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Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community

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Abstract

INVESTOR-STATE DISPUTE SETTLEMENT:
A SCOPING PAPER FOR THE INVESTMENT POLICY COMMUNITY

by

David Gaukrodger and Kathryn Gordon

Governments are facing an increasing number of arbitration claims by foreign investors relating to important public policies or seeking substantial damages, and many governments are taking a greater joint interest in how such cases are resolved in investor-state dispute settlement (ISDS). This scoping paper has supported inter-governmental dialogue about ISDS at several OECD-hosted investment Roundtable meetings.

Part I compares ISDS with other international and domestic processes for resolving disputes including the WTO and European Court of Human Rights, and considers how ISDS may affect domestic policy making processes.

Part II examines eight current and emerging issues in ISDS: (i) investors' access to justice; (ii) the costs of ISDS cases; (iii) remedies for foreign investors under investment treaties and their possible impact on a level playing field for domestic and foreign investors; (iv) the enforcement and execution of ISDS awards; (v) third party financing of ISDS; (vi) the characteristics, selection and regulation of arbitrators in ISDS; (vii) forum shopping and treaty shopping by investors; and (viii) the question of the consistency of decision-making in ISDS. Part III outlines key findings from a statistical survey of ISDS provisions in 1,660 bilateral investment treaties.

Public comment on this paper, including 46 investment policy questions (as outlined in the paper), was obtained in May-July 2012 and is available on the OECD website.

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INTRODUCTION[1]

The visibility of investor state dispute settlement for the resolution of investment treaty claims (henceforth, ISDS) has grown as the list of respondent countries has lengthened (recently, including Australia, China and Germany). Some ISDS cases raise important public policy issues – e.g. claims involving health-motivated regulation of cigarette marketing brought against Australia and Uruguay. Moreover, in some cases, the amount of claimed compensation is high enough – hundreds of millions or even billions of dollars – to seriously affect a respondent country's fiscal position.[2]

The ISDS landscape has also been transformed in recent years by new participants. An arbitration industry has emerged, led by entrepreneurial lawyers advising potential clients about options for resolving investment disputes through international arbitration that would not have been considered only a few years ago. The EUR 1.4 billion claim brought by power generation company Vattenfall against Germany in 2009 involved German lawyers from the expanding German arbitration bar on both sides of the case.[3] A more recent and related development is the emergence of third party financing (TPF) of claims, linked to the high costs and high potential damages awards characteristic of arbitral awards in investment disputes. These developments have increased the likelihood that government action will be subject to heightened scrutiny in the ISDS system in the future.

Countries have diverse experiences with and attitudes toward ISDS that could enrich international dialogue in this area. China is now including comprehensive provisions on access to international arbitration in its investment treaties (after limiting such access in earlier treaties). Experiences of States that have responded in numerous ISDS cases provide important insights and lessons. Australia recently decided to no longer seek to include provisions on international arbitration in its future agreements. States that have not to date agreed in investment treaties to international arbitration for the settlement of investment disputes (e.g. Brazil) could contribute to international dialogue both by explaining their reservations and by describing their experience using alternative approaches to dispute resolution. The EU institutions and EU member states are engaged in a wide-ranging discussion about the EU's future investment policy and approach to ISDS in the wake of the Lisbon Treaty.

In light of these and other developments, participants in the FOI Roundtable 13 in October 2010 agreed to discuss ISDS at FOI Roundtable 15, held in December 2011[4]. Participants at FOI Roundtable 15 decided

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[1] David Gaukrodger, Senior Legal Adviser, and Kathryn Gordon, Senior Economist, of the Investment Division of the OECD Secretariat, prepared this paper. Alexis Nohen and Nicolás Perrone, legal consultants with the OECD Secretariat, assisted with research. The paper has been discussed by governments participating in the OECD-hosted Freedom of Investment Roundtable. It does not necessarily reflect the views of the OECD or of the governments that participate in the Roundtable, and it cannot be construed as prejudging ongoing or future negotiations or disputes pertaining to international investment agreements. It is also without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

[2] In relative percentage of GDP terms, the USD 270 million CME award against the Czech Republic may have been the equivalent of a USD 71 billion award against the United States. See Separate opinion of Ian Brownlie in *CME Czech Republic B.V. v. Czech Republic*, § 80 (reproducing Czech calculation showing that equivalent claim against the United States, in relative percentage of GDP terms, would be USD 131 billion)*; CME Czech Republic B.V. v. Czech Republic*, Final Award § 649 (awarding CME approximately 55% of the amount claimed).

[3] See *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. The Federal Republic of Germany*, ICSID, Request for Arbitration (20 September 2009); *id*., Award (11 March 2011).

[4] A summary of these discussions is available on the FOI website. www.oecd.org/daf/investment/foi

that dialogue on ISDS should continue at FOI Roundtable 16. The revisions and additions to the scoping paper have been made in support of this dialogue. The scoping paper is accompanied by a background paper by the Secretariat entitled "Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey". The scoping paper also benefits from earlier OECD-hosted dialogue on international investment law[5].

The discussions will help FOI participants to:

- Have a broad and strategic, government-controlled dialogue on issues raised by ISDS;
- Adopt a systemic approach to ISDS under which FOI participants consider interactions of different components of the ISDS system; and
- Adopt an interdisciplinary approach, based on legal analysis and insights from other disciplines.

The scoping paper is divided into three parts:

- Part I positions the ISDS system in the context of other international and domestic dispute settlement mechanisms; it seeks to support FOI discussion of States' broad objectives in establishing and maintaining the system of ISDS through international arbitration and to elucidate how international arbitration fits in with other dispute settlement mechanisms.
- Part II reviews eight key issues in ISDS: (II.A) investors' access to justice – which investors participate in ISDS?; (II.B) the costs of ISDS; (II.C) remedies for breach of investment treaties; (II.D) the enforcement and execution of ISDS awards; (II.E) third party financing of ISDS; (III.F) the selection, regulation and characteristics of arbitrators in ISDS; (III.G) forum shopping and treaty shopping; and (III.H) consistency of decision-making in ISDS. These issues have been chosen because of their overriding importance to the parties in ISDS cases, their importance to the overall ISDS system, their salience in ongoing debates about ISDS and expressions of interest by delegates.
- Part III looks at the results of the paper on "Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey". This statistical survey of 1,660 bilateral treaties was prepared by the Secretariat as background for the FOI discussion of ISDS.

[5] For an overview of earlier OECD-hosted discussions of international investment law, including investor-state dispute settlement, see www.oecd.org/daf/investment/agreements.

PART I. ISDS IN CONTEXT -COMPARISONS WITH OTHER INTERNATIONAL DISPUTE SETTLEMENT MECHANISMS AND WITH DOMESTIC INVESTOR-STATE DISPUTE SETTLEMENT MECHANISMS

Prior to the emergence of the ISDS system in the mid-twentieth century, investor state disputes that could not be resolved by direct investor-state dialogue or proceedings in domestic courts were either not settled or were handled by home State espousal of the claim via diplomatic processes or, at times, by the threat or use of military force.[6] Seen from this perspective, ISDS can be viewed as a progressive institutional innovation inasmuch as it helped to reduce sources of international tension and recourse to military force.[7]

Viewed within the broader context of international law, ISDS is one of many innovations that have emerged from specific policy and legal contexts and that have endowed international law with a rich array of international judicial bodies, quasi-judicial procedures, implementation control mechanisms and other dispute settlement bodies. The chart in Annex 1 provides an overview of some 125 international bodies, procedures and mechanisms that promote compliance with international law, help to settle international disputes, and provide redress for victims of harm caused by violations of various aspects of international law. The chart illustrates the great diversity of these institutions; they cover such subject areas as human rights, compliance with multilateral environmental agreements, and the law of the sea. Their institutional form varies from permanent international judicial bodies, to quasi-judicial tribunals, arbitration bodies and inter-governmental bodies for the control of implementation of specific treaties. The chart also attests to the ongoing evolution of these institutions, with some mechanisms becoming dormant even as new bodies and processes are created or proposed.

Thus, ISDS is evolving within the broader institutional evolution of international law. The remainder of this section looks at how the architecture of ISDS decision making compares with that of other major dispute resolution settings. In particular, the section covers three areas:

- First, it compares investor-state arbitration with international dispute resolution in other areas of international law including trade and European human rights law.
- Second, it reviews the many areas of international law that involve limited or no recourse to international dispute resolution and focus instead on improving the domestic policies, regulatory systems and dispute resolution of the parties to the treaty.
- Third, it examines the various ways in which ISDS interacts with domestic regulatory, enforcement and dispute resolution institutions and looks briefly at ISDS design elements that might affect how these influences play out.

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[6] See, for example, O. Thomas Johnson and Jonathan Gimblett. "From Gunboats to BITs: The Evolution of Modern International Investment Law," *Yearbook on International Investment Law and Policy* (December 2011); Andrew Paul Newcombe and Luis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*. Under "Historical Development of Investment Treaty Law" (2009), p. 9; Barnali Choudhury, Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit? *Vanderbilt Journal of Transnational Law* (2008), p. 780, available at SSRN: http://ssrn.com/abstract=1070701.

[7] See Won-Mog Choi, "The present and future of the investor-state dispute settlement paradigm", *Journal of Economic Law* 10(3), pp. 725-747.

I.A. ISDS and other international dispute settlement mechanisms

ISDS is a fundamental element of States' efforts to reinforce the credibility of the commitments they make in their international investment agreements. In effect, the bilateral investment treaties that provide for international arbitration – about 93% of the total, according to the large-sample survey of treaties – allow for private enforcement of these commitments. If a State is found to be in breach of its treaty obligations, the harmed investor can receive monetary compensation or perhaps other forms of redress.[8] In principle, the availability of such remedies creates powerful incentives for States to honour their investment treaty commitments. Thus, ISDS is both an enforcement mechanism that promotes compliance and a means of compensating victims of harm caused by breaches of investment treaty provisions.

The ISDS mechanism as established by thousands of IIAs and other international documents has three features that make it stand out from most of the other institutions described in Annex 1:

- First, the legal basis of ISDS is complex and varied, while many of the other dispute settlement mechanisms are anchored in well defined treaty frameworks. ISDS' legal basis is spread across dispute resolution provisions contained in some 3000 investment treaties, in other international conventions (notably the ICSID Convention and the New York Convention) and arbitration rules. As just noted, the OECD survey of ISDS provisions shows that the overwhelming majority of bilateral investment treaties provide for ISDS, as do practically all recent treaties. The survey also documents large variations in the contents and detail of these provisions.

- Second, ISDS allows private parties to bring claims against States (subject to the diverse pre-conditions set out in various investment treaties) and can generate large monetary awards. Few, if any, of the other mechanisms listed in Annex 1 enable private parties to compel States to participate in dispute resolution procedures involving monetary compensation of this magnitude.

- Third, the institutional set-up of ISDS draws heavily on that of commercial arbitration (e.g. *ad hoc*, party appointed arbitration panels, emphasis on speed and finality of findings).

While ISDS is an unusual – or even unique – system for adjudication when compared with others created in other areas of international law, the importance of this unusual status should not be exaggerated. The broad field of international dispute settlement bodies shown in Annex 1 is so disparate that most of these other institutions are also "unusual" in their own way. In fact, international dispute resolution is not dominated by one or a few institutional models embodying agreed standards of 'good practice'; instead various institutional designs have emerged, reflecting the specificities of the related subject matters, political considerations and historical circumstances.

The theme of disparate architectures for international dispute resolution systems is reinforced by closer review of the three high-profile, heavily-used dispute resolution mechanisms created by (i) international investment law; (ii) the World Trade Organisation (WTO); and (iii) the European Convention on Human Rights. These mechanisms address overlapping subject matters, thus making comparisons more pertinent. For example, the WTO Dispute Settlement Understanding (DSU) covers, *inter alia*, issues related to investment law such as trade-related investment measures. Likewise, the European Court of Human Rights (ECHR) deals with, *inter alia*, protection of the right of property and the right to a fair hearing as well as with the prohibition of discrimination, including based on national origin.

Annex 2 contains a broad comparison of the dispute resolution mechanisms provided for by these three bodies of international law. It underscores the diversity of arrangements for three dispute resolution systems. Examples of such differences include:

[8] For discussion of remedies in ISDS, see section II.C. below.

- ***Access to dispute settlement.*** Under ISDS, investors have direct access to proceedings. Private parties also have access to the ECHR. In the WTO, only WTO member states can bring cases.

- ***Remedies.*** Under ISDS, investors generally seek monetary (pecuniary) compensation, but there are growing numbers of requests for provisional measures to require the respondent to do or to refrain from doing certain things. The WTO's DSU does not provide for any damages. The sole final remedy is the withdrawal by the respondent State of the WTO-inconsistent measure. However, the DSU may also allow for temporary remedies to be applied pending withdrawal, including retaliatory measures by the harmed States parties. For the ECHR, the primary remedy is generally declaratory, but may also include awards of "just compensation". In cases involving property, and in particular, cases of expropriation, the court can order restitution or, where impossible, equivalent monetary damages.

- ***Appeals/annulment/review and the duration of proceedings***. Review of ISDS awards depends on the forum to which the dispute was initially brought and can involve the ICSID annulment procedure or national court review, almost always on narrow grounds that exclude review of errors of law. Review periods vary but are frequently over two years in cases of annulment proceedings. In contrast, parties have a right to appeal on legal issues at the WTO, and approximately 70% of panel reports are appealed; appellate proceedings leading to circulation of the appellate decision to member States are generally completed within 90 days. Appeals at the ECHR involve a full second hearing of the case with the consequent delay, but are generally limited to cases of great importance.

- ***Choice of decision makers***. ISDS uses different systems depending on the applicable investment treaty and arbitration rules, but generally relies on ad hoc panels. These are frequently appointed wholly or in part by the parties, but appointing authorities are also often involved. Review of awards is conducted by ad hoc annulment committees appointed by ICSID or by national courts in non-ICSID cases. In contrast, the ECHR relies on a permanent body of 47 judges, each of whom has a non-renewable term of 9 years. Members of WTO panels and ISDS tribunals are generally legal professionals with other concurrent career activities. WTO Appellate Body members are permitted limited outside activities while ECHR judges are fully dedicated to ECHR cases. This design element is an important consideration when thinking about independence and impartiality of decision makers.

- ***Compensation of decision makers***. In ISDS, the parties to the dispute compensate the arbitrators. WTO panellists and Appellate Body members receive compensation directly from the WTO budget, which is funded by member States, and may not accept compensation from parties. ECHR judges are similarly paid out of the Council of Europe budget. Thus, the incentives created by compensation practices for arbitrators in ISDS are quite different than those created by WTO DSU and ECHR practices.

- ***Regulation of and ethics rules for decisions makers***. No universal special purpose rules or codes exist for ISDS, but the ICSID Convention and various arbitral rules require independence and impartiality and set standards for challenges to panel members (an increasingly common practice). Codes of conduct developed primarily for arbitrators in commercial arbitration may also be relevant, such as the International Bar Association (IBA) Guidelines, are frequently used in ISDS cases as well. The WTO and ECHR have both adopted specific ethics rules: for the WTO, the 1996 WTO Code of Conduct for the Dispute Settlement Understanding applies in all cases and, for ECHR, the 2008 Resolution on Judicial Ethics sets standards for decision makers.

Although experience gained with existing dispute resolution mechanisms may inform the design of other mechanisms, the direct transfer of components may not lead to optimal outcomes: various design components of a given system interact, ideally creating an internally consistent whole. For example,

arrangements for review and appeal and choice of arbitrators will reflect the parties' tolerance for errors in adjudication, which in turn will depend on the subject matter at stake and the remedies provided for.

In the absence of a dominant model for international dispute resolution, an assessment of the suitability of a given institutional design is ultimately an exercise in assessing public policy. Systems of international adjudication – including ISDS – need to be evaluated according to how well they meet the needs of the societies on behalf of which they were created (including, for ISDS, the needs of investors). Like all analyses of public policy, such an analysis should look at efficiency and effectiveness, fairness and accountability.

I.B. Bodies of international law without compulsory international dispute settlement

1. Unlike the areas of international law just reviewed (investment, trade, and human rights), many other areas of international law involve limited or no recourse to international dispute resolution. Some areas of international law however are complemented by softer international compliance mechanisms such as international cooperation, peer pressure, and non-compulsory dispute resolution involving mainly declaratory remedies. Various processes for promoting compliance with State commitments have been created under international environmental law, labour law and anti-corruption:

- ***Multilateral environmental agreements (MEAs)***. In the area of environmental protection, many cooperation and review processes have been established for promoting compliance with the commitments made in MEAs. A UN Environmental Programme review[9] of these processes shows that these involve softer methods: reporting on national performance of MEA obligations, performance peer reviews and non-compliance procedures, including assistance for countries that are deemed to have resource constraints that prevent them from meeting their international obligations. Numerous state-to-state dispute resolution procedures are created under many of the MEAs (special procedures for voluntary arbitration and compulsory conciliation), but these are rarely or never used.[10]

- ***Compensation for victims of trans-boundary environmental incidents***. Processes for improving the ability of domestic legal systems to provide redress for victims of trans-boundary environmental incidents are another area of international cooperation. Various conventions and other instruments are being adopted in numerous international settings, but remain work in progress. One analysis of these efforts states: "individuals harmed by trans-boundary pollution have few viable avenues for redress because of … procedural hurdles to bringing transnational tort suits."[11]

- ***Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*** (OECD Anti-bribery Convention). The OECD Anti-bribery Convention relies on peer review and peer pressure (via the OECD Working Group on Bribery, WGB) to promote parties' compliance with their anti-bribery commitments. These peer processes focus on aligning domestic legislation, law enforcement and other processes with the obligations contained in the Convention. Publications of WGB findings are closely followed in the press and by civil society.

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[9] See UN Environmental Programme "Comparative Analysis of Compliance Mechanisms" (2005). http://www.acpmeas.info/publications/Compliance_mechanisms_under_selected_MEAs.pdf.

[10] Compliance and dispute resolution procedures under international environmental law: An overview. Paper prepared for the October 2010 Freedom of Investment Roundtable, p.3, www.oecd.org/daf/investment/foi.

[11] See Noah Sachs, Beyond the Liability Wall: Strengthening Tort Remedies in International Environmental Law, 55 UCLA L. Rev. 837, 839 (2008).

- ***The International Labour Organisation.*** The ILO supervisory system involves a continuum of procedures to promote implementation of labour commitments:[12] The ILO's "regular procedure" hinges on member states' periodic reports on measures they have taken to implement the conventions they have ratified. These reports are reviewed and issues are highlighted for attention. Complementary *ad hoc* procedures help countries deal with issues of noncompliance. They range from a "soft", politically-oriented representation procedure to a quasi-judicial complaints procedure.

Thus, enforcement mechanisms under these bodies of international law focus primarily on efforts to enhance domestic court and regulatory systems' ability to uphold countries' international commitments. Experience shows that improving such systems is a long and slow process, but that progress can be real[13]. Reflection on these approaches to enforcement raises the question of why international investment law has adopted the alternative approach of focusing mainly on investor state dispute settlement at the international level.

I.C. Influence of ISDS on domestic dispute resolution and policy making processes

Debate on the merits of ISDS often emphasises its benefits for investors who face poorly functioning or biased domestic dispute resolution and policy-making processes. In addition to its benefits for individual investors, so continues the argument, ISDS can yield indirect collective benefits for host societies, as it allows host States to attract investment even though their domestic governance standards may have weaknesses. However, the availability of ISDS may also change the political dynamic of reform of domestic dispute resolution and policy making institutions. This section considers the broader effects that the existence of ISDS may have on host states' institutions.

While investor recourse to ISDS occurs in only a tiny fraction of international investment projects proceedings, the availability of arbitration as an option for investors can be assumed to influence the entire spectrum of investor-state dialogue and dispute resolution practices. The availability of investment arbitration can be assumed to alter the way the parties to a dispute use these alternative procedures because its expected outcome forms a benchmark by which the outcomes of other dispute settlement procedures will be judged. An investor who is trying to resolve a dispute with a host government will keep in mind the prospects offered by international arbitration when determining strategy and tactics in other dispute settlement procedures. This underscores the importance of appropriate design for ISDS, since it is likely to influence all other dispute resolution processes.

ISDS gives foreign investors the option of side-stepping what may be poorly functioning or biased domestic dispute resolution and policy-making processes. In countries with very serious institutional shortcomings, domestic dispute resolution mechanisms might often, in practice, also include recourse to violence, improper political lobbying and corruption. Thus, it is at least a possibility that the availability of ISDS allows international investors to side step these mechanisms and to use instead more orderly forms of dispute resolution. It is noteworthy that other parties who might also suffer from these same problems (e.g. domestic investors, private citizens) do not generally have access to analogous international procedures[14] –

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[12] This text draws from Cesare Romano, The ILO System of Supervision and Compliance Control: A Review and Lessons for Multilateral Environmental Agreements, Executive Report 96-1, International Institute for Applied Systems Analysis (May 1996).

[13] See Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi, Governance Matters VIII: Aggregate and Individual Governance Indicators 1996-2008, World Bank Policy Development Research Group Policy Research Working Paper 4978 (June 2009), p. 19. This shows that countries are capable of bringing about significant changes in perceptions of their governance institutions, including rule of law within a ten year time period.

[14] Providing higher standards of protection of aliens than those that are *de facto* applied to citizens of particular countries has a long tradition in international law.

this raises the issue of the relationship between standards of protection for international investors and those that apply to domestic investors.

The availability of ISDS as a supra-national dispute resolution option could potentially lower incentives for both host countries and international investors (who are often important political actors in host countries) to work to improve domestic dispute resolution and regulatory institutions.[15] ISDS makes it easier for host governments to attract international investment without having to put in place effective domestic government and judicial procedures. Likewise, international investors may have reduced incentives to press for improved domestic systems of investor-state dispute resolution, given the availability of ISDS. The argument is, in a nutshell, that the political economy of ISDS may weaken pressures for reform of domestic dispute resolution procedures.

An alternative view is that ISDS has the opposite effect – that it provides strong incentives to improve domestic institutions. It does this by providing for monetary compensation of investors for violations of such treaty standards as 'fair and equitable treatment'. For example, several arbitration cases have dealt with alleged "denial of justice"; the threat of having to pay compensation for denial of justice presumably creates incentives for host States to align domestic judicial practices with international norms. Other tribunals' decisions have asserted bias in regulation, which has led to growing interest in preventative practices designed to manage legal risks associated with the policy making process.[16] If States respond to these monetary incentives[17], then, in principle, this commitment should be followed up with concrete measures to improve domestic systems.

Whether ISDS commitment mechanisms lead to improvements in domestic judicial and regulatory institutions is a complex empirical question whose answer goes beyond the scope of the present paper. There is an active debate on the role of external actors and incentives – including those created by ISDS – in improving domestic legal institutions and on the relationship between domestic legal systems and economic and social development.[18] A review of the legal literature on this topic summarises it as follows: "While there appears to be an increasingly firm empirically grounded consensus that [legal] institutions are an important determinant of economic development … there is much less consensus on which *legal* institutions are important … what an optimal set of legal institutions might look like for any developing country, or for those developing countries lacking optimal legal institutions (however defined) what form a feasible and effective reform process might take and the respective roles of 'insiders' and 'outsiders' in that process." Thus, there is solid support for the idea that legal systems matter for development, but less understanding of what roles, if any, that external forces can play in improving these systems.

One facet of this issue relates to how investment treaties – and arbitral tribunals – view and handle procedures for conflict resolution prior to arbitration, including provisions on cooling-off periods, attempts

15 For related analyses, see, R. J. Daniels, "Defecting on Development: Bilateral Investment Treaties and the subversion of the Rule of Law in the Developing World", (draft paper) (2004) cited in Susan D. Franck "Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law". Footnote 143 page 366. Global Business and Development Law Journal. Volume 19 2007. T. Ginsburg, "International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance", International Review of Law and Economics 25(1): 107-123 (2005); A. Newcombe, "Sustainable Development and Investment Treaty Law", Journal of World Investment & Trade, Vol. 8, 2007 and J. P. Sasse, An Economic Analysis of Bilateral Investment Treaties, chapter 6.

16 See, for example, Section IV of UNCTAD, Investor-State Disputes: Prevention and Alternatives to Arbitration (2010).

17 States might not respond to such incentives for a number of reasons. First, monetary incentives might not be felt by the individuals in charge of regulatory or judicial reform. Second, there may be countervailing forces, such as capture of the regulatory process by political and economic elites. Third, the government may simply not have the human or financial resources to respond to the monetary incentives.

18 See for example: Kevin E. Davis and Michael J. Trebilcock, The Relationship between Law and Development: Optimists versus Skeptics, American Journal of Comparative Law, Vol. 56, No. 4, 2008, p. 60.

at amicable settlement, and obligations on initial referral to domestic procedures. Results in this regard of the OECD statistical survey of ISDS provisions in bilateral investment treaties are shown in Box 1. Another important development is arbitral panels' recent (and still infrequent) use of preliminary injunctions to attempt to affect host countries' judicial procedures pending resolution of the international arbitration.

Box 1. Pre-arbitration dispute settlement: OECD survey results

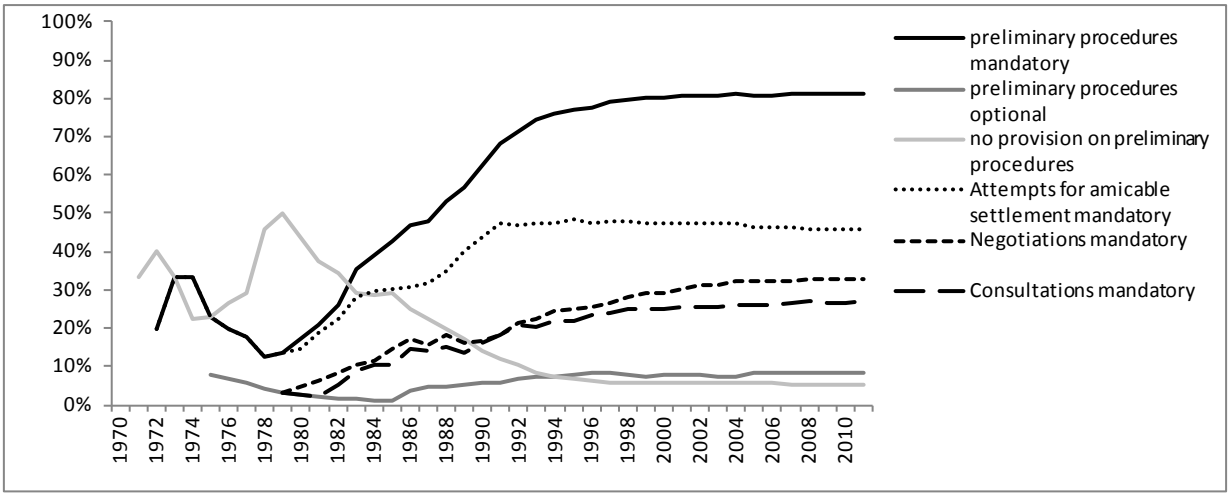
A sizeable number of investment treaties with ISDS provisions – and almost all recent treaties – contain provisions on pre-arbitration dispute settlement. These include provisions on amicable settlement, cooling-off periods, and, occasionally, initial referral of disputes to domestic courts.

Amicable settlement: Almost all – 89% – of the bilateral treaties that provide for ISDS require or recommend efforts to resolve disputes amicably prior to arbitration; 81% require such procedures and another 10% recommend them. This finding makes amicable dispute settlement one of the most commonly covered general subject areas in ISDS provisions; however, when viewed in more detail, treaty language varies considerably.

Over 30 different descriptions of these pre-arbitration procedures were found in the treaty sample, plus a few descriptions that occur only once in the sample. The frequency of clauses on specific preliminary procedures varies widely and has evolved over time (see Box Figure). A large, but slightly declining majority of treaties require parties in dispute to attempt to settle the dispute "amicably". Many treaties, and an increasing share in the total, specify that such attempts to amicable settlement have to be pursued through "negotiations" or "consultations".

Box Figure. Treaties with specific clauses on non-confrontational dispute settlement procedures

(percentage of stock of treaties in the sample in existence at the end of a given year).



Cooling-off periods: Provisions on preliminary procedures are often accompanied by mandatory cooling-off periods. In most cases, the cooling off period is fixed at 6 months, but a sizeable number of treaties call for a 3-month period.

Initial referral to domestic procedures: 8% of the sample treaties require that investor-state disputes be initially submitted to domestic judicial procedures before they may be brought before an international arbitral tribunal. These conditions may include, in the order of frequency found in the sample: a failure of the domestic courts to deliver any decision or a decision on the merits within a defined period of time (often 18 months); a failure to settle the dispute regardless of or despite the delivery of a decision on the merits; in case the decision rendered by domestic courts is "manifestly unjust" or "violates the provisions of the [international investment] agreement".

I.D. Issues for discussion

1) ***Although ISDS is shown to be an unusual, even unique, system of international dispute settlement, the entire set of international dispute resolution systems is highly disparate – there seems to be no dominant model for international adjudication.***

   a) ***Do you agree with this characterisation?***

   b) ***Do you agree that ISDS, like all other international dispute resolution systems, should be evaluated according to principles for effective public policy and legal systems?***

2) ***The international dispute settlement mechanisms for investment, trade and human rights have very different institutional designs.***

   a) ***What is the rationale for such large differences in mechanisms for resolving disputes that involve similar or overlapping issues? For example, why should private parties not be given direct access to the WTO procedure, as they have under ISDS? Why should claimants who suffer violations of property rights be required to exhaust local remedies under human rights procedures, but not under many investment treaties?***

   b) ***Do you agree that, since the various elements of a system of dispute resolution interact, design elements from one system cannot be transplanted into another system and have automatically the same effects?***

3) ***In many areas of international law, focus is placed on enhancing the performance of domestic systems.***

   a) ***Why has this same approach not been adopted in the context of international investment law?***

   b) ***What are the advantages and disadvantages of this choice?***

   c) ***Should efforts to improve domestic systems become a more important part of international investment dialogue?***

4) ***Do you agree that, although ISDS is explicitly used in only a tiny fraction of all international investments, it can nevertheless be assumed to influence the dynamics of other investor-state dispute settlement practices, both formal and informal?***

   a) ***What are your views on the interaction of ISDS with domestic judicial and regulatory systems? Does it on balance improve or undermine these systems?***

   b) ***Should investment treaty negotiators and arbitrators be mindful of the effects of the ISDS system on domestic judicial and regulatory systems?***

5) ***The OECD survey of investor-state arbitration provisions in bilateral investment agreements shows that provisions on the pre-arbitration phase of dispute settlement (e.g. Attempts at amicable dispute settlement) are among the most common general subject areas dealt with in the treaty sample.***

   a) ***What are your views and experiences on the use of these provisions?***

   b) ***Are they important components of the ISDS system?***

PART II. KEY ISSUES IN ISDS

When considering ISDS cases, investors and States will evaluate many issues in relation to ISDS and potentially about competing dispute resolution systems:

- How much will the case cost and how will it be paid for? – this relates to the question of costs, allocation of costs and financing and, ultimately, investors' access to justice;

- What happens if the investor prevails in the case? – this relates to the question of remedies and enforcement;

- Who is going to decide the case and subject to what rules? – the question of selection and regulation of arbitrators, and the questions of forum shopping and treaty shopping;

- What are the chances of success? – the question of consistency and predictability.

Beyond their importance to the parties, the answers to these questions are central to the public policy debate about ISDS. Part II deals with these issues. The subsections below discuss, in turn, (II.A) investors' access to justice – which investors participate in ISDS?; (II.B) the costs of ISDS; (II.C) remedies for breach of investment treaties; (II.D) the enforcement and execution of ISDS awards; (II.E) third party financing of ISDS; (III.F) the selection, regulation and characteristics of arbitrators in ISDS; (III.G) forum shopping and treaty shopping; and (III.H) consistency of decision-making in ISDS.

II.A. Investor access to justice in ISDS – Who are the investor-claimants?

In order to clarify who the ISDS claimants are, the OECD has surveyed their characteristics for 50 ICSID cases and for 45 UNCITRAL cases (Figure 1; see Annex 3 for methodology). This survey sheds light on some aspects of access to justice in the context of ISDS.

The survey shows that investors-claimants range from individuals with quite limited international experience (e.g. an association of retirees) to major multi-national enterprises with tens and thousands of employees and global operations. More specifically, the survey shows the following:

- ***Small investors can be ISDS claimants***. (See first and third set of bars in Figure 1). Far from supporting the view that investment arbitration is not an option for smaller investors, the survey shows that 22% of the claimants in both ICSID and UNCITRAL cases are either individuals or very small corporations with limited foreign operations (one or two foreign projects).

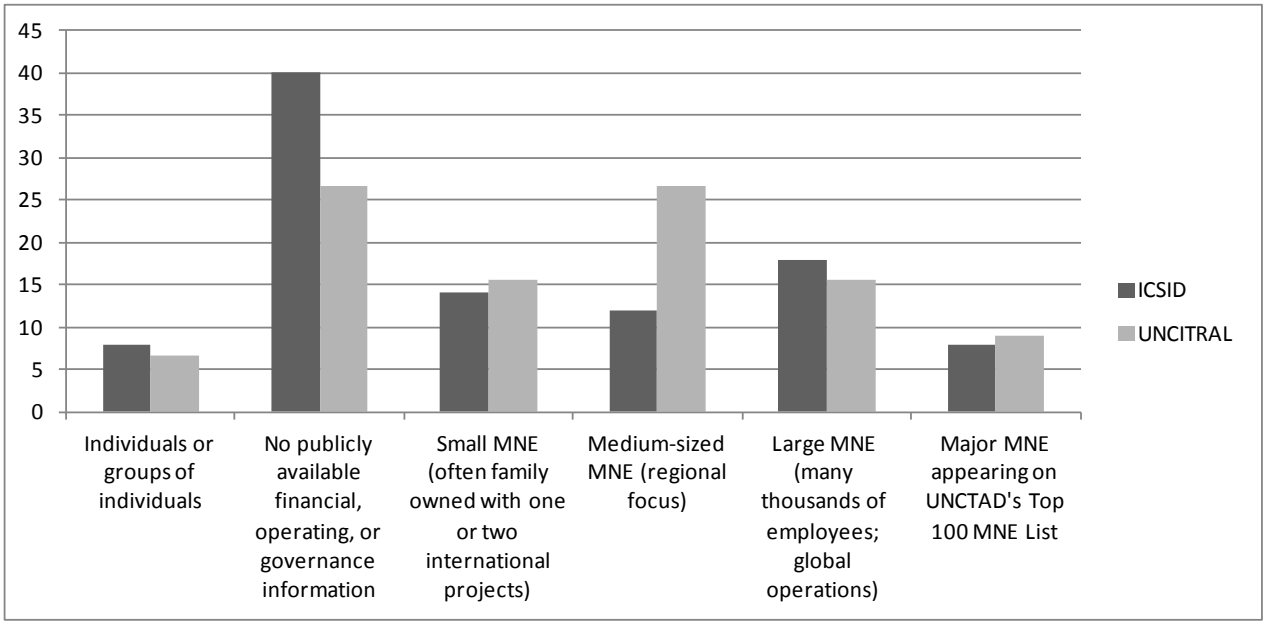
- ***A third of the cases in the sample were brought by investors about which there is little or no public information***. (See second set of bars in Figure 1). Information on this category of investor comes from the arbitration case itself (awards and analyses) – little or no other public information about these investors is available. This category appears to contain two types of investor: 1) small investors that are not obliged to report publicly and that do not maintain extensive websites; 2) holding companies formed around the specific asset or activity that is the subject of the arbitration. Twenty of the 50 ICSID cases were brought by this category of investor as were 12 of the 45 UNCITRAL cases.

- ***Two cases involve domestic investors that incorporated overseas, apparently in order to qualify for investment treaty protections***. Awards for two cases (both holding companies) make it clear that the investors (the Azpetrol group in one case and Libananco in the other) were domiciled in the respondent countries (Azerbaijan and Turkey, respectively) and had incorporated abroad in order to qualify for investment treaty protections.

- ***Medium and large multinational enterprises account for about half of the total sample***. These vary in size from several hundred employees to tens of thousands of employees. Extremely large multinationals – those appearing in UNCTAD's list of top 100 multinational enterprises account for 8% of the total claimants in the ICSID and UNCITRAL samples.

- ***Nationality – are investors from emerging/developing/transition economies represented as ISDS claimants?*** The nationality of investor claimants is not always easy to determine. This is because, in some cases, the nationality of an international investor is inherently ambiguous and because, in others, very little information about the investor is available. Nevertheless, a determination of the nationality with a view to making a conservative estimate of the degree to which investor-claimants are from developing countries[19]. It was found that at least 14 of the 95 arbitration cases were brought by investors from economies classified by the World Bank as low income, lower middle income and upper middle income.[20]

Figure 1. Types of Investor that are claimants in 50 ICSID and 45 UNCITRAL cases
(for the ICSID and UNCITRAL cases, characteristics of investor-claimants; percentage of cases)



[19] For the purposes of this study, a developing country is defined as one that appears in any of the first three categories in the World Bank 4-part typology of development. Under this typology, economies are divided according to 2010 GNI per capita, calculated using the World Bank Atlas method. The groups are: low income, USD 1,005 or less; lower middle income, USD 1,006 – USD 3,975; upper middle income, USD 3,976 – USD 12,275; and high income, USD 12,276 or more. For more information, see: http://data.worldbank.org/about/country-classifications .

[20] The breakdown of countries was as follows: PR China (2), Russian Federation (5), Azerbaijan (1), Turkey (2), Indonesia (1), Peru (1), South Africa (1), and Malaysia (1).

Thus, the survey of investor claimants suggests that a wide range of investor types avail themselves of the ISDS system. If there is a problem of investor access to justice in this system (see below about countries' access to justice), then it is not the sort of problem that can be revealed by a survey of investor claimants. A fuller exploration of this question would require also looking at the investors with claims that did not bring them to the ISDS mechanisms and at how these claims were resolved.

II.B. Costs of ISDS

High costs were identified as one of the two greatest disadvantages of international arbitration in a recent survey of in-house counsel at leading corporations.[21] This section reviews the broad issue of ISDS costs and finds that:

(i) costs are high and some reform efforts are underway to try to reduce them; and

(ii) rules for allocating these costs among the parties are very flexible and are a source of uncertainty for both claimants and respondents.[22]

For FOI Roundtable 15, the OECD has surveyed publicly-available information about ISDS costs. This survey shows that legal and arbitration costs for the parties in recent ISDS cases have averaged over USD 8 million with costs exceeding USD 30 million in some cases.[23] In the recent Abaclat decision (which addresses jurisdiction but not the merits), the tribunal noted that the claimants had spent some USD 27 million on their case to date, and that Argentina had spent about USD 12 million.[24]

The largest cost component is the fees and expenses incurred by each party for its legal counsel and experts. They are estimated to average about 82% of the total costs of a case. Arbitrator fees average about 16% of costs. Institutional costs payable to organisations that administer the arbitration and provide secretariat services – such as ICSID, the Permanent Court of Arbitration (PCA), or the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) – are low in relative terms, generally amounting to about 2% of costs.[25]

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[21] See Lucy Reed, More on Corporate Criticism of International Arbitration, Kluwer Arbitration Blog (16 July 2010) (referring to survey by Corporate Counsel International Arbitration Group (CCIAG) finding that 100% of the corporate counsel participants believe that international arbitration "takes too long" (with 56% of those surveyed strongly agreeing) and "costs too much" (with 69% strongly agreeing). Surveys of companies generally show overall satisfaction with international arbitration. See, e.g., International Arbitration: Corporate attitudes and practices, 2008, PriceWaterhouseCoopers & University of London.

[22] In order to address issues raised by the potential interaction of third party financing with remedies and settlement, third party financing is addressed below in Section II.E.

[23] The OECD Secretariat survey of 143 available ISDS arbitration awards listed on the www.italaw.com website (which collects and reproduces ISDS awards (formerly http://ita.law.uvic.ca)), revealed that only 28 provide information about the arbitral fees and the parties' legal expenses. Eighty-one cases provide some information about costs while 62 provide no information. Survey of the 143 awards (addressing jurisdiction, the merits and other issues) listed as of August 2011. See also UNCTAD, Investor-State Disputes: Prevention and Alternatives to Arbitration (2010) at pp. 16-18 (suggesting that ISDS costs have skyrocketed in recent years and citing examples of high-cost cases).

[24] See Abaclat v. Republic of Argentina, Decision on Jurisdiction and Admissibility, ICSID (4 August 2011);

[25] See Techniques for controlling time and costs in arbitration, Report from the ICC Commission on Arbitration (2007), Introduction (survey of costs in arbitration showing that sources of costs were 82% for counsels' fees and expenses, 16% for the arbitrators' fees and 2% for the institutions' fees); Matthias Scherer, Arbitral institutions under scrutiny, Kluwer Arbitration blog (5 October 2011) (reporting that recent survey of 21 arbitral institutions reflected general agreement that the split in the costs of arbitration is very similar to the ICC survey).

Rules on arbitrators' fees are conditioned by applicable rules and practices under ICSID[26], UNCITRAL[27], the PCA[28] and the SCC.[29] An investor's forum-selection options, where they exist under an investment treaty, may be a relevant consideration to a potential investor-appointed arbitrator because the different fora apply different rules and pay different fees.[30]

1. Explanations for high costs of ISDS and reform initiatives

Many explanations have been offered for the high costs of ISDS.[31] Some attribute high costs to limited arbitrator availability, itself resulting in part from parties' tendency to nominate the same small group of arbitrators who allegedly take on too much work; or weak case management by arbitrators who allow the parties to run up costs before they focus on the case shortly before the merits hearing.[32]

Other explanations point to the nature and role of counsel and their approaches to litigation, attributing high costs to the increased role of large law firms that mobilise teams of lawyers using expensive litigation techniques borrowed from corporate litigation practices; the high billing rates for arbitration lawyers running to USD 1000 an hour; the substantial time spent on the selection of arbitrators including intensive research on each potential arbitrator; the proliferation of procedural, jurisdictional and discovery issues;

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[26] ICSID currently provides for a daily arbitrators' fee of USD 3,000 plus expenses which has been applied without exception over the last two years. Arbitrator fees were a focus of reform of ICSID arbitration in 2005-2006; there was reportedly a practice of arbitrators asking the parties for more than the stipulated fees and in some cases, the parties may be poorly placed to oppose arbitrator requests for higher fees. See G. Born et al, Investment Treaty Arbitration: ICSID Amends Investor-State Arbitration Rules, (WilmerHale website 2006). The amended ICSID rules seek to make clear that requests for increases in the standard rate should be exceptional and in effect must be made through the Secretary General.[26]

[27] Under the UNCITRAL Arbitration Rules, there are no institutional limits akin to those at ICSID. The 2010 UNCITRAL Rules (art. 41(3)) now provide the parties with an opportunity to request review by the appointing authority of the reasonableness of the arbitrators' fees and expenses.

References herein to the UNCITRAL Rules are generally to the 2010 version of the Rules. However, almost all decided cases have considered the 1976 version of the UNCITRAL Rules. Case citations herein identify the applicable arbitration rules but not the specific version of the UNCITRAL Rules at issue.

[28] In ISDS cases administered by the PCA, which are frequently governed by the UNCITRAL Rules, arbitrator fees are generally determined by agreement with the parties. There are no institutional limits on fees akin to those at ICSID.

[29] The SCC Rules, which investors can opt for in Energy Charter Treaty arbitrations as well as under some other investment treaties, provide, for claims up to 100 million euros, for arbitrator fees on a schedule based on the amount in dispute. See Marie Öhrstrom, Investment Arbitration in Sweden before the SCC, March 2011 (presentation at Frankfurt International Investment Arbitration Moot).

[30] Respondent State-appointed arbitrators are named only after the forum is chosen so the choice of forum issue does not arise for them.

[31] For recent discussion of costs issues, see, e.g., S. Franck, Rationalizing Costs in Investment Arbitration, 88 Wash. Univ. L. Rev. 769 (2011) [hereinafter Franck, Rationalising Costs]; David Smith, Shifting Sands: Cost-and-Fee Allocation in International Investment Arbitration, 51 Va. J. Int'l L. 749 (2011); Lucy Reed, More on Corporate Criticism of International Arbitration, Kluwer Arbitration Blog (16 July 2010); Nicolas Ulmer, The Cost Conundrum, Arbitration International (2010), volume 26, issue 2, p. 221-51; Pierre Lalive, Dérives arbitrales (II), ASA Bulletin 1/2006. See also UNCTAD, Investor-State Disputes: Prevention and Alternatives to Arbitration (2010) at pp. 16-18 (suggesting that ISDS costs have skyrocketed in recent years and citing examples of high-cost cases).

[32] Arbitration awards cannot generally be overturned for legal or factual error, but they can be overturned if a party was denied a fair hearing. This may be an incentive to allow the parties' counsel broad latitude to present all their arguments in order to insulate an award from successful challenge on procedural grounds.

and expanded use of high-cost party-appointed experts on a wide range of issues. Other explanations focus on: i) the nature of the cases and applicable law, citing, for example, unresolved legal issues that need to be readdressed in detail in each case; ii) high damages claims, which are correlated with high tribunal costs; and iii) uncertain cost shifting rules.

Recent reforms have sought to rein in costs. A number of reforms are summarised in Box 2.

Box 2. Institutional reforms to lower ISDS costs and streamline procedures

Recent reforms have sought to lower ISDS costs and streamline procedures. For example, ICSID has taken a series of measures to strengthen its administration of cases including expanding new staff to include 16 full-time lawyers and increasing staff specialisation, introducing new electronic systems and improving service through a best practice project.[33] Key internal case times have been reduced (registering a request for arbitration in 27 days or less; constituting an arbitral tribunal within 6 weeks of being asked).[34] All prospective arbitrators are required to confirm their availability prior to their appointment. A calendar of the available blocks of time for the three arbitrators over the forthcoming two-year period is prepared to enable the scheduling of the initial meeting within 60 days (as required by the rules) and of the case more generally. ICSID also follows up with arbitrators who have undecided cases outstanding for over 12 months. Although it is recognised that speed is not an absolute goal, these and other efforts have significantly reduced average ICSID case duration over the past three years. The average duration from registration to conclusion of a case has dropped from 42 to 31 months since 2009.

Other reforms seek to reduce costs by allowing prompt termination of meritless cases. ICSID Arbitration Rule 41 was amended in April 2006 to allow parties to object to claims which are "manifestly without legal merit" at the outset of the case and obtain a prompt tribunal decision.[35] This can require the arbitrators to focus on a case at the outset. Some commentators have contended, however, that some rules designed to streamline proceedings can be counterproductive because they introduce new issues for resolution and potentially additional steps to resolving a case.

The revised 2010 UNCITRAL Rules provide that parties may consider requesting from an arbitrator an optional general statement confirming that he/she can devote the necessary time to the arbitration. UNCITRAL Rules p. 30.

Due in part to perceived problems with ISDS arbitration including high costs, there is growing interest in dispute prevention and alternative dispute resolution (ADR) in ISDS, and UNCTAD in particular has recently examined these issues.[36] Efforts to prevent disputes include, for example, improved good governance and early alert systems that work across different ministries in the government. ADR includes mediation, which is generally informal, and conciliation, which is usually governed by pre-existing rules, such as those of ICSID, UNCITRAL or the ICC; neither precludes later arbitration if they are unsuccessful. ADR is more flexible, faster, and cheaper than arbitration, and can enable parties to avoid an arbitral award which may create an unwanted precedent. On the other hand, ADR requires time and money, and is not

[33] Remarks of Meg Kinnear at Why ICSID, Investment Treaty Forum conference, British Institute of International and Comparative Law, London (3 November 2011).

[34] As noted in the section on arbitrators (II.F), the parties frequently negotiate amongst themselves about the tribunal for a considerable period before possibly requesting assistance from an appointing authority).

[35] ICSID Rule 41(5). There have been four known attempts to use the clause, the first two unsuccessful and two more recent attempts that were successful. See *Global Trading Resources Corp. and Globex International v. Ukraine*, ICSID (1 Dec. 2010) (finding that there was no investment); *RSM Production Corp. v. Grenada*, ICSID (10 Dec. 2010) (finding treaty-based claims barred by earlier ICSID tribunal decision between the same parties). Two earlier cases rejected attempts to dispose of cases under Rule 41(5). See *Trans-Global Petroleum, Inc v Hashemite Kingdom of Jordan*, ICSID (12 May 2008); *Brandes Investment Partners, LP v Bolivarian Republic of Venezuela*, ICSID (2 Feb. 2009). See also Aissatou Diop, Objections under Rules 41(5) of the ICSID Arbitration Rules, ICSID Review – Foreign Investment Law Journal, Vol. 25, no. 2.

[36] See UNCTAD, Investor-State Disputes: Prevention and Alternatives to Arbitration (2010); see Summary of Roundtable 16 (presentation to Roundtable on ADR by Joachim Karl, UNCTAD).

always successful. Moreover, it is non-transparent so that there is little public data about its use in ISDS. The outcomes of ADR can be difficult to implement since compliance is voluntary.

2. Allocation of legal and arbitration costs by investment arbitrators

Cost allocation refers to decisions by arbitrators ordering one party to pay the other party money to defray its legal and/or arbitration costs; the costs allocation becomes part of the enforceable award.

The applicable rules differ depending on the arbitral rules and forum although the arbitrators generally have significant discretion. For example, the ICSID Convention (article 61(2)) requires the final award to address the issue of legal and arbitration costs; costs can also be addressed in earlier partial awards. However, there is no guidance about how to allocate costs. In contrast, the new 2010 UNCITRAL Rules now provide broadly that all costs of the arbitration, including reasonable legal fees, "shall in principle be borne by the unsuccessful party" although the arbitrators have discretion to decide otherwise.[37] The now significantly different approaches to cost shifting between ICSID and the 2010 UNCITRAL Rules – with the latter providing in principle for shifting of both legal and arbitral costs to the losing party while the former provides no preferred approach – may make investor power to choose the arbitral forum of more consequence.

It is widely recognised that outcomes on cost shifting in ISDS cases are highly uncertain.[38] Only a few general conclusions can be drawn.

- The "pay your own way" rule, generally applicable in public international law, under which no costs are shifted – each party pays its own legal and expert costs, and the parties share equally the arbitrator and institutional costs – has been used overall more often than other approaches.[39]

- The trend in recent cases is toward the shifting of at least some costs. More than half of the known cases in 2010 and the first half of 2011 shifted at least some costs.

- In the decisions that shift costs, some shift overall costs (both tribunal and legal costs) while others shift only some costs, in various proportions.

- The amounts shifted have risen in recent cases. In a pre-2007 case sample of 52 cases, the 11 decisions awarding legal costs shifted an average of USD 655,407. The largest legal costs award

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[37] UNCITRAL Rules 42(1) and 40(2). The earlier 1976 UNCITRAL Rules provide that the losing party should in principle pay the arbitral fees and expenses although the arbitrators are expressly given discretion to decide otherwise; legal fees were largely left to the tribunal's discretion.

[38] See Christoph Schreuer et al, The ICSID Convention: A Commentary 1229 (2009) [hereinafter, Schreuer, ICSID Commentary] ('the practice of ICSID tribunals in apportioning costs is neither clear nor uniform"). The same apparently applies to UNCITRAL or SCC ISDS cases. See Smith at p. 775, 780 ("From this confusing mass of awards, it appears that there is no real unifying principle …".).

The uncertainty extends to claims dismissed as "manifestly without legal merit" under ICSID Rule 41(5) at the outset of the case, as discussed above. Compare *RSM Production Corp.* (awarding costs; suggesting that manifestly meritless claim should results in costs award) with *Global Trading* (refusing to award costs despite striking manifestly meritless claims because Rule 41(5) is new and because the arguments were presented reasonably).

[39] It was applied in 63% of costs decisions in cases that were publicly available as of June 2006 (33 out of 52). See Franck, Rationalizing Costs, at p. 810. In 31 more recent publicly-available decisions in 2008-2009, it was applied by 58% of awards. See Smith 2011 at p. 753.

was just under USD 3 million.[40] Recent cases have given rise to much greater shifts in legal and/or tribunal costs, including over USD 10 million in legal costs in CSOB.[41]

- Evidence is mixed on whether costs decisions are broadly more favourable to investors than to States.[42]

Pre-2007 ISDS decisions on costs rarely included reasons or legal authority.[43] Commentators have noted that the lack of reasoning for costs awards can raise issues of legitimacy and efficiency.[44] More recent awards contain more reasoning on cost allocation decisions. Where reasons are provided, a variety of factors appear to come into play. In addition to success on the merits, tribunals can take note of any party misconduct such as bad faith claims or excessive filings.

3. Policy issues raised by high costs

High costs for investment arbitration raise a number of policy issues. Developing States with little experience in international litigation and with small in-house legal departments may be overwhelmed by the resources available to large investors. High costs may preclude access to justice for small and medium investors (although the OECD survey of investor-claimants presented in section II.A suggests that this is not the case). Likewise, smaller claims – worth less than several million dollars – could not be pursued effectively in such a high cost system. Finally, the States that are respondents in ISDS cases are accountable to their citizens regarding whether or not such expenditures are a good use of public funds.

It has been noted that the high costs of ISDS or the threat of such costs can have a dissuasive effect on States and that investors can use the spectre of high-cost ISDS litigation to bring a recalcitrant State to the negotiating table for purposes of achieving a settlement of the dispute. Similar effects may also exist for investors. It appears that a number of ISDS claims by investors have been discontinued due to the refusal or inability of the investors to pay the costs.[45] High costs will likely generally play to the advantage of financially stronger parties (including third party sources of funding) on either side.

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[40] Franck, Rationalizing Costs, at p. 812.

[41] *Ceskoslovenska Obchodni Banka, a.s. [CSOB] v. The Slovak Republic*, ICSID (29 Dec. 2004). Other costs awards include almost USD 7.5 million in *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID (27 Aug. 2008); USD 6 million in *Siag v. Egypt*, ICSID (1 June 2009); USD 4.5 million in *PSEG Global v. Arab Republic of Egypt*, ICSID (19 Jan. 2007); and over USD 4 million in *Europe Cement Investment and Trade S.A. v. Turkey*, ICSID (13 Aug. 2009).

[42] Compare Franck, Rationalizing Costs, p. 777 (finding relatively equivalent treatment of investors and states in pre-2007 awards) with Smith, p. 750 (reviewing 31 2008-2009 awards and finding "victorious claimants are substantially more likely to recover some measure of legal fees or arbitral costs than victorious respondents").

[43] See Franck, Rationalizing Costs, at p. 820 (75% of costs awards failed to provide legal authority).

[44] Susan Franck cites the example of *Eureko B.V. v. Republic of Poland*, Partial Award and Dissenting Opinion, ad hoc arbitration, § 261 (19 Aug. 2005), in which the panel awarded the claimant all of its legal and arbitral costs in two sentences with no reasons. The relevant treaty prohibited that approach to costs. The tribunal subsequently issued a supplementary award retracting its decision on costs. See Franck at 830 n.307. As Franck notes, the apparent legal error is a rarity (because investment treaties rarely provide rules on costs), but the summary treatment of costs is not.

[45] See, e.g., *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v. Republic of Costa Rica*, ICSID (AF) (27 Oct. 2010) (noting discontinuance of claim due to investors' inability to fund claim and awarding costs against investor; noting that "it is plausible to question whether Claimants had thoughtfully considered the costs involved in this arbitration and whether they had been adequately advised on the matter before filing their claim").

As potentially repeat players, States also face the issue of how to organise and finance their legal expenditures on ISDS. Large States with a significant number of cases, like the US and Canada, now have sizable specialised in-house legal departments which can reduce costs and improve defence counsel's knowledge of the government.[46] However, an in-house system can require a reasonably steady flow of cases to justify the fixed costs; it may also be difficult to organise for many developing States due to language barriers and the lack of national lawyers with the requisite expertise and connections to the world of international arbitration. The allocation of substantial ISDS litigation costs between different levels of government may raise issues especially in federal or similar systems.

Efforts to limit costs can also raise policy issues. A number of arbitrators and others contend that there can be a trade-off between the speed and cost of proceedings, and accuracy of outcomes.[47]

4. Issues for discussion

6) ***The OECD survey finds that ISDS cost average about USD 8 million per case and can exceed USD 30 million per case.***

a) Do you consider that these total costs are unreasonable, relative to the nature of the problems being solved and the costs of resolving them under other procedures?

b) If costs are considered to be high, does this raise concerns?

7) ***Case costs of USD 8 million may present a major obstacle to justice for developing States. Is there a risk that developing States lose cases primarily as a result of being "out-lawyered" rather than on the merits?***

8) ***Because the rules on cost allocation in ISDS are uncertain, parties frequently have little idea of the likely final allocation of the millions of dollars in costs that they incur. What are your experiences and views on cost allocation in ISDS?***

II.C. Remedies for breach of investment treaties

Remedies are what investors seek and what governments are compelled to provide in cases where they breach treaty obligations – they are of critical importance to the parties to case. The nature of remedies can also be of fundamental importance to the operation of the ISDS system, including its interaction with domestic legal systems.

1. Types of remedies and terminology

Different legal systems have different names and categorisations for the various types of remedies for improper governmental decisions. These create a fairly complex legal vocabulary for remedies. A key distinction exists between (i) non-pecuniary remedies, which are also referred to as "primary" or "judicial

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In other cases, investors have had collateral disputes with their lawyers over fees and costs. See Luke Eric Peterson, Investor and lawyers fall out over contingency-fee arrangement in aftermath of ICSID arbitration, Investor Arbitration Reporter (7 May 2010) (reporting on dispute between investor and lawyers over non-payment of contingency fee alleging amounting to 80% of USD 133 million award).

[46] See, e.g., *Chemtura v Canada*, Canada's Submission on Costs, UNCITRAL (15 Feb. 2010) § 112 (government lawyers costs are "substantially below the going [private] market rate").

[47] See William W. Park, Arbitrators and Accuracy, 1 Journal of International Dispute Settlement, Vol. 1, no. 1, p. 25 (2010).

review" remedies; and (ii) pecuniary remedies (principally damages and interest), also referred to as "secondary" remedies.[48]

a. Non-pecuniary, judicial review or primary remedies

Non-pecuniary, judicial review or primary remedies include (i) the annulling of a governmental measure or decision; (ii) injunctions (requiring a party to do or to refrain from doing something); and (iii) declarations of the rights and obligations of the parties, or a declaration that a particular administrative decision was illegal without otherwise stating any consequences.

International law generally does not allow an international tribunal to directly annul a national government measure. However, a similar outcome can be achieved where national law so provides, as it now does for many ECHR Convention countries with regard to cases where the ECHR has found a violation.[49] The power of international tribunals to issue injunctions also varies. As discussed below, ISDS arbitrators are increasingly issuing preliminary injunctions (that is, they seek to require or to stop a particular course of action by the respondent State while the arbitration is taking place). Finally, a few IIAs explicitly allow arbitral tribunals to pronounce that a State party has breached its obligations under the treaty, while some treaties explicitly prohibit a declaration of a breach of domestic law.[50]

b. Pecuniary remedies

Pecuniary remedies are dominant in investment arbitration. They include monetary compensation, interest and costs. A number of investment treaties refer to restitution or restitution in kind. These provisions usually provide that the respondent State having the option to pay compensation in lieu of restitution.

c. Final versus provisional remedies

Another key distinction is between remedies obtained during the course of a proceeding (provisional remedies), and remedies obtained at the end of the case. Most if not all of the non-pecuniary remedies in ISDS case have involved provisional rather than final remedies. The latter have been almost exclusively pecuniary in nature. As discussed below, the enforcement of final non-pecuniary remedies raises additional issues for a system of *ad hoc* arbitration.

2. Remedies for investors in advanced systems of domestic administrative law

Advanced national administrative law systems[51] have many functions similar to ISDS (controlling State power, upholding the rule of law and providing remedies to regulated entities and persons for State

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[48] Common law systems frequently refer to these non-pecuniary remedies as judicial review remedies. In German law, the term primary remedies is more frequent; as outlined below, it is generally mandatory in Germany to seek such primary remedies where possible before seeking damages (secondary remedies). Such remedies are also referred to as public law remedies.

[49] See Philip Leach, Taking a case to the European Court of Human Rights § 3.49 (3d ed. 2011). These provisions in national law were adopted in many states following a Council of Europe Committee of Ministers Recommendation in 2000.

[50] The OECD survey of treaty language found that some treaties concluded, *inter alia*, by Austria and Mexico, allow tribunals to make statements on breach of treaty obligations. A few treaties, all concluded by Colombia, explicitly prohibit tribunal statements on the legality of a measure under domestic law.

[51] Administrative law is used here in a broad sense to include damages claims for economic loss against the state (which may be characterised as private law or constitutional claims) as well as judicial review.

misconduct).[52] Both systems cover many similar fact situations for investors (e.g. wrongful or arbitrary denial of licences, failure to accord due process, as well as expropriations and changes in regulatory or tax policies, etc). It is also necessary to understand domestic law remedies when considering possible interactions between ISDS and domestic law, including in such areas as exhaustion of local remedies, concurrent proceedings and fork in the road provisions. The relevance of national administrative law is increasingly being recognised by ISDS tribunals and academics.[53]

The question of how ISDS relates to advanced domestic systems is of increasing political and economic interest, as illustrated by (i) the recent Australian Productivity Commission report recommending that Australia should seek to avoid accepting ISDS provisions in trade agreements that confer additional substantive or procedural rights on foreign investors over and above those already provided by the Australian legal system; the Commission argued that such preferences, if they exist, would distort investment flows[54]; and (ii) positions taken by candidates during the 2008 US Presidential election.

A preliminary review by the Secretariat suggests that substantial differences exist between domestic systems and ISDS. Advanced national systems strongly emphasise so-called "primary", "judicial review" remedies which are non-pecuniary (annulling illegal action, prohibiting or requiring specified government action, etc.); these remedies (but only these remedies) are often available in specialised proceedings. Damages remedies for investors appear to be rare (except for expropriation for which restitution or damages are the only remedies). Few cases involve substantial damages claims against governments and fewer still succeed. The legal doctrines, rules and approaches that have the effect of favouring primary remedies and making damages difficult to obtain for investors vary between the countries surveyed, but the outcome in terms of remedies is uniform in all countries surveyed. For a comparative overview of the law in the United Kingdom, the United States, Germany, France and Japan, see Annex 4. In contrast to these national systems, as noted above, ISDS focuses almost exclusively on monetary damages which can be very large. The reasons for these significant differences in approach should be explored.

ISDS tribunals have frequently awarded damages as compensation by reference to the rules of State responsibility under general international law, relying notably on the ILC's Draft Articles on State Responsibility. As noted by Irmgard Marboe, however, the rules on State responsibility were developed in

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[52] See, e.g., Rudolf Dolzer, The Impact of International Investment Treaties on Domestic Administrative Law, 37 NYU J. Int'l. L. & Policy 953, 970 (2005) ("the jurisprudence of investment tribunals as a whole contains ingredients of a growing system of international administrative law for foreign investment"); *International Thunderbird Gaming Corp v. Mexico*, UNCITRAL, separate opinion of Thomas Walde, § 129 ("Investment arbitration is in substance a special form of international quasi-judicial review of governmental conduct using as a default the methods of commercial arbitration.")

[53] See, e.g., *Total, S.A. v. Republic of Argentina*, ICSID, Decision on Liability §§ 128-130 (2010) (engaging in a comparative analysis of the protection of legitimate expectations in domestic jurisdictions); S. Schill, ed., International Investment Law and Comparative Public Law, (Oxford 2010).

[54] The issue of the comparative status of domestic and foreign investors was an important aspect of the debate over the report. The Commission's draft report included a recommendation that ISDS "should not afford foreign investors in Australia or partner countries with legal protections not available to residents". In comments on the draft report, the Department of Foreign Affairs and Trade (DFAT) opined that the protections are broadly equivalent.[54] See Department of Foreign Affairs and Trade, Supplementary submission to the Australian Productivity Commission Review of Bilateral and Regional Trade Agreements, September 2010, §§ 54-55 ("the key issue is whether [ISDS] confers better treatment than [domestic law]. We assess that, broadly, this is not the case."). DFAT's comparative analysis focused on expropriation, but did not address the other main investor protections or the remedies for violations. The final Commission report did not directly address the question, but stated that "the general granting of additional substantive and procedural rights to foreign investors through ISDS can disadvantage domestic relative to foreign investment and thereby distort investment flows". Bilateral and Regional Trade Agreements, Productivity Commission research report (November 2010), p. 272.

inter-State relationships, thus between sovereign States on the basis of equality under international law.[55] A different kind of relationship exists between a State and a foreign investor, a private law subject. Part II of the ILC's Draft Articles on State Responsibility, which notably concerns the obligation to make reparation for injury, does not apply to cases brought by individuals against States.[56] Marboe suggests it is worth considering whether all aspects of the rules on State responsibility are appropriate to address the wrongful conduct of States in this particular relationship.

Enforcement of non-pecuniary primary remedies in ISDS raises a number of issues which are briefly addressed in section II.D and in Annex 6. Systems like the WTO that provide for final primary remedies rather than damages have additional institutions and procedures to oversee compliance with such remedies. The difficulties associated with investment arbitration tribunals applying final primary or judicial review type remedies have prompted some commentators to suggest expanded use of primary remedies by domestic courts in host States rather than by arbitral tribunals.[57]

Investment treaty provisions requiring recourse to domestic tribunals before access to ISDS are relatively rare; only about 8% of the treaties that provide for ISDS contain such requirements.[58] Recent ISDS cases have sharply divided in interpreting BIT clauses requiring recourse to domestic courts for 18 months before investor-state arbitration can commence. Some tribunals have found them to be inapplicable, either where the tribunal finds they would be futile or through application of an MFN clause.[59] In contrast, a US appellate court and an ISDS tribunal have recently applied them strictly, overturning an award or refusing jurisdiction on the basis of an 18-month clause.[60]

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[55] See Irmgard Marboe, State Responsibility and Comparative State liability for Administrative and Legislative Harm to Economic Interests, in S. Schill, op cit., at 377.

[56] See Draft Article 33(2); James Crawford, The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect, 96 AJIL 874, 881 (2002) ("the articles do not cover the question of invocation of responsibility by nonstate entities").

[57] See Anne van Aaken, Primary and secondary remedies in international investment law and national state liability: A functional and comparative view, in Schill, op cit., pp. 721-54 (suggesting expanded use in ISDS of primary remedies in the domestic legal system while reserving the possibility of damages to the international level).

[58] Article 26 of the ICSID Convention allows States to make exhaustion of domestic remedies a condition of consent to arbitration. However, relatively few States have included requirement of recourse to domestic administrative or judicial remedies in their treaties.

[59] See *Abaclat v. Republic of Argentina*, Decision on Jurisdiction and Admissibility, ICSID (4 August 2011) (majority allowed claimant to disregard 18-month requirement where, *inter alia*, tribunal considered it would be futile). A number of cases have allowed investors to invoke MFN clauses to avoid the 18-month requirement, with some considering that the requirement is nonsensical. See *Plama Consortium Limited v. the Republic of Bulgaria*, ICSID, Decision on Jurisdiction (8 February 2005) (allowing investor to circumvent "curious" 18-month requirement using an MFN clause; finding it appropriate "to neutralize ... a provision that is nonsensical from a practical point of view"); *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19; *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL (joined cases), Decision on Jurisdiction § 67 (citing Plama's "non-sense" theory in allowing application of MFN to avoid 18-month requirement).

The suggestion by some tribunals that time-limited domestic exhaustion requirements are nonsensical in ISDS contrasts with a number of advanced systems of administrative law which apply strict exhaustion requirements as a pre-condition for claims for damages (notably through the substantive law principle of contributory negligence). See Annex 4 below.

[60] See *Argentina v. BG Group plc*, (US Ct. App. D.C. Cir.) (18 January 2012) (setting aside USD 185 million UNCITRAL award which allowed investor to commence arbitration without recourse to domestic courts in Argentina for 18 months; arbitrators did not have power to decide whether investor could ignore requirement); *ICS Inspection and Control Services Limited v. Argentina*, UNCITRAL (10 Feb. 2012) (rejecting jurisdiction over

3. Expanding use of non-pecuniary provisional remedies in ISDS

The use of non-pecuniary remedies has been explored in a number of ISDS cases. Arbitrators are increasingly issuing preliminary injunctions both in ICSID and non-ICSID cases.[61] To date, the context involves provisional remedies. As reported in the press, a recent European Commission discussion paper proposes that further consideration be given to non-monetary remedies, such as requiring repeal or reversal of the measure concerned.[62]

Article 47 of the ICSID Convention gives the tribunal the power to "recommend any provisional measures ...". Christoph Schreuer notes that the Convention's legislative history suggests that a conscious

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claims due to investor failure to satisfy "mandatory" 18-month domestic litigation requirement; finding MFN clause inapplicable).

[61] See, e.g., *Chevron, Inc. v. Republic of Ecuador*, UNCITRAL, Order for Interim Measures (9 February 2011) (ordering Ecuador to "take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against Chevron in the Lago Agrio Case"; Lago Agrio is a tort case in Ecuador brought by Ecuadorians against Chevron in which (at the time of this arbitral decision) a first instance court had issued an USD 18 billion judgment); *id*., Second Interim Award on Interim Measures (12 Feb. 2012) (following appellate court decision in Ecuador affirming the judgment against Chevron, ISDS tribunal granted Chevron's request for interim relief in the form of an interim award instead of an order; award reaffirms the global anti-enforcement injunction and orders "[Ecuador] (whether by its judicial, legislative or executive branches) to take all measures necessary to suspend or cause to be suspended the enforcement and recognition within and without Ecuador" of the Lago Agrio judgments).

The arbitral tribunal rulings in *Chevron* have been thrown into greater relief by decisions in the US courts. The initial February 2011 *Chevron* arbitral tribunal anti-enforcement injunction followed an earlier US federal district court order which had already enjoined the Lago Agrio tort plaintiffs and their counsel from enforcing the Lago Agrio judgment anywhere in the world. However, the Second Circuit Court of Appeal overturned that global anti-enforcement injunction in September 2011. *Chevron Corp. v Camacho Naranjo*, US 2d Cir. Ct. App. (26 Jan. 2012). The Second Circuit decision was based primarily on the scope of statutes governing enforcement, but the court noted the sensitive nature of the issues raised: "when a court in one country attempts to preclude the courts of every other nation from ever considering the effect of [a] foreign judgment, the [international] comity concerns become far graver. In such an instance, the court risks disrespecting the legal system not only of the country in which the judgment was issued, but also those of other countries, who are inherently assumed insufficiently trustworthy to recognize what is asserted to be the extreme incapacity of the legal system from which the judgment emanates. The court presuming to issue such an injunction sets itself up as the definitive international arbiter of the fairness and integrity of the world's legal systems." As noted above, the arbitral tribunal in effect reaffirmed its global anti-enforcement injunction against Ecuador in its Feb. 2012 interim award.

For additional ISDS cases involving provisional measures, see *Perenco Ecuador Ltd. v. Republic of Ecuador and Petroecuador*, ICSID, Decision on provisional measures §§ 79-80 (8 May 2009) (ordering that tax payments be put into escrow, rather than remitted to the state; ordering Ecuador to refrain from pressuring Perenco for payment of back-taxes); *Paushok v. Mongolia*, UNCITRAL, Order on Interim Measures, p. 16 (2 September 2008) (ordering Mongolia to refrain from collecting windfall tax from Russian mining company while case is heard; half of tax allegedly due to be put in escrow); *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia*, ICSID, Decision on Provisional Measures, Feb 26, 2010 (ordering Bolivia to suspend criminal proceedings which the tribunal considered were directly related to the arbitration due to a very close link between the commencement of the arbitration and the launching of the criminal proceedings); *ATA Construction v. Hashemite Kingdom of Jordan*, ICSID (18 May 2010) (ordering Jordan to halt ongoing court proceedings in Jordan between two parties to a contract with a commercial arbitration clause and precluding further judicial proceedings in Jordan or elsewhere on the substance of the dispute).

[62] See Luke Eric Peterson, Unpublished discussion paper gives overview of European Commission trade department's recent thinking on foreign investment dispute settlement, Investment Arbitration Reporter (9 June 2011). The Commission paper also reportedly suggests consideration of a parallel state-to-state dispute mechanism focused on obtaining non-pecuniary remedies for investment law violations amounting to measures of general application that impact upon many investors.

decision was made not to grant the tribunal the power to order binding provisional measures.[63] However, ICSID tribunals have repeatedly found that their provisional measures have binding effect on the parties.

4. The OECD statistical survey of ISDS provisions in bilateral investment treaties – remedies

The OECD survey of ISDS provisions confirms that while many treaties address remedies for expropriation, remedies for other violations are rarely specifically identified.

- For expropriation, many treaties specify that compensation is due and expressly specify a compensation standard – such as "compensation equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or comparable measure has become publicly known".[64]

- For treaty obligations other than expropriation, consequences of breach are infrequently defined. Only 9% of the sample treaties that have specific provisions on ISDS include, in these provisions, some language on remedies. About 3% of treaties in the sample expressly mention pecuniary remedies. Among treaties that contain language on remedies, such language varies markedly in terms of coverage and detail. The first treaty in the sample to contain language on remedies is the United States-Cameroon BIT (1986).

5. Issues for discussion

9) ***Should investment treaties give greater consideration to remedies? Should expanded use of primary remedies in ISDS be considered?***

10) ***The text and Annex 4 note that pecuniary (or monetary) remedies for investors against governments under domestic administrative law in the UK, US, Germany, France and Japan are rare (other than for expropriation).***

a) Would FOI participants wish to explain how their countries' laws handle similar claims? What remedies are provided for?

b) Have investors brought cases for substantial damages against the government in domestic courts and, if so, how have they fared?

c) Are the policy reasons for limiting damages remedies for claimants against governments in some domestic administrative law systems relevant to considering appropriate remedies against governments in ISDS?

d) Could the broader availability of damages remedies for ISDS claimants than for domestic investors give the former a competitive advantage over the latter? Is this a source of concern?

11) ***What are your views on the expanding use by ISDS tribunals of provisional remedies such as injunctions?***

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[63] Schreuer, ICSID Commentary, p. 764.

[64] See, eg, Germany 2008 model BIT art. 4(2).

II.D. Enforcement and execution of ISDS arbitration remedies

1. Historical experience of State compliance with and payment of investor-state arbitral awards

State compliance with ISDS arbitration awards was, until recently, considered to have been good. Most ISDS awards were rendered in the ICSID system: a 2007 article noted that the ICSID provisions on enforcement had only been tested in four cases.[65] More recently, some problems have arisen with compliance with both ICSID and non-ISCID awards.

At the time of the discussions about certain unpaid ICSID awards in FOI Roundtables 12 and 13, the background materials noted two final awards against Argentina and in favour of US investors that remained unpaid.[66] In addition, in August 2010, an award for USD 105 million in favour of a French investor under the Argentina/France BIT was upheld by an annulment committee and became final.[67] In September 2011, a USD 2.9 million award in favour of another US investor against Argentina was also upheld in an annulment proceeding. These awards do not appear to have been paid.[68]

In addition to the situation with regard to awards against Argentina as discussed in Roundtables 12 and 13, news reports in 2010 indicated a growing number of refusals to comply with awards including by Russia, Thailand, Zimbabwe and the Kyrgyz Republic.[69] Some refusals were with regard to relatively recent awards from 2009, but others related to earlier awards (1999 and 2005). A more recent report suggests that the Kyrgyz Republic has not fully satisfied a separate September 2009 award.[70] In addition, the Republic

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[65] Antonio R. Parra, The Enforcement of ICSID Arbitral Awards, (16 November 2007).

[66] The FOI Roundtable recently discussed the ICSID compliance and enforcement regime in connection with these awards against Argentina. Several countries (the United States, France, Canada, the Netherlands and Germany) considered that, apart from the regime for enforcement, Article 53 of the ICSID Convention establishes an unequivocal obligation on the disputing parties to abide by and comply with an ICSID award. Under this view, Article 54 of the Convention, which contemplates recognition and enforcement of the award, applies to all contracting States and is necessary only after a disputing party has failed to honour Article 53. Argentina considers that, before its payment obligations can arise, it is necessary for investors to follow the formalities applicable to enforcement in Argentina of final judgments of Argentine courts, pursuant to Article 54. Argentina's position has been rejected in decisions by a number of ICSID annulment committees. For an account of the different positions on these issues, see the Summaries of discussion of Roundtables 12 and 13. See also "Comments by Argentina regarding FOI Roundtable (December 2011)" [DAF/INV/RD(2012)8].

[67] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID, Annulment Proceeding, Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007 (10 August 2010); *id.*, Additional Opinion of Professor J.H. Dalhuisen under Article 48(4) of the ICSID Convention (30 July 2010). Referring to the additional opinion of Professor Dalhuisen, about "the role of the ICSID Secretariat in this matter" [paragraph 1 of Additional Opinion], Argentina has stated that it considers that the dispute resolution procedures in the case were irregular and contrary to due process. See "Comments by Argentina regarding FOI Roundtable (December 2011)" [DAF/INV/RD(2012)8].

[68] *Continental Casualty Co. v. Argentina*, ICSID, Annulment Proceeding, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic (16 September 2011).

[69] Luke Eric Peterson, How many states are not paying awards under investment treaties?, Investment Arbitration Reporter (7 May 2010).

[70] See Jarrod Hepburn & Luke Eric Peterson, As new arbitral claim is brought against Kyrgyzstan, an ICSID award remains unpaid, Investment Arbitration Reporter (29 September 2011) (referring to investor complaint about alleged unpaid amount of USD 12 million).

of Kazakhstan reportedly failed to pay an arbitral award upheld in an ICSID annulment proceeding despite having undertaken to do so within 30 days of the decision on annulment.[71]

It appears, however, that in some cases States may be paying late or in part, rather than not at all. ICSID recently reported that the number of countries with known outstanding compliance issues with ICSID awards had declined from six to three.[72]

Not all refusals to comply with awards are publicly-known. Efforts to enforce in national courts, however, generally become public.

2. Non-payment of awards and investor and other reactions

Faced with a failure to honour an award, an investor has several options including (i) seeking to enforce the award in one or more enforcement jurisdictions; (ii) seeking diplomatic protection from its home State; (iii) complaining to the arbitral authority primarily in ICSID cases; (iv) selling the award at a discount in a secondary market if one is available; or (v) settling with the respondent State to avoid the need for enforcement proceedings, frequently at a discount.

A number of investors have sought to register and execute upon ISDS awards in national jurisdictions. There are a number of cases where investors have sought to enforce awards for lengthy periods. One well-known case, *Sedelmayer v. Russian Federation*, involves enforcement efforts against Russia since 1998 relating to a USD 2.5 million award (plus interest). Much can depend on the degree of awareness of potentially seizable assets. For example, recent news reports indicate that in July 2011, a Boeing 737 plane allegedly owned by the Thai government was seized in Germany by the insolvency administrator of a German company. The administrator had obtained a USD 43 million award against Thailand in a non-ICSID ISDS arbitration sited in Geneva.[73] The German insolvency administrator has also registered the award in a United States federal district court and Thailand has appealed.[74]

Diplomatic protection is generally prohibited during the pendency of ICSID proceedings.[75] However, diplomatic protection by the State of nationality of the aggrieved claimant becomes possible if the respondent State fails to comply with the final award. Diplomatic protection may potentially involve negotiations, countermeasures or threats thereof, and judicial or other adjudicatory or dispute settlement proceedings.[76]

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[71] Kazakhstan made the commitment in order to avoid having the award be enforceable during the pendency of the annulment proceeding.

[72] Remarks of Meg Kinnear at Why ICSID, Investment Treaty Forum conference, British Institute of International and Comparative Law, London (3 November 2011).

[73] See generally, Thai Prince's Private Jet to Remain Impounded in Munich, Spiegel Online (26 July 2011); Jet spat: Thai govt slams Berlin, AsiaOne News (28 July 2011); Andreas Wasserman, Thailand pledges to settle disputes over prince's jet, Spiegel Online (3 August 2011). The case has given rise to diplomatic exchanges. Germany has generally indicated that the seizure is a judicial matter. News reports indicate that after the Thai foreign ministry and press reacted to the seizure, the German embassy in Thailand provided an explanation of the situation on its website in Thai, underlining the previous German government efforts to obtain compensation for the investor and payment of the award. Id.

[74] See *Werner Schneider v. Kingdom of Thailand*, 10 Civ. 2729 (United States S.D.N.Y. 14 March 2011).

[75] ICSID Convention Art. 27(1). Informal diplomatic exchanges for the sole purpose of facilitating a settlement are permitted. Id. Art. 27(2).

[76] Schreuer, ICSID Commentary, p. 1109. Schreuer notes that while States other than the investor's State of nationality have no right of diplomatic protection, they may show a general interest in the effectiveness of the

Commentators have indicated that the right to exercise diplomatic protection if the host State does not comply with the award includes the possibility of instituting proceedings at the ICJ.[77] Article 64 of the ICSID Convention provides for ICJ jurisdiction over "[a]ny dispute arising between Contracting States concerning the interpretation or application of this Convention". To date, no such reference has been made to the Court. Diplomatic protection is not addressed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[78] One or more interested States could also seek to take other action in response to the non-payment of awards.[79]

Collective action by States interested in the ISDS system appears to be rare although such actions may not be public. Host States of arbitration institutions may also be interested in the effective enforcement of awards; reports indicate that Sweden recently raised the non-payment of an award rendered by the SCC in Stockholm with the Kyrgyz Republic although the matter had no other connections to Sweden.[80]

ICSID does not have any formal role with regard to the enforcement of ICSID awards. However, the Secretariat frequently learns about compliance problems. The Secretary-General will remind the allegedly non-compliant State of the obligation to comply with final awards and will copy the country Director and Executive Director of that State for the World Bank. Other arbitral institutions do not have any role with regard to enforcement issues.

There is now a secondary market in arbitration awards, in particular in awards against States. This market has existed with regard to commercial arbitration awards for some time and now apparently extends to ISDS awards as well.[81] Investors may be able to sell their award albeit at a discount. Firms such as hedge funds that acquire these awards typically engage in aggressive enforcement efforts in multiple jurisdictions.

Some respondent States may use non-payment as leverage to seek a settlement at a lower figure than the face value of the award and accumulated interest. Generally, these negotiations are not public. Recent reports, however, indicate that the Kyrgyz Republic settled in September 2011 with an investor concerning a 2005 award, but may not have paid the full amount of the award including interest and costs.[82]

Overall, there is limited public information about how non-compliance situations are resolved. In some cases, home States whose investors are having difficulty achieving satisfaction are aware of actions taken and the outcomes.

ICSID arbitration process under the Convention and demand that other States meet their obligations, including under Article 53.

[77] Schreuer, ICSID Commentary, p. 1261.

[78] NAFTA Art. 1136(5) provides for an additional possible inter-state procedure in case of non-compliance with a NAFTA award. The investor's home state may request establishment of an inter-state arbitral panel which may determine that the non-compliance is inconsistent with NAFTA obligations and recommend that the party concerned abide by and comply with the award.

[79] For example, a State could oppose loans to the relevant State by multilateral development banks or withdraw preferential trade status.

[80] See Luke Eric Peterson, Lengthy debt collection battle ends, as former Soviet state pays arbitral award; unusual form of diplomatic assistance seen, International Arbitration Reporter (29 September 2011).

[81] A 2009 news report indicated that US energy company CMS sold its ISDS arbitral award against Argentina for an undisclosed sum and that a subsidiary of Bank of America was trying to collect on the award. See Luke Eric Peterson, Clock runs out on Argentina; Vivendi likely to begin award enforcement proceedings even as annulment proceeding continues, (28 Feb. 2009).

[82] See Luke Eric Peterson, Lengthy debt collection battle ends, as former Soviet state pays arbitral award; unusual form of diplomatic assistance seen, International Arbitration Reporter (29 September 2011).

3. Enforcement and execution of pecuniary awards against States

a. Legal context for the enforcement and execution of awards

Arbitration tribunals do not have enforcement powers. They must rely on national courts. The legal context for the enforcement and execution of awards by courts differs under the ICSID and New York Conventions. Neither regime affects state immunity from execution, a significant obstacle to enforcement in some cases.

i. ICSID

The ICSID regime is largely self-contained. Review of the award is limited to the ICSID annulment system and the narrow grounds for review set forth in Article 52(1) of the ICSID Convention.[83] If an award is upheld by the annulment committee, ICSID member States are required to treat it as a final national judgment under Article 54. The regime of the ICSID Convention does not, however, extend to execution – the actual seizure of assets. Execution is governed by the law of each country where execution is sought (including its law and customary international law on state immunity).

ii. New York Convention

Post-award proceedings to enforce an award are possible in national courts at the situs of the arbitration and/or in other countries where enforcement of the award is sought. ISDS award creditors are similarly situated to commercial award creditors of States in this context. The New York Convention regime distinguishes between enforcement of an award (i) in the country where it is made (the "situs" of the award); and (ii) in other countries (where the award is considered as a "foreign" arbitral award).

Parties may seek to enforce (or to set aside) an award in the courts at the situs. The New York Convention does not directly govern these proceedings. Rather, they are subject to the national law at the situs. In many leading arbitration jurisdictions (where most arbitrations are sited), the grounds under national law for setting aside an arbitration award and denying enforcement are narrow. (An arbitration-friendly national law can be an important competitive consideration in the choice of a situs where applicable.) In the absence of such grounds being established, the award can typically be registered and becomes enforceable in the same manner as a national judgment.

The New York Convention governs the registration and enforcement of so-called "foreign" arbitral awards. Contracting States must generally recognize arbitration awards rendered in other Contracting States and enforce them in accordance with their rules of procedure. Grounds to refuse enforcement are limited. A national court may on its own motion refuse enforcement for reasons of public policy.[84] The other key grounds for refusal of enforcement are: (i) lack of a valid arbitration agreement; (ii) violation of due process; (iii) excess of the arbitral tribunal's authority; (iv) irregularity in the composition of the arbitral tribunal or arbitral procedure; or (v) where the award has not yet become binding, has been set aside or suspended.[85]

As in the case of ICSID, the New York Convention is generally considered not to affect state immunity from execution.

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[83] See Katia Yannaca-Small, Expert Dialogue on International investment agreements and Investor-State Dispute settlement: Review of Arbitral Awards (March 2011) §§ 6-50 [DAF/INV/WP/WD(2011)2].

[84] New York Convention Art. V(2). The New York Convention allows a party seeking enforcement to base its request for enforcement on any more favourable applicable national law or treaties in the country where it seeks enforcement. Article VII(1) A (the so-called more-favourable-right provision).

[85] See New York Convention, Art. V(1)(a)-(e); Albert Jan van den Berg, The New York Convention of 1958: An Overview (2008).

b. Principal legal obstacles to enforcement and execution

In broad terms, two steps can be distinguished: (i) registering the award as a national judgment; and (ii) obtaining execution against assets of the debtor.

i. Converting an award into a national judgment

As noted above, the ICSID Convention expressly requires that final awards be treated as final national judgments. This first step has generally raised few problems in ICSID cases to date.[86] However, an issue has arisen with regard to the potential scope of procedures that would be applicable to enforcement of a final ICSID award in Argentina and their consistency with article 54.[87]

Non-ICSID awards are generally not required to be treated as final national judgments. However, domestic awards can generally be registered as national judgments in the courts at the situs (that is, in the country where the arbitration proceeding took place) in a simple proceeding. Practically all proceedings relating to ISDS awards at the situs of the arbitration have involved challenges to the award, which have rarely succeeded. National arbitration laws prescribe various grounds on which arbitration awards can be challenged.[88]

Post-award proceedings for non-ICSID awards in jurisdictions other than the situs do not appear to have raised serious problems with regard to registration of the award. Award creditors can register an award and seek enforcement in any jurisdiction that is a party to the New York Convention. It does not appear that ISDS award creditors have had difficulty in this area, but they may be hesitant even to try to register and enforce an award in some jurisdictions. Courts in some States, for example, have broadly interpreted the public policy exception to enforcement of commercial arbitration awards, and this approach likely dissuades ISDS award creditors from even seeking enforcement in those States.[89] Creditors rarely seek to register awards in the courts of the State debtor even though the New York Convention grounds for refusing enforcement would be the same as in other national courts.

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[86] See, e.g., *AIG Capital Partners Inc. and Another v. Kazakhstan*, [2005] EWHC 2239 (Comm.), 129 ILR 589; A. Parra, supra.

[87] As noted above, Roundtables 12 and 13 discussed this issue. Although some investors have obtained final ICSID awards against Argentina, it does not appear that any has submitted an award to the Argentine courts for enforcement and execution under Art. 54. See Investor-State Arbitration: Come and Get Me, The Economist (18 Feb. 2012) (reporting on the controversy). See also "Comments by Argentina regarding FOI Roundtable (December 2011)" [DAF/INV/RD(2012)8].

[88] For a review of case law on challenges to awards at the situs of the arbitration, see Katia Yannaca-Small, supra, [DAF/INV/WP/WD(2011)2] (reporting on the then 23 known set aside proceedings relating to ISDS awards). As noted, a US appellate court recently set aside an UNCITRAL award. See *Argentina v. BG Group plc*, (US Ct. App. D.C. Cir.) (18 January 2012) (setting aside USD 185 million UNCITRAL award which had allowed investor to commence arbitration without recourse to domestic courts for 18 months).

[89] The alleged wrongful failure to enforce a commercial arbitration award has been the basis for a number of recent ISDS claims. See, e.g., *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award (20 November 2011); Luke Eric Peterson, Application of treaty to facts yields no breaches by Czech Republic in FPS case; arbitrators will review local court's enforcement of arbitral awards, Investment Arbitration Reporter, (report on unreported decision in *Frontier Petroleum Services v. Czech Republic*) (16 Dec. 2010) (case reportedly involved claim that national courts' refusal to enforce the entirety of two commercial arbitral awards amounted to a breach of obligations under the BIT).

ii. Obtaining execution against assets

A key obstacle to execution in some cases is the difficulty of locating assets that can be "attached" (used as a basis for enforcement) and that are not subject to state immunity.[90] State immunity arises with regard to all arbitration awards against States, not just to ISDS awards. Those seeking execution face two difficulties in particular. First, they may find that, where a State has commercial assets, they are held by a separate entity such as a State-owned corporation; these assets are generally considered to belong to a third party rather than the State and are found to be unavailable to satisfy a judgment against the State. Investors (and commercial award creditors) have attempted to "pierce the veil" and argue that the third party should not be treated as a separate entity, with occasional success. Second, where the State itself has assets in a jurisdiction, they may be limited to sovereign assets, such as some diplomatic bank accounts, and accordingly be immune from execution under the law on state immunity (or diplomatic immunity).

State immunity has barred measures of execution of a number of ISDS awards. For example, in the AIG v. Kazakhstan case, an English court registered an ICSID award as an English judgment, but rejected execution on the ground that the assets in question benefitted from absolute immunity (because they were "property" of the Kazakhstan central bank) and because they were sovereign rather than commercial assets.[91]

As noted during the earlier Roundtable discussion on state immunity, while there is a general trend towards application by States of a restrictive theory of state immunity – under which execution is possible against State assets in commercial use – the theory has not been universally accepted. In what has been described as a landmark judgment, the Hong Kong Court of Final Appeal (CFA) recently held by a 3-2 majority that absolute state immunity applies in Hong Kong China.[92] Under the absolute theory, immunity applies to all foreign State assets whether they are used for sovereign or purely commercial transactions. Investors thus cannot execute awards against foreign States in Hong Kong China in the absence of a waiver of immunity. The SCNPC interpretation requested by the court confirmed the several submissions by China earlier in the case contending that absolute immunity applies in China.[93]

4. Enforcement of pecuniary awards against investors

States have limited grounds for counterclaims against investors and it does not appear that any State has succeeded with a counterclaim. However, respondent States can be awarded costs in some cases. Some awards of costs in favour of States have remained unpaid. This can be a particular problem when the claim is brought by a holding company with few assets. One State with a number of non-public awards, including costs awards against investors, has reported that investors have not voluntarily complied with any such costs awards. The State has been required to engage in enforcement efforts in each case. States have in

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[90] The Roundtable discussed state immunity in FOI Roundtable 11 although the discussion did not focus on the execution of arbitration awards. See David Gaukrodger, "Foreign State Immunity and Foreign Government Controlled Investors", OECD Working Papers on International Investment 2010/2.

[91] See Gaukrodger, pp. 21-22, 25 (discussing state immunity aspects of case).

[92] See *Democratic Republic of the Congo v. FG Hemisphere Associates*, Hong Kong Court of Final Appeal (8 June 2011), [2011] HKCU 1049. The case was the first example of the Hong Kong Court of Final Appeal exercising its power under Hong Kong's Basic Law to issue a provisional judgment and refer certain questions to the Standing Committee of the National People's Congress (SCNPC). *Id*. § 60. In August 2011, the SCNPC issued its interpretation, stating that the courts of Hong Kong are bound to give effect to doctrine of state immunity determined by the Central People's Government and indicating that China applies absolute immunity. The SCNPC interpretation confirmed the basis of the Court of Final Appeal's decision and the court issued its final judgment in September 2011. See http://www.legco.gov.hk/yr10-11/english/hc/papers/hc1007ls-101-e.pdf.

[93] Id.; *Democratic Republic of the Congo v. FG Hemisphere Associates*, Hong Kong Court of Final Appeal (8 June 2011), [2011] HKCU 1049 §§ 44-48.

some cases sought to obtain security for costs in advance, including where the investor appears to be a special-purpose vehicle with few apparent assets, but apparently without success to date.[94] An award against a shell entity leaves a State with no meaningful means of enforcement.

5. Enforcement of non-pecuniary remedies

Non-pecuniary remedies can be included as part of the final remedies granted at the end of the case. As discussed above, the primary or judicial review remedies in advanced systems of domestic administrative law are generally non-pecuniary final remedies. Provisional remedies, which are granted during the pendency of a case, are frequently non-pecuniary. While the former have rarely, if ever, been sought or granted in ISDS cases despite their dominance in domestic law, there is growing recourse in ISDS cases to provisional non-pecuniary remedies. Enforcement issues arise with regard to both and these are addressed in Annex 6.

6. Issues for discussion

12) ***Is enforcement of ISDS arbitral awards a growing problem?***

13) ***If so, do enforcement problems pose the risk of a growing re-politicization of ISDS and a return to diplomatic channels for resolution of investor-state disputes?***

14) ***The scoping paper describes foreign state immunity as a significant obstacle to enforcement of awards in some cases. Do you agree with this description?***

15) ***Are the difficulties encountered by States in obtaining compliance with costs awards against investors (or enforcement against investors) of concern?***

16) ***As noted in the section on remedies, ISDS tribunals are expanding their use of provisional remedies such as injunctions. What should tribunals do if States parties refuse to comply with the injunction? Are liquidated damages or penalties, as suggested by some commentators, an appropriate solution?***

II.E. Third party financing

1. Overview

Third party litigation funding has been described as "a new industry composed of institutional investors who invest in litigation by providing finance in return for a stake in a legal claim and a contingency in the recovery".[95] A typical funding arrangement involves "a specialist funding company or a hedge fund [which] pays your legal fees on an interim basis. If you win, you pay a contingency fee out of the damages, usually expressed as a percentage of the damages". A typical contingency fee would be between 20% and 50% of the damages. It may be capped at a multiple of the legal costs advanced by the funder. However, much may depend on the parties' relative bargaining position.

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[94] See Luke Eric Peterson, Analysis: Gov'ts have no success in forcing claimants to post security while treaty arbitrations are ongoing, Investment Arbitration Reporter (10 Feb. 2009).

[95] Maya Steinitz, Whose claim is this anyway? Third party litigation funding, 95 Minn. L. Rev. 1268 (2011). Commercial third party funding has been defined as "[t]he funding of litigation by a party who has no pre-existing interest in the litigation, usually on the basis that (i) the funder will be paid out of the proceeds of any amounts recovered as a consequence of the litigation, often as a percentage of the recovery sum; and (ii) the funder is not entitled to payment should the claim fail". Rupert Jackson, *Review of Civil Litigation Costs - Preliminary Report*, London: 2009, p. viii.

Commercial third party litigation funding has expanded rapidly in recent years. One commentator has identified a "second wave" of litigation funding by major banks and insurance companies who have joined the smaller boutique firms.[96] As of March 2008, "[e]ight out of ten of London's top law firms [were] already using or assessing external funding for litigation and arbitration cases … marking a dramatic move of third-party funding into mainstream practice".[97] A number of litigation funding firms have listed on stock exchanges.[98]

The high costs and potentially high damages characteristic of ISDS may make it an attractive market for third party funders. At least two UK listed funds, Juridica and Burford, have specifically targeted international arbitration claims for financing, as has Omni Bridgeway, a Netherlands based provider of litigation finance that has apparently funded several investor cases under BITs.[99]

Commercial third party financing of claimants is likely to be dominant among the forms of third party financing in ISDS.[100] However, the public interest nature of ISDS cases has also attracted non-commercial third party funding, including by NGOs in at least two ISDS cases.[101] Support for investors by individuals and companies for political reasons is also conceivable.

Commercial third party funders generally prefer not to disclose their role to the other parties or to the adjudicators, and funders and parties appear to consider that no clear disclosure requirements currently exist. Accordingly, it is not possible to determine the scope of third party funding in ISDS. However, available evidence suggests an already significant role. Third party funding (actual or alleged) has been at issue in several recent ISDS cases.[102] Funders attend or sponsor arbitration industry events and have regular contact with ISDS counsel.

Third party funding has emerged only recently even with regard to domestic litigation and it is subject to a wide range of approaches in national jurisdictions. In the common law world, it was long prohibited under

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[96] See Steinitz, p. 1277 (noting role of major banks and insurance companies such as Credit Suisse and Allianz).

[97] Ashby Jones, Third-Party Litigation Funding Stepping up in the U.K., Wall St. J. (20 March 2008) (internal quotations omitted), quoted in Steinitz, p. 1281.

[98] Hedge funds frequently market themselves based on their ability to offer investments not cyclically correlated with bonds and equities to improve diversification of risk. Legal claims as an asset class are often considered to be not cyclically correlated with bonds and equities.

[99] See Omni Bridgeway website (last visited 4 November 2011).

[100] Commercial funding of respondents is conceivable although with a different economic model. See Steinitz, p. 37 ("Claim funding functions as a form of finance whereas defense funding functions as a form of insurance.") (emphasis in original). Defence funding allows a company to pay the expected value of a law suit plus a premium to protect it against a higher-than-expected loss. However, one of its principal benefits for defendant companies – to allow them to quantify and limit their liability at any early stage in order not be disqualified from certain markets for regulatory reasons throughout a major case – would seem to be of limited value to States.

[101] See Luke Eric Peterson, Uruguay hires law firm and secures outside funding to defend against Philip Morris claim; not the first time an NGO offers financial support for arbitration costs, International Arbitration Reporter (20 October 2010).

[102] See *Abaclat v. Republic of Argentina*, Decision on Jurisdiction and Admissibility, ICSID (4 August 2011); dissenting opinion of Prof. Georges Abi-Saad (28 October 2011); *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID, Award (3 March 2010); *RSM Production Corp. v Grenada*, ICSID Case No Arb/05/14, Annulment Proceeding (28 April 2011); *ATA v. Jordan*, ICSID, annulment proceeding(Aug. 2011) (unpublished), as reported in Jarrod Hepburn, ICSID annulment proceeding is discontinued in Jordan construction case, as third-party funding is again flagged, Investment Arbitration Reporter (19 Aug. 2011).

doctrines of champerty and maintenance.[103] In recent years, these doctrines have been in decline albeit in varying degrees. Australia has gone furthest in broadly allowing and regulating third party financing, including through licensing requirements for some funders, and is currently reconsidering the regulatory context.

The law in the UK is in flux, but may be tending to allow some third party funding subject to the claimant maintaining control over the case; the courts having jurisdiction to require disclosure of funding and to impose some liability on funders for adverse costs awards; and a code of conduct for funders. In the US, third party funding has emerged more recently and is subject to varying rules between individual US states. Champerty restrictions barring funding have been reaffirmed in some US states but relaxed in others.[104]

Civil law jurisdictions also appear to have different approaches to third party financing. German law generally permits third party funding without requiring disclosure although the market is still relatively undeveloped. German litigation costs and costs awards are generally very modest in comparison to major UK and US cases or ISDS so there may be less need for financing in commercial cases. The Netherlands also permits third party financing. In contrast, in France the law discourages it at least to some extent and the practice appears to be rare.

Third party funding is considered to provide a number of benefits. It promotes access to justice by providing an additional means of funding litigation and, for some parties, the only means of funding litigation. In this context, some competition law regulators have encouraged third party funding, subject to safeguards, as a possible method for funding private claims for damages for breaches of competition law, including mass claims, although the question remains controversial.[105] Although a successful claimant with third party funding foregoes a percentage of his/her damages, it is better to recover a substantial part of the damages than nothing at all. Third party funding is also expected to filter out some unmeritorious cases because funders will not take on the risk of such cases. Claimants may take a second look at their

[103] In general terms, the doctrine of champerty prohibits dividing litigation proceeds between a party and a non-party who supports the legal action; it is a form of maintenance whereby "assistance in prosecuting or defending a lawsuit [is] given to a litigant by someone who has no bona fide interest in the case." Steinitz, p. 1287. Contracts in contravention of the prohibition of maintenance and champerty are considered invalid. The exact scope of the doctrines is in flux.

[104] Some courts have accepted some third party financing providing there is a supervisory role for the court in order to reduce the risk of abuses. For example, in a class action context, the New Zealand Court of Appeal recently relaxed a long-standing prohibition on third party funding but required that funding proposals be approved by the court. See *Saunders v. Houghton*, [2009] NZCA 610 (2009) §§ 79, 111.

[105] See Office of Fair Trading (UK), Private actions in competition law and effective redress for consumers and business (Nov. 2007) § 8.21 (third party funding could be an important source of funding for private complaints; it should be encouraged subject to funder liability for costs awards and judicial supervision of funding); see also European Commission, Towards a Coherent European Approach to Collective Redress, executive summary of contributions to the public consultation and hearing, (Oct. 2011) question 26 (reporting on widely varying opinions about third party funding).]

case if potential funders are not impressed.[106] Funders may provide competition for lawyers offering contingency fees and drive down prices.[107]

Some continue to see the practice as illegitimate. Concerns involve, among things, the impact of the practice on the legitimacy of the legal system.[108] Frequent defendants such as corporations and corporate directors have criticised third party funding in the domestic context particularly where it is associated with mass claims.[109]

Third party financing in ISDS raises a number of issues addressed briefly here including the possible impact of financing on remedies, settlements and a level playing field for investors; the risk of arbitrator conflicts of interest; the risk and regulation of possible funder misconduct; and the question of liability for costs of funders who fund and/or direct unsuccessful claims and how any such liability should be enforced.

2. Impact of third party financing in ISDS on desired remedies, on settlement incentives and on the relative status of foreign and domestic investors

Section II.D noted that the availability of damages remedies for foreign investors for ISDS claims contrasts with advanced systems of administrative law which generally limit remedies to non-pecuniary relief (other than for expropriation). It has been suggested that this difference is desirable (or at least of limited concern) because the potential availability of damages in ISDS allows the investor and State to come to a negotiated solution that may exclude any damages remedy. Investors who have a long term interest in a market may prefer or be willing to accept a negotiated non-monetary solution. Such a negotiated outcome was notably achieved in the *Vattenfall* case recently discussed in the Roundtable.[110] The likelihood of such negotiated outcomes to ISDS cases involving non-pecuniary remedies, however, may be significantly affected by third party financing.

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[106] *See* Jackson 2010, p. 117; *see also Campbells Cash and Carry Pty Limited v Fostif Pty Limited* [2006] HCA 41 (permitting third-party funding with the funder having broad powers to control the litigation; the court stressed the value provided by the access to funding, and the funder's need to have some measure of control over the litigation while stating that court supervision, ethics rules, and rules governing representative proceedings mitigated the traditional dangers posed by third-party funding).

[107] At the same time, funders may rely on lawyers to bring potential cases to them and may be concerned that lawyers will disclose only relatively weak cases while keeping the stronger ones for contingency fees. The funder-lawyer relationship raises a number of complex issues.

[108] A statement illustrative of these views was provided by the dissenting judges in the Australian case that permitted third party financing:

"The purpose of court proceedings is not to provide a means for third parties to make money by creating, multiplying and stirring up disputes in which those third parties are not involved and which would not otherwise have flared into active controversy but for the efforts of the third parties, by instituting proceedings purportedly to resolve those disputes, by assuming near total control of their conduct, and by manipulating the procedures and orders of the court with the motive, not of resolving the disputes justly, but of making very large profits.

Courts are designed to resolve a controversy between two parties who are before the court, dealing directly with each other and with the court: the resolution of a controversy between a party and a non-party is alien to this role. Further, public confidence in, and public perceptions of, the integrity of the legal system are damaged by litigation in which causes of action are treated merely as items to be dealt with commercially." *Campbells Cash and Carry Pty Limited v Fostif Pty Limited* [2006] HCA 41 (dissenting opinion of Callinan and Heydon JJ.).

[109] See, e.g., US Chamber Institute for Legal Reform, Selling Lawsuits, Buying Trouble (2009).

[110] See *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. The Federal Republic of Germany*, ICSID, Request for Arbitration (20 September 2009); *id*., Award (11 March 2011); Summary of FOI Roundtable 15 (noting negotiated settlement of EUR 1.4 billion claim in *Vattenfall* which involved no money payment).

It is widely recognised that conflicts of interest can arise between claimants and funders with regard to settlement. For example, "a financing company may object to … [the client] accepting a settlement offer that does not meet the company's expectation regarding the return on its investment", as noted in a recent formal opinion on lawyers ethics addressing issues raised by third party financing.[111] Most consideration of this issue appears to involves conflicts between claimants and funders over the amount of damages sought or to be obtained in a settlement where both are seeking money.

Where a claimant may be interested in or willing to accept non-pecuniary remedies, the conflict would likely be more stark. Funders would be unlikely to be interested in funding, based on a percentage of the proceeds, any case in which an investor would be seeking a non-monetary settlement or remedy. As noted in the Jackson Report, "[t]hird party funding is not usually feasible where non-monetary relief, such as an injunction or declaration, is the main remedy sought."[112] For this reason, funders would also likely generally avoid or disfavour cases (or treaties) requiring prior recourse to the domestic courts as a condition of access to ISDS; funders would prefer direct access to the ISDS system to obtain damages. A claimant's ability to settle for a primary remedy would appear to be equally problematic for a funder.

Increased third party funding may also affect the relative status of domestic and foreign investors. Foreign investors with access to a damages remedy in ISDS may have access to funding; in contrast, domestic investors, if they are likely to be limited to the primary remedies available in domestic courts for most non-expropriation claims, would not. The increased availability of funding may accordingly accentuate the difference in status between foreign and domestic investors faced with the same or similar government measures.

3. Avoiding arbitrator conflicts of interest

An important question raised by third party funding is whether the existence and identity of third party funders should be systematically disclosed to ISDS arbitrators to ensure that arbitrators do not unknowingly have inappropriate relationships with third-party funders of cases they are deciding. For example, a funder could be financing a separate ISDS or other case in which the arbitrator is counsel.

Disclosure for this purpose could be limited to sufficient information about the identity of the funder to allow for an effective determination with regard to conflicts of interest. The amounts of funding, for example, would not be required for this purpose.

4. The risk of funder misconduct

One of the concerns lying behind the traditional prohibition of third party funding in common law jurisdictions was that a third party funder could be "tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses".[113] Courts, however, generally have powers to sanction conduct by non-parties that improperly interferes with the administration of justice (although sanctioning non-parties may be more difficult than with regard to parties or counsel).

In contrast, an arbitration tribunal derives its jurisdiction from consent and has no powers over third parties unless they have consented to jurisdiction for at least some purposes. Further study could be appropriate to determine the degree to which misconduct by a funder affecting ISDS arbitration proceeding would be subject to effective rules and sanctions.

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[111] See New York City Bar Assoc., Formal Opinion 2011-2: Third party litigation financing, p. 4.

[112] Rupert Jackson, *Review of Civil Litigation Costs: Final Report*, London: TSO 2010, p. 117.

[113] *Re Trepca Mines (No 2)*, [1963] 1 Ch 199 (Lord Denning).

5. Imposition of liability for costs on funders who fund and/or direct unsuccessful claims

Some courts have imposed costs awards on non-party funders where they fund cases that are unsuccessful and impose costs on defendants.[114] The rationale is generally that funders who purchase a stake in a case for a commercial motive should not be protected from all liability for the costs of the opposing party if the funded party fails in the action. The English courts have applied an intermediate approach where the funder is not liable for the full costs, but only up to the amount of funding it provided to the claimant. The court recognised that professional funders would incorporate the potential liability into the pricing of their funding for claimants, but considered that this was appropriate in order to protect the interests of respondents.[115] In order to allow for the imposition of costs, courts have also ordered that the claimant disclose the existence of funders and the amount of funding provided.[116] In contrast, the High Court of Australia rejected a claim against a funder.[117] The court noted that the defendant could have sought an order for security for costs against the plaintiff earlier in the litigation to protect its interests. As noted above, States have not been successful in seeking such security for costs orders in ISDS cases (although third party financing has not been at issue).

6. Other issues

Third party funding raises a number of additional issues including the following:

- whether the funder's degree of control of decisions about the conduct and settlement of the case should be limited;
- whether the formal claimant needs to retain any of the economic value of the claim;
- whether contracts between the funder, counsel and the claimants need to be regulated or monitored for conflicts of interest or fairness, for example with regard to the terms on which funding can be withdrawn or renegotiated in the middle of proceedings;

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[114] See Section 51 of the Senior Courts Act (UK) (court has full power to determine by whom and to what extent the costs relating to court proceedings shall be paid); *Arkin v Borchard Lines Ltd* [2005] EWCA Civ. 655 (English Court of Appeal) (funder provided financing for unsuccessful claim in which opposing party incurred legal costs of GBP 6 million; funder held liable to reimburse successful party's costs in an amount equivalent to the financing provided to the financed party). See also *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691, 694 (Florida. Dist. Ct. App. 2009) (deeming funder a "party" liable for opposing party's attorney's fees where, *inter alia*, funder had the right to approve any settlement entered into by the recipient of funds).

[115] See *Arkin*, § 41 (while claimants' net recovery would be diminished in cases where they prevail due to the higher cost of funding, overall justice is better served by system that does not leave respondent without any right to recover costs from a professional funder whose intervention has permitted the continuation of a claim which has ultimately proved to be without merit).

[116] See *Merchantbridge & Co. Ltd v. Safron General Partner 1 Ltd*, [2011] EWHC 1524 (Comm) §§ 15, 34-43 (court ordered party to disclose the identities of funders and the dates and extent of funding from each one; liability for costs imposed on certain funders); see also *Thema International Fund PLC v. HSBC Institutional Trust Services (Ireland) Ltd*, [2011] IEHC 357 (Irish High Court) §§ 5.3-5.5 (rejecting request for disclosure of funders because professional third party funding for profit remains illegal in Ireland and because only funding at issue was from related parties rather than professional funders; stating that disclosure is appropriately required where professional funding for profit is permitted).

[117] *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd; Jeffery & Katauskas Pty Ltd v Rickard Constructions Pty Ltd (subject to Deed of Company Arrangement)*, 239 CLR 75 (2009) (High Court of Australia). Liability for funding depended on whether the litigation funder had "committed ... an abuse of process of the Court" under Rule 42.3(2)(c) of the Uniform Civil Procedure Rules 2005 (New South Wales).

- the impact of funding on the transparency of ISDS;
- the capacity of the ISDS system to address mass claims (since third party funding is frequently associated with mass claims).

It is difficult to predict how ISDS arbitrators would address third party funding of ISDS in the absence of rules or guidance from States. In cases decided on third party funding to date, arbitrators have found that third party funding of the prevailing party is of no importance to costs allocation; they have not required disclosure of the existence or identity of funders in that context. More recently, a divided tribunal addressed known third party financing in the context of a third-party-funded mass claim by 60,000 claimants. The majority essentially found it permissible to bring mass claims in ISDS using a third party funding agreement (notwithstanding possible conflicts of interest between the funder and the claimants), over a sharp dissent.[118]

7. Issues for discussion

17) ***Third party funding appears to be significantly expanding in ISDS.***

a) What are the likely consequences of increased third party financing of investor state disputes?

b) Third party financing is frequently associated with mass claims, such as the recent Abaclat case. What are your views on mass claims?

18) ***It is often considered that negotiated settlements can provide disputing parties with superior outcomes to adjudicative decisions. Are the dynamics of settlement negotiations in ISDS likely to be affected by third party funding?***

19) ***In your view, would the availability of third party funding in ISDS likely affect the comparative position of domestic and foreign investors?***

20) ***Do awards by arbitrators favourable to undisclosed funders with whom they have a business relationship raise concerns for the ISDS system?***

21) ***Domestic courts generally have significant powers to sanction interference with the administration of justice. In contrast, arbitration tribunals do not have any powers of enforcement. Can arbitration tribunals or other institutions adequately police the risk of funder misconduct in ISDS?***

22) ***Should third party funders of unsuccessful cases be potentially liable for costs awards?***

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[118] See *Abaclat v. Republic of Argentina*, Decision on Jurisdiction and Admissibility, ICSID (4 August 2011); *dissenting opinion of Prof. Georges Abi-Saad* (28 October 2011). The funding agreement gave the funder and its selected counsel complete control over the case and any settlement. See Decision § 456 ('Claimants are passive participants to the arbitration, all relevant decisions being made by [the funder] and [its selected counsel]")

In a significant departure from the general practice of maintaining the existence of funding secret, a claimant voluntarily disclosed, in a recent 1 March 2012 press release, the existence of funding at the early stages of a case. See http://www.reuters.com/article/2012/03/01/idUS101378+01-Mar-2012+RNS20120301 (press release by Oxus Gold plc announcing existence of a litigation funding agreement); *Oxus Gold plc v. Uzbekistan*, UNCITRAL. The press release identifies the funder and a related entity, and provides some information about the funding agreement including the funding fee arrangements. Control over settlement is addressed, but the degree of funder input into decisions about settlement, if any, is not entirely clear.

II.F. Arbitrators in ISDS

Arbitrators are of critical importance both to the functioning of the ISDS system and to the parties to individual arbitration cases.[119] Arbitral panels are among the key determinants of the quality of ISDS awards (especially since the scope for review of awards under ISDS is quite narrow).

Three-person tribunals are overwhelmingly dominant in ISDS and are the focus of this section.[120] Arbitrators must be selected for each case either by the parties or a by a third-party institution, in contrast to national judges who are assigned to cases without party input. Both the ICSID and UNCITRAL rules provide for each party selecting one arbitrator unless the parties agree on another method.[121] There are few limits on parties' choice of arbitrator as applicable criteria are couched in general terms.[122] Annex 5 describes the process for naming arbitrators in ICSID and UNCITRAL cases.[123]

Although methods and practices vary, arbitrator selection by both the claimant and the respondent tends to involve complex guesswork and strategising. Parties generally try to identify candidates who will be sympathetic to their case and who have the right character, reputation and persuasiveness to convince the other two arbitrators (and in particular the likely presiding arbitrator) of the validity of their case.[124]

1. Characteristics of investment arbitrators

Parties focus intense effort on the selection of arbitrators because they are seen as critical to the outcome of the dispute. Seen from a broader perspective, the characteristics of investment arbitrators as a group may influence general trends of interpretation in investment law and, therefore, such characteristics as legitimacy of ISDS and consistency of awards. Recent research has sought to identify key characteristics of the population of ISDS arbitrators. Statistics are generally unavailable for UNCITRAL and other non-ICSID arbitration due to non-public cases so that academic work has focused on ICSID.

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[119] As the Roundtable recently stated in its communication on Harnessing Freedom of Investment for Green Growth, "[i]t is essential to ensure the integrity and competence of investment arbitrators". On the importance of arbitrators to the parties, see, e.g., C. Seppälä, Recommended Strategy for Getting the Right International Arbitral Tribunal: A Practitioner's View (2008).

[120] Applicable rules generally permit agreement on tribunals of other sizes, but they are rare in ISDS.

[121] See ICSID Convention art. 37(2)(b) (in absence of party agreement otherwise, "the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties."); UNCITRAL Rule 9(1) ("If three arbitrators are to be appointed, each party shall appoint one arbitrator.").

[122] ICSID arbitrators, for example, must 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". See ICSID Convention, Arts. 14(1) and 40(2). Other rules add an express requirement of impartiality to the independence requirement.[122]

[123] Generally, these rules are not mandatory: States can thus provide otherwise in their investment treaties, and the parties to individual cases can agree on a different approach.

[124] See C. Seppälä, Recommended Strategy for Getting the Right International Arbitral Tribunal: A Practitioner's View (2008), p. 7; C. Rogers, Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct, 41 Stanford Journal Of International Law 53, 113 [hereinafter, Rogers, Regulating International Arbitrators]; Paulsson, J. (2010), Moral Hazard in International Dispute Resolution, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair, University of Miami School [hereinafter, Paulsson, Moral Hazard].

Investment arbitrators typically constitute an elite pool of law professionals.[125] They are often lawyers, professors and former judges, who have reached very senior positions in their respective fields. According to a recent study of ICSID arbitrators, lawyers in private practice dominate the field with over 60% of ICSID investment arbitrators in private practice. About one third are full-time academics. Approximately 40% are specialists in public international law (including some lawyers in private practice). Government backgrounds are less represented, although a number of arbitrators have served as domestic or international judges.[126] Few arbitrators are drawn from former investment treaty negotiators. The level of reliance in ISDS on commercial arbitrators has recently been the subject of press commentary.[127]

It appears that over 50% of ISDS arbitrators have acted as counsel for investors in other ISDS cases while it has been estimated about 10% of ISDS arbitrators have acted as counsel for States in other cases.[128] It does not appear that government ISDS defence counsel (for example from those countries with sizable in-house litigation departments that defend ISDS claims) have been selected as arbitrators for cases involving other States. Nor do government investment treaty negotiators appear to figure among arbitrators. The practical exclusion of these government investment law specialists from the arbitral pool may exacerbate the apparent tendency for ISDS arbitrators' work as counsel in other cases to be significantly more frequently for investors than for States.[129] It may also be a factor in the limited degree of public law expertise on ISDS panels.

ICSID investment arbitrators mostly originate from Europe and North America, and approximately 75% come from OECD countries.[130] The geographic origins of arbitrators contrast with the geographic distribution of respondent States in ICSID cases.[131] Empirical research has attempted to evaluate whether the origin of an arbitrator in a developing State affects his/her tendency to rule in favour of States on issues

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[125] See J. A. Fontoura Costa, Comparing WTO Panelists and ICSID Arbitrators: the Creation of International Legal Fields, p. 14, Oñati Socio-Legal Series, v. 1, n. 4 - Socio-Legal Aspects of Adjudication of International Economic Disputes; C. Rogers, The Vocation of the International Arbitrator, 20 American University International Law 957, 958 (2005).

[126] M. Waibel and Y. Wu (2010), Are Arbitrators Political?, ASIL Research Forum, UCLA (5 November 2011); see also J. A. Fontoura Costa, Comparing WTO Panelists and ICSID Arbitrators: the Creation of International Legal Fields, Oñati Socio-Legal Series, v. 1, n. 4 - Socio-Legal Aspects of Adjudication of International Economic Disputes.

[127] See Investor-State Arbitration: Come and Get Me, The Economist (18 Feb. 2012) (Argentine complaints about ICSID being too business-friendly have "some justification"; ISDS issues differ markedly from the contract issues in commercial arbitration, but ISDS tribunal members are frequently commercial arbitrators).

[128] Waibel & Wu, p. 28 ("a majority of investment arbitrators also serve as counsel for investors in other cases"); Email from Michael Waibel, on file with the Secretariat (estimating percentage of investment arbitrators who also serve as counsel for States in other cases based on the raw data in a database on investment arbitrators).

[129] By contrast, the WTO DSU (Art. 8) calls for panels to be composed of "well-qualified governmental and/or non-governmental individuals".

[130] Susan D. Franck, Development and Outcomes of Investment Treaty Arbitration, 50 Harv. Int'l L.J. 43, 78 (2009). The latest ICSID Caseload Statistics appear to confirm these findings with approximately 70% of appointments coming from Western Europe and North America (including Mexico). The ICSID Caseload, Statistics, (Issue 2011-2).

[131] One recent study of the 361 ICSID cases from 1972 to 2011 in which tribunals have been appointed found that approximately 85% of disputes are between an investor from a developed country and a developing host country. About 10% of cases are between investors from a developing country and a host country that is a developing country. Waibel & Wu, pp. 23, 27. Analysis of this nature depends to some degree on definitions. The study in question classified as "developed" all OECD member states as of 1995, with all other states being classified as "developing". Different or more refined definitions would give somewhat different results as would an attempt to include non-ICSID cases.

of jurisdiction or liability.[132] The lack of gender balance amongst investment arbitrators as a group is also striking: 95 percent of ICSID arbitrators have been male.[133] As outlined by an ICSID representative at the March 2012 FOI Roundtable, ICSID is making efforts to help address these imbalances in the ISDS arbitrator pool while ensuring that appointments are of the highest quality.[134] States can make a critical contribution in this regard by ensuring that their appointments of four potential ICSID arbitrators to the ICSID Panel of Arbitrators (from which ICSID must choose arbitrators in some cases) are of high quality and renewed upon expiry.[135]

Some scholars have suggested that questions about investment arbitrators should focus not only on individuals but also on an emerging group of frequently appointed arbitrators who may shape customs and habits within the broader arbitration community.[136] For a mechanism that allows parties to choose their arbitrators with only few limitations, it is striking to find that a group of only 12 arbitrators have been involved (typically as one or more of three arbitrators) in 60 % of a large sample of ICSID cases (a total of 158 cases out of 263 tribunals).[137] Frequent arbitrators may also serve in other cases as counsel or experts on legal issues.

2. The debate about party-appointed arbitrators

The repeated interactions of arbitrators and their multiple roles as arbitrator, legal counsel and expert have given rise to concerns that have been the subject of active debate in recent years.[138] A number of senior arbitration practitioners have recently raised questions about party-appointed arbitrators. Most critics consider that the concerns may mostly be ones of perceived risks rather than actual problems, although it is generally recognised that abuses are hard to detect. These concerns include:

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[132] See Susan D. Franck, Development and Outcomes of Investment Treaty Arbitration, 50 Harv. Int'l L.J. 43 (2009) (finding no statistical impact); Waibel & Wu, p. 34 (preliminary analysis of ICSID case dataset suggests possibility of statistical impact on jurisdictional rulings). As Waibel and Wu note, most arbitrators from developing states have been educated in developed states.

[133] Waibel & Wu, p. 27. In contrast, three of the seven current members of the WTO Appellate Body are female.

[134] For details, see below Annex 5.4 on the Characteristics of the ISDS arbitrator pool and efforts to improve gender and regional balance.

[135] ICSID maintains and publishes on its website the list of members of the Panel, including appointees from each State. The current list contains a number of expired appointments by States.

[136] See, e.g., Fontoura Costa, pp. 18-20.

[137] Id., p. 11.

[138] *Compare* Alexis Mourre, Are unilateral appointments defensible? On Jan Paulsson's Moral Hazard in International Arbitration, Kluwer Arbitration Blog (5 October 2010) ("The bottom line is that if parties really want to enhance their chances of success, they should appoint experienced, impartial, arbitrators rather than super-advocates.") *with* Hans Smit, The pernicious institution of the party-appointed arbitrator, Perspectives on topical foreign direct investment issues by the Vale Columbia Center on Sustainable International Investment, No. 33, (14 December 2010) ("While Alexis Mourre argued that party-appointed arbitrators are selected for their reputation of impartiality, I disagree. I believe that lawyers feel that their duty to advocate for their clients' interests takes precedence over institutional concerns."). See also Martin Hunter, Ethics of the International Arbitrator, 53 Arbitration 219, 223 (1987) ("[W]hen I am representing a client in an arbitration, what I am really looking for in a party-nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias"); Doak Bishop and Lucy Reed, Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration (differentiating between a general favourable predisposition, which can be overcome by consideration of the merits, and actual bias, which encompasses a willingness to decide a case in favour of the appointing party regardless of the merits or without critical examination of the merits; most parties seek an arbitrator with a favourable predisposition but without bias).

- A perceived risk that “mutual back-scratching” (between the arbitrators or between arbitrators and counsel) could lead to cases being decided on grounds other than the merits.[139] As noted by Jan Paulsson, "[i]n skilled and malicious hands", an offer, "perhaps no more than implicit, of ‘I will see it your way when I preside and you as co-arbitrator want a particular outcome; and I will then count on you when our roles are reversed,’", can "lead to a series of unanimous awards without the slightest indication of their wicked origin. Such practices (and the very *fear* of such practices) would disappear with the eclipse of the unilateral nominee.”[140]

- Party-appointments can allegedly encourage unhealthy compromise solutions, as the presiding arbitrator seeks to achieve a unanimous decision that will be seen as more legitimate and improve his /her reputation as an arbitrator.[141]

- A risk of bias. Another criticism contends that a significant number of party-appointed arbitrators do not in fact act as neutrals as required under most modern arbitration rules.[142] Critics point, for example, to dissenting opinions, which are almost invariably (in more than 95% of the cases) written by the arbitrator nominated by the losing party.[143] An empirical study of arbitrators suggests that two groups of frequent arbitrators, one with a track record of being appointed by investors and the other with a track record of being appointed by States, were significantly more likely to make decisions that were favourable to investors and States, respectively.[144] As Paulsson recognizes, however, such data are not conclusive evidence of the partiality of party-appointed arbitrators; the parties may simply be correctly identifying arbitrators whose views are more sympathetic to their case.[145]

- Misconduct in arbitration, critics suggest, is more likely to arise with party-appointed arbitrators.[146]

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[139] Thomas Buergenthal, then a judge at the ICJ, criticised the practice of counsel selecting an arbitrator who, the next time around when the arbitrator is counsel, selects the previous counsel as arbitrator, and contends that it should be avoided in order to advance the rule of law. See Thomas Buergenthal, The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law, 22 Arb. Int’l 495 (2006).

[140] Jan Paulsson, Moral Hazard, p. 12-13 (emphasis in original).

[141] See Smit ("compromise will ordinarily be attractive to the chair of the panel, for his or her reputation for obtaining unanimous awards may increase the likelihood of being appointed to future panels"). Paulsson sees several negative consequences including: (i) reducing the likelihood of coherently and sincerely motivated awards, thereby lessening their legitimacy; (ii) harming a party who is 100% right and would be fully upheld by an objective decision-maker; and (iii) favouring an unscrupulous party who has no basis to seek to reduce his debt except the perception that arbitration may let him get away with it. Jan Paulsson, Moral Hazard, p. 12. Critics also contend that party-appointed arbitrators can reduce and even eliminate the free exchange of ideas on the tribunal.

[142] See Smit ("in international arbitration, the party-appointed arbitrator is expected to be objective and impartial. I believe the reality is that many, if not most, of those party-appointed arbitrators respond to their personal incentives and become to a certain extent party advocates within a system that expects them to behave objectively.")

[143] See Paulsson, Moral Hazard, p.8 (citing studies).

[144] See Waibel & Wu, p.16 (finding that arbitrators with a track record of appointment by investors are statistically more likely to find jurisdiction to exist and the State to be liable, while those with a track record of appointments by States are conversely less likely to find jurisdiction and liability to exist; the track record of appointments has more statistical impact than the fact of appointment in the individual case).

[145] A recent empirical survey of ISDS arbitrators suggests that this is the case. Waibel & Wu, p. 38.

[146] Cases relating to ISDS appear to be rare, but they are of course difficult to detect. Two ISDS cases have been described by commentators as involving improper conduct relating to party-appointed arbitrators. See Paulsson, Moral Hazard, pp. 5-8.

These criticisms of the party-appointment system have been rejected by other arbitration specialists such as Alexis Mourre.[147] They emphasise the importance of the parties being able to choose an arbitrator as a core attraction of arbitration for parties. Each tribunal is selected by the parties to the dispute, with the result that both parties can ensure that the tribunal is both unbiased and expert in international investment law. The market for arbitrator selection is seen as operating powerfully to maintain and improve standards.[148] They further contend that the vast majority of party-appointed arbitrators act as neutrals as required and misconduct relating to party-appointed arbitrators is rare. The alternatives to party-selection, and in particular institutional selection of arbitrators, are criticized as in some cases worse than the disease.[149] Some experts have defended party-appointed arbitrators for commercial arbitration, but find the criticism more pertinent with regard to ISDS.[150]

3. Arbitrator incentives

As noted above in the section on costs, arbitrators and arbitration counsel are very highly paid. It has been suggested that arbitrators have a structural conflict of interest in deciding on whether they have jurisdiction to hear each ISDS dispute because they are in effect deciding whether they will continue to be active (and be paid) for substantial additional work on the case in question.[151] In addition to its economic impact in the case at hand, expansive rulings on jurisdiction may contribute to expanding the scope of ISDS arbitral business in the future.[152]

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[147] See Alexis Mourre, Are unilateral appointments defensible? On Jan Paulsson's Moral Hazard in International Arbitration, Kluwer Arbitration Blog (5 October 2010).

[148] William Park argues that this market discipline provides arbitration with a distinctive advantage compared to other dispute resolution mechanisms. See William W. Park, Arbitrator Integrity: The Transient and the Permanent, 4 San Diego Law Review 629, 644 (2009).

[149] As noted above, some leading commercial arbitration institutions, such as the Paris-based ICC and the London-based LCIA, now provide for institutional selection of the presiding arbitrator as the default rule. The LCIA has gone further and provides for institutional selection of the entire three-person tribunal. See http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration.aspx. In contrast, the ICC has retained a default party-selection rule for co-arbitrators. In ISDS, as noted above, both leading sets of rules provide for party selection of co-arbitrators. They also provide for agreement on the presiding arbitrator (by the parties under ICSID, by the co-arbitrators under UNCITRAL). In the absence of selection or agreement, the appointing authority will appoint the co-arbitrator or presiding arbitrator.

[150] See, e.g., Giorgio Sacerdoti, Is the party-appointed arbitrator a "pernicious institution"?, A reply to Professor Hans Smit, Perspectives on topical foreign direct investment issues by the Vale Columbia Center on Sustainable International Investment (15 April 2011) (defending party-appointed arbitrators for commercial arbitration, but finding that "[a]s to investment arbitration, Prof. Smit's argument that arbitral decisions that can affect the State and its people 'should not be rendered by privately selected arbitrators but by arbitrators selected by truly neutral institutions' carries more weight.").

[151] Similar considerations may apply to arbitral decisions categorising particular issues as jurisdictional or as relating to the merits; categorisation of an issue as relating to the merits means that the full case must normally be heard (and ultimately paid for) before the issue can be decided.

Arbitrators also arguably have a further incentive to seek generally to characterise issues as going to the merits or as relating to admissibility rather than jurisdiction because review of their awards generally does not extend to decisions on the former issues. Arbitral decisions are thus more likely to be upheld if the challenge is to decisions on the merits or admissibility.

[152] NGOs have recently sought to highlight the alleged impact of economic incentives and ISDS practices in particular cases. See, e.g., Letter by three NGOs to the three ISDS tribunal arbitrators in the Chevron v. Ecuador case dated 8 Feb. 2012 (requesting information about arbitrator fees and expenses including additional fees expected to be earned if the tribunal decides to continue the case until a full hearing on the merits; and for hearings in the case to be open to the public).

A second possible economic incentive for arbitrators that has been identified is a broader interest in preserving a lucrative ISDS industry. It has been suggested, for example, that this interest could assist in achieving an acceptable degree of consistency of outcomes in ISDS in order to ensure the preservation of the system (see further below section II.H). The interest in system preservation may also heighten arbitrators' sensitivity to potential ethical issues. In contrast, some critics of the ISDS system have contended that because only investors bring claims, the interest in system-preservation (and competition between arbitrators and arbitral institutions for investor business) leads to undue attention to investor interests.

While a number of potential economic incentives can be identified, it is difficult to determine their impact in practice. Many arbitration commentators consider that arbitrators' strong interest in their reputation for good and impartial decision-making (and effective case management) trump these economic incentives to the extent they exist. In some cases, it appears that perceptions differ between the arbitration bar and outside observers with the latter being more critical of current practices without being able to precisely identify the scope of actual problems. However, because investment law itself is based on expectations about the power of economic incentives to affect behaviour – the risk reduction provided by investment treaties is expected to encourage investment by lowering its expected cost – the possible impact of economic incentives on arbitrators should be considered.

4. The question of unequal information or "information asymmetries" in arbitrator selection

Some commentators have identified a problem of unequal information or "information asymmetries" between different parties with regard to arbitrator selection in ISDS.[153] Information about potential arbitrators is seen as a highly valuable commodity which constitutes proprietary information for law firms and arbitration institutions. This gives rise to what has been described as a “grey market” in arbitrator information to which parties frequently have unequal access. Senior partners in law firms, for example, will typically have easier and better access than outsiders to the system to informal information exchange with colleagues with experience with particular potential arbitrators, including in non-public cases.

Due to the need to maintain neutrality, arbitration institutions such as ICSID and the PCA have limited ability to rectify information asymmetries. They typically cannot inform a poorly-informed party even about known poor performance of someone the party is considering as a party-appointed arbitrator or as a chair. Some consider that those institutions compete for arbitration business on the basis of their capacity to select arbitrators including based on non-public information.

The limited empirical research to date on the issue of the effect of arbitrator selection on ISDS outcomes, as noted above, has primarily focused on general outcomes. However, it has been suggested that in practice, lawyers frequently seek information on arbitrator attitudes to narrower procedural and substantive issues on which superior information can be very important.[154] Parties that need to challenge the credibility of a key opposing witness will want to know about potential arbitrators' views about the proper scope of lawyer questioning and cross-examination. Coupled with knowledge about an arbitrator’s views about narrow or broad interpretation of treaty protections or of the particular provisions at issue, including in non-public cases, this type of knowledge may provide significant advantages to a party.

Information asymmetries at the level of parties and their lawyers can be compounded at the level of party-appointed arbitrators: a poorly-chosen party-appointed arbitrator will be less effective in selecting the chair.

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[153] This section is primarily based on the presentation of Professor Catherine Rogers at FOI Roundtable 16, 20 March 2012.

[154] See Rogers, op cit.

5. Regulation of arbitrators

International arbitrators are regulated by various rules and standards, which are found in international treaties, domestic laws and arbitral rules.

In non-ICSID arbitration, arbitrators are primarily regulated by (i) the applicable arbitration rules, if any; and (ii) the laws of the State of the seat of the arbitration. Thus, in an UNCITRAL case sited in Paris, the primary sources of applicable rules for arbitrators would be the UNCITRAL Rules and French arbitration law.

In practice, in non-ICSID arbitration, arbitrators may frequently have considerable power to select the applicable national arbitration law. Only a limited number of investment treaties – around 12% of the treaties that provide for ISDS – address the *situs* of ISDS claims. This silence can leave the decision on *situs* to the arbitrators (unless the disputing parties agree otherwise after the dispute arises).[155]

ICSID investment arbitration differs from non-ICSID arbitration in that it is fully "denationalised" (except for enforcement of the award). In keeping with this positioning, regulation of ICSID arbitrators is primarily addressed by the ICSID Convention and arbitration rules. The national laws on arbitration of the seat of the arbitration are not applicable to ICSID arbitrators.

In general, these sources of law do not provide detailed rules about arbitrators. The limited scope of arbitral regulation has led to the development of soft law complements by the commercial arbitration industry, such as the 2004 "IBA Guidelines on Conflicts of Interest in International Arbitration" (IBA Guidelines) or the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, as revised in 2004. Both the IBA Guidelines and the AAA/ABA Code were developed primarily for commercial disputes, but their drafters consider that they also relevant to ISDS cases and the IBA Guidelines in particular have been regularly cited in ISDS cases. Some commentators have underlined that some serious concerns about ISDS arbitration are not addressed by existing ethical rules or standards.

Two issues for ISDS arbitrator regulation have attracted particular attention: (i) assuring impartiality and independence; and (ii) avoiding issue conflicts that can arise from the multiple roles played by legal professionals active in arbitration (where they serve as arbitrators, legal counsel and experts in different cases). These issues are discussed in turn below.[156]

Independence and impartiality. It is widely recognised that the independence and impartiality of arbitrators are fundamental to due process and the legitimacy of investment treaty arbitration.[157] The ICSID Convention, national arbitration laws and arbitration rules generally all require that arbitrators be independent. Arbitral rules also generally require arbitrators to disclose (both at the outset of the case and on a continuing basis) facts that might give rise to concerns about their independence.[158] Timely and complete disclosure of potential conflicts is recognised as vital to the arbitral process.[159] Disclosure gives

[155] As discussed above in the section on enforcement (II.D.3), selection of the situs also determines the national law applicable to review of the award at the situs.

[156] Annex 5, subheading 4 provides a fuller discussion of the regulation of arbitrators.

[157] See A. Sheppard, Arbitrator Independence in ICSID Arbitration, in C. Binder et al, eds., International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer (2009), p. 131.

[158] ICSID requires a statement of relationships (if any) with the parties and of "any other circumstance that might cause the prospective arbitrator's reliability for independent judgment to be questioned by a party". ICSID Rule 6(2). The UNCITRAL Rules require disclosure of "any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence." Art. 11 (emphasis added). These formulations are designed to encourage disclosure extending beyond facts sufficient to justify disqualification under each system.

[159] See Gary Born, International Commercial Arbitration, p. 1543 (2009).

the parties the opportunity to challenge the prospective arbitrator or accept him/her notwithstanding the disclosed circumstances. However, the applicable rules do not describe in detail what needs to be disclosed. Some commentators have criticised leaving disclosure to the arbitrators' discretion.[160] The IBA Guidelines provide guidance with regard to particular fact situations in some areas, but do not address in any detail the important area of issue conflicts.

The perceived emergence of pro-investor and pro-State arbitrators, as noted above, and their repeated nomination by different parties on the same side of an investor-state divide, also raises questions that are largely absent from commercial arbitration. Repeated appointments of an arbitrator by the same side of the divide are not addressed by commercial arbitration rules or ethical standards that address only repeated appointments by the same company or law firm.

Issue conflicts refer to situations where an arbitrator has either a pre-existing view or a conflicting interest in an issue in a case they are deciding. Investment arbitration is particularly vulnerable to issue conflicts because of the recurring legal issues under the same or similar legal instruments (eg., BITS and/or the ICSID Convention). Laws and rules developed for commercial arbitration do not address issue conflicts in detail because they rarely arise in commercial arbitration.

Issue conflicts can arise because, following the longstanding practice in commercial arbitration, many ISDS arbitrators simultaneously serve as counsel for parties in other ISDS cases. Issue conflicts can thus arise when an arbitrator has ongoing interests relating to the same legal issue as counsel in another case. Thomas Buergenthal, a judge at the International Court of Justice, has criticised the dual arbitrator-counsel role. He considers that the dual role raises questions of due process and should be eliminated in order to ensure that an arbitrator "will not be tempted, consciously or unconsciously, to seek to obtain a result in an arbitral decision that might advance the interests of a client in a case he or she is handling as counsel."[161]

As noted above, it appears that over 50% of ISDS arbitrators act as counsel for investors in other cases while approximately 10% act for States in other cases. The impact of issue conflicts, to the extent they exist, may be unlikely to be neutral as between States and investors if ISDS arbitrators' "second hats" more frequently involve work as counsel for investors than for States.

At present, there are no clear rules addressing issue conflicts in ISDS. In 2004, the ICSID Secretariat suggested expanding ICSID's disclosure requirements to contain the same rule as the UNCITRAL Arbitration Rules (involving disclosure of circumstances likely to give rise to "justifiable doubts).[162] It was noted that this change "might in particular be helpful in addressing perception of issues conflicts among arbitrators". It further suggested the possible adoption of a code of conduct for arbitrators analogous to the one adopted by the WTO. In one recent case, the former deputy Secretary-General of ICSID acknowledged

[160] See Rogers, Regulating international arbitrators, pp. 71-73.

[161] Thomas Buergenthal, The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law, 22 Arb. Int'l 495 (2006); see also Leading Figures in International Dispute Resolution: A Conversation with Thomas Buergenthal, ASIL International Courts and Tribunals Interest Group (uploaded 8 Feb. 2012) (video minute 39:40) (reaffirming view that issue conflicts in arbitration raise serious due process concerns and expressing scepticism at the argument that stricter regulation of issue conflicts would create difficulties in finding qualified arbitrators).

[162] ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration, Discussion Paper (22 October 2004). Art. 11 of the UNCITRAL Rules use a "justifiable doubts" standard and require disclosure of "any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence." A 2009 article reviewing case law suggested that those considering issue conflict challenges under the UNCITRAL rules have been more inclined to uphold a challenge than those in ICSID proceedings. Sheppard, p. 149.

that the practice of ISDS arbitrators also serving as counsel is generally accepted "[a]s things stand today, and irrespective of the advisability of such a situation".[163]

6. Issues for discussion

23) ***The ISDS system has attracted a pool of elite law professionals that are active as arbitrators, but also as counsel and experts.***

a) Does the fact that accomplished law professionals are attracted into the ISDS system contribute to the quality of arbitration available under ISDS?

b) Are you generally satisfied with the competence and impartiality of arbitration panels in ISDS?

24) ***Some senior arbitration specialists have criticised party-selection of arbitrators for ISDS cases while many others reject these criticisms. What are your views on this controversy?***

25) ***The ISDS system appears to create a number of economic incentives for arbitrators. How do these affect the ISDS system, if at all? Are ethics rules and reputational interests sufficient to counteract the economic incentives?***

26) ***Is there in your view a problem of unequal information in the selection of arbitrators in ISDS cases?***

27) ***Do you see a need for different ethical requirements for ISDS arbitrators than for commercial arbitrators? Does the fact that ISDS may engage the public interest more directly than commercial arbitration mean that different ethical requirements should apply?***

28) ***As noted in the text, the risk of issue conflicts in ISDS (notably due to arbitrators' "dual hats" as arbitrator and counsel) has been criticised. What are your views on this question?***

II.G. Forum shopping and treaty shopping

In international investment law, forum shopping and treaty shopping are separate, but related practices undertaken by investors. This section defines both terms and briefly reviews factors that influence these practices. Some considerations that State parties to investment treaties might wish to keep in mind with respect to forum and treaty shopping are also explored.

1. Forum shopping

In general terms, forum shopping involves efforts by disputing parties to have the dispute resolved by what they believe is the most favourable forum for their interests. Parties compare possible fora with respect to a wide range of variables such as the likely decision-makers; the integrity of the adjudication process; the applicable law for considering the merits of the case; the degree of transparency of proceedings; and the impact of the choice of forum on execution and enforcement[164]. Parties also consider the likelihood of each

[163] *Gallo v. Canada*, Decision on the Challenge to Mr. J. Christopher Thomas, QC, § 29 (14 October 2009) (NAFTA/UNCITRAL case in which ICSID Secretary-General serves as appointing authority applying UNCITRAL challenge standard).

[164] For more on the dynamics of forum shopping decisions see Christopher Whytock, The evolving forum shopping system, 96 Cornell Law Review 481, 485-490 (2011).

forum accepting the case. The initial choice of forum may subsequently give rise to protracted arguments about the appropriateness of the choice.

Domestic legal systems appear to generally try to limit or discourage forum shopping. Legal rules on jurisdiction and competence often seek to try to identify neutral criteria to determine the appropriate fora. For claims against the State in particular, whether in the nature of judicial review or claims for damages, competence rules may be precisely defined.

Issues raised by forum shopping under international law are dealt with below under two headings. First, forum shopping under general international law is briefly examined. Second, the more specific case of forum shopping under international investment law is addressed.

a. Forum shopping under general international law

The emergence of international adjudicating bodies addressing at least partially overlapping subject matters (e.g. trade, human rights, investment) may make it possible for a claimant to seek compensation for the same harm before different tribunals, and under different bodies of laws. Forum shopping in international law has been described as a newly-acquired "luxury[165]" – "for a long time and in most cases, there was simply no international court to turn to, let alone two tribunals whose jurisdiction overlapped. With the recent boom in international tribunals, it is well documented that international law is increasingly confronted with the challenge of managing multiple, overlapping courts."[166]

Because forum shopping among international tribunals is a recent phenomenon, it has received limited attention to date. A number of factors may also attenuate concerns about forum shopping in an international context:

- The fact that international tribunals generally operate under the principle of party consent (in contrast to domestic law, where courts typically operate on constitutional or statutory authority) means that, if States wish to control forum shopping, they can do so by changing the conditions of their consent to arbitrate or by changing the rules of the fora.

- Various international fora may consider the same factual situation, but with respect to different bodies of norms (e.g. human rights, trade or investment). If the objective is not, at least in the medium term, to promote integration of overlapping jurisdictions of international tribunals and their associated bodies of law into a fully unified body of international law, States may be satisfied with multiple tribunals adjudicating cases with reference to their own, distinctive bodies of law, and awarding their own types of remedies.

- The low volume of international disputes (compared with domestic disputes) means that forum shopping among international tribunals may not (yet) give rise to high enough resource costs to make it a priority matter for public policy.

- A "healthy competition among [international tribunals] may also improve the quality of rulings and the expediency of proceedings."[167]

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[165] This and the following paragraphs draw on Joost Pauwelyn and Luiz Eduardo Salles, Forum Shopping before International Tribunals: (Real) Concerns and (Im)possible Solutions, 42 Cornell International Law Journal pp. 79-85 (2009).

[166] Ibid., pp. 79-80. See also Yuval Shany, The Competing Jurisdictions of International Courts and Tribunals (2003).

[167] Pauwelyn and Salles, op. cit., p. 80.

Nevertheless, it is clear that, where international tribunals have overlapping jurisdiction over similar cases, inconsistencies or apparent inconsistencies in decisions can arise. This can pose problems of legitimacy, increased legal costs and uncertainty, as discussed in Section II.H. of this paper.

b. Forum shopping in investor-state disputes

In the broadest terms, it appears that forum shopping in investment law can arise in three ways. First, at the level of international arbitration, investment treaties frequently explicitly give investors a choice of more than one arbitral fora and/or rules.[168] Thus, many investment treaties offer investors a choice of either ICSID or UNCITRAL arbitration, and some offer additional choices. Second, as in international law more generally, an investor may be able to file a claim under a treaty such as the ECHR, which protects property rights, rather than or in addition to a claim under an investment treaty. Third, investors can also frequently choose whether to litigate their case in domestic courts in the host State or in international arbitration (or other international fora). Many investment treaties contain provisions on how recourse to international and domestic fora are to be coordinated. While recognizing the importance of all three types of forum shopping, this section addresses only the first type of forum shopping – investor choice from among multiple international arbitration fora.

Many investment treaties offer investors a choice of forum. These include ICSID, which is both a forum and a set of rules (a center that administers arbitration cases that are subject to a given set of rules and a given governance structure) and the UNCITRAL Rules (which is a set a rules, but not a forum for administering arbitration cases). Slightly over 56% of the bilateral investment treaties in the OECD statistical survey that provide for investor-state arbitration give investors a choice of arbitral fora and this proportion has risen over time.

The consequences of investor choice in this area depend on a number of factors. The first is the degree to which the investment treaty establishes rules for how ISDS is to be conducted: setting more precise rules for procedures in treaties limits the consequences of forum shopping. For example, if the treaty addresses the transparency of all ISDS proceedings under the treaty, the investor's power to choose the arbitral forum will not affect that issue. In contrast, if the treaty is silent, the investor with the choice between ICSID and UNCITRAL will influence to a significant degree the transparency of proceedings. Similarly, the investment treaty may set rules for costs allocation and those rules would then apply in all cases. If the treaty is silent, the investor with a choice between ICSID and UNCITRAL arbitration has a significant degree of influence over the costs allocation rule.[169] In general, the OECD treaty survey finds that most investment treaties engage in only limited direct regulation of ISDS. This means that arbitral forum shopping clauses are likely to increases investors' influence over a significant number of issues.

A second factor in determining the consequences of forum shopping power is the degree of difference between arbitral rules and institutions. It has been suggested that there are trends towards convergence. There may also, however, be forces for divergence particularly if institutions follow differentiation strategies in order to compete to attract investors to file cases. Further study could review this area in more detail.

While the treaty survey shows explicit forum shopping clauses are becoming more common in bilateral investment treaties and that the average number of fora on offer is growing, there appears to be relatively little discussion by governments of their purposes in crafting such clauses. The benefits and costs of allowing investor forum shopping, and the contrast between domestic law policy and investment treaty policy with regard to forum shopping, appear to be rarely addressed. While such forum shopping clauses are likely desirable for some States wishing to maximize protections for foreign investors, recently

[168] For convenience, we use the term forum generally to refer to different arbitral rules or administering bodies.

[169] See above Part II.B.2.

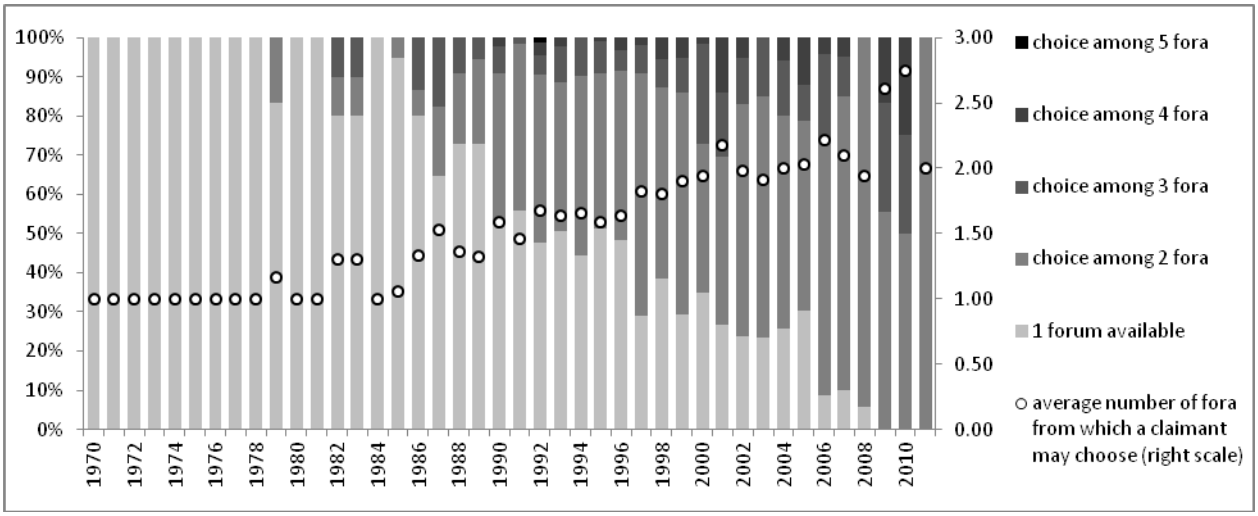
expressed concerns about ensuring a level playing field between domestic and foreign investors may require additional or different policy rationales.[170]

Forum shopping clauses can constitute an important protection for investors; forum shopping clauses may serve to protect investors from the risk that States or groups of States may "capture" a particular forum. However, such clauses also arguably complicate efforts to reform ISDS – if arbitration fora have to compete actively for investors' filings of cases, their ability to implement reforms (at least on matters that are not attractive to investors) may be constrained.

Box 3. Treaty practice on choice of arbitral fora/rules

The OECD survey shows that many bilateral investment treaties allow investors to choose from among a variety of fora. ICSID and *ad hoc* tribunals established under UNCITRAL rules are by far the most often mentioned fora for ISDS (respectively in 90% and 61% of sample treaties containing an ISDS clause). The International Chamber of Commerce comes a distant third (12%). Other less frequently mentioned fora include treaty-designed *ad hoc* tribunals, the *Arbitration Institute of the Chamber of Commerce in Stockholm*, as well as the *Cairo Regional Center for International Commercial Arbitration*, the *Conciliation and Arbitration Centre of the Chamber of Commerce of Bogota*, the *Kuala Lumpur Regional Centre for Arbitration*, the *Cour Commune de Justice et d'Arbitrage* of the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires*, the *Permanent Court of Arbitration*, and the *International Arbitral Centre of the Austrian Federal Economic Chamber*.

The survey shows that treaty practice varies with respect to the number of fora made available to the investor. While 43% of the treaties in the sample provide access to only one forum, other treaties offer the investor a choice from among as many as five different tribunals. On average, bilateral treaties mention 1.7 arbitration fora for dispute settlement, with a marked trend in recent years toward providing wider choice (the average number of fora offered was 2.7 for treaties concluded in 2009 and 2.8 for 2010 treaties).



Finally, the overwhelming majority of sample treaties that provide access to multiple tribunals allow the investor to choose between the available fora.[171] Other treaties condition access to arbitral tribunals to an *agreement* between the parties to the dispute, and provide for a default option in the absence of agreement.[172]

[170] Forum shopping can encourage competition between fora which can lead to better service at lower cost; it is noteworthy, however, that only 2% of ISDS costs relate to the administrative costs of the forum. See above Part II.B.

[171] For example, see the Slovakia-Switzerland BIT (1990), Article 9(2), which states: "If these consultations do not result in a solution within six months, the dispute shall upon request of the investor be submitted to an arbitral tribunal."

2. Treaty shopping

Treaty shopping under international investment law occurs when an investor structures an investment (through incorporation and possibly by restructuring certain business operations) in order to seek to qualify for protections conferred by particular investment treaties. The practice typically involves establishing an entity in a State that is party to a targeted treaty. For example, a US investor may wish to benefit from investment protections for its investment in Zimbabwe, even though the US does not have an investment treaty with Zimbabwe. By structuring the investment through a country (e.g. by establishing a subsidiary in that country) that does have an investment treaty with Zimbabwe – for example, in the Netherlands – the investor may be able to benefit from the protections provided in the Netherlands-Zimbabwe BIT (1996). In effect, the investor attempts to become a national of the Netherlands eligible for treaty protection under the Netherlands-Zimbabwe BIT (1996). Since investors generally do not know the nature of (future) disputes when they are structuring their investments, they may seek to structure their investment in a way that provides potential coverage under several treaties with different characteristics – such as by using several intermediate holding companies in different jurisdictions.[173]

Investors may seek to engage in treaty shopping for several reasons including: (i) to seek to ensure treaty protection where none would otherwise be available; (ii) to seek to benefit from specific substantive protections in particular treaties; or (iii) to seek to benefit from certain procedural or other aspects of the dispute settlement provisions of a particular treaty. Treaty shopping thus raises issue for ISDS as well as with regard to substantive investment law.

Treaty shopping will be facilitated to the extent that the rules enabling an investor to claim BIT protection are interpreted as being permissive. Mapping the scope for investment treaty shopping is a difficult task, in part because many of the relevant concepts have yet to be clarified in treaties and in case law. Issues that affect the scope for treaty shopping notably include the following, which include some of the most frequently disputed issues in ISDS cases:

- investment treaty definitions of the concept of investor and in particular treaties' treatment of nationality of legal persons, and interpretations thereof by arbitral tribunals;[174]

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[172] For example, see the United Kingdom-Croatia BIT (1997), Article 8(2), which states: "Where the dispute is referred to international arbitration, the national or company and the Contracting Party concerned in the dispute may agree to refer the dispute either to: (a) the International Centre for the Settlement of Investment Disputes […];or (b) the Court of Arbitration of the International Chamber of Commerce ; or (c) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United National Commission on International Trade Law. If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures , the dispute shall at the request in writing of the national or company concerned be submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties may agree in writing to modify these Rules."

[173] Law firms are providing clients with advice on investment treaty shopping in structuring their investments. See, e.g., N. Blackaby & S. Noury, International Arbitration in Latin America, Latin Lawyer Review (2006) (section on "Structuring the investment to attract the protection of investment treaties"). The example in the text is drawn from Roos van Os and Roeline Knottnerus, Dutch Bilateral Investment Treaties: A Gateway to 'Treaty Shopping' for Investment Protection by Multinational Companies, SOMO, Amsterdam (Oct. 2011).

[174] A 2008 OECD Working Paper documents variations in treaty writing practice with respect to a key determinant of the scope for treaty shopping – the criteria for determining the nationality of legal persons. The paper states: "Bilateral investment treaties have essentially relied on the following tests for determining the nationality of legal persons: i) the place of constitution in accordance with the law in force in the country; ii) the place of incorporation or where the registered office is; iii) the country of the seat; i.e. where the place of administration is; and iv) less frequently, the country of control[174]." Another survey of treaty practice has found that the most

- the interpretation of the ICSID Convention provisions on investor nationality;[175]
- investment treaty definitions of covered investments together with the interpretation of the reference to investment in article 25 of the ICSID Convention;
- in particular, the degree to which shareholders, including indirect shareholders, are able to bring claims based on injury to the company of which they are a direct or indirect shareholder;
- denial of benefits or similar clauses in investment treaties which may seek, for example, to exclude shell companies from the protection of the treaties;
- the rules on incorporation of companies in possible host State jurisdictions.

In addition to the extensive case law on many of these issues, case law is emerging in a number of other areas relevant for treaty shopping: (i) on several occasions, tribunals have considered disputes involving host States and entities controlled by their own nationals[176]; and (ii) in at least two recent cases, tribunals addressed the temporal aspect of treaty shopping due to allegations that investors restructured their investments in order to seek to benefit from treaty protection *after* the dispute had arisen.[177]

Treaty shopping raises a number of policy issues. As a general matter, businesses frequently seek to structure their affairs to benefit from law that is advantageous to their interests. It is clear that allowing broad scope for treaty shopping may create broad investor eligibility for States' investment treaty protections. Countries that consider that these commitments enhance investor confidence and promote more orderly and effective investment policies might feel quite comfortable with the expansion of investor eligibility for these protections to their own nationals or to investors from third parties. Countries that do not share this view or that, for other reasons, wish to limit eligibility to foreigners may have a different perspective on treaty shopping. Ultimately, the decision as to what, if anything, States should seek to do about investment treaty shopping is closely linked to their underlying objectives in signing investment

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frequently used test for nationality of legal persons in BITs concluded between 1995 and 2006 was the place of incorporation or constitution. See Section II of Katia Yannaca Small and Lahra Liberti, "Definition of Investor and Investment in International Investment Agreements" in International Investment Law: Understanding Concepts and Tracking Innovations, p. 18-19.

Cases addressing arguments that the claimant did not in fact have the nationality of the other Contracting Party include *Aguas del Tunari v. Bolivia*, ICSID, Decision on Jurisdiction (2005); *ADC v. Hungary*, ICSID, Final award (2006); *Saluka B.V. v. Czech Republic*, UNCITRAL, Partial award (2006). See also Antoine Martin, International Investment Disputes, Nationality and Corporate Veil: Some Insights from Tokios Tokelès and TSA Spectrum de Argentina, Transnational Dispute Management, Volume 8, Issue 1 (February 2011).

[175] Article 25 of the ICSID Convention limits the jurisdiction of the Centre to legal disputes arising out of an investment between a contracting state and a 'national' of the other contracting state. The Article defers to the Contracting State parties in setting out criteria for nationality (Article 25.2.(a)). The Article also deals with the issue of foreign owned controlled legal persons and provides that they should be treated a foreign companies only where the State parties so agree (Article 25.2(b)). According to the OECD survey of ISDS treaty provisions, an agreement in line with Article 25.2(b) appears in 301 of the 1700 treaties in the sample. The UNCITRAL Rules do not contain equivalent language on nationality of legal persons, as they do not include jurisdictional rules.

[176] On this issue, see Antoine Martin, op cit., p. 2; see also *Rompetrol v. Romania*, ICSID, Decision on Jurisdiction (2008).

[177] See *Yukos Universal Ltd. (Isle of Man) v. Russia*, UNCITRAL, Interim Award on Jurisdiction and Admissibility (2009); *Philip Morris Asia Ltd. v. Australia*, UNCITRAL, Australia's Response to the Notice of Arbitration (21 Dec. 2012). See also Paul M. Blyschak, Yukos Universal v. Russia: Shell companies and treaty shopping in international energy disputes, 10 Richmond Journal Global Law and Business 179.

treaties, and to how they see treaty shopping as either hindering or facilitating the realization of these objectives.

In addition to this very broad policy issue, a number of more specific concerns for State parties in relation to treaty shopping have been identified:

- ***Legal uncertainty.*** Treaty shopping can make it difficult for States parties to investment treaties to ascertain the exact scope of their commitments under those treaties. This tends to increase the legal uncertainties countries face in relation to these treaties.

- ***Impact on reciprocal benefits and burdens.*** In some cases, States may want to restrict rights to investors from a bilateral treaty partner country and establish a reciprocal relationship. This reciprocity is called into question when investors from third countries can 'shop into" treaties to which their countries are not party. The third country's investors can obtain the advantages of investment treaties without the government having to submit to the disciplines and potential liability created by investment treaties. Treaty shopping may therefore undermine countries' incentives to negotiate investment treaties.

- ***Impact on a level playing field between domestic and foreign investors***. As noted above, some ISDS cases have involved efforts by domestic investors to use treaty shopping to get access to investment treaty arbitration (rather than being limited to their domestic law and courts). These efforts raise the question of whether there is a level playing field between domestic and international investors.

- ***Treaty competition***. Competition arising from treaty shopping may alter treaty negotiating dynamics. A "competitive" investment treaty is one whose substantive and procedural provisions are attractive to investors and whose domestic legal context(s) make it is easy for third-country investors to qualify for treaty protections. Such a treaty becomes *de facto* a treaty with an undetermined number of other countries. Non-competitive treaties, on the other hand, are not used by investors as a source of investment protection. Whether this matters for parties to such treaties depends on what the parties hoped to get from the treaties in the first place and whether or not the treaties actually create the hoped for benefits. Treaty negotiators may wish to think about how "competitive" their treaty package is (that is, treaty language plus other arrangements such as incorporation rules).

3. Issues for discussion

29) ***Many States appear to favour allowing investors to forum shop between arbitral fora. At the same time, most States are less tolerant of forum shopping in domestic legal systems. What explains the different approaches?***

30) ***For States that favour allowing investors to forum shop between arbitral fora, has your government publicly articulated its policy rationale in this regard to parliament or elsewhere?***

31) ***What are your views on the relationship between forum shopping and differences in the rules governing the various arbitration fora (e.g. in relation to transparency and review of awards)? Does the diversity of rules and procedures in the various arbitration fora (e.g. ICSID, UNCITRAL) meet the needs of the societies on behalf of whom investment treaties have been signed?***

32) ***Is the fact that domestic investors have tried (and succeeded) in qualifying for protections under their own countries' investment treaties a source of concern? Why would countries wish to deny to their own investors benefits that they offer to foreign investors?***

33) ***Why would countries wish to deny to third party investors benefits that they offer to the investors of their treaty partner(s)?***

34) ***Is treaty shopping a major problem for your country? If so, why?***

II.H. Consistency of decision-making in ISDS

The issue of consistency involves, broadly, the question of whether adjudicatory bodies are resolving the same or similar legal or factual questions in the same or similar way in successive cases. In recent years, a debate has emerged about alleged inconsistency in ISDS – whether it exists, if it is a problem and, if so, what should be done about it.

In an OECD context, concerns were raised in 2002-2005 and significant consideration was given to the possibility of developing an appellate mechanism as a method of addressing inconsistency.[178] A March 2011 Legal Experts Meeting also considered aspects of consistency in ISDS. This section of the scoping paper provides an initial analysis of the complex issues raised by attempts to evaluate consistency in ISDS.

The section first provides general consideration on the benefits of consistency and how it interacts with other valued characteristics of dispute resolution outcomes. A rough typology of consistency issues is discussed and some key areas of ISDS where consistency is at issue are identified. Some challenges of assessing consistency, generally and in the ISDS context, are then identified.

1. Consistency can enhance security, predictability and legitimacy, as well as reducing costs and frequency of dispute settlement

One of the main purposes of international rules on trade and investment is to meet the needs of traders and investors for security and predictability. Dispute settlement that generates consistent interpretations helps meet this need. The WTO Dispute Settlement Understanding and Appellate Body, for example, expressly recognise the role of the WTO dispute settlement system and of consistent case outcomes in fostering this security and predictability.[179]

A reasonable degree of consistency is also important to the legitimacy and perceived fairness of a dispute resolution system. If similar cases are not resolved in similar ways, public confidence in the system is weakened. Legitimacy can be undermined, in particular, by suspicions that inconsistencies may not be random as between parties, States and contexts.

In addition to investors and the general public, States have a particular interest in the consistent interpretation of investment law. Collectively, they are the primary users of the system because they are litigants in every case. With the rapid growth in the number of claims, they are increasingly subject to its rules as potential respondents and need to judge their exposure in formulating policies. Prior review of government measures for investment law compliance, as discussed in relation to green growth policies at

[178] See, for example, Katia Yannaca-Small, Improving the System of Investor State Dispute Settlement: An Overview, in International Investment Perspectives. Available at: www.oecd/daf/investment.

[179] See WTO DSU art. 3(2) ("The dispute settlement system of the WTO is a central element in providing security and predictability to the multinational trading system."); WTO Appellate Body report, United States— Final Anti-Dumping Measures on Stainless Steel from Mexico, ¶ 162, WT/DS344/AB/R (30 April. 2008).

the March 2011 FOI Roundtable[180], is made more difficult by inconsistent rules. Inconsistent rulings may also compel States to seek to renegotiate numerous treaties in order to reduce legal uncertainty.

Consistency can also increase the cost-effectiveness of dispute settlement for parties to disputes and potential disputes. Where issues are open and the subject of conflicting rulings, cases are more expensive because more issues need to be briefed and more research done by both lawyers and arbitrators. Settlement negotiations are made more difficult by greater legal uncertainty.

2. Weighing the benefits of consistency against other considerations

While consistency is an important value for evaluating systems of adjudication, it is necessary to recognise that all legal systems have many legal issues that remain unresolved for extended periods. Moreover, working through challenges to accepted thinking through litigation are part of well-functioning systems. Consistency is thus by nature a question of degree – a certain amount of inconsistency may need to be tolerated as the system works out its approach to issues.

Consistency can only be evaluated over time. An undue emphasis on requiring consistency with the first decisions addressing a problem may not be desirable. When a legal system is confronted with a new problem in the context of disputes, it may take some time for case law to develop. In domestic systems, higher appellate courts that can choose their cases often wait until an interpretive issue has been addressed by a number of intermediate appellate courts before seeking to resolve it. In a system without an appellate structure, it may similarly take some time before a consensus approach is reached. The problem becomes more acute when inconsistent decisions accumulate over time and there is no mechanism to resolve the issue in a definitive manner.

Achieving consistency also entails costs. For example, appellate review produces more consistent rules because conflicting decisions can be confronted and the conflicts resolved. However, appeals and review procedures are costly and take time. There is no necessary relationship between the scope of review and the costs or delay: for example, although the WTO system addresses legal error much more broadly than does review of awards in ISDS, the WTO generally resolves appeals in 90 days, thus limiting both legal costs and damages incurred during the pendency of the appeal.

Parties may be more interested in obtaining a resolution of disputes than in creating case law to clarify treaty provisions. While consistent adjudicatory decisions help to create, clarify and reinforce norms that elucidate rights and responsibilities, the parties to a dispute might, understandably, be less interested in contributing to the development of norms than in getting a quick resolution to their dispute.

A number of tools exist to promote consistency in adjudication. Transparency or publication of decisions is one of them. ICSID has taken steps to enhance transparency, but the debate on transparency is still active in UNCITRAL. Some ways of achieving consistency – especially the creation of permanent review bodies – may have or been seen by some as having other possible undesirable effects – e.g. for appellate review under ISDS, a danger of re-politicisation of the system.[181] At the same time, the successful WTO experience with the Appellate Body suggests that politicisation is not inevitable. Similarly, investors may feel that a more consistent system could be overall less favourable to investor interests. While arbitral panels are chosen on an equal basis, a permanent interpretive body might be seen as likely to be staffed primarily or fully by representatives chosen by States.

[180] See Summary of 14th FOI Roundtable, p. 6, http://www.oecd.org/dataoecd/9/26/48374749.pdf

[181] See Katia Yannaca-Small, Improving the System of Investor State Dispute Settlement: An Overview, in International Investment Perspectives, p. 195 (section on "Politicisation of the system").

All systems of adjudication embody a certain de facto tolerance for inconsistency, which may be high or low. Tolerance will depend on the costs of wrong judgements, the need to work through legal issues and the costs of obtaining consistency. Some considerations on tolerance for inconsistency for ISDS include:

- Beyond their large potential impact on the public purse, some ISDS cases involve review of government measures on issues of great public interest such as anti-tobacco policies or environmental policies. Inconsistent approaches to the evaluation of such policies raise more concerns for society at large than inconsistent approaches to the interpretation of commercial contracts.

- Greater transparency, which makes inconsistencies visible, also affects tolerance. The publicity now increasingly given to ISDS awards and cases makes apparent inconsistencies more visible.

- The need to work through issues of legal interpretation. It may be that the meaning of certain investment law concepts needs to be further worked out and inconsistent decisions make be an integral part of the process.

3. Rough typology of ways in which inconsistency arises in ISDS

Two broad ways in which inconsistency can arise in investment arbitration can be identified, although there is some overlap. A first involves general inconsistency of interpretation of legal standards/rules in different disputes. A second involves inconsistency in outcomes in separate cases involving essentially the same dispute; this arises principally where related parties bring separate cases.

Cases of inconsistency of interpretation of legal standards/rules in different disputes can be further subdivided into two categories.

- Different tribunals disagree about the same treaty provision.

- Different tribunals under different investment treaties decide disputes involving a similar commercial situation and similar investment rights, but come to opposite conclusions.[182]

Related party cases involving the same dispute can take a number of forms. The most frequent would appear to be separate claims by a company and by a shareholder of the company, both raising essentially the same issues of alleged mistreatment of the company.[183] Another form, discussed below, are claims brought by different shareholders of the same company.

The related party(ies) may bring not only separate ISDS cases, but also similar cases under other dispute resolution systems.[184]

In addition to analysing areas of apparent inconsistency in order to determine the scope of the problem, it is important to compare the scope of inconsistency with the areas in which the ISDS system is resolving issues in consistent ways. A recent commentator has argued that the consistency of ISDS is greater than commonly supposed and that the system has produced largely consistent results, including with regard to a

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[182] See Susan D. Franck, The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions, 73 *Fordham Law Review* pp. 1521, 1545-1546 (2005).

[183] The conflicting outcomes in the *Lauder* and *CME* cases against the Czech Republic referred to above are an example of this type. See *Lauder v Czech Republic*, UNCITRAL, 3 September 2001; *CME v Czech Republic*, UNCITRAL, Partial Award, 13 September 2001.

[184] For example, Turkey has faced both ISDS and ECHR cases arising out of its disputes with the Uzan family.

number of the issues identified above. He suggests inconsistency may exist only at the margins and there may be substantial agreement as to the core of key investment law concepts.[185]

4. Evaluating consistency is an important but challenging task

During the discussion at FOI Roundtable 15, a substantial number of State participants felt that there is a serious problem with regard to consistency in ISDS. It was suggested that the institutional structure of ISDS with ad hoc panels composed of different arbitrators for each case was not designed to achieve consistency, had not done so and was not likely to do so in the foreseeable future. These participants stressed the costs and risks for investors and for States, which, as a result of perceived inconsistencies, could not be sure how their treaties would be applied to important public interest issues. Some delegates suggested that the consistency problem should be considered in the broader context of addressing the state of substantive investment law, with its numerous variations of legal language contained in treaties.

Some other delegates suggested that the problem should not be exaggerated. One underlined that there should be a certain tolerance for inconsistency. He noted that he was from a country that has not yet been a respondent, but suggested that FOI participants should have more trust in an arbitration system that has shown its value and is fundamentally sound. As noted above in the section on arbitrators, it was also suggested that the interest of the arbitration bar in preserving the ISDS system could play a positive role with regard to achieving consistency. Another delegate contrasted what he considered to be the higher degree of consistency in the NAFTA system, due notably to active State interest in the ongoing interpretation of the treaty, with the more serious situation regarding consistency in ISDS generally.

Assessing the degree of consistency of decisions is challenging in a decentralised system like ISDS composed of 3000 different treaties. Those treaties have many similarities but also many differences, both obvious and in detail. While two cases may both address a particular issue, such as fair and equitable treatment and its relation to the international minimum standard, they may be addressing different treaties with significantly different wording of the relevant standards.

Indeed, some States may have deliberately modified or clarified their treaty language in light of previous interpretations or arguments about treaties. Due recognition of such differences in treaty language and intent is important. Accordingly, such situations may properly give rise to different interpretations but should not, without more, give rise to concerns about consistency.

Beyond differences in language, other factors may also come into play and provide explanations for differences in case law interpretations of greater or lesser acceptability from a public policy point of view: e.g. the quality of legal argument and case strategy; particular facts and attitudes of the parties.

It is apparent that consistency should not be confused with uniformity in a world of differing State interests and differing treaty language. Given States' varying interests, it has been suggested by some that the system should be an “intelligent” one that provides different solutions for different users of the system, including developing countries who need policy space for their development. It has also been suggested that predictability might be a better term than consistency to capture the goal at issue.

[185] Oral presentation of Emmanuel Gaillard on the question of consistency in ISDS, at L'arbitrage relatif aux investissements: nouvelles dynamiques internationales", conference at l'Hôtel du Ministre des Affaires étrangères et européennes de la France (4 March 2011) (arguing that the problem is not serious although the brevity of the presentation did not allow for analysis of case law).

5. Issues for discussion

35) ***How does your government evaluate the consistency of ISDS?***

36) ***Is it important for the ISDS system to produce consistent results?***

37) ***How should consistency as a value be weighed against other considerations (costs, speed, need to work out issues through case law)?***

38) ***Is the current architecture of ISDS suited to promoting consistency?***

39) ***The scoping paper notes that some inconsistency is an unavoidable feature of any dynamic system of adjudication. Inconsistent decisions can be part of the process by legal concepts are analysed and clarified. Is this need for clarification and innovation a feature of ISDS?***

40) ***As noted in the section on remedies, under some advanced systems of administrative law, such as in Germany, claimants seeking damages must first seek judicial review or primary remedies. Multiple proceedings are thus required to obtain damages. In addition, all domestic systems allow judgments awarding sizable damages against governments to be appealed. Are advanced domestic administrative law systems relevant comparators for evaluating the importance of finality with regard to ISDS arbitration decisions awarding damages?***

41) ***ISDS cases frequently involve huge claims. Damages awards are generally far below the claimed amount, but remain sizable in many cases. Is it more important to have consistent outcomes in cases that involve high monetary compensation?***

PART III. INVESTMENT TREATY PRACTICE AND ISDS

III.A. Presentation of the OECD statistical survey of bilateral investment treaties

States give their consent to participate in ISDS and specify (in more or less detail) its institutional characteristics in some 3,000 international investment treaties. Analysing the range of investment treaty texts on ISDS is an important input to evaluating policy in this area because these texts are among the most important tools available to governments as they seek to ensure that ISDS serves to enhance, to the maximum extent possible, the welfare of the societies on whose behalf investment treaties have been concluded. Yet, with such numerous and diverse texts, obtaining a broad picture of treaty content in relation to ISDS is a challenging task.

In order to assist policy makers with this task and as part of its broader work on ISDS, the OECD Secretariat has prepared a statistical survey based of ISDS provisions from among a sample of 1,660 bilateral international investment agreements (IIAs) concluded by the 54 countries that participate in the FOI Roundtables with any other country.[186]

The statistical sample includes 1,660 bilateral investment treaties (BITs) and other bilateral agreements with investment chapters, mainly Free Trade Agreements (FTAs), regardless of whether these treaties are in force or not. The bilateral treaties that comprise the sample are also compared with some multilateral agreements with investment chapters.

ISDS provisions appear primarily in two places in sample treaties: in clauses or sections on expropriation; and in specific articles or sections dealing on ISDS. For this reason and in order to manage the complexity of the survey, the survey focuses only on these two texts (separate ISDS articles or sections and expropriation clauses). Thus, when referring to ISDS provisions, the study refers only to expropriation clauses and specific ISDS sections or articles.

The survey presents a statistical portrait of ISDS provisions of this sample of bilateral treaties. It seeks to enhance the information available to the international investment community on investment treaty practice in relation to ISDS. The intention is for the Secretariat to provide a factual and statistical catalogue of a vast body of treaty content and not to in any way engage the OECD or countries participating in the FOI Roundtables regarding interpretation of specific treaty language. In light of the volume of material and the complexity of the issues raised, the survey does not use of refer to arbitral jurisprudence that may seek to interpret the same clauses; the survey is meant to portray the content, in aggregate of the treaty sample, thereby shedding light on treaty writing practice for the 54 countries covered in the survey.

The survey sheds light of countries' propensity to include ISDS provisions in their bilateral treaties and on specific characteristics of these provisions (e.g. limitation on access to ISDS, coordinating domestic judicial review and international arbitration, composition and regulation of arbitral tribunals, applicable laws and remedies).

[186] Austria, Argentina, Australia, Belgium, Brazil, Canada, Chile, China, Colombia, Costa Rica, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Serbia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, Ukraine, United Kingdom, and United States.

III.B. Key findings of the survey

Key findings from the survey include:

- 96% of the sample treaties contain language on ISDS including both domestic courts and international arbitration (see treaty survey, figure 1). ISDS through international arbitration has become a common feature of IIAs – only 108 treaties, or 7% of the sample, do not provide for international arbitration. However, a few recent treaties, such as the Australia-United States FTA (2004), do not provide for investor-state arbitration.

- Many countries only lightly regulate ISDS in their bilateral agreements. There is heavy reliance on arbitral rules and in particular the ICSID system developed for investor-state disputes and the UNCITRAL Arbitration Rules, developed primarily for commercial arbitration. There is an upward trend in the number of ISDS issue categories addressed in treaties. A few countries now tend to include ISDS provisions that are both comprehensive and detailed.

- Light regulation can result in some significant differences compared to domestic procedural frameworks. For example, only 7% of bilateral investment treaties that provide for ISDS establish time limits for the bringing of investor claims in arbitration. The issue is not addressed in the ICSID Rules; nor is it addressed in the UNCITRAL rules or other commercial arbitration rules.[187] Likewise, the issue of final remedies is only rarely addressed in bilateral investment treaties. The policy rationale for failing to address major issues such as these appears to have been rarely addressed.

- 56% of the sample treaties offer investors the possibility to forum shop between at least two arbitration fora, most frequently ICSID and UNCITRAL. Where light regulation coexists with a forum shopping option, the treaty may give investors significant power to choose or influence the rules or practices governing a variety of issues. For example, ICSID addresses the permitted scope of diplomatic protection relating to investor-state arbitration whereas UNCITRAL does not. Treaties that offer a choice of fora to investors and that do not address diplomatic protection may *de facto* leave the rules governing the issue to investor choice (via his choice of forum).

- In addition to frequently being light, regulation of ISDS is highly diverse. The sample contains an estimated 1,200 different rule sets on ISDS among the 1,660 bilateral treaties. The effects of this variation are not always obvious.

    - *Variations in coverage of ISDS issues*. Most of the treaties deal with a limited set of ISDS issues. Seventeen issue categories were identified in the treaty sample (e.g. remedies, cost allocation, coordination of domestic court proceedings and international arbitration). States' propensity to cover individual issues varies widely.

    - *Fine variations in treaty language*. In addition to differences in the issues addressed, the survey notes that there are many variations in details of language used to describe specific concepts (e.g., for pre-dispute requirements, "*negotiations*", "*amicable negotiations*", "*negotiations or consultations*", "*consultations and negotiations*", "*friendly agreement*", etc.) are also a feature of treaty language. In some cases, such differences have at least the potential to influence legal outcomes and thus to attract (costly) legal argument.

[187] Claims in commercial arbitration are generally based on national law and thus are generally subject to limitations periods under such law.

- As set forth in treaty language, the right to bring an investment-related claim to international arbitration is now mainly provided in addition to an explicit reference to the possibility of resorting to domestic proceedings.[188] Treaties since 1972 frequently state that domestic proceedings are available for claims arising under all substantive treaty provisions. In earlier treaties, treaties often referred to domestic proceedings only with regard to expropriation. 70% of recent treaties explicitly mention domestic judicial review as a dispute settlement mechanism in their ISDS clauses. Many also seek to coordinate the use of domestic judicial review with investor recourse to international arbitration.

- Many countries' treaty samples – especially those of countries whose treated practice has evolved over time – show "legacy" characteristics. These characteristics emerge when, first, treaty writing practice is dynamic (ISDS policy evolves) and, second, when the stock of treaties is not frequently updated. Indeed, investment treaties seem to have a long life expectancy. The average age of the treaties in the sample is 16.5 years. Several countries have an average treaty age of almost 21 years (e.g., the United Kingdom, Norway and France). Colombia is the country with the lowest average treaty age in the sample: 7.7 years. Consideration of how treaty users deal with the various treaty "vintages" is beyond the scope of this paper, but the question of how legal innovations and changes of policy get reflected in the stock of treaties over time may merit further reflection.

III.C. Issues for discussion

42) ***What reasons explain the wide preference for inclusion of international arbitration in bilateral investment treaties?***

43) ***Many of the ISDS provisions contain texts requiring attempts at amicable settlement and coordinating recourse to international arbitration relative to domestic judicial procedures. Are these provisions important parts of States' consent to arbitrate?***

44) ***Why do many States engage in light regulation of ISDS in their bilateral investment treaties?***

45) ***The survey of ISDS provisions in investment treaties shows differences (among treaties and countries) in treaty language with respect to essentially all issues covered. What do you think about this degree of variation in language? Is it useful? If so, for what purpose?***

46) ***Many countries' older treaties are different than their newer treaties. Is this a source of concern for these countries? Why are investment treaties and, more specifically, their ISDS provisions not updated more frequently?***

[188] As the survey notes, it is limited to the analysis of treaty text. The ability of investors to have recourse to the domestic courts, and the applicable law in such disputes, may depend on other law.

ANNEX 1

International Enforcement and Dispute Resolution Bodies in Context

International Judicial Bodies (from Cesare P.R. Romano, August 2001) Project on International Courts and Tribunals New York University)								
General Jurisdiction	**International Criminal Law/Humanitarian law**	**Human Rights**	**Trade, Commerce and Investments**	**Regional Economic and Political Integration Agreements**				
▪ **EXISTING** • International Court of Justice (1946 →) ▪ **EXTINCT** • Permanent Court of International Justice (1922-1946) **Law of the Sea** ▪ **EXISTING** • International Tribunal for the Law of the Sea (1996 →) **Environment** ▪ **PROPOSED** • International Court for the Environment	▪ **EXISTING** • International Criminal Tribunal for the Former Yugoslavia (1993 →) • International Criminal Tribunal for Rwanda (1995 →) • International Criminal Court (2004 →) ▪ **EXTINCT** • African Slave Trade Mixed Tribunals (1819-1866 circa) • International Military Tribunal at Nuremberg (1945-1946) • International Military Tribunal for the Far East (1946-1948) ▪ **ABORTED** • International Prize Court (1907)	▪ **EXISTING** • European Court of Human Rights (1959-1998 / 1998 →) • Inter-American Court of Human Rights (1979 →) ▪ **NASCENT** • African Court on Human and Peoples' Rights (1998) The Protocol to the African (Banjul) Charter on Human and Peoples' Rights entered into force in January 25, 2004. However, by the time this synoptic chart was updated (November 2004), the ACHPR had not yet started operating. ▪ **PROPOSED** • International Human Rights Court	▪ **EXISTING** • World Trade Organization Dispute Settlement Understanding (1995 →) The DSU created a dispute settlement system based on a standing political organ (the Dispute Settlement Body), comprising all members of the WTO, a set of ad hoc expert panels, and the Appellate Body. The reports of the Panels and the Appellate Body can be rejected by the DSB only by consensus. Strictly speaking, only the Appellate Body belongs in this column, while the DSB and the panels should be listed in the section, "Permanent Arbitral Tribunals/Conciliation Commissions". ▪ **PROPOSED** • International Loans Tribunal	**Europe** ▪ **EXISTING** • Court of Justice of the European Communities (1952→) • Benelux Economic Union Court of Justice (1974 →) The Benelux College of Arbitrators has been listed in the section "Permanent Arbitral Tribunals / Conciliation Commissions". • Court of First Instance of the European Communities (1988 →) The European Court of Auditors (1977→) is not quite an international judicial body (see back). It is an internal control body of the European Union. It examines whether EU budgetary revenue has been received, and the corresponding expenditure incurred, in a legal and regular manner. The Court does not formally adjudicate	The Court does not formally adjudicate disputes (although it can render advisory opinions). When auditors discovers cases of irregularities, including suspect fraud, the information is communicate to the Community bodies responsible in order that they may take appropriate action. EFTA Court (1994 →) ▪ **DORMANT** • European Nuclear Energy Tribunal (OECD) (1957) • Western European Union Tribunal (1957) • European Tribunal on State Immunity (Council of Europe) (1972)	**Europe/Central Asia** ▪ **EXISTING** • Economic Court of the Commonwealth of Independent States (1993 →) **Africa / Middle East** ▪ **EXISTING** • Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa (1997 →) • Court of Justice of the Common Market for Eastern and Southern Africa (1998 →) • Court of Justice of the African Union (2003) • Court of Justice of the Economic Community of West African States (ECOWAS) (2001 →) • Court of Justice of the West African Economic and Monetary Union (1996 →) • Court of Auditors of the West African Economic and Monetary Union (2000 →) • East African Court of Justice (2001 →)	▪ **EXTINCT** • East African Community Court of Appeal (1967-1977) • East African Community Common Market Tribunal (1967-1977) • Economic Community of West African States Tribunal (1975-1991) ▪ **DORMANT** • Judicial Board of the Org. of Arab Petroleum Exporting Countries (1980) • Court of Justice of the Economic Community of Central African States (1983) • Court of Justice of the Arab Maghreb Union (1989) • Court of Justice of the African Economic Community (1991) ▪ **NASCENT** • Southern Africa Development Community Tribunal (2000)	▪ **PROPOSED** • International Islamic Court of Justice • Arab Court of Justice **Latin American / Caribbean** ▪ **EXISTING** • Court of Justice of the Andean Community (1984 →) • Central American Court of Justice "Corte Centroamericana de Justicia" (1994 →) ▪ **EXTINCT** • Central American Court of Justice "Corte de Justicia Centroamericana"(1908-18) ▪ **ABORTED** •Central American Tribunal (1923) ▪ **NASCENT** • Caribbean Court of Justice (2001) ▪ **PROPOSED** • MERCOSUR Court of Justice • Inter-American Court of Intl. Justice

Quasi-Judicial, Implementation Control and other Dispute Settlement Bodies

Human Rights and Humanitarian law Bodies

▪ EXISTING

• ILO Commission of Inquiry (1919 →)
• ILO Committee of Experts on the Application of Conventions and Recommendations (1926 →)
• ILO Conference Committee on the Application of Conventions (1926 →)
• United Nations Commission on Human Rights (1946 →)
• ILO Governing Body Committee on Freedom of Association (1950 →)
•Committee of Independent Experts under the European Social Charter (1965 →) Renamed in 1998 European Committee of Social Rights
• Committee on the Elimination of Racial Discrimination (1969 →)
• International Civil and Political Rights Committee (1976 →)
• Inter-American Commission on Human Rights (1979 →)
• Committee on the Elimination of All Forms of Discrimination Against Women (1981 →)
• Committee on Economic, Social and Cultural Rights (1987 →)
• Committee Against Torture (1987 →)
• African Commission on Human and Peoples' Rights (1987 →)
• European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1989 →)
• Committee on the Rights of the Child (1990 →)
• European Commission Against Racism and Intolerance (1993 →)

▪ EXISTING

• Commission for Displaced Persons and Refugees (Bosnia Herzegovina) (1995 →)
• Commission to Preserve National Monuments (Bosnia Herzegovina) (1995 →)
• Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (2004 →)
• International Humanitarian Fact-Finding Commission (1992 →)

▪ EXTINCT

• European Commission on Human Rights (1959-1998)
• Human Rights Chamber for Bosnia and Herzegovina (1996–2003)
• Human Rights Commission Within the Constitutional Court of Bosnia and Herzegovina (2004-2005)

International Administrative Tribunals

▪ EXISTING

International Labour Organization Administrative Tribunal (1946 →)
• United Nations Administrative Tribunal (1949 →)
• Appeal Board of the Organization for Economic Cooperation and Development (1950 →)
• Appeals Board of the Western European Union (1956 →)
• Council of Europe Appeals Board (1965 →)
• Appeals Board of NATO (196 5 →)
• Appeals Board of the Intergovernmental Committee for Migration (1972 →)
• Appeals Board of the European Space Agency (1975 →)
• Administrative Tribunal of the Organization of American States (1976 →)
•World Bank Administrative Tribunal (1980 →)

▪ EXISTING

• Inter-American Development Bank Administrative Tribunal (1981 →)
• International Monetary Fund Administrative Tribunal (1994 →)
• Asian Development Bank Administrative Tribunal
• African Development Bank Administrative Tribunal
• Latin American Integration Association

▪ EXTINCT

• League of Nations Administrative Tribunal (1927-1945)
• Appeals Board of the European Space Research Organization (1966-1974)
• Appeals Board of the European Space Vehicle Launcher Development Organization

Inspection Panels

▪ EXISTING

• World Bank Inspection Panel (1994 →)
• Inter-American Development Bank Independent Investigation Mechanism (1995 →)
• Asian Development Bank Inspection Policy (1995 →)

Non-Compliance / Implementations Monitoring Bodies (Environmental Agreements)

▪ EXISTING

• Implementation Committee under the Montreal Protocol on Substances that Deplete the Ozone Layer (1990 →)
• IMO Sub-committee on Flag State Implementation (1992 →)
• Implementation Committee of the Protocols to the 1979 ECE Convention on Long-Range Transboundary Air Pollution (1997 →)
• Committee for the Review of the Implementation of the Desertification Convention (2002 →)

▪ EXISTING

• Basel Convention on Control of Transboundary Movements of Hazardous Wastes and their Disposal Compliance Committee (2003 →)
• Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters Compliance Committee (2003 →)
• Compliance Committee of the Cartagena Protocol on Biosafe

▪ NASCENT

• Kyoto Protocol Compliance System (1997)
• Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998)
• Multilateral Consultative Process for the United Nations Climate Change Convention (1998)
• Stockholm Convention on Persistent Organic Pollutants (2001)

International Claims and Competence Bodies – Multilateral/Bilateral

▪ EXISTING

• Iran-United States Claims Tribunal (1980 →)
• Marshall Islands Nuclear Claims Tribunal (1983 →)
• United Nations Compensation Commission (1991 →)
• Claims Resolution Tribunal for DORMANT Accounts in Switzerland (1997 →)
• German Forced Labour Compensation Programme (2000→)
• Eritrea-Ethiopia Claims

▪ EXTINCT

• American-Mexican Claims Commissions (1868, 1923 and 1924)
• Conciliation Commissions under the 1947 Peace Treaty with Italy (1947-1965*)
• UN Tribunal for Eritrea (1951-1954)
• UN Tribunal for Libya (1951-1955)
• Commission for Real Property Claims of Displaced Persons and Refugees (Bosnia and Herzegovina) (1995-2003)

▪ EXTINCT

• Property Commissions under the Peace Treaty with Japan (1951-1961*)
• Arbitral Tribunal and Mixed Commission under the 1953 London Agreement on German External Debts (1953-1980*)
• Arbitral Commission on Property, Rights, and Interests in Germany (1956-1969)
• Austro-German Property Arbitral Tribunal (1961-1973)

This list is not exhaustive, but only illustrative. There are more than 80 mixed arbitral tribunals and claims commissions that were created in the nineteenth and twentieth centuries in the wake of armed conflicts and revolutions. Most of them were created in the aftermath of World Wars I and II.
* This is the date in which the last award was made.

Permanent Arbitral Tribunals/Conciliation Commissions

▪ EXISTING

• Permanent Court of Arbitration (1899 →)
• International Joint Commission (1909 →)
• Bank for International Settlements Arbitral Tribunal (1930 →)
• International Civil Aviation Organization Council (under the 1944 Chicago Convention the ICAO Council has certain dispute settlement competences) (1944 →)
• International Centre for the Settlement of Investment Disputes (1966 →)
• Gulf Cooperation Council Commission for the Settlement of Disputes (1981→)
• Court of Arbitration for Sport (1984 →)
• North American Commission on Environmental Cooperation (1993→)

▪ EXISTING

• NAFTA Dispute Settl. Panels (1994 →)
• Arbitration and Mediation Center of the World Intellectual Property Organization (1994 →)

▪ EXTINCT

• Upper Silesia Arbitral Tribunal (1922-1937)
• OAU Commission of Mediation, Conciliation and Arbitration (1964-1999)
▪

▪ DORMANT

• Arbitral Tribunal of the Inter-governmental Organization for International Carriage by Rail (OTIF) (1890)
• Arbitral College of the Benelux Economic Union (1958)
• Court of Arbitration of the French Community (1959)
• Arbitration Tribunal of the Central American Common Market (1960)
• OSCE Court of Conciliation and Arbitration (1994)

Internationalized Criminal Courts and Tribunals

▪ EXISTING

• Special Court for Sierra Leone (2003 →)
• "Regulation 64" Panels in the Courts of Kosovo (2000 →)
• Serious Crimes Panels in the District Court of Dili (East Timor) (2000 →)

▪ NASCENT

• Extraordinary Chambers in the Courts of Cambodia (2003)

▪ PROPOSED

• Special War Crimes Chamber for Bosnia-Herzegovina

The so-called Lockerbie Trial Court was not an international body nor an internationalized one. It was a Scottish court, applying Scottish criminal law. Unlike the bodies listed in this column, it did not carry out its functions under international supervision.

Truth and reconciliation commissions (like the ones created for South Africa, Guatemala, Argentina, etc.) are not listed in this chart because, although of international interest, they are essentially domestic endeavours.

The Iraqi Special Tribunal (2004 →) is not listed here as it is neither a fully international nor an internationalized criminal body. It is an Iraqi tribunal, composed of Iraqi judges, and applying Iraqi law. Be that as it may, under the IST Statute, non-Iraqi nationals may (and in practice do) assist or observe the work of the Special Tribunal.

ANNEX 2.

Summary of Selected International Dispute Resolution Systems

	Investor-state arbitration under investment treaties	**World Trade Organisation (WTO)**	**European Court of Human Rights (ECHR)**
GENERAL			
Access to the system	Broad access for a wide range of investors and investments under most treaties and arbitral decisions. Foreign nationality required but specific requirements can vary. Acceptance of jurisdiction over shareholder claims for injury to company in many cases.	Only WTO members.	Broad access. Individuals, groups of individuals, NGOs, companies (even if dissolved), shareholders, trusts, professional associations, trade unions, political parties and religious organisations may all submit applications. Property rights claims require "possession". No nationality requirement (both nationals and foreign persons). Shareholder claims for injury to company are only exceptionally allowed unless the shareholder can show it was impossible for the company or its liquidator to commence domestic proceedings.[1]
Key overlaps with investment law	N/A	Cross-border services and cross-border trade where linked to an investment in some cases. Trade-related investment measures (TRIMs).	Broad overlap. Right of property (art. 1 Protocol 1); right to a fair hearing (art. 6 ECHR); Prohibition of discrimination including based on national origin (art. 1 Protocol 12).
Number of cases	Total unknown. 390 known treaty-based cases as of end 2010 (UNCTAD). ICSID (245 cases) and UNCITRAL (109). Other venues are used infrequently, with 19 cases at the SCC, six with the International Chamber of Commerce and four ad hoc. (Id.) 25 known new cases filed in 2010.	427 as of September 2011 (including requests for consultations at outset of dispute). (WTO) 17 new requests for consultations in 2010.	Over 150,000 cases pending as of 2011. Many cases (over 80%) are struck out as inadmissible. The court also has a very high proportion of repeat violation ("clone") cases. Huge case load is recent phenomenon: the Court produced only 169 judgments in the decade of the 1980s.

	Investor-State arbitration under investment treaties	World Trade Organisation (WTO)	European Court of Human Rights (ECHR)
DECISION MAKERS			
Decision makers: overall view	Ad hoc arbitrators. For review of awards: (i) Annulment committees (appointed by ICSID); or (ii) national court judges (non-ICSID cases).	(i) Ad hoc panels composed of three individuals, who are not nationals of the parties or third parties to the dispute; (ii) Appellate Body permanent international 7-person tribunal. (iii) Dispute Settlement Body (DSB) is the WTO General Council acting as administrator of the WTO dispute settlement system. Composed of ambassador-level diplomats. Administers the dispute settlement system and maintains surveillance of implementation of rulings. Quasi-judicial role of DSB was essentially eliminated in 1994 with adoption of negative consensus rule (proposed decisions are adopted unless consensus opposes).	47 Judges (1 per State). 9 year term, non-renewable. Various formations (see below). Committee of Ministers of the Council of Europe (COM) comprises the Foreign Affairs Ministers of all the member states, or their permanent diplomatic representatives. Quasi-judicial role of COM eliminated in 1998 (continues to supervise enforcement - see below).
First instance decision making formations	Arbitration tribunals generally with 3 members.	3-person Panels; (panel report adopted by DSB by reverse consensus unless appeal).	Single judge; 3 judge Committee; 7 judge Chamber; or 17-judge Grand Chamber.
Appellate or review formation	ICSID: ad hoc annulment committee of 3 members. Non-ICSID: (i) national courts at the situs of the arbitration; and/or (ii) national courts in jurisdictions where enforcement is sought.	3 judge Divisions of AB. Divisions systematically consult with the other 4 members of AB to help ensure consistency. (AB Report adopted by DSB by reverse consensus)	17-judge Grand Chamber.
Selection of decision makers	Parties and/or appointing authorities. (see Annex 5 of scoping paper)	WTO Secretariat initially proposes panel members. Objections frequent. Parties can agree on panel members. In practice, can be difficult and contentious process. In absence of agreement after 20 days, either party may request the WTO Director-General to appoint the panellists. He/she appoints within 10 days after consultations. In recent years, WTO has appointed about half of the panels. Candidates for AB are nominated by WTO Members; Selection Committee[2] makes recommendations. AB members are then appointed by the DSB by consensus for a term of four years, renewable once. Composition is representative of WTO membership.	Each state submits a list of 3 candidates. Candidates are reviewed by Directorate General of Human Rights and the Committee of Ministers; also assessed by a committee of Parliamentary Assembly. Parliamentary Assembly elects 1 judge from the list for the State party. 2010 Interlaken Conference created Advisory Panel of Experts on candidates for Election to the ECHR to strengthen selection processes.

	Investor-State arbitration under investment treaties	**World Trade Organisation (WTO)**	**European Court of Human Rights (ECHR)**
Selection of decision makers: Importance of Nationality	ICSID: rules discourage appointment of nationals. Non-ICSID: depends on arbitral rules. UNCITRAL: parties have free choice of their party-appointed arbitrator. Appointing authority must take nationality into account.	Panels: No nationals of parties or third parties unless parties otherwise agree. Appellate Body: Nationality irrelevant. Cases are distributed at random to 3-member Divisions.	A national judge[3] always sits (if necessary one is added ex officio) in Chamber or Grand Chamber cases. National judge may but will not necessarily sit in 3-judge Committee formations. National judge cannot be single judge.
Ethical rules for decision-makers	No standard rules or code. ICSID Convention and various arbitral rules require independence/impartiality and set standards for successful challenges. Additional guidance in commercial arbitration industry-generated guidelines (IBA; AAA/ABA). Case law on arbitrator challenges, where public, provides further guidance. IBA Guidelines frequently cited.	1996 WTO Code of Conduct for Dispute Settlement Understanding applies in all cases.	2008 Resolution on Judicial Ethics, adopted by the plenary European Court of Human Rights, applies in all cases.
Ex parte communications[4] with arbitrators/panellists/judges	Not formally regulated. Generally prohibited after tribunal is constituted. Not prohibited during constitution of tribunal. Appropriate scope addressed by some case law and industry-generated guidelines, with some variations.	Prohibited by DSU and by Rules of Conduct.	Not specifically regulated in Resolution on Judicial Ethics. Judges must, inter alia, ensure the appearance of impartiality.

	Investor-State arbitration under investment treaties	World Trade Organisation (WTO)	European Court of Human Rights (ECHR)
COSTS/LENGTH OF CASES/FINANCING			
Duration of proceedings and time limits: first instance	Average duration appears to exceed 3 years. Recent ICSID efforts have significantly shortened average case duration. Ad hoc scheduling of each case. Frequent jurisdictional issues and intensive litigation on collateral issues. Complex fact issues in some cases due to question of treatment of individual investor.	Panel proceedings lasted 404 days on average as of 2007. Tight time limits and relatively standardised procedures. Each party submits 2 written submissions to the panel; panel holds 2 substantive hearings, one after each round of submissions. Need for speed is linked to absence of damages remedy for injury prior to or during pendency of case.	Very large backlog of cases even though Court resolved 40,000 cases in 2010. Primarily a written procedure. Various recent reforms to address case load and backlog. Since Nov. 2010, court applies a priority policy based notably on urgency, impact, existence of questions of general interest, main complaint involving a core right and direct threats to physical integrity and dignity of human beings.
Duration of proceedings and time limits: review and appeals	ICSID: Review is by 3 new annulment committee members selected by ICSID. Annulment proceeding takes about 2 years. Non-ICSID: Depends on national courts and law at situs and in enforcement jurisdictions. Frequently a summary proceeding. Can generally be appealed although enforcement may be possible pending appeal.	Rules require AB decision to be circulated to member states within 90 days from notice of appeal. Very tight standardised schedule. AB generally meets 90-day deadline.	Full rehearing before Grand Chamber. No time limits.
Court/Tribunal costs and Fees for Disputing Parties	Generally considered to average about 18% of total case costs (16% arbitrators; 2% arbitration institution). Case costs (including legal and expert fees) appear to average over USD 8 million dollars. ICSID: Applies a fee cap on arbitrators of USD 3000/day. Non-ICSID: Appears to involves generally higher daily/hourly fees for arbitrators. Negotiated with parties.	None. Panels and AB members receive compensation directly from the WTO budget Funded by member states) and cannot receive compensation from the parties.	None. Judges are paid by Council of Europe whose budget is financed by state contributions. Introduction of (modest) court fees under consideration. (COM has agreed in 2010 on cost/benefit analysis prior to decision).

	Investor-State arbitration under investment treaties	World Trade Organisation (WTO)	European Court of Human Rights (ECHR)
Legal and expert costs	Generally considered to average approximately 82% of total costs. Case costs (including legal and expert fees) appear to average over USD 8 million.	Unknown. Principally borne by states with in-house lawyers. States are permitted to be represented by outside counsel since 1997 AB decision. A 2003 article suggested that an average WTO claim costs in the range of USD 300-400,000 in attorneys' fees.[5] Interested companies are often also represented and assist states. Their legal fees have reportedly reached several million dollars in some major cases.	Requests for costs by applicants are generally very modest compared to ISDS requests. Government costs are unknown.
Cost shifting	Variable outcomes. (see text of scoping paper). Some tribunals award arbitral and/or legal costs in part or in whole, others let each party bear their costs.	None. Each party bears its own legal costs.	One-way cost-shifting. Court may award applicants their necessary, reasonable, actually-incurred legal costs and expenses. Costs are commonly granted, but frequently significantly less than claimed amount. Costs awards generally much less than in ISDS. No costs awards against applicants.
Legal aid	None. Permanent Court of Arbitration Financial Assistance Fund for Settlement of International Disputes can provide funding for states parties to 1899 and 1907 Conventions for PCA administered cases.	Legal aid is given by Advisory Centre on WTO Law (ACWL), an independent inter-governmental organisation. Provides support to 73 developing and least-developed countries at all stages of cases at discounted rates. Provided over 200 legal opinions to governments in 2010. Has assisted developing and least-developed countries with some 40 WTO disputes. Developing country WTO members have made significant use of the DSU as claimants in recent years.	Limited form of legal aid available from ECHR.
Commercial third party financing	Evidence of expanding role. Unregulated.	No evidence of any role. Unregulated.	No evidence of any role. Unregulated.

	Investor-State arbitration under investment treaties	World Trade Organisation (WTO)	European Court of Human Rights (ECHR)
REMEDIES			
Remedies	Investors primarily seek pecuniary remedies such as damages as final remedy. Final relief granted by tribunals is almost always damages or other pecuniary remedy. Increasing requests for and grants of provisional non-pecuniary measures.	No damages or pecuniary remedies. Not expressly excluded by WTO agreements, but considered to be excluded. DSU provides for one final remedy: the withdrawal of the (WTO-inconsistent) measures concerned. Requires changes to domestic law/administration. There is also a temporary remedy which can be applied pending withdrawal: retaliation, ie. suspension of concessions or other obligations.[6] Retaliation can require additional proceedings to determine (i) a reasonable period for withdrawal; (ii) whether compliance achieved within reasonable period; and/or (iii) appropriate scope of retaliation.	Primary remedy is declaration of violation. Places onus on state to rectify situation through domestic measures. Remedies may also include a discretionary award of "just compensation". A number of equitable circumstances may justify less than full compensation for all damages incurred. Awards of damages are frequently described as relatively low. In property cases, and in particular cases of expropriation, court can order restitution or, where impossible, equivalent monetary damages.
ENFORCEMENT			
Compliance rates	Unknown. Generally considered to be high in ICSID cases. Increasing known cases of non-compliance since 2007.	As of 2007, compliance with final remedy – withdrawal of measure – achieved within the “reasonable period of time for implementation” (which averages about one year) in over 80% of cases.	Variable. Generally good, but large case load means there are also many cases of non-compliance. End 2009 there were 8,661 pending cases of non-compliance before COM.
Multilateral enforcement	Yes, at instigation of claimant. Claimant can seek to enforce award in any ICSID member state or any New York Convention state (for non-ICSID cases). ICSID: Pecuniary remedies are enforceable as domestic judgments in all ICSID member state courts. Non-ICSID: Parties to New York Convention agree to recognise and enforce foreign arbitral awards subject to narrow exceptions.	No. DSB regularly discusses unimplemented rulings.	No. COM can adopt resolution calling on all member states to take all action they deem appropriate in order to assist in ensuring execution. 102.

	Investor-State arbitration under investment treaties	World Trade Organisation (WTO)	European Court of Human Rights (ECHR)
Multilateral supervision of compliance with remedies: institutions	None.	DSB, monthly meetings.	COM: 4 meetings a year plus urgent meetings.
Multilateral supervision of compliance with remedies (a) pecuniary (money) remedies	None.	N/A	States generally given 3 months to confirm payment of just satisfaction. Applicant has 2 months to respond. Applicants can complain to COM. COM can issue strongly worded resolutions (see below) in cases of non-payment. Payment made after such resolutions in a number of cases.
Multilateral supervision of compliance with remedies (b) non-pecuniary remedies	Final remedies: none. Provisional remedies: ICSID: arbitration tribunal supervises compliance with its own provisional remedies, but lacks enforcement powers. Non-ICSID: arbitration tribunal can supervise compliance with its own provisional remedies, but lacks enforcement powers. National courts at arbitration situs or elsewhere could in theory play a role.	DSB keeps under surveillance. During the 'reasonable period of time for implementation'[7], the DSB keeps the implementation of adopted recommendations and rulings under surveillance. If timely compliance is not achieved, the complainant may request DSB authorisation to retaliate by suspending concessions or other obligations.[8] If compliance is disputed, that issue is generally resolved first in a compliance procedure using the basic DSU dispute settlement procedures, including, wherever possible, resort to the original panel. Accelerated schedule, but not usually met: average time as of 2007: 215 days. The complainant can request the DSB to authorise the suspension of concessions or other obligations by reverse consensus (generally after non-compliance is established). If the non-complying Member objects to the proposed level of retaliation, that issue may be referred to arbitration before the DSB takes its decision.	COM assesses adequacy of execution of judgments. Slow rate and negligence in execution has been acknowledged. Leach 98. Two-track process instituted in 2011: standard and enhanced supervision procedures. Secretariat interacts with State, reviews progress, assists State (under enhanced procedure). If State and Secretariat agree on compliance, Secretariat proposes that Committee adopt a final resolution closing case. Various COM measures in cases of non-compliance: declarations by the Chair; press releases, high-level meetings; issuing decisions following debate and issuing interim resolutions. Resolutions can stress that compliance is a condition of COE membership, calling on all member states to take all action they deem appropriate in order to assist in ensuring execution. As of 2010, COM (by 2/3 majority) can bring infringement proceeding to Court. If Court finds infringement, refers back to COM for consideration of measures. Art. 8 of COE statute provides for suspension of voting rights in the COM or expulsion from COE. COM website provides information about status of compliance.

	Investor-State arbitration under investment treaties	World Trade Organisation (WTO)	European Court of Human Rights (ECHR)
CONSISTENCY			
Importance of consistency: institutional design	Tribunals are ad hoc. There is no body charged with promoting or ensuring consistency. Some tribunals have recognised importance of consistency, but practice varies.	Art 3.2 DSU states that the 'dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." AB has insisted on the importance of consistent decisions. The Secretariat also serves as an institutional memory to provide some continuity and consistency between panels.	No formal doctrine of precedent, but Court recognises that it is in the interests of legal certainty, foreseability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases.
Right to appeal/review/re-hearing	ICSID: Both parties can seek annulment as of right in all cases. New 3-person committee chosen by ICSID SG. Non-ICSID: (i) Generally review is available as of right in national courts at the situs of the arbitration, but depends on national law at the situs. (ii) parties can seek to oppose enforcement in any national jurisdiction where enforcement is sought based on limited New York Convention grounds.	Appeal available as of right in all cases. Approximately 70% of panel reports are appealed. Only parties to the dispute can appeal a panel report.	Re-hearing possible in exceptional cases only. (12 out of 264 requests accepted in 2010). Any party may request. 5-judge panel of Grand Chamber considers request. Can deny without reasons or refer to full Grand Chamber. Requires serious question about Convention interpretation or affecting its application; or serious issue of general importance.
Review and/or appeals: procedure	ICSID: Procedures fixed on ad hoc basis by annulment committee. Briefing and oral argument based on existing record. Non-ICSID: procedures depend on national law at situs or in enforcement jurisdictions.	Standardised procedures and schedule with very tight briefing deadlines to meet 90-day schedule.	Full re-hearing.

	Investor-State arbitration under investment treaties	World Trade Organisation (WTO)	European Court of Human Rights (ECHR)
Nature of review/appeal	ICSID: narrow grounds as specified in ICSID Convention. Errors of law not sufficient for annulment. Non-ICSID: (i) set-aside grounds are as specified in national law, generally narrow; (ii) opposition to enforcement on limited grounds as set forth in New York Convention.	Appeal available on issues of law and legal interpretations. No review of questions of fact.	Allows full re-hearing of fact and law. Broad power to consider new evidence and arguments, subject to fairness.
Possible outcomes on review/appeal/re-hearing	ICSID: Annulment committee can annul award in whole or part; or uphold award. Cannot modify award. Cannot remand back to original tribunal. Claimant can restart annulled case from beginning. Non-ICSID: (i) At situs: depends on national law - generally set aside or recognition as a national judgment. (ii) in enforcement jurisdictions: refusal to enforce or recognition of enforceability.	AB may uphold, modify or reverse the panel's legal findings and conclusions. Cannot remand a case back to a panel. In a number of cases, the AB has 'completed the legal analysis' on issues not addressed by the panel.	Grand Chamber fully disposes of case using full range of judicial powers conferred on the Court. Outcomes can include friendly settlement, striking out the claim, and full range of final remedies.
RELATIONSHIP WITH DOMESTIC AND OTHER PROCEEDINGS			
Relationship with other proceedings: domestic remedies	Varies, but exhaustion of domestic remedies generally not required. Complex issues and variable relations with domestic proceedings relating to the same case under various treaty provisions (eg. fork in the road, waiver clauses, umbrella clauses, exhaustion requirements). Some investment treaties include time-limited domestic recourse requirements. Tribunals generally do not give them jurisdictional effect although some exceptions. Exhaustion or at least reasonable recourse to domestic remedies has been required in some cases as a matter of substantive law.	Exhaustion not required.	Exhaustion of domestic proceedings generally required. Applied with some degree of flexibility and without excessive formalism.

	Investor-State arbitration under investment treaties	World Trade Organisation (WTO)	European Court of Human Rights (ECHR)
Relationship with other proceedings: forum shopping and concurrent proceedings	Investors frequently have a choice of forum under investment treaties. Company and its shareholder(s) may be able to bring separate cases arising out of same injury to company.	None within WTO system. Concurrent proceedings can exist with regional trade agreements.	European Convention provides that Court shall not consider an application that is substantially the same as a matter that has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
Relationship with other proceedings: Settlement & ADR	Many treaties contain provisions requiring pre-dispute negotiations for a specified period. In some cases, tribunals do not give jurisdictional effect and allow investors to commence cases in any event.	Settlement strongly favoured. Pre-dispute effort to negotiate in accordance with rules is required in every case as a matter of jurisdiction.	"Friendly settlement" is encouraged. Court can take any steps necessary to facilitate settlement.

Primary sources for the information on the WTO and ECHR herein are Peter van den Bossche, The Law and Policy of the World Trade Organization (2d ed. 2008) and Philip Leach, Taking a Case to the European Court of Human Rights (3d ed. 2011). Additional information comes from the WTO and ECHR websites and other secondary sources.

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1 Council of Europe Handbook, p.6.

2 Composed of the chairpersons of the General Council, the DSB, the Councils for Goods and for Services, the TRIPS Council and the WTO Director-General.

3 National judge here refers to the judge elected in respect of the state concerned; in some rare cases, the person has not been a national of that state

4 Ex parte communications occur in the absence of other parties to the matter and without notice and opportunity for all parties to participate.

5 G. Shaffer, How to make the WTO dispute settlement system work for developing countries: some proactive developing country strategies, International Centre for Trade and Sustainable Development Resource paper no. 5. 2003, pp. 45-46 & n.152.

6 Parties can also agree on "compensation" pending withdrawal of the measure; compensation is not financial relief but rather agreed forward-looking measures such as temporary additional market access concessions. Agreement is rarely achieved.

7 If necessary, the reasonable time can be determined by a special single-issue accelerated arbitration procedure, which does not suspend the running of the time to implement.

8 The parties may also agree on a temporary remedy (known as "compensation" (art. 22 DSU). It does not involve monetary compensation and must be addressed only to injury that will be suffered in the future. It has only been rarely been agreed upon. One agreed compensation involved temporary additional market access concessions by the party in breach to the original complainants.

ANNEX 3.

Methodology for the survey of investor/claimant characteristics

Using publicly available information, the survey examines the characteristics of investors (size, nature of incorporation, etc.). The survey covers investor-claimants for 50 ICSID cases and for 45 UNCTRAL cases. The ICSID cases are the 50 most recent settled cases that appear on the ICSID website at the time the study was conducted (third quarter 2011); these cases cover the period from April 2006 to April 2010. The 45 UNCITRAL cases are comprised all of investor-state cases conducted under UNCTRAL rules for which documentation has been posted on a subscription law website at the time the study was conducted (the difference in sampling method – ICSID involving only most recent cases and UNCITRAL involving all available cases – was made necessary by differences in information availability between the two types of case.

For each case, several sources of information were used to categorise investors: the awards posted on the ICSID website and the subscription service (for UNCITRAL cases); the investors' website, when available; and other business information appearing on the internet.

Languages available for search included English, French and Spanish. In a few cases, other language capabilities available at the OECD were used to gather information from websites in other foreign languages.

For cases with more than one investor-claimant, the Secretariat included the largest investor as being the claimant for the case. This technique tends to increase the proportion of large investors in the findings and to reduce the proportion of smaller investors.

The categorization of investors is based on a five part typology:

- Individuals. Investor claimants that are individuals or groups of individuals;

- Undefined entities. Non-transparent investors that do not appear to be publicly listed, have only a rudimentary do not have a website and about which no governance, financial or operating information is available. Some of these investors appear small enough that they are probably not subject to disclosure rules that apply to larger corporations. However, others appear to be holding companies formed for the specific asset or activity that is the subject of the arbitral dispute.

- Medium sized multinational companies that are significant entities in regional contexts and that publish extensive information about governance, operations and financial results; When employees information is provided it indicates that these firms have several hundred to several thousand employees.

- Very large multinational enterprises with involvement in multiple geographical areas and with at least several thousand employees. Web information is extensive and generally includes governance information. When employee information is available it generally indicates that employment is numbered in the tens of thousands.

- Member of UNCTAD list of top 100 transnational corporations.

ANNEX 4.

Remedies in advanced systems of domestic administrative law

Different legal systems have different names and categorisations for the various types of remedies to provide redress for government misconduct. A key distinction exists between (i) non-pecuniary remedies, which are also referred to as "primary" or "judicial review" remedies; and (ii) pecuniary remedies (principally damages and interest), also referred to as "secondary" remedies.[189]

Review of applicable remedies in some advanced systems of domestic administrative law in cases analogous to ISDS claims suggests that (i) the non-pecuniary vs. pecuniary remedies distinction is of fundamental importance in domestic administrative law systems; and (ii) except for expropriation, damages remedies may be frequently difficult to obtain.

1. The non-pecuniary vs. pecuniary remedies distinction

The non-pecuniary vs. pecuniary remedies distinction is of fundamental importance in many systems of domestic administrative law. Frequently, non-pecuniary remedies (but only such remedies) are available in a special system of law and/or in special courts. The Canadian Supreme Court recently described the function of judicial review and the consequent use of specialised procedures and exclusion of damages claims:

> *The focus of judicial review is to quash invalid government decisions — or require government to act or prohibit it from acting — by a speedy process. … There is no pre-hearing discovery, apart from what can be learned through affidavits and cross-examination. The applications judge hears no viva voce evidence. Damages are not available.*[190]

The main administrative law statute for judicial review in the United States, the Administrative Procedure Act (APA), similarly does not provide for damages as a remedy. For example, the APA directs courts to set aside agency action that is “arbitrary, capricious or an abuse of discretion”. But it does not authorise the courts to award damages for such action.[191] In the UK, judicial review proceedings are generally heard by a special Administrative Court which generally can grant only primary remedies and has only very limited powers to order damages.[192]

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[189] Common law systems frequently refer to these non-pecuniary remedies as judicial review remedies. In German law, the term primary remedies is more frequent; as outlined below, it is generally mandatory in Germany to seek such primary remedies where possible before seeking damages (secondary remedies). Such remedies are also referred to as public law remedies.

[190] *Attorney-General of Canada v. Telezone, Inc.*, (Supreme Court of Canada, 23 December 2010) (internal citation omitted).

[191] 5 U.S.C. § 706. Section 706 provides that the reviewing court can (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action.

[192] See Law Commission, Administrative Redress: Public Bodies and the Citizen: A Consultation Paper (2008) [hereinafter Law Commission 2008] § 3.101 (“Traditionally, the function served by judicial review has *not* been to award compensation. The power of the Administrative Court to order monetary compensation is subject to tight restrictions.”)

Civil law countries also distinguish between claims for non-pecuniary and pecuniary remedies against the state. In Germany, claims for primary remedies are sought from the administrative courts, whereas claims for secondary damages remedies are heard in separate proceedings in the ordinary civil courts.[193] As discussed below, claimants must seek primary remedies, where possible, before making a claim for damages. French law distinguishes between the *contentieux de l'annulation*, principally the *recours pour excès de pouvoir*, in which essentially only non-pecuniary remedies are available, and *contentieux de pleine jurisdiction*, in which the court can award damages. Japan similarly distinguishes between actions for judicial review, which are limited to primary remedies, and actions against the State for damages: each action is governed by a different statute and involves different standards of liability.

Such judicial review proceedings involving only primary remedies can be simplified, as in Canada and the UK, in order to provide accelerated non-pecuniary remedies if appropriate. Time limits to bring challenges to decisions subject to review are typically short.[194] Injury incurred prior to and during the pendency of the proceedings is thus limited. The government is also immediately put on notice of the claim. Alternatively or in addition, urgent procedures may exist allowing for immediate injunctions. This is important where damages for injury suffered may be frequently unavailable or limited, as discussed below.[195]

2. Damages remedies may be difficult to obtain

Other than for expropriations, damages appear to be a rarely-obtained remedy for investors against governments under domestic law in several major OECD countries.[196]

a. United Kingdom

As outlined in recent reports by the Law Commission, English law generally does not provide a remedy in damages for breaches of public law such as violations of due process; only judicial review remedies are available.[197] To obtain damages, a plaintiff must satisfy the criteria for one of the nominate torts under private law. There are three principal torts under which damages claims can be asserted against public authorities under traditional UK law: (i) negligence; (ii) breach of statutory duty; and (iii) misfeasance in public office.[198]

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[193] See, e.g., German Basic Law arts. 19(IV), 34; Law of Administrative Procedure § 40(1); See C. Brown, Procedure in investment treaty arbitration and the relevance of comparative public law, in Schill, op. cit., at p. 679-680.

[194] Claimants in Canada only have 30 days from the decision to file their claim, see *Telezone* above,; in the UK, the time limit is three months. See Judicial Review: A short guide to claims in the Administrative Court, House of Commons Library, Research paper 06/44 (28 September 2006), p.22. In France, the *recours pour excès de pouvoir* must generally be filed within two months of the notification or publication of the challenged decision. See Jacqueline Morand-Deviller, Droit Administratif (11th ed. 2009), p. 782.

[195] The accelerated nature of WTO proceedings responds to the same imperative in a system in which damages are unavailable. See Peter van den Bossche, The Law and Policy of the World Trade Organisation, (2d ed. 2007) p. 200 (rapid decisions are important because there are no damages).

[196] The focus here is on non-contractual claims and contractual claims are not addressed.

[197] See, e.g., *R. (Quark Fishing Ltd.) v. Secretary of State for Foreign and Commonwealth Affairs*, [2003] EWHC 1743 § 14 (Admin) (Collins J.); Law Commission 2008 §§ 3.100-3.101.

[198] These have been supplemented by two theories available only with regard to breaches of European law: (iv) a possibility of, but not a right to, Human Rights Act damages in cases of breach of the ECHR; and (v) damages for breach of EU law. Damages are available under certain conditions in these specific fields without the need to establish the existence of a tort. See Law Commission, Administrative Redress: Public Bodies and the Citizen (2010) [hereinafter Law Commission 2010] §§ 2.44-2.48.

Negligence has become the predominant tort for damages claims against the government due to the tight restrictions on bringing claims for compensation on the basis of misfeasance in public office and breach of statutory duty.[199] To establish liability for negligence against public authorities and officials, claimants must establish, among other things, that (i) the matter is justiciable; and (ii) the defendant owes the claimant a duty of care. As noted by the Law Commission, "[j]usticiability operates as an extremely potent control mechanism for limiting claims against public bodies, because it requires the court to strike out a claim without even proceeding to ask whether or not a duty of care should be owed". A 1995 House of Lords decision found that damages were excluded were regard to policy (as opposed to operational) decisions.[200]

Among the conditions for determining whether there is a duty of a care, the courts consider policy arguments: it must be "fair, just and reasonable" for the law to impose a duty of care.[201] The courts recognise an important policy interest in providing compensation to injured parties. However, they also frequently refer to a number of policy arguments against state tort liability in damages. Potential liability is seen as likely to harm the quality of administration by (i) leading public bodies and their employees to take an unduly defensive approach to their work; (ii) diverting scarce resources away from the primary functions of public bodies and towards efforts to avoid litigation and defensive measures; and (iii) potentially leading to a great number of lawsuits and vexatious claims, further reducing the available resources for public bodies. State liability can also be rejected because the relevant issues are seen to be

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[199] Law Commission 2008 § 3.116. The Law Commission noted that breach of statutory duty is "close to obsolete in many areas of the law" due to the restrictive approach to liability. Id. § 4.75 (footnotes omitted).

For misfeasance in public office, the claimant faces the difficulty of proving that the defendant acted with a particular state of mind: "the evidential requirement of proving malice or that an official knowingly acted in excess of his or her powers is a particularly high barrier to successful actions." Id. § 4.78. After 12 years of litigation and what the Bank of England describes as the longest and most expensive trial ever held in the Commercial Court, a GBP 850 million damages claim against the Bank of England (and 22 then former and current staff members) for alleged misfeasance in public office was withdrawn by the claimants in 2005. The claim was brought by Deloitte Touche Tohmatsu as liquidator of BCCI after BCCI was closed down in 1991 owing over GBP 9 billion; it was alleged that the Bank of England knowingly failed to protect depositors by allowing BCCI to operate despite evidence of its fraudulent activities. The claim was withdrawn after the trial judge had stated that he was in no doubt that the very serious allegations of impropriety and dishonesty against the Bank of England and its officials were wholly without foundation. Legal fees in the case exceeded GBP 100 million; the liquidator was ordered to pay the Bank GBP 73.6 million to cover the Bank's legal costs. See BCCI liquidators drop £1bn case, BBC News (2 November 2005); Rory Cellan-Jones, The end of an epic, BBC News (2 November 2005); Bank awarded £73m in BCCI costs, BBC News (7 June 2006); Bank of England, Judgment in BCCI Liquidators' Case against the Bank of England (press release) (12 April 2006).

There have been few arguable claims for misfeasance in public office in recent years, mostly involving the police. See 2008 § 4.90 & n.112.

[200] See *X (Minors) v Bedfordshire County* Council [1995] 2 AC 633 (House of Lords). See id. at 737 ("Where Parliament has conferred a statutory discretion on a public authority, it is for that authority, not for the courts, to exercise the discretion"; "a common law duty of care in relation to the taking of decisions involving policy matters cannot exist."). See also below the "discretionary function exception" to damages liability for the US government.

Some Commonwealth countries have applied a similar test to exclude damages. See *Holland v. Saskatchewan*, 2008 SCC 42 (Supreme Court of Canada) (striking out claims against province for damages because "policy decisions about what acts to perform under a statute do not give rise to liability in negligence"; damages are only potentially available for operational negligence).

[201] Law Commission 2008, §§ 3.129, 3.139-3.153.

inapt for judicial evaluation, particularly due to their discretionary features or complexity, or on the ground that adequate protection for the claimants already exists by way of insurance or other remedies.[202]

Another hurdle to damages under UK law arises from the typical nature of investor losses from government action. Investors generally incur pecuniary losses without any bodily injury or physical damage to property. UK law generally bars claims for damages in negligence for such so-called "pure economic loss".[203]

As the Law Commission noted, the restrictiveness of UK law in allowing damages is demonstrated by cases involving the illegal removal or non-renewal of a licence, a frequently-encountered scenario in ISDS cases.204 The claimant can challenge the refusal through judicial review and obtain primary remedies, but generally cannot recover lost earnings or other damages.[205]

The lack of damages remedies in such cases has long been seen by some as a problem. As the 2008 Law Commission report noted, its criticisms of this situation echoed findings of an earlier 1971 Law Commission working paper. However, the Law Commission noted the strong and unified government opposition to its 2008 proposals to modify damages liability under traditional UK law because of, *inter alia*, the uncertain financial consequences of the proposed reforms for government budgets. In light of the government opposition, the Law Commission did not continue with work on reform of government damages liability beyond a final report in 2010.[206]

b. United States

As noted above, the main administrative law statute in the United States, the APA, does not provide for damages as a remedy. The two primary options for damages claims are tort suits and suits for constitutional breaches.

A claimant can bring private law action to obtain damages arising out of official action. However, he/she must show that a common law tort has been committed. It is not sufficient to show that the government

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[202] Id.

[203] See *Murphy v. Brentwood District Council* [1991] 1 AC 398 (House of Lords); 2008 Law Commission § 3.170 ("the general 'exclusionary rule' for the tort of negligence is that pure economic loss is not recoverable").

[204] See Campbell McLachlan et al, International investment Arbitration; Substantive Principles § 7.99 (2007) (noting that the granting or withholding of licences is one of the two most frequent contexts for claims of violation of the fair and equal treatment requirement).

[205] Law Commission 208 § 4.28; *R. v. Knowsley Borough Council ex parte Maguire* [1992] COD 499; *R. (Quark Fishing Ltd.) v. Secretary of State for Foreign and Commonwealth Affairs*, [2003] EWHC 1743 (Admin). In *Quark*, a damages claim in tort for over GBP 2 million was denied. An appellate court had quashed the unlawful non-renewal of a valuable licence due to numerous breaches of due process. The damages claim was nonetheless struck out as clearly meritless. The court noted that it 'reached this conclusion with some regret since the claimants have an apparently strong case that they have suffered loss as a result of unlawful acts by the defendant." The judge noted that "this case is yet another which shows that consideration should be given by Parliament to providing some possibility of a claim for damages for unlawful executive action which causes loss. It is clearly not something which can be done by the courts."

[206] See Law Commission 2010 § 1.3 ("This project was notable in that the key stakeholder – Government – was firmly opposed to our proposed reforms. This opposition was expressed both in the formal response and in discussions at both ministerial and official level. Government's formal response was a single document agreed across Government. This is extremely unusual, if not unique, in recent times."); Id. §§ 2.93-95.

acted illegally. Government action that injures private persons without causing a tort is addressed through judicial review with its primary remedies.[207]

Damages may be excluded even for viable tort claims under the domestic law doctrine of sovereign immunity of the United States government. Under US law, the federal government is generally immune from damages suits unless it consents.[208] The 1946 Federal Tort Claims Act (FTCA) provides consent to many tort claims for damages by waiving immunity for those claims. However, it remains "a highly limited waiver of immunity".[209] Several broad exclusions preserve immunity from damages claims in important areas.

One broad immunity, known as the "discretionary function exception", precludes damages claims for government action involving the use of discretion. No damages are available for claims arising out of "the exercise of performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government."[210] The Supreme Court has noted that "Congress wished to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort."[211] Such decisions can in effect only be challenged in judicial review proceedings where they can be addressed through primary remedies.[212]

Other important exclusions of damages liability preclude claims for damages based on the tort of interference with contract rights or for claims relating to fiscal operations of the Treasury or regulation of the monetary system.[213]

A second possibility to obtain damages is under implied rights of action for damages for breach of certain constitutional rights (known as a *Bivens* cause of action).[214] However, in a case against the FDIC, the Supreme Court found that *Bivens* claims can only be brought against individual officials, not against government agencies.[215] The Court found that "[i]f we were to recognize a direct action for damages against federal agencies, we would be creating a potentially enormous financial burden for the Federal Government" and that "decisions involving 'federal fiscal policy' are not ours to make".[216]

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[207] See Stephen G. Breyer et al., Administrative Law and Regulatory Policy (6th ed. 2006), pp. 748-49 (judicial review remedies allow the courts to address government action that injured private person without causing a tort).

[208] *FDIC v. Meyer*, 510 U.S. 471, 475, (1994); *US v. Navajo Nation*, 129 S.Ct. 1547, 1551 (2009). See Breyer, p. 759 ("Suits can be brought against the United States for damages only if there is a statute by which the United States specifically consents to be sued.").

[209] See Breyer, p. 759.

[210] 28 USCA § 2680(a).

[211] *United States v. S.A. Impresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 US 797, 814 (1984).

[212] The discretionary function exception requires that the courts distinguish between "discretionary" as opposed to "operational" decisions. Only the latter can give rise to damages. See, e.g., *US v. Gaubert*, 499 U.S. 315 (1991) (finding actions of financial regulator to involve discretion; damages unavailable).

[213] 28 USC § 2680(h), (i).

[214] *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388 (1971).

[215] See *FDIC v. Meyer*, 510 U.S. 471 (1994); *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

[216] *FDIC v. Meyer*, 510 U.S. at 486. The Supreme Court has narrowly interpreted the *Bivens* cause of action against individual federal officials in recent years. See *Wilkie v. Robbins*, 551 U.S. 537 (2007). Liability for individual state officials, however, is broader than for individual federal officials.

c. Germany

German administrative law emphasizes primary, judicial review-type remedies over damages in cases against the state. Before a claim for damages can be brought against the state, two levels of primary remedies must be sought where potentially available: (i) remedies in the administrative system; and (ii) remedies in the administrative courts. Recourse to remedies in the administrative system is generally a prerequisite to filing a court suit.[217] This allows the administrative authority to review the decision in question before it is considered by the courts.

Where available, a judicial review-type claim for primary remedies in the administrative courts is a mandatory pre-condition to filing a later suit for damages in the ordinary civil courts. A wilful or negligent failure to seek available primary remedies in the administrative courts is considered to constitute a special case of contributory negligence: it bars claims for damages.[218]

German law has a general concept of fault liability for government officials in the Civil Code (BGB). An official who 'wilfully or negligently commits a breach of official duty incumbent upon him towards a third party" is personally liable.[219] While the BGB establishes the personal liability of the official, article 34 of the German Basic Law (Constitution) shifts this liability to the public authority if the official breaches his duties in the exercise of office.[220] The public authority is generally liable in the same way and to the same extent as the official.[221] Liability extends to administrative and judicial wrongdoing, but liability is excluded for legislative acts.

number of commentators have noted a contrast between the overall flavour of German law compared to common law jurisdictions on state liability.[222] Where common law courts frequently refer to a host of policy factors justifying limiting damages liability, as noted above, German courts focus more on the need to compensate the injury to the individual.

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[217] See C. Brown, Procedure in investment treaty arbitration and the relevance of comparative public law, in Schill, op. cit., p. 679 (an action before an administrative court will only be admitted after required administrative procedures are exhausted, citing Verwaltungsgerichtordnung §§ 68, 113(1)).

[218] See § 839(3) BGB; Anne van Aaken, Primary and secondary remedies in international investment law and national state liability: A functional and comparative view, in Schill, op cit., p. 728 ("In tort cases, or cases similar to a violation of fair and equitable treatment, for example a violation of the rule of law or a violation of due process, damages may only be claimed if the claimant has taken primary remedies first. If the right holder fails to use the available remedies, he or she is barred from claiming damages.").

Austrian and Swiss law similarly require recourse to primary remedies prior to seeking damages and bars claims on a contributory negligence theory if the claimant has failed to challenge the act. See Irmgard Marboe, State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests, in S. Schill, op cit., at p. 398 (in Austria, "damages shall not be due in cases where the injured person would have been able to avoid the damage by any legal remedy or by a complaint to the Administrative Court. The failure to challenge the act is regarded as a manifestation of contributory negligence."); van Aaken, p. 729 (in Switzerland, "primary remedies have to be used first before secondary remedies become available. The failure to use primary remedies precludes any damage claims against the state.").

[219] § 839 BGB (German civil code), (3rd ed. 1997 (trans. Basil Markesinis)).

[220] See Marboe, p. 388.

[221] Id.

[222] See, e.g., Ralph Surma, A comparative study of the English and German approach to the liability of public bodies in negligence, (2000) Oxford Univ. Comparative Law Forum 8.

In order to give rise to damages, however, the official must have breached a duty owed to the claimant or to a limited group of people to which the claimant belongs. If the duty is owed to the public as a whole, no damages are available.

Two 1979 decisions of the German Federal Supreme Court extended damages liability to bank regulators after finding that the relevant statute imposed an official duty owed to each individual owner or creditor of a deposit.[223] However, the legislature subsequently reacted and eliminated damages liability by clarifying that the statute protected the public as a whole.[224] It does not appear that investors have submitted many claims for substantial damages in the German courts, but more research may be necessary.

d. France

State liability law in France is largely based on case law. The basic regime is fault-based.[225] Case law has resulted in most cases of the liability of officials also giving rise to the liability of the administration, notably by broadly interpreting the notion of a *faute de service*.[226]

A general trend has been to eliminate special and higher *faute lourde* requirements for liability, and require only the normal *faute simple*, in order to better compensate victims especially in areas like medical and hospital malpractice.[227]

However, stronger *faute lourde* requirements have been maintained where the administrative task is complex, difficult or delicate. The higher *faute lourde* requirement was applied in *Kechichian*, an important 2001 case involving the potential liability of the Banking Commission.[228] In a 2005 study, the Conseil d'Etat (Section des études) indicated that the *faute lourde* requirement, as applied in *Kechichian*, would likely apply to all independent regulatory authorities.[229] Government activity that causes only pure economic loss (as opposed notably to bodily harm) may also be more likely to attract a *faute lourde* requirement.[230]

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[223] See BGHZ 74, 144-147; BGHZ 75, 120-122.

[224] § 6 KWG (1984 BGBI. I 1693).

[225] Alongside the basic fault-based regime, the courts also apply no-fault liability in some areas.

[226] See Morand, p. 827, 832-33.

[227] See the submissions of the commissaire du gouvernement: Conclusions sous Conseil d'Etat, Assemblée, 30 novembre 2001, n° 219562, Ministre de l'économie et des finances