Convention are subject to its enforcement provisions. To facilitate enforcement, the ICSID Convention requires that each Contracting State¹⁸⁸ treat pecuniary obligations in awards rendered under the Convention as if they were final judgments of the courts of that State. The annulment procedure described in section II.Q.2 above is the only way to challenge an ICSID Convention award. The a-national nature of ICSID Convention arbitration means that a disputing party may not challenge an award any further after losing its application for annulment.

With respect to investment treaty awards rendered outside the ICSID Convention (including awards issued under the ICSID Additional Facility Rules¹⁸⁹), the 1958 New York Convention on Recognition and Enforcement of Arbitral Awards serves as the main tool to facilitate enforcement. It allows eligible arbitral awards to be enforced in any of the 149 States that are parties to the Convention.

The New York Convention provides that each State party must recognize and enforce arbitral awards rendered outside its territory. Most States have made a declaration that they will apply the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State (i.e., not any third State). Thus, most non-ICSID Convention arbitrations are sited in a New York Convention State in order to facilitate enforcement. Indeed, some investment treaties contain a requirement that the arbitration be sited in a State party to the New York Convention.¹⁹⁰

¹⁸⁸ One hundred and forty-nine States had ratified the Convention as of August 2013.

¹⁸⁹ See section II.D above.

¹⁹⁰ For example, the Colombia-Korea FTA provides: “*If the disputing parties fail to reach an agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall*”

Upon the signature of the New York Convention, a significant number of States also made a declaration that they will apply the Convention only to differences arising out of legal relationships that are considered “commercial” under national law. In order to avoid any dispute about the applicability of the New York Convention in an enforcement procedure, some IIAs explicitly state that the relevant relationships are deemed “commercial” for the purposes of the New York Convention.¹⁹¹

Under Article V(1) of the New York Convention, a national court of the State where the enforcement is sought can only refuse to enforce an award if the party challenging it offers proof that:

“(a)The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b)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; or

(c)The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration [...].; or

be in the territory of a State that is a party to the New York Convention.”
(Article 8.22(1))

¹⁹¹ Canada's Model BIT (2004), Article 45.7 (“A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention”). See also Reinisch, 2010, pp. 671, 673–674 (noting that there is a general agreement that awards rendered under IIAs are enforceable under the New York Convention).

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreements, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”

Section 2 of Article V provides that a court can also refuse enforcement if:

“(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

It is generally accepted that national courts should exercise a highly deferential standard of review when deciding whether or not to enforce an arbitral award under the New York Convention. The grounds for refusing enforcement found in Article V(1) deal generally with procedural matters, and challenges to awards in investor-State cases based on them have usually not been successful.¹⁹²

The Article V(2) grounds encompass policy objections that might exist in the enforcing State that would defeat enforcement of an award. The first is the question of arbitrability — whether the subject matter of the arbitration was capable of being removed from a national court for decision. In an ISDS case this should not be a frequent problem given that the State itself would have consented to arbitrate the dispute. The public policy defense in Article V(2)(b), on the other hand, is often considered a significant threat to

¹⁹² Reinisch, 2010, p. 677.

enforcement in commercial cases and could give rise to difficult issues in investment cases as well.¹⁹³

Sovereign immunity from execution. By virtue of their agreement to arbitrate, States are generally held to have waived any immunity-based objection to the jurisdiction of national courts enforcing awards. It is generally accepted, however, that a State's assets enjoy separate immunity. A waiver of jurisdictional immunity does not equate to a waiver of execution immunity.¹⁹⁴ Neither the New York Convention nor the ICSID Convention contains a waiver of execution immunity; the New York Convention is silent on the topic, while the ICSID Convention explicitly states that the enforcement provisions of the Convention were not intended to derogate from domestic State immunity laws.

The amenability to execution of a State's assets will thus depend on the national immunity law in the jurisdiction where the assets are located. Some jurisdictions, for example China, have absolute immunity. A larger number of States follow the restrictive theory of immunity, under which sovereign assets, such as diplomatic property and central bank assets, are not subject to execution; however, commercial property may be seizable.¹⁹⁵ This means that a

¹⁹³ *Ibid.*, pp. 680–681.

¹⁹⁴ Fox, 2008, pp. 599, 601.

¹⁹⁵ The UN Convention on Jurisdictional Immunities of States and Their Property lists the following property that is generally immune from execution: “(a) *property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts [...] for the use of missions; (b) property of a military character or used or intended for use in the performance of military functions; (c) property of the central bank or other monetary authority of the State; (d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale; (e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be*

State's sovereign assets cannot be seized absent an explicit waiver of execution immunity. A State's commercial assets will likely be subject to execution in any State that has adopted the restrictive theory of immunity.

S. MFN clause: impact on ISDS

The most-favoured-nation (MFN) obligation is included in most investment treaties. An MFN clause requires a State to grant investors covered by the IIA treatment no less favourable than it has accorded to investors from any third country. MFN treatment is a relative obligation; the treatment accorded to a third party must be compared to the treatment accorded to the covered investor. In addition, the comparators must be "in like circumstances"; otherwise there is no basis for the comparison and a claim will fail.¹⁹⁶

With respect to ISDS, the MFN obligation has given rise to controversy about whether the MFN clause can be used to invoke more favourable ISDS provisions from other treaties concluded by the respondent State. This question has spawned unpredictable decisions.

The issue first arose in *Maffezini v. Spain*, in which the Argentinean claimant sought to avoid an 18-month period, as specified in the Argentina-Spain BIT (upon which the claim was brought), during which the investor was supposed to seek local remedies. The investor argued that the MFN clause in the Argentina-Spain BIT entitled it to better treatment granted in IIAs to

placed on sale." Article 21(1). The Convention is not yet in force but can be seen as codification of customary international law on sovereign immunity.

¹⁹⁶ For the detailed discussion of the MFN obligation and relevant treaty and arbitral practice, see UNCTAD, 2010c.

other States, specifically by reference to the Chile-Spain BIT, which contained no waiting period.¹⁹⁷ The tribunal accepted the argument.

Several other tribunals faced with the issue of an 18-month waiting period have followed the lead of the *Maffezini* tribunal.¹⁹⁸ The most common assumption supporting direct access to ISDS has been that the 18-month waiting period is an admissibility requirement and the State's consent to arbitration is not conditioned on its satisfaction. Not all tribunals have agreed, however. The *Wintershall v. Argentina* tribunal took the view that seeking local remedies for 18 months was a jurisdictional requirement and that Argentina's consent to ISDS was conditioned on an investor having satisfied it.¹⁹⁹

The 18-month domestic-litigation requirement is not the only ISDS requirement that investors have sought to replace by using the MFN clause. The tribunal in *Plama v. Bulgaria* refused to grant an investor access to ICSID Convention arbitration via an MFN clause when ICSID Convention arbitration was not available under the IIA applicable to the claimant investor.²⁰⁰

¹⁹⁷ *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award, 25 January 2000.

¹⁹⁸ UNCTAD, 2010c, pp. 67–73.

¹⁹⁹ *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARb/04/14, Award, 8 December 2008, para. 172. See also *ICS Inspection and Control Services Ltd. v. Argentina*, UNCITRAL, Award on Jurisdiction, 10 February 2012, pp. 82–86; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Dissenting Opinion of Brigitte Stern, 21 June 2011 (endorsing the view that the 18-month waiting period was one of the fundamental conditions on which an investor's enjoyment of rights was predicated).

²⁰⁰ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/14, Decision on Jurisdiction, 8 February 2005.

Even tribunals that have permitted some importation of more favourable provisions have suggested that there are limits on the practice. Thus, conditions on a State's consent to arbitration that reflect deeply held public policies of the State would not be deposable by means of an MFN clause. The *Maffezini* tribunal gave examples of requirements that could not be ousted by virtue of an MFN clause, such as a State's requiring the exhaustion of local remedies, a State's having included a fork-in-the-road clause requiring the election of either local or international venues, a State's having offered an entirely different forum unavailable in the basic treaty, or a State's having designed an extremely detailed arbitration regime, such as is the case with NAFTA Chapter Eleven.²⁰¹ These limitations restrict the reach of the MFN clause, but their use in any particular case is not predictable. Thus, significant concerns abound as to the ability of investors to "cherry-pick" provisions from various treaties and thereby create a new treaty.

The lack of agreement on the interpretation of MFN clauses makes it important that States make their intent very clear with respect to a MFN clause that they include in an IIA. Thus, a number of countries have started to introduce clarifications on the operation of the MFN clause in their IIAs in order to foreclose the possibility of using it to import procedural provisions from third-party treaties.²⁰²

T. "Umbrella" clauses and appropriate ISDS forums

"Umbrella", or "observance of undertakings", clauses have given rise to an issue of investment treaty tribunals having competence to hear certain investor-State disputes that would not

²⁰¹ *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award, 25 January 2000, para. 63.

²⁰² See UNCTAD, 2010c, pp. 84–87.

otherwise fall within the scope of the IIA. An umbrella clause requires a host State to respect any obligation assumed by it with regard to a specific investment (for example, in an investment contract). The clause thus brings contractual and other individual obligations of the host State under the “umbrella” of the IIA, making them potentially enforceable through ISDS.

Article 11 of the BIT between Pakistan and Switzerland (1995) is illustrative:

“Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.”

1. Varying interpretations

The meaning and application of these clauses have been subject to significant controversy. The clauses have the potential to bring within the ambit of the treaty disputes relating to any undertaking a State has made towards an investor, including a contractual obligation, a legislative provision, or an offering circular. The last decade of ISDS jurisprudence has not been consistent regarding the significance and effects of umbrella clauses. While most arbitral tribunals have agreed that umbrella clauses have the potential to bring contract-based claims within the ambit of treaty-based arbitration, other tribunals have rejected the argument that umbrella clauses have the effect of elevating breaches of contract to a violation of the applicable IIA.²⁰³

According to one approach, an umbrella clause will elevate a State’s breach of contract to a violation of an IIA, thus enabling

²⁰³ For a survey of the varied approaches tribunals have taken towards umbrella clauses, see UNCTAD, 2007a, pp. 28–30; Sinclair, 2009, p. 275; UNCTAD, 2013a, pp.16–17.

investors to have recourse to ISDS in cases of a breach of contract.²⁰⁴ Another approach is that umbrella clauses are nothing more than a reiteration of a State's duty to honour its obligations. A third approach takes the middle ground: an umbrella clause prevents a State from using its sovereign power ("*puissance publique*") to abrogate its obligations, but would not elevate ordinary breaches of contract by a State to an international wrong.²⁰⁵ A fourth view, which has been described as the "enforcement" view, interprets the umbrella clause as elevating the contractual breach to a treaty breach, but does not replace the law governing the contract (usually domestic law) with international law.²⁰⁶ If a contract contains a dispute settlement clause that selects arbitration or domestic courts as the proper venue, the breach-of-contract claim might need to first be referred for resolution in accordance with that provision — meaning that an investor could not have recourse to investment arbitration without first submitting its claim to the contractually-provided-for dispute resolution process.

Other questions raised by umbrella clauses include: whether the wording of the clause has a significant effect on the clause's reach (e.g. "constantly guarantee" vs. "observe"); whether the obligation is owed to the investor or to its investment; whether the promise to guarantee obligations may only be given by a State or may also be given by a State entity and whether the disputing parties in ISDS proceeding need to be the parties to the investment contract concerned (i.e. for example whether it is enough for the claimant in the ISDS proceeding to be a majority shareholder in the company that concluded an investment contract with the State).

²⁰⁴ Schreuer, 2004, pp. 291–324.

²⁰⁵ Sasson, 2010, pp. 178–179, 183.

²⁰⁶ *Ibid.*, pp. 184–185.

2. Treaty solutions

Many treaties do not include an umbrella clause at all. Omitting them altogether is thus an option that removes some of the uncertainty surrounding their meaning and effect.

A number of treaties, especially those concluded by the United States, refer to the settlement of disputes arising from breaches of “investment agreements” between investors and States as a separate category of ISDS (see Section II.B.1.iv above). These agreements are usually further defined in the IIA and do not cover all contracts between an investor and a host State.

Some treaties containing more traditional umbrella clauses have added a clarification aimed at excluding the availability of the IIA’s dispute settlement mechanism for disputes arising out of a contract when there is a contractually specified dispute settlement provision. For example, the Greece-Mexico BIT (2000) provides:

“Article 19. Application of other Rules

[...]

*Each Contracting Party shall observe any other obligation it may have entered into in writing with regard to a specific investment of an investor of the other Contracting Party. **The disputes arising from such obligations shall be settled only under the terms and conditions of the respective contract.** [...].”* (Emphasis added).

In a similar vein, the Colombia-Japan BIT (2011) provides that *“where the written agreement referred to in paragraph 3 of Article 4 [“umbrella” clause] stipulates a dispute settlement procedure, such procedure shall prevail over this Chapter [ISDS]”*.

The Germany-Pakistan BIT (2009) seeks to reconcile the two procedures in a more nuanced way:

“Article 7(2)

*Each Contracting State shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting State, **with disputes arising from such obligations being redressed under the terms of the contracts underlying the obligations** in accordance with Article 10 (5).* (Emphasis added)

[...]

Article 10(5)

*If a contract between an investor and a Contracting State provides a dispute resolution mechanism, the investor can invoke **only that dispute resolution mechanism** concerning the issues arising under that contract. However, in case of issues **arising under this Agreement** including Article 7(2), he is entitled to utilize the dispute settlement procedures provided under this Article.”* (Emphasis added).

These provisions attempt to allocate jurisdiction between tribunals established under the IIA and other courts and tribunals. They draw a distinction between the disputes involving a violation of the contract (which are to be settled in accordance with the contractual dispute settlement procedures, whatever they may be), and disputes involving an alleged violation of the BIT obligations (such as FET, expropriation, etc.) that may arise from a contract breach. This latter category of disputes can be settled pursuant to the BIT’s provisions on ISDS.²⁰⁷

²⁰⁷ The language of Article 10(5) is somewhat confusing because the words “*issues arising under this Agreement including Article 7(2)*” may be read to suggest that Article 7(2) disputes themselves (about a State’s non-compliance with obligations assumed with regard to investments) can be

III. OUTLOOK AND POLICY OPTIONS

With over 3,000 investment treaties and over 500 known ISDS cases to date, States have accumulated the necessary mass of experience to draw general conclusions regarding the design and functioning of the ISDS mechanism. Given the concerns that the system is not fully meeting its overall objective of contributing to the creation of a stable and predictable environment for foreign investors and host States, policy makers may wish to explore various avenues to achieve short-, medium- and longer-term goals. As outlined in WIR 2013,²⁰⁸ these avenues can be broadly categorized as follows:

- (1) Tailoring the existing system through individual IIAs;
- (2) Limiting investor access to ISDS;
- (3) Introducing an appeals facility;
- (4) Creating a standing international investment court; and
- (5) Promoting alternative dispute resolution and dispute prevention policies.

Section III.A addresses options (1) and (2) jointly as both of them contemplate improvements to the ISDS system through individual IIAs. Section III.B discusses options (3) and (4), both of which require changes to the institutional structure of the ISDS system. Finally, section III.C touches upon alternative dispute resolution and dispute prevention policies.

A. Improving ISDS treaty provisions

Before turning to the ISDS mechanism itself, it should be reiterated that it does not exist in a vacuum, but rather serves as an enforcement tool for substantive commitments undertaken by States in IIAs. Provisions delineating the general scope of the IIA, as well

subject to ISDS. Such reading would, however, contradict Article 7(2). (Emphasis added).

²⁰⁸ UNCTAD, 2013b, pp. 112–117.

as those setting out specific investor protections, dictate when ISDS will be available and what it can help investors achieve.

It is, therefore, critically important to thoroughly assess and improve the content of IIAs with a view to clarifying key concepts and provisions, carefully defining the scope of the treaties, and including desired exceptions to any of the substantive obligations undertaken by States in IIAs. These are essential steps that should be taken alongside well-thought-through and clear ISDS clauses. Substantive commitments go hand in hand with their enforcement mechanism as two cornerstones of international investment policies.

1. Minimalist vs. detailed approach to ISDS provisions

As far as ISDS provisions are concerned, States, broadly speaking, have taken two approaches. The first is a minimalist (and more traditional) approach, exemplified by most BITs concluded by European countries. It is characterized by a broad ISDS scope and limited procedural specifications. Ordinarily the treaty requires a cooling-off period during which settlement negotiations might occur, followed by offering the investor resort to international arbitration (sometimes in one forum but more often a choice between several forums or several sets of arbitral rules). It also often includes a provision relating to the final and binding nature of the arbitral award. The ISDS specifications typically end there, leaving all procedural aspects to be determined by the selected rules of arbitration.

The second, more recent, approach features a more circumscribed ISDS scope and more detailed procedural regulation. A number of new elements are addressed by the treaty itself, as opposed to being left to “outside” arbitration rules or to interpretation by the arbitral tribunal. Such detailed provisions may offer guidance as to the selection of arbitrators and the early dismissal of frivolous claims, and set out specifics regarding certain aspects of the procedure, enforcement of the award, consolidation of

related proceedings, transparency of the arbitral process and other issues. They aim to clarify and delineate the scope of the ISDS provisions as well as optimize the arbitral procedure in the interests of a prompt, predictable, legitimate and cost-effective process.

These different approaches can almost be patterned on a divide between those States that frequently have appeared as respondents before ISDS tribunals and those that have not. Some States, notably the United States and Canada, have extensive experience as both home and host States. The complexity of their treaties reflects those dual perspectives – the “offensive” and the “defensive” interests.

The choice between a detailed ISDS regulation and a minimalist one is a key policy decision. A minimalist ISDS clause will be fully operational, but will leave decisions regarding potentially important matters of the arbitration up to the applicable arbitration rules and arbitrators. The “detailed” approach allows States to exercise more control over procedural and other aspects of arbitration. It does not necessarily imply a full-fledged ISDS chapter spanning many pages. Instead, the contracting parties may choose to address only those issues that they consider important. In other words, under the “detailed” approach, there can be variations as to the level of detail in ISDS regulation. It is important to ensure that the ISDS provisions work together to create a coherent, consistent, and functional arbitral process.

2. Policy options on specific ISDS issues

On the basis of the discussion in section II, this section identifies policy options for IIAs with respect to specific ISDS issues. Some of these elements are indispensable to the crafting of an operational ISDS provision (consent to arbitration, scope of the ISDS clause, available arbitration forums). Other issues are complementary and will depend on the specific policies and concerns of the States negotiating the IIA. Most of the options

below can be combined in different ways in order to craft an ISDS regime tailored to the interests of the contracting parties.

Some of the options reviewed below allow limiting investor access to ISDS with a view to slowing down the proliferation of ISDS proceedings, reducing the risk of States' significant financial liabilities and saving resources. These goals can be achieved in numerous ways, including: (i) by reducing the subject-matter scope for ISDS claims; (ii) by restricting the range of investors who qualify for the benefits of the treaty, and (iii) by introducing the requirement to exhaust local remedies before resorting to international arbitration. A far-reaching version of this approach would be to abandon ISDS as a means of dispute resolution altogether, as some countries have done.²⁰⁹ It should be noted that qualifying and/or introducing limitations to ISDS provisions or entirely excluding them from an IIA can contribute to reducing the protective coverage of the treaty in question, and thereby undermine its quality as an investment promotion tool.

Introducing improvements and adjustments through individual treaties is relatively straightforward given that only two treaty parties (or several — in case of a plurilateral treaty) need to agree. However, the approach is limited in effectiveness: unless the new treaty is a renegotiation of an old one, the modifications apply only to newly concluded IIAs while the large number of “old” agreements remains unaffected. Moreover, one of the key advantages of this approach, namely, that countries can choose *whether* and *which* issues to address, is also one of its key disadvantages, as it turns this option into a piecemeal approach that stops short of offering a comprehensive and integrated way forward.

²⁰⁹ Recent examples of IIAs without ISDS provisions are the Japan-Philippines Economic Partnership Agreement (2006), the Australia-United States FTA (2004) and the Australia-Malaysia FTA (2012).

The following table summarizes key policy options with respect to individual ISDS elements. It follows the same order as section II, which can be referred to for treaty examples. Many of these elements also feature in UNCTAD's *Investment Policy Framework for Sustainable Development* (2012).

Table 4. Summary of ISDS policy options

<p>Consent to arbitration</p>	<p>A State's <u>advance consent to arbitration</u> provides the most security to investors. While this is the option most frequently used in IIAs, other options are also possible.</p> <p>For example, a contracting party may <u>reserve its right to give consent</u>, which means that it will decide whether to give its consent, or to refuse it, in relation to each specific dispute. This approach gives the contracting party more flexibility regarding the ways it wishes to settle each particular investor-State dispute.</p> <p>A State's advance consent to arbitration can also be made <u>conditional</u> on the investor's meeting certain requirements, such as pursuing local remedies for a certain period of time or exhausting them altogether.</p>
<p>Scope of ISDS</p>	<p>Clearly identifying the scope of issues that can be settled by means of investor-State arbitration is a key matter to be determined in an IIA.</p> <p>Range of disputes subject to ISDS. Negotiators need to consider carefully what kind of disputes they wish to make subject to ISDS. A <u>narrow formulation</u> ("disputes concerning an</p>

	<p>alleged breach of an obligation under the treaty which causes loss or damage to the investor”) restricts the scope of ISDS to claims alleging violations of the treaty itself.</p> <p>A <u>broad open-ended formulation</u> (any dispute “related to” or “in connection with” an investment) also can bring other claims within the ISDS ambit, e.g. alleged breaches by the State of its own domestic law, an investment contract or customary international law.</p> <p>A <u>median approach</u> would specifically identify potential causes of action (e.g., “disputes alleging the breach of the treaty, of an investment agreement or an investment authorization”; these latter should also be defined in the treaty).</p> <p>A treaty may use additional techniques to delineate the scope of ISDS, for example:</p> <ul style="list-style-type: none">• Name the treaty obligations that can be subject to ISDS (e.g. only disputes relating to expropriation or compensation) or, instead, name those obligations that are <i>not</i> subject to ISDS (e.g., “pre-establishment” obligations or transparency);• Exclude disputes in a particular economic sector, industry or regulatory area (e.g. real estate, financial services, national security, government procurement);• Introduce a limitation period for claims (e.g. three years).
--	---

	<p>Because the scope of ISDS very much depends on the scope of the treaty as a whole, negotiators should consider the reach of the treaty and in particular:</p> <ul style="list-style-type: none"> • The <u>subject-matter coverage</u> of the treaty (definition of “investment”, policy areas excluded (e.g., taxation, government procurement and/or subsidies), other exclusions (existing non-conforming measures)); • <u>Range of persons entitled to benefit from the treaty</u> (e.g., dual nationals, permanent residents, “mailbox” companies); • <u>Temporal coverage of the treaty</u> (application to investments made before the treaty’s entry into force, to disputes or acts occurring before the treaty’s entry into force).
<p>Waiting period and amicable settlement</p>	<p>Cooling-off period. Should negotiators decide to opt for a traditional “cooling-off” period, it is important to frame it with enough detail to make it effective. It is essential to have a precise starting date for this period and to include <u>an investor’s legal obligation to notify</u> the specified government agency of the details of the dispute. For additional certainty, States may make their consent to arbitration conditional upon observance of the cooling-off period.</p> <p>Duration of the cooling-off period. It is also important to include a <u>reasonable time-frame</u> for this cooling-off period in order for it to achieve</p>

	<p>its purpose. A six-month period is common in IIAs and appears realistic, while a three-month period might be too short. This reflects the possibility of an inherent slowness in internal communication channels and decision-making processes within the host government. It is also in the investor's interest to ensure that there is no way to resolve the dispute other than by submitting it to a lengthy and expensive arbitration.</p> <p>Specifics regarding negotiation. States may wish to promote consultations and negotiations as a way to settle disputes, thus reinforcing the function of arbitration as a measure of last resort. If considered useful, the treaty may set out some further details of the consultation procedure, including the timing of and the location for holding consultations and the relevant authority or agency within the State that is authorized to conduct such amicable discussions.</p>
<p>Forums for ISDS cases</p>	<p>Settlement of disputes under international arbitration can come with a large menu of possible forums and rules, or with only one or two possibilities.</p> <p>ICSID was established specifically to deal with investor-State disputes; it is a self-contained system with no role for national courts and quasi-automatic enforcement of arbitral awards in all ICSID Convention Contracting States. Arbitration in other forums, such as under the UNCITRAL Arbitration Rules or commercial arbitration forums, allows for more involvement</p>

	<p>of national courts including (limited) review of arbitral awards at the seat of arbitration and in the course of the enforcement procedure in the country where enforcement is sought.</p> <p>In non-ICSID Convention arbitration the place of arbitration plays a significant role, as the law of the place of arbitration specifies the extent of judicial assistance available to arbitration and the standards for set-aside of the arbitral award. Furthermore, arbitration in a State that is Party to the New York Convention on the Recognition and Enforcement of Arbitral Awards means that resulting awards are enforceable in any other New York Convention signatory State.</p> <p>Regional arbitration. In addition to strongholds of arbitration such as London, Stockholm, and Paris, regional arbitration centres, such as the Cairo Regional Centre or the Kuala Lumpur Centre, are also available venues to hear and arbitrate ISDS cases. Providing investors with the option to refer disputes to national or regional arbitration centres is likely to lower the costs of the arbitration and also strengthen capacity in those regions to deal with international law commitments.</p>
<p>Arbitration and domestic courts</p>	<p>As a condition of access to international arbitration, an IIA may oblige investors to pursue local remedies in the host State. Broader policy considerations underlying this option include reinforcing the rule of law in the host State, improving the domestic judicial system, and encouraging the stronger involvement of the host</p>

	<p>State's legal community. Contracting parties may prescribe a certain minimum period of time to give the domestic judiciary an opportunity to consider the matter. Parties may also consider including the obligation to exhaust local remedies, or alternatively, to demonstrate ineffectiveness/bias of local courts. This would make ISDS an exceptional remedy of last resort.</p> <p>To encourage recourse to domestic courts, a treaty may wish to use a "no-U-turn" clause instead of a "fork-in-the-road" clause. The former permits investors to opt for international arbitration even after commencing a claim for relief in domestic courts or tribunals. States may also wish to consider "tolling" any limitations period while the investor seeks local redress in order to give local remedies time to work and remove the investor's incentive to shift forums before the limitations period expires. However, once the investor decides to submit the same claim (i.e., a claim regarding the same State action or measure) to international arbitration, then the investor must waive its right to pursue local remedies.</p> <p>Domestic courts and tribunals are typically presented with claims based on alleged violations of the host State's domestic laws and/or of the relevant contract. Depending on the legal system of the State concerned, and subject to any required domestic implementation of the IIA, domestic courts may have jurisdiction to rule on the alleged breaches of the IIA itself.</p>
--	---

Arbitrator selection and challenges to arbitrators	<p>Most IIAs do not contain detailed provisions concerning arbitrators, leaving those matters to the arbitration rules. In response to concerns about the expertise of arbitrators, one option is to specify the qualifications that arbitrators should have, such as expertise in public international law and/or investment law, with a further option to require specialized expertise for certain categories of cases such as those relating to financial services. Another option is to establish a roster of arbitrators where each member State would nominate a number of persons and from which all arbitrators to hear specific cases must be chosen. It is debatable, however, whether a roster of such kind would give the parties enough flexibility to establish a tribunal and whether it might lead to political nominations.</p> <p>Another concern relates to issues of “repeat appointments” – when some arbitrators gain a reputation as “claimants’ arbitrators” or “respondents’ arbitrators”, or are repeatedly appointed by the same type of party. One proposal is to eliminate the practice of party appointment altogether.²¹⁰ Yet this proposal gives rise to many unanswered questions: who would make the appointments; from whence would the arbitrators be drawn?</p> <p>Other proposals relate specifically to concerns about issue conflicts. One possibility is to provide in an IIA that only arbitrators who do</p>
---	--

²¹⁰ Paulsson, 2010.

	<p>not act as counsel can hear cases under the IIA. The disadvantage of this proposal appears to be primarily in its restrictiveness; only well-established arbitrators or those with alternative employment, such as academics, could likely afford to give up counsel work altogether; more junior and potentially more diverse candidates would likely be foreclosed by financial necessity from serving on such panels.</p> <p>A second option would be to adopt more precise guidelines about arbitrator disclosure requirements in order to identify and forestall issue conflicts. More onerous disclosure requirements in early stages of an arbitration would facilitate a challenge based on ICSID's requirement that an arbitrator's lack of appropriate qualities be "manifest", and help identify such conflicts before the arbitration advances towards the final stages.²¹¹</p>
<p>Claims by investors on their own behalf and on behalf of an enterprise</p>	<p>Most IIAs permit ISDS claims to be submitted by investors; in many cases they are the only permissible claimants. However, where an investor owns or controls an enterprise in the host State, an IIA may allow the enterprise to bring ISDS claims <u>in its own name</u> or may allow the investor to bring claims <u>on behalf</u> of such enterprise. The identity of the claimant may have a significant effect on the calculation of damages: if an investment seeks and recovers damages, they will be calculated based on the damage to the investment (enterprise) itself. If an investor</p>

²¹¹ Hwang and Lim, 2011.

	(shareholder) seeks and recovers damages on its own behalf, they will be calculated based on the injury to that investor. The IIA should direct that claims for damage to the investment be paid directly to it in order to ensure that all those with an ownership interest in the investment can recover their appropriate share of the funds.
Frivolous claims	States that wish to ensure that preliminary objections are heard promptly — whether they be that claims manifestly lack legal merit or that a dispute does not fall within a tribunal’s jurisdiction — might include in their IIAs a directive for tribunals to hear preliminary objections prior to the merits of the case whenever possible. ²¹² The objective of this procedure is to avoid spending time and resources on adjudicating frivolous claims. In some cases, however, a tribunal might, after preliminary consideration, choose to defer a final decision on preliminary objections until after having heard the full arguments of the case, as it can be difficult to come to a final decision within a short time frame and with a less-than-full record.
Provisional measures	Arbitral rules typically permit tribunals to order interim measures of protection. In order to avoid challenges to the authority of a tribunal to issue these orders, it is useful for the ISDS provision to explicitly authorize this recourse.

²¹² This will be relevant only for non-ICSID arbitration because the ICSID Rules and the ICSID Additional Facility Rules each include such a provision.

	<p>Conversely, an IIA may also explicitly prohibit arbitral tribunals from issuing such orders. IIAs can also specify what interim measures of protection are available.</p> <p>In addition, it is useful for IIAs to indicate whether and how national court-ordered interim measures should interact with the arbitral tribunal's authority. Arbitral tribunals have no ability to act until they are constituted, and have limited coercive powers even then. In an ICSID Convention arbitration, a national court will have no authority to order interim measures absent an explicit agreement that the court's assistance is available in a particular dispute. The parties to an IIA can make it clear whether or not they want provisional measures from local courts to be available to parties who commence an ICSID Convention arbitration. In other cases, the domestic court's authority will depend on the arbitral law of the State in which the court is located.</p>
<p>Consolidation of claims</p>	<p>Consolidation is often an attractive option to deal with related parallel proceedings based on the same IIA. However, consolidation can be problematic in the case of proceedings based on different IIAs because the obligations contained in the IIAs might differ, thus complicating legal analysis even if the same operative facts are at issue.</p> <p>If a State wishes to maximize its discretion to decide whether or not to agree to consolidate a dispute, it can simply not include a consolidation</p>

	<p>provision in a treaty. Consolidation will always be possible with the consent of the parties to the dispute. Another way to manage parallel proceedings and ensure coherence of outcomes is to appoint the same arbitrators in the related proceedings.</p> <p>To ensure consolidation of two or more cases brought under the same IIA, a treaty may require that such a question be referred to a specially constituted “consolidation tribunal”. This eliminates the problem of deciding which existing tribunal should have the authority to decide whether consolidation is appropriate and which existing tribunal would hear the consolidated case. It also takes the decision about consolidation away from the parties and puts it in the hands of a neutral decision maker.</p>
<p>Counterclaims by respondent States</p>	<p>It is uncertain whether States will be able to assert counterclaims against foreign investors in the event that the applicable IIA does not explicitly address the issue. Much will depend on the scope of the IIA’s ISDS clause, its provision on applicable law, and whether the treaty imposes any obligations on investors.</p> <p>To avoid this uncertainty, States may consider including in the IIA a specific provision on counterclaims, along with reference to the applicable laws on which a counterclaim could be based. One possibility is to include an obligation in the treaty that investors must to comply with the national laws and regulations of the host State (as long as these national laws and regulations are</p>

	<p>not inconsistent with the IIA).</p> <p>A “two-way” umbrella clause would also enable States to bring counterclaims based on an investor’s breach of specific obligations undertaken in relation to the investment, for example in the context of privatization or a concession contract.</p>
<p>Transparency of proceedings</p>	<p>Transparency promotes greater public participation in, and awareness and accountability of, the ISDS system. The extent of transparency can vary. Disclosure can be limited to arbitral awards only, or include other important documents such as the notice of arbitration (request for arbitration), pleadings, memorials, submissions by third parties, and procedural orders issued by the tribunal. The time at which information is made public can vary as well, as can the means of disclosure. In addition, a treaty may authorize the opening of ISDS hearings to the public, with a proviso that confidential information must be preserved.</p> <p>Giving access to awards and other dispute-related documents including parties’ submissions (while preserving confidential information) contributes to the development of international investment law as well as to awareness, capacity- and consensus-building.</p> <p>Another way to open up the ISDS process to the broader public is to allow <i>amicus curiae</i> submissions, which is particularly important where the dispute touches upon public interests such as the protection of the environment, public</p>

	<p>morals or public health and safety. To do so effectively, an IIA may set out the procedures by which such <i>amicus curiae</i> briefs are to be submitted and administered in order to prevent them from obstructing the course of the arbitration. This may include criteria that the arbitral tribunal should consider when deciding whether a non-disputing party may file a submission and guidance as to the weight that such submission should have in the proceedings.</p>
<p>Applicable substantive law</p>	<p>In order to guide arbitrators in their decision making, it is desirable that IIAs specify the sources of law applicable to disputes under the IIA and the hierarchy among them. This designation must be considered in light of other relevant provisions of the treaty, including the scope-of-ISDS clause, which specifies the range of disputes that can be submitted to arbitration. Without such instruction, the law applicable to the dispute will be left to an arbitral tribunal's discretion.</p> <p>Addressing the potential tensions between different branches of international law is another challenge. An IIA could specifically state that in case of a conflict between the IIA and a host State's international commitments, such conflicts should be resolved in accordance with customary international law, including with reference to the Vienna Convention on the Law of Treaties. Such a provision would at least remove questions as to whether a tribunal established under the IIA has jurisdiction to consider other international commitments (beyond investment law). A more</p>

	<p>far-reaching approach would be to stipulate that in case of a conflict between the IIA and a host State's international commitments under a multilateral agreement in another policy area, such as environment and public health, the latter shall prevail.</p> <p>Whatever the approach, the main objective of such a provision would be to help arbitral tribunals take into account other international commitments in order to ensure, as much as possible, harmonious interpretation of IIA provisions with other aspects of international law.</p>
<p>States' involvement in the interpretative process</p>	<p>Enhancing State control over interpretive matters can help prevent tribunals from giving particular provisions unexpected meanings. As a general rule, the more the contracting parties are involved in the interpretation of the treaty, the easier it should be for a tribunal to apply the treaty correctly.</p> <p>Such enhancement of control can be achieved in IIAs by: (1) reiterating the right of the contracting parties to give joint interpretations of the IIA that would be binding on tribunals (including through joint commissions or committees, if established by the treaty); (2) obliging tribunals to refer certain (sensitive or specialized) matters to the contracting parties or bodies designated by them for a preliminary determination; (3) allowing the non-disputing contracting party (i.e. the home State of the investor) to have access to dispute-related documents, to make written submissions and</p>

	attend hearings. One aspect to consider, given States' dual roles as treaty negotiators and as disputing parties, is concerns about due process, which are especially acute when interpretive steps are taken during on-going cases.
Available remedies	To improve predictability and control over the arbitration process, States may want to list the permissible remedies that tribunals may award under an IIA (e.g., monetary compensation, interest and restitution of property) and/or specifically prohibit tribunals from awarding certain kinds of remedies (in particular, punitive damages or orders to repeal or modify internal legislative/administrative acts). Although in practice tribunals only rarely award non-monetary relief, specifying in the IIA that the tribunal lacks that authority could prevent potentially costly and time-consuming arguments about the tribunal's power in that regard.
Costs of arbitration	It may be useful to set out in the IIA the rules regarding the distribution of arbitration costs and legal fees in order to avoid the uncertainty that is inherent in the arbitral rules. The latter leave a wide margin of discretion to the arbitral tribunal. An IIA can specifically require that each party to the dispute shall bear its own costs and fees, or that the losing party shall pay the costs and fees. Arbitrators' fees can be controlled by reference to a specific fee schedule in the absence of party agreement on the appropriate amount. The IIA could also distinguish between attorneys' fees and other costs, and allocate responsibility for each differently, such as providing that costs be

	<p>shared equally but that each party bears its own attorneys' fees. However, it might be difficult to foresee the appropriate apportionment of fees in all cases.</p>
<p>Review of arbitral awards</p>	<p>Arbitral awards are subject to set-aside under the law of the seat of arbitration in non-ICSID-Convention cases or to annulment in ICSID Convention cases.</p> <p>In a non-ICSID Convention case, the reviewing court will apply its domestic arbitral law to decide whether the award should be recognized or vacated. In practice, that review is often deferential to the awards. Should Parties to a treaty want to limit the jurisdictions in which set-aside decisions can be made, they should specify in the treaty which jurisdictions would be acceptable arbitration sites. ICSID Convention awards are a-national, but are still subject to the control of an annulment committee applying Article 52 of the ICSID Convention. In practice both such methods of review are likely to focus on whether the arbitral procedure met fundamental standards of procedural fairness and not on whether the decision was substantively correct.</p> <p>Certain recent treaties have required that the contracting parties to the treaty consider adhering to a separate <u>multilateral agreement establishing an appellate body</u> to review awards rendered by investor-State tribunals or consider setting up an appellate body for each specific treaty. Such an appellate body, consisting of permanent or quasi-</p>

	<p>permanent members, would be able to carry out an in-depth scrutiny of the award and correct substantive mistakes in the interpretation and application of the law. So far, no formal appellate body has been established or even designed, either bilaterally or multilaterally.</p>
Enforcement of arbitral awards	<p>When the treaty refers to ICSID or UNCITRAL arbitration, the final character of the award is provided for by the respective arbitration rules. In addition, the treaty itself can also explicitly provide that the award shall be final and binding, and that disputes under the IIA be deemed to have arisen out of “commercial” relationships, for purposes of enforcement under the New York Convention on the Recognition and Enforcement of Arbitral Awards. Many treaties also oblige each contracting party to provide for the enforcement of the award in its own territory in accordance with its national legislation. The latter will govern matters such as the form in which the petition for enforcement must be presented, how process should be served on the judgment debtor and similar issues.</p> <p>Another way to ensure enforcement is to require either that arbitrations be seated in a State party to the New York Convention, or that the arbitration occurs under the ICSID Convention. Awards rendered in States that are party to the New York Convention are enforceable in any other State party to that Convention, subject to the grounds for challenging enforcement listed therein. Awards rendered under the ICSID Convention are enforceable in any ICSID</p>

	<p>Convention State.</p> <p>Any State that does not honour an award rendered against it would be in clear violation of the treaty, which can trigger the State-State dispute settlement mechanism, diplomatic pressure and/or countermeasures by the home State.</p>
<p>ISDS and MFN clauses</p>	<p>MFN clauses that do not specify their intended reach open themselves to (often diverging) interpretations by arbitral tribunals. Uncertainty surrounding the provision's scope of application can be addressed by careful treaty drafting. It is essential for the treaty language to be specific about the reach of the MFN clause.</p> <p>Contracting parties may opt for an unfettered MFN clause that explicitly extends its applicability to both substantive and procedural matters, and allows importation of more favourable provisions from third-party IIAs. Other countries may prefer to explicitly narrow the MFN clause in order to exclude its application to the ISDS mechanism. When this is done as a clarification (using "for greater clarity" language or a similar formulation), this supports the argument that existing treaties with similar MFN provisions have the same, limited reach.²¹³</p>
<p>"Umbrella" clauses and</p>	<p>Omitting an "umbrella" clause would remove the uncertainty surrounding its meaning and</p>

²¹³ For other policy options with respect to MFN, see UNCTAD, 2010c, pp. 106-114.

<p>appropriate ISDS forums</p>	<p>effect. If an IIA does include an “umbrella” clause, it is more likely than not that, under the <i>effet utile</i> principle, the clause will be interpreted to have some specific purpose in the treaty, and will likely elevate certain contractual or other promises given by a State to the investor to the international treaty level. In many circumstances investor-State contracts have dispute resolution clauses whose interaction with the treaty’s dispute resolution clause is uncertain. Negotiators planning to include an “umbrella” clause in the treaty may wish to: (1) specify the purpose and reach of the umbrella clause; (2) address possible conflicts between the dispute settlement mechanisms under the contract and under the treaty; and (3) identify the law applicable to any dispute involving the umbrella clause.</p>
---------------------------------------	---

B. Options for reforming the institutional structure of the ISDS system

To effectively deal with the main concerns about systemic deficiencies in the ISDS regime,²¹⁴ the following two approaches merit particular consideration: (1) introducing an appeals facility;²¹⁵ and (2) creating a standing international investment court. They are discussed in turn.

²¹⁴ An overview of these deficiencies is provided in section I.B.

²¹⁵ In 2004, the ICSID Secretariat mooted the idea of an appeals facility but at that time the idea failed to garner sufficient State support. See ISCID, 2004, Part VI and Annex “Possible Features of an ICSID Appeals Facility”. In the almost ten years that have elapsed since, views of many governments may have evolved.

1. Introducing an appeals facility

An appeals facility implies a standing body with a competence to undertake substantive review of awards rendered by arbitral tribunals. It has been proposed as a means to improve consistency among arbitral awards, correct erroneous decisions of first-level tribunals and enhance predictability of the law.²¹⁶ This option has been contemplated by some countries.²¹⁷ If constituted of permanent members, appointed by States from a pool of the most reputable jurists, an appeals facility has a potential to become an authoritative body capable of delivering consistent — and more balanced — opinions, which would rectify some of the legitimacy concerns about the current ISDS regime.²¹⁸

Authoritative pronouncements by an appeals facility on issues of law would guide both the disputing parties (when assessing the strength of their respective cases) and arbitrators adjudicating disputes. Even if the process for constituting first-level arbitral

²¹⁶ For the relevant discussion see, e.g., Tams, 2006.

²¹⁷ Several IIAs concluded by the United States have addressed the potential establishment of a standing body to hear appeals from investor-State arbitrations. The Chile-United States FTA was the first one to establish a “socket” in the agreement into which an appellate mechanism could be inserted should one be established under a separate agreement (Article 10.19(10)). The Dominican Republic-Central America-United States FTA (CAFTA) (2004) went further, and required the establishment of a negotiating group to develop an appellate body or similar mechanism (Annex 10-F). Notwithstanding these provisions, there has been no announcement of any such negotiations and no text regarding the establishment of any appellate body.

²¹⁸ An alternative solution would be a system of preliminary rulings, whereby tribunals in ongoing proceedings would be enabled or required to refer unclear questions of law to a certain central body. This option, even though it does not grant a right of appeal, could also help improve consistency among arbitral decision making. See e.g., Schreuer, 2008.

tribunals remained unchanged, concerns would be alleviated through their effective supervision at the appellate level. In a word, an appeals facility would add direction and order to the existing decentralized, non-hierarchical and *ad hoc* regime.

At the same time, absolute consistency and certainty would not be achievable in a legal system that consists of more than 3,000 legal texts; different outcomes may still be warranted by the language of specific applicable treaties. Also, the introduction of an appellate stage would further add to the time and cost of the proceedings, although that could be controlled by putting in place tight timelines, as has been done for the WTO Appellate Body.²¹⁹

In terms of implementation, for the appeals option to be meaningful, it would need to be supported by a significant number of countries. In addition to an in-principle agreement, a number of important choices would need to be made: Would the facility be limited to the ICSID system or be expanded to other arbitration rules?²²⁰ Who would elect its members and how? How would it be financed? Would appeals be limited to the points of law or also encompass questions of fact? What would the standard of review be? How would States ensure the coverage of earlier-concluded IIAs by the new appeals structure?²²¹ In sum, this reform option is likely to face significant, although not insurmountable, practical challenges.

²¹⁹ At the WTO, the appeals procedure is limited to 90 days.

²²⁰ It has been suggested that the application of an appeals facility to ICSID disputes would require an amendment to the ICSID Convention, which in turn may be hard to achieve.

²²¹ Some further questions include: Would it have the power to correct decisions or only a right of remand to the original tribunal? Would the establishment of an appellate review mechanism imply the phase-out of the ICSID annulment mechanism and national-court review?

2. Creating a standing international investment court

This option implies the replacement of the current system of *ad hoc* arbitral tribunals with a standing international court. The latter would consist of judges appointed or elected by States on a permanent basis, for example, for a fixed term. It could also have an appeals chamber.

This approach rests on the theory that investment treaty arbitration is analogous to domestic judicial review in public law because “*it involves an adjudicative body having the competence to determine, in response to a claim by an individual, the legality of the use of sovereign authority, and to award a remedy for unlawful State conduct.*”²²² Under this view, a private model of adjudication (arbitration) is inappropriate for matters that deal with public law. The latter requires objective guarantees of independence and impartiality of judges which can only be provided by a security of tenure — to insulate the judge from outside interests such as an interest in repeat appointments and in maintaining the arbitration industry. Only a court with tenured judges, the argument goes, would establish a fair system widely regarded to be free of perceived bias.²²³

A standing investment court would be an institutional public good serving the interests of investors, States and other stakeholders. The court would address most of the problems outlined above: it would go a long way towards ensuring the legitimacy and transparency of the system, facilitating consistency

²²² Van Harten 2008.

²²³ *Ibid.*

and accuracy of decisions and ensuring independence and impartiality of adjudicators.²²⁴

However, this solution is also the most difficult to implement as it would require a complete overhaul of the current regime through a coordinated action by a large number of States. At the same time, the consensus would not need to be universal. A standing investment court may well start as a plurilateral initiative, with an opt-in mechanism for those States that will wish to join.

Finally, it is questionable whether a new court would be fit for a fragmented regime that consists of a huge number of mostly bilateral IIAs. It has been argued that this option would work best in a system with a unified body of applicable law.²²⁵ Nonetheless, even if the current diversity of IIAs is preserved, a standing investment court would likely be much more consistent and coherent in its approach to the interpretation and application of treaty norms, compared with numerous *ad hoc* tribunals.

C. Promoting alternative dispute resolution and dispute prevention policies

Conventional wisdom suggests that the best way to resolve a dispute is to avoid it altogether or resolve it at an early stage. In this respect, an increased resort to so-called alternative dispute resolution (ADR) methods and dispute prevention policies (DPPs) may be beneficial. ADR and DPPs can be either enshrined in IIAs or implemented at the domestic level, without any specific references in the IIA.

²²⁴ A system where judges are assigned to each case, as opposed to being appointed by the disputing parties, would also save significant resources currently spent on researching arbitrator profiles.

²²⁵ An obvious analogy is the European Court of Human Rights, which adjudicates claims brought under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

As discussed above,²²⁶ non-binding ADR methods, such as conciliation and mediation, seek not to apply the law in a rigid manner but to find a solution to a dispute that would be acceptable to both parties.

ADR methods can help to save time and money, find a mutually acceptable solution, prevent escalation of the dispute and preserve a workable relationship between the disputing parties. However, there is no guarantee that an ADR procedure will lead to the resolution of the dispute; an unsuccessful procedure could simply increase the costs involved. Also, depending on the nature of a State act challenged by an investor (e.g., a law of general application), ADR may not always be acceptable to the government. A pre-condition for an effective ADR system is an adequate institutional arrangement within a government that allows relevant officials and agencies to propose, conduct and implement the ADR procedures.

ADR could go hand in hand with the strengthening of dispute prevention and management policies at the national level. Such policies aim to create effective channels of communication and improve institutional arrangements between investors and respective agencies (for example, investment aftercare policies) and between different ministries dealing with investment-related issues. An investment ombudsman office, or a specifically assigned agency that takes the lead should a conflict with an investor arise, can help resolve investment disputes early on, as well as assess the prospects of, and, if necessary, prepare for international arbitration.²²⁷

In terms of implementation, this approach is relatively straightforward, and much has already been done by some countries. Importantly, given that most ADR and DPP efforts are implemented at the national level, individual countries can proceed without the

²²⁶ Section II.C.5.

²²⁷ See further UNCTAD, 2010a; UNCTAD, 2011a.

need for their treaty partners to agree. However, ADR and DPPs do not solve key ISDS-related challenges. The most they can do is to reduce the number of full-fledged legal disputes, which would render this reform path a complementary rather than stand-alone avenue for ISDS reform.

* * *

Among the reform options outlined above, some imply individual actions by governments and others require joint action by a significant number of countries. Most of the options would benefit from being accompanied by comprehensive training and capacity-building to enhance awareness and understanding of ISDS related-issues.²²⁸

While the collective action options would go further to address the problems posed by today's ISDS regime, they would face more difficulties in implementation and require agreement between a larger number of States. An inclusive, universal and transparent multilateral policy dialogue on ISDS could help to develop a consensus on the preferred course for reform and ways to put it into action. The time is ripe.

²²⁸ Such capacity building activities are, among others, being carried out by UNCTAD (together with different partner organizations). Latin American countries, for example, have benefitted from UNCTAD's advanced regional training courses on ISDS on an annual basis since 2005.

REFERENCES

- Asia-Pacific Economic Cooperation (APEC) (2013). *International Investment Agreements Negotiators Handbook: APEC/UNCTAD Modules*. Publication Number APEC#212-CT-03.3 Available from http://publications.apec.org/publication-detail.php?pub_id=1420.
- Bjorklund A K (2013). The role of counterclaims in rebalancing investment law. *Lewis & Clark Law Review*.17:461.
- Borchard E (1915). *The Diplomatic Protection of Citizens Abroad*. Banks Law Publishing.
- Born G (2009). *International Commercial Arbitration*. Vol. II. Wolters Kluwer.
- Caplan L and Sharpe J (2013). Commentaries to the 2012 Model BIT of the United States. In Brown C. ed. *Commentaries on Selected Model Investment Treaties*. Oxford University Press: Oxford.
- Douglas Z (2009). *The International Law of Investment Claims*. Cambridge University Press.
- Dugan C, Wallace D Jr, Rubins N and Sabahi B (2011). *Investor-State Arbitration*. Oxford University Press: Oxford.
- Eberhardt P and Olivet C (2012). Profiting from injustice: how law firms, arbitrators and financiers are fuelling an investment arbitration boom. *Corporate Europe Observatory and Transnational Institute*.
- Fox H (2008). *The Law of State Immunity*. Second edition. Oxford University Press: Oxford.
- Franck S (2011). Rationalizing costs in investment treaty arbitration. *Washington University Law Review*. 88:769.

Gaillard E & Banifatemi Y (2008). The meaning of ‘and’ in article 42(1), second sentence, of the Washington Convention – the role of international law in the ICSID choice of law process. *ICSID Review – Foreign Investment Law Journal*. 18:375.

Gaukrodger D and Gordon K (2012). Investor-State dispute settlement: a scoping paper for the investment policy community. *OECD Working Papers on International Investment, No. 2012/3*. OECD Investment Division.

Hwang M & Lim K (2011). Issue conflict in ICSID arbitrations. *Transnational Dispute Management*. 8(5).

International Center for Settlement of Investment Disputes (ICSID) (1968). *Documents Concerning the Origin and Formulation of the Convention*. Volume 2. ICSID.

_____ (2004). Possible improvements of the framework for ICSID arbitration. *ICSID Discussion paper*. ICSID. Washington. 22 October.

_____ (ICSID) (2012). *ICSID Annual Report 2012*. ICSID. Washington.

Kaufmann-Kohler G and Antonietti A (2010). Interim relief in international investment agreements. In: Yannaca-Small K, ed. *Arbitration Under International Investment Agreements: A Guide to the Key Issues*. Oxford University Press: Oxford.

Kinnear M, Bjorklund A and Hannaford J (2006; 2009 Update). *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*. Kluwer Law International.

Kjos H E (2013). *National and International law in Investor-State Arbitration*. Oxford University Press: Oxford.

Kleinheisterkamp J (2011). The next 10 year ECT investment arbitration: a vision for the future from a European law perspective. *LSE Legal Studies Working Paper No 7/2011*.

Kreindler R (2010). Final rulings on costs: loser pays all? *Transnational Dispute Management*. 7(1).

Kriebaum U (2007). Privatizing human rights: the interface between international investment protection and human rights. In: Reinisch A, Kriebaum U eds. *The Law of International Relations: Liber Amicorum Hanspeter Neuhold*. Eleven International Publishing.

Legum B (2010). An overview of procedure in an investment treaty arbitration. In Yannaca-Small K ed. *Arbitration Under International Investment Agreements: A Guide to the Key Issues*. Oxford University Press: Oxford.

Lévesque C and Newcombe A (2013). Commentaries to Canada's Model BIT. In Brown C. ed. *Commentaries on Selected Model Investment Treaties*. Oxford University Press: Oxford.

Levine J (2006). Dealing with arbitrator 'issue conflicts' in international arbitration. *Dispute Resolution Journal*. 61(1).

Lew J D M, Mistelis L & Kröll S (2003). *Comparative International Commercial Arbitration*. Kluwer Law International.

Malintoppi L (2008). Independence, impartiality, and duty of disclosure of arbitrators. In Muchlinski P *et al.* eds. *Oxford Handbook of International Investment Law*. Oxford University Press: Oxford.

_____ (2009). Provisional measures in recent ICSID proceedings: what parties request and what tribunals order. In Binder C *et al.* eds. *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*. Oxford University Press: Oxford.

McLachlan C (2005). The principle of system integration and article 31(3)(c) of the Vienna Convention. *International and Comparative Law Quarterly*. 54:279.

Organisation for Economic Cooperation and Development (OECD) (2012). Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey. *OECD Working Papers on International Investment No. 2012/2*.

Park W (2009). Arbitrator integrity: the transient and the permanent. *San Diego Law Review*. 46:629.

Paulsson J (1995). Arbitration without privity, *ICSID Review — Foreign Investment Law Journal*. 10:232.

_____ (2010). Moral hazard in international dispute resolution. Inaugural Lecture at Miami School of Law. Available from http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf.

Peterson L E (2010). How many States are not paying awards under investment treaties? *Investment Arbitration Reporter*.

Peterson L E and Hepburn J (2011). Payment round-up: new reporting on ICSID award debts of Kazakhstan, Kyrgyzstan, and Bangladesh. *Investment Arbitration Reporter*.

Pohl J, Mashigo K and Nohen A (2012). Dispute settlement provisions in international investment agreements: A large sample survey. *OECD Working Papers on International Investment, No. 2012/2*. OECD Investment Division.

Reinisch A (2010). Enforcement of awards. In Yannaca-Small K ed. *Arbitration Under International Investment Agreements: A Guide to the Key Issues*. Oxford University Press: Oxford.

Reisman W M (2000). The regime for lacunae in the ICSID choice of law provision and the question of its threshold. *ICSID Review – Foreign Investment Law Journal*. 15:362.

Ripinsky S with Williams K (2008). *Damages in International Investment Law*. British Institute of International Comparative Law. London.

Roberts A (2010). Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States. *American Journal of International Law*. 104:179.

Rogers C (forthcoming). *Ethics in International Arbitration*. Oxford University Press: Oxford.

Sands P (2011). Conflict and conflicts in investment treaty arbitration: ethical standards for counsel. In Brown C and Miles K eds. *Evolution in Investment Treaty Law and Arbitration*. Cambridge University Press: Cambridge.

Sasson M (2010). *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International and Municipal Law*. Wolters Kluwer.

Schreuer C (2004). Investment treaty arbitration and jurisdiction over contract claims: the Vivendi I case considered. In Weiler T ed. *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*: Cameron. London.

_____ (2008). Preliminary rulings in investment arbitration. In Sauvant K ed. *Appeals Mechanism in International Investment Disputes*. Oxford University Press: Oxford.

_____ with Malintoppi L, Reinisch A and Sinclair A (2009). *The ICSID Convention: A Commentary*. Second edition. Cambridge University Press: Oxford.

Sherwin P and Rennie D (2009). Interim relief under international arbitration rules and guidelines: a comparative analysis. *American Review of International Arbitration*. 20:317.

Sinclair A (2009). The umbrella clause debate. In Bjorklund A, Laird I and Ripinsky S eds. *Investment Treaty Law: Current Issues III*. British Institute of International and Comparative Law.

Tams C (2006). An appealing option? A debate about an ICSID appellate structure. *Essays in Transnational Economic Law No.57*.

UNCTAD (2003). *Dispute Settlement: Investor-State*. UNCTAD Series on Issues in International Investment Agreements II. Sales No. E.03.II.D.5. New York and Geneva.

_____ (2007a). *Investor-State Dispute Settlement and Impact on Investment Rulemaking*. Series on International Investment Policies for Development. Sales No. E.07.II.D.10. New York and Geneva.

_____ (2007b). *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*. Sales No. E.06.II.D.16. New York and Geneva.

_____ (2009). *The Protection of National Security in IIAs*. Series on International Investment Policies for Development. Sales No. E.09.II.D.12. New York and Geneva.

_____ (2010a). *Investor-State Disputes: Prevention and Alternatives to Arbitration*. Series on International Investment Policies for Development. Sales No. E.10.II.D.11. New York and Geneva.

_____ (2010b). *Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims*. IIA Issues Note. Available from http://unctad.org/en/Docs/webdiaeia20106_en.pdf.

_____ (2010c). *Most-Favoured-Nation Treatment: A Sequel*. UNCTAD Series on Issues in International Investment Agreements II. Sales No. 10.II.D.19. New York and Geneva.

_____ (2011a). *How to Prevent and Manage Investor-State Disputes: Lessons from Peru*. Best Practice in Investment for Development Series, Series B, Number 10. New York and Geneva.

_____ (2011b). *Interpretation of IIAs: What States Can Do*. IIA Issues Note. Available from http://unctad.org/en/Docs/webdiaeia2011d10_en.pdf.

_____ (2011c). *Latest Developments in Investor-State Dispute Settlement*. IIA Issues Note. Available from http://unctad.org/en/Docs/webdiaeia20113_en.pdf.

_____ (2011d). *Scope and Definition: A Sequel*. UNCTAD Series on Issues in International Investment Agreements II. Sales No. E.11.II.D.9. New York and Geneva.

_____ (2011e). *Sovereign Debt Restructuring and International Investment Agreements*. IIA Issues Note. Available from: http://unctad.org/en/docs/webdiaepcb2011d3_en.pdf.

_____ (2011f). *Investor-State Disputes: Prevention and Alternatives to Arbitration II: Proceedings of Symposium held on 29 March 2010*. New York and Geneva.

_____ (2012a). *Investment Policy Framework for Sustainable Development*. (UNCTAD/DIAE/PCB/2012/5). Geneva. Available from http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf.

_____ (2012b). *Latest Developments in Investor-State Dispute Settlement*, IIA Issues Note. Available from http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf.

_____ (2012c). *Transparency: A Sequel*. UNCTAD Series on Issues in International Investment Agreements II. Sales No. E.11.II.D.16. New York and Geneva.

_____ (2012d). *World Investment Report 2012. Towards a New Generation of Investment Policies*. Sales Number E.12.II.D.3. Available from <http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf>.

_____ (2013a). *Recent developments in Investor-State Dispute Settlement*. IIA Issues Note. Available from http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf.

_____ (2013b). *World Investment Report 2013. Global Value Chains: Investment and Trade for Development*. Sales Number E.13.II.D.5. Available from http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf.

_____ (forthcoming). *The Problem of States' Counterclaims in Investment Arbitration*, IIA Issues Note.

Van Harten G (2008). A Case for an international investment court. Inaugural Conference of the Society for International Economic Law (SIEL). Available from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153424.

Waibel M, Kaushal A, Liz Chung K-H and Balchin C eds. (2010). *The Backlash against Investment Arbitration: Perceptions and Reality*. Kluwer Law International.

Yeşilirmak A (2005). *Provisional Measures in International Commercial Arbitration*. Kluwer Law International.

CASES AND ARBITRAL AWARDS

Unless indicated otherwise, the texts of arbitral awards and decisions can be found at <http://italaw.com>.

Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011.

AES Summit Generation Limited and AES-Tisza Erömi Kft v. The Republic of Hungary, ICSID Case No. ARB/07/19, Award, 23 September 2010.

Amco Asia Corporation and Others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on the Application for Annulment, 16 May 1986. ICSID Reports 1 (1993).

Antoine Goetz and Others. v. Republic of Burundi, ICSID Case No. ARB/95/3, Award (Embodying the Parties' Settlement Agreement), 10 February 1999.

Archer Daniels Midland Co. & Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, ICSID Case No ARB(AF)/04/5, and *Corn Products Int'l v. Mexico*, ICSID Case No. ARB(AF)/04/1, Order of the Consolidation Tribunal, 20 May 2005.

Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, 27 June 1990.

Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003.

Bayview Irrigation District et al. v. United Mexican States, ICSID Case No. ARB(AF)/05/1, Award, 29 June 2007.

Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008.

Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/3, Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 2 February 2009.

Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010.

Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, Award, 30 April 1990, (1990) 20 RIAA 217.

CME Czech Republic B.V. v. The Czech Republic (UNCITRAL), Partial Award, 12 September 2001.

CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, 25 September 2007.

Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007, 10 August 2010.

Consortium RFCC v. Royaume du Maroc, ICSID Case No. ARB/00/6, Final Award, 22 December 2003.

Eastern Sugar B.V. (Netherlands) v. The Czech Republic, SCC No. 088/2004, Partial Award, 27 March 2007.

Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Award, 25 January 2000.

Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2006.

Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010.

Ethyl Corporation v. The Government of Canada (NAFTA/UNCITRAL), Decision on Jurisdiction, 24 June 1998.

European American Investment Bank AG (EURAM) v. Slovak Republic, (UNCITRAL), Decision on Jurisdiction, 22 October 2012. Decision, unpublished, information available from http://www.iareporter.com/articles/20130117_1.

Global Trading Resource Corp. and Globex International, Inc. v. Ukraine, ICSID Case No. ARB/09/11, Award, 1 December 2010.

Hulley Enterprises Limited (Cyprus) v. The Russian Federation, PCA Case No. AA 226.

ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina (UNCITRAL), PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012.

Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Dissenting Opinion of Brigitte Stern, 21 June 2011.

Jan Oostergetel and Theodora Laurentius v. The Slovak Republic, (UNCITRAL), Decision on Jurisdiction, 30 April 2010.

Klöckner v. Republic of Cameroon, ICSID Case No. ARB/81/2, Decision on the Application for Annulment, 3 May 1985. ICSID Reports 2 (1994).

LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ARB/02/1, Award, 25 July 2007.

Libananco Holdings Co. Limited v. Republic of Turkey, ICSID Case No. ARB/06/8, Award, 2 September 2011.

Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009.

Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002.

Mr. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006.

Murphy Exploration & Production Company – International v. Republic of Ecuador, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010.

Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, 5 October 2012.

Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12.

Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/1, Letter Regarding Non-Disputing Parties, 5 October 2009.

Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/14, Decision on Jurisdiction, 8 February 2005.

Railroad Development Corporation v. Republic of Guatemala, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction: CAFTA Article 10.20.5, 17 November 2008.

Ronald S. Lauder v. The Czech Republic (UNCITRAL), Final Award, 3 September 2001.

Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001.

Saluka Investments BV v. Czech Republic (UNCITRAL), Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004.

Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 9 June 2010.

Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia (UNCITRAL), Award on Jurisdiction and Liability, 28 April 2011.

SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003.

Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/01, Award, 7 December 2011.

The Canadian Cattlemen for Fair Trade v. United States of America (NAFTA/UNCITRAL), Award on Jurisdiction, 28 January 2008.

United Parcel Service of America Inc. v. Government of Canada, (NAFTA/UNCITRAL), Award on the Merits, 11 June 2007.

Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No.

ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, 12 August 2010.

Veteran Petroleum Limited (Cyprus) v. The Russian Federation, PCA Case No. AA 228.

Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000.

Western NIS Enterprise Fund v. Ukraine, ICSID Case No. ARB/04/2, Order, 16 March 2006.

Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, 8 December 2008.

Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. AA 227.

**SELECTED UNCTAD PUBLICATIONS ON
INTERNATIONAL INVESTMENT AGREEMENTS,
TRANSNATIONAL CORPORATIONS AND FOREIGN
DIRECT INVESTMENT**

(For more information, please visit www.unctad.org/en/pub)

World Investment Reports

(For more information, visit www.unctad.org/wir.)

World Investment Report 2013: Global Value Chains: Investment and Trade for Development. Sales no.:E.13.II.D.5. \$80.

Available from http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf.

World Investment Report 2012: Towards a New Generation of Investment Policies. Sales no.:E.12.II.D.3. \$80.

Available from <http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf>.

World Investment Report 2011: Non-Equity Modes of International Production and Development. Sales no.:E.11.II.D.2. \$80.

Available from <http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf>.

World Investment Report 2010. Investing in a Low-Carbon Economy. Sales No. E.10.II.D.1. \$80.

Available from http://www.unctad.org/en/docs/wir2010_en.pdf.

World Investment Report 2009. Transnational Corporations, Agricultural Production and Development. Sales No. E.09.II.D.15. \$80. Available from

http://www.unctad.org/en/docs/wir2009_en.pdf.

World Investment Report 2008. Transnational Corporations and the Infrastructure Challenge. Sales No. E.08.II.D.23. \$80. Available from

http://www.unctad.org/en/docs/wir2008_en.pdf.

World Investment Report 2007. Transnational Corporations, Extractive Industries and Development. Sales No. E.07.II.D.9. \$75. Available from http://www.unctad.org/en/docs/wir2007_en.pdf.

World Investment Report 2006. FDI from Developing and Transition Economies: Implications for Development. Sales No. E.06.II.D.11. \$75. Available from http://www.unctad.org/en/docs/wir2006_en.pdf.

World Investment Report 2005. Transnational Corporations and the Internationalization of R&D. Sales No. E.05.II.D.10. \$75. Available from http://www.unctad.org/en/docs/wir2005_en.pdf.

World Investment Report 2004. The Shift Towards Services. Sales No. E.04.II.D.36. \$75. Available from http://www.unctad.org/en/docs/wir2004_en.pdf.

World Investment Report 2003. FDI Policies for Development: National and International Perspectives. Sales No. E.03.II.D.8. \$49. Available from http://www.unctad.org/en/docs/wir2003_en.pdf.

World Investment Report 2002: Transnational Corporations and Export Competitiveness. 352 p. Sales No. E.02.II.D.4. \$49. Available from http://www.unctad.org/en/docs/wir2002_en.pdf.

World Investment Report 2001: Promoting Linkages. 356 p. Sales No. E.01.II.D.12. \$49. Available from <http://www.unctad.org/wir/contents/wir01content.en.htm>.

World Investment Report 2000: Cross-border Mergers and Acquisitions and Development. 368 p. Sales No. E.99.II.D.20. \$49. Available from <http://www.unctad.org/wir/contents/wir00content.en.htm>.

Ten Years of World Investment Reports: The Challenges Ahead. Proceedings of an UNCTAD special event on future challenges in the area of FDI. UNCTAD/ITE/Misc.45. Available from <http://www.unctad.org/wir>.

International Investment Policies for Development

(For more information, visit <http://www.unctad.org/iaa>.)

Investor-State Disputes: Prevention and Alternatives to Arbitration II: Proceedings of Symposium held on 29 March 2010. 214 p.

Investor-State Disputes: Prevention and Alternatives to Arbitration. 160 p. Sales no. E.10.II.D.11. \$22.

The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries. 161 p. Sales no. E.09.II.D.20. \$22.

The Protection of National Security in IIAs. 170 p. Sales no. E.09.II.D.12. \$15.

Identifying Core Elements in Investment Agreements in the APEC Regions. 134 p. Sales no. E.08.II.D.27. \$15.

International Investment Rule-Making: Stocktaking, Challenges and the Way Forward. 124 p. Sales no. E.08.II.D.1. \$15.

Investment Promotion Provisions in International Investment Agreements. 103 p. Sales no. E.08.II.D.5. \$15.

Investor-State Dispute Settlement and Impact on Investment Rulemaking. 110 p. Sales No. E.07.II.D.10. \$30.

Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking. 172 p. Sales No. E.06.II.D.16. \$30.

Investment Provisions in Economic Integration Agreements. 174 p. UNCTAD/ITE/IIT/2005/10.

Preserving Flexibility in IIAs: The Use of Reservations. 104 p. Sales no.: E.06.II.D.14. \$15.

International Investment Arrangements: Trends and Emerging Issues. 110 p. Sales No. E.06.II.D.03. \$15.

Investor-State Disputes Arising from Investment Treaties: A Review. 106 p. Sales No. E.06.II.D.1 \$15

South–South Cooperation in Investment Arrangements. 108 p. Sales No. E.05.II.D.26 \$15.

International Investment Agreements in Services. 119 p. Sales No. E.05.II.D.15. \$15.

The REIO Exception in MFN Treatment Clauses. 92 p. Sales No. E.05.II.D.1. \$15.

Issues in International Investment Agreements I and II
(For more information, visit <http://www.unctad.org/iaa>.)

Transparency: A Sequel. 102 p. Sales No. E.11.II.D.16. \$20.

Expropriation: A Sequel. 166 p. Sales No. E.12.II.D.7. \$25.

Fair and Equitable Treatment: A Sequel. 142 p. Sales No. E.11.II.D.15. \$25.

Scope and Definition: A Sequel. 149 p. Sales No. E.11.II.D.9. \$25.

Most-Favoured-Nation Treatment: A Sequel. 141 p. Sales No. E.10.II.D.19. \$25.

International Investment Agreements: Key Issues, Volumes I, II and III. Sales No.: E.05.II.D.6. \$65.

State Contracts. 84 p. Sales No. E.05.II.D.5. \$15.

Competition. 112 p. E.04.II.D.44. \$ 15.

Key Terms and Concepts in IIAs: a Glossary. 232 p. Sales No. E.04.II.D.31. \$15.

Incentives. 108 p. Sales No. E.04.II.D.6. \$15.

Transparency. 118 p. Sales No. E.04.II.D.7. \$15.

Dispute Settlement: State-State. 101 p. Sales No. E.03.II.D.6. \$15.

Dispute Settlement: Investor-State. 125 p. Sales No. E.03.II.D.5. \$15.

Transfer of Technology. 138 p. Sales No. E.01.II.D.33. \$18.

Illicit Payments. 108 p. Sales No. E.01.II.D.20. \$13.

Home Country Measures. 96 p. Sales No. E.01.II.D.19. \$12.

Host Country Operational Measures. 109 p. Sales No. E.01.II.D.18. \$15.

Social Responsibility. 91 p. Sales No. E.01.II.D.4. \$15.

Environment. 105 p. Sales No. E.01.II.D.3. \$15.

Transfer of Funds. 68 p. Sales No. E.00.II.D.27. \$12.

Flexibility for Development. 185 p. Sales No. E.00.II.D.6. \$15.

Employment. 69 p. Sales No. E.00.II.D.15. \$12.

Taxation. 111 p. Sales No. E.00.II.D.5. \$12.

Taking of Property. 83 p. Sales No. E.00.II.D.4. \$12.

National Treatment. 94 p. Sales No. E.99.II.D.16. \$12.

Admission and Establishment. 69 p. Sales No. E.99.II.D.10. \$12.

Trends in International Investment Agreements: An Overview. 133 p. Sales No. E.99.II.D.23. \$12.

Lessons from the MAI. 52 p. Sales No. E.99.II.D.26. \$10.

Fair and Equitable Treatment. 85 p. Sales No. E.99.II.D.15. \$12.

Transfer Pricing. 71 p. Sales No. E.99.II.D.8. \$12.

Scope and Definition. 93 p. Sales No. E.99.II.D.9. \$12.

Most-Favoured Nation Treatment. 57 p. Sales No. E.99.II.D.11. \$12.

Investment-Related Trade Measures. 57 p. Sales No. E.99.II.D.12. \$12.

Foreign Direct Investment and Development. 74 p. Sales No. E.98.II.D.15. \$12.

Investment Policy Monitors

Investment Policy Monitor. A periodic report by the UNCTAD secretariat. No. 12, 10 March 2013. Available from http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d1_en.pdf

Investment Policy Monitor. A periodic report by the UNCTAD secretariat. No. 11, 12 November 2013. Available from http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d11_en.pdf

Investment Policy Monitor. A periodic report by the UNCTAD secretariat. No. 10, 19 June 2013. Available from http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d10_en.pdf

Investment Policy Monitor. A periodic report by the UNCTAD secretariat. No. 9, 12 March 2013. Available from http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d2_en.pdf

Investment Policy Monitor. A periodic report by the UNCTAD secretariat. No. 8, 26 November 2012. Available from http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d5_en.pdf

Investment Policy Monitor. A periodic report by the UNCTAD secretariat. No. 7, 16 February 2012. Available from

http://www.unctad.org/en/docs/webdiaepcb2012d1_en.pdf.

Investment Policy Monitor. A periodic report by the UNCTAD secretariat. No. 6, 12 October 2011. Available from http://www.unctad.org/en/docs/webdiaeia2011d12_en.pdf.

Investment Policy Monitor. A periodic report by the UNCTAD secretariat. No. 5, 5 May 2011. Available from http://www.unctad.org/en/docs/webdiaeia20115_en.pdf.

Investment Policy Monitor. A periodic report by the UNCTAD secretariat. No. 4, 28 January 2011. Available from http://www.unctad.org/en/docs/webdiaeia20112_en.pdf.

Investment Policy Monitor. A periodic report by the UNCTAD secretariat. No. 3, 7 October 2010. Available from http://www.unctad.org/en/docs/webdiaeia20105_en.pdf .

Investment Policy Monitor. A periodic report by the UNCTAD secretariat. No. 2, 20 April 2010. Available from http://www.unctad.org/en/docs/webdiaeia20102_en.pdf .

Investment Policy Monitor. A periodic report by the UNCTAD secretariat. No. 1, 4 December 2009. Available from http://www.unctad.org/en/docs/webdiaeia200911_en.pdf .

IIA Monitors and Issues Notes

IIA Issues Note No. 4 (2013): Towards a New Generation of International Investment Policies: UNCTAD's Fresh Approach to Multilateral Investment Policy-Making. Available from http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d6_en.pdf.

IIA Issues Note No. 4 (2013): International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal. Available from http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9_en.pdf.

IIA Issues Note No. 3 (2013): The Rise of Regionalism in International Investment Policymaking: Consolidation or Complexity? Available from http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d8_en.pdf.

IIA Issues Note No. 2 (2013): Reform of Investor-State Dispute Settlement: In Search of a Roadmap Special issue for the Multilateral Dialogue on Investment. Available from http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf.

IIA Issues Note No. 1 (2013): Latest Developments in Investor-State Dispute Settlement. Available from http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf.

IIA Issues Note No. 1 (2012): Latest Developments in Investor-State Dispute Settlement. Available from http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf.

IIA Issues Note No. 3 (2011): Interpretation of IIAs: What States Can Do. Available from http://www.unctad.org/en/docs/webdiaeia2011d10_en.pdf.

IIA Issues Note No. 2 (2011): Sovereign Debt Restructuring and International Investment Agreements. Available from http://www.unctad.org/en/docs/webdiaepcb2011d3_en.pdf.

IIA Issues Note No. 1 (2011): Latest Developments in Investor-State Dispute Settlement. Available from http://www.unctad.org/en/docs/webdiaeia20113_en.pdf.

IIA Issues Note No. 2 (2010): Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims. Available from http://www.unctad.org/en/docs/webdiaeia20106_en.pdf.

IIA Issues Note No. 1 (2010): Latest Developments in Investor-State Dispute Settlement. Available from http://www.unctad.org/en/docs/webdiaeia20103_en.pdf.

IIA Monitor No. 3 (2009): Recent developments in international investment agreements (2008–June 2009).

Available from http://www.unctad.org/en/docs/webdiaeia20098_en.pdf .

IIA Monitor No. 2 (2009): Selected Recent Developments in IIA Arbitration and Human Rights.

Available from http://www.unctad.org/en/docs/webdiaeia20097_en.pdf .

IIA Monitor No. 1 (2009): Latest Developments in Investor–State Dispute Settlement.

Available from http://www.unctad.org/en/docs/webdiaeia20096_en.pdf .

IIA Monitor No. 2 (2008): Recent developments in international investment agreements (2007–June 2008).

http://www.unctad.org/en/docs/webdiaeia20081_en.pdf .

IIA Monitor No. 1 (2008): Latest Developments in Investor– State Dispute Settlement.

Available from http://www.unctad.org/en/docs/iteiia20083_en.pdf .

IIA Monitor No. 3 (2007): Recent developments in international investment agreements (2006–June 2007).

Available from http://www.unctad.org/en/docs/webiteiia20076_en.pdf .

IIA Monitor No. 2 (2007): Development implications of international investment agreements.

Available from http://www.unctad.org/en/docs/webiteiia20072_en.pdf .

IIA Monitor No. 1 (2007): Intellectual Property Provisions in International Investment Arrangements.

Available from http://www.unctad.org/en/docs/webiteiia20071_en.pdf .

IIA Monitor No. 4 (2006): Latest Developments in Investor-State Dispute Settlement.

Available from http://www.unctad.org/sections/dite_pccb/docs/webiteiia200611_en.pdf .

IIA Monitor No. 3 (2006): The Entry into Force of Bilateral Investment Treaties (BITs).

Available from http://www.unctad.org/en/docs/webiteia20069_en.pdf .

IIA Monitor No. 2 (2006): Developments in International Investment Agreements in 2005.

Available from http://www.unctad.org/en/docs/webiteia20067_en.pdf .

IIA Monitor No. 1 (2006): Systemic Issues in International Investment Agreements (IIAs).

Available from http://www.unctad.org/en/docs/webiteia20062_en.pdf .

IIA Monitor No. 4 (2005): Latest Developments in Investor-State Dispute Settlement.

Available from http://www.unctad.org/en/docs/webiteit20052_en.pdf .

IIA Monitor No. 2 (2005): Recent Developments in International Investment Agreements.

Available from http://www.unctad.org/en/docs/webiteit20051_en.pdf .

IIA Monitor No. 1 (2005): South–South Investment Agreements Proliferating.

Available from http://www.unctad.org/en/docs/webiteit20061_en.pdf.

United Nations publications may be obtained from bookstores and distributors throughout the world. Please consult your bookstore or write to the addresses listed below.

For Africa, Asia and Europe:

Sales Section
United Nations Office at Geneva
Palais des Nations
CH-1211 Geneva 10
Switzerland

Telephone: (41-22) 917-1234

Fax: (41-22) 917-0123

E-mail: unpubli@unog.ch

For Asia and the Pacific, the Caribbean, Latin America and North America:

Sales Section

Room DC2-0853

United Nations Secretariat

New York, NY 10017

United States

Telephone: (1-212) 963-8302 or (800) 253-9646

Fax: (1-212) 963-3489

E-mail: publications@un.org

All prices are quoted in United States dollars.

For further information on the work of the Division on Investment and Enterprise, UNCTAD, please address inquiries to:

United Nations Conference on Trade and Development

Division on Investment and Enterprise

Palais des Nations, Room E-10054

CH-1211 Geneva 10, Switzerland

Telephone: (41-22) 917-5651

Telefax: (41-22) 917-0498

<http://www.unctad.org>

QUESTIONNAIRE

Investor-State Dispute Settlement: A Sequel

Sales No. 13.II.D.8.

In order to improve the quality and relevance of the work of the UNCTAD Division on Investment and Enterprise, it would be useful to receive the views of readers on this publication. It would therefore be greatly appreciated if you could complete the following questionnaire and return it to:

Readership Survey
UNCTAD Division on Investment and Enterprise
United Nations Office at Geneva
Palais des Nations, Room E-9123
CH-1211 Geneva 10, Switzerland
Fax: 41-22-917-0194

1. Name and address of respondent (optional):

2. Which of the following best describes your area of work?

- | | | | |
|-----------------------------|--------------------------|----------------------------------|--------------------------|
| Government | <input type="checkbox"/> | Public enterprise | <input type="checkbox"/> |
| Private enterprise | <input type="checkbox"/> | Academic or research institution | <input type="checkbox"/> |
| International organization | <input type="checkbox"/> | Media | <input type="checkbox"/> |
| Not-for-profit organization | <input type="checkbox"/> | Other (specify) _____ | |

3. In which country do you work? _____

4. What is your assessment of the contents of this publication?

Excellent	<input type="checkbox"/>	Adequate	<input type="checkbox"/>
Good	<input type="checkbox"/>	Poor	<input type="checkbox"/>

5. How useful is this publication to your work?

Very useful	<input type="checkbox"/>	Somewhat useful	<input type="checkbox"/>
Irrelevant	<input type="checkbox"/>		

6. Please indicate the three things you liked best about this publication:

7. Please indicate the three things you liked least about this publication:

8. If you have read other publications of the UNCTAD Division on Investment, Enterprise Development and Technology, what is your overall assessment of them?

Consistently good	<input type="checkbox"/>	Usually good, but with some exceptions	<input type="checkbox"/>
Generally mediocre	<input type="checkbox"/>	Poor	<input type="checkbox"/>

-
9. On average, how useful are those publications to you in your work?

Very useful Somewhat useful
Irrelevant

10. Are you a regular recipient of *Transnational Corporations* (formerly *The CTC Reporter*), UNCTAD-DITE's tri-annual refereed journal?

Yes No

If not, please check here if you would like to receive a sample copy sent to the name and address you have given above:

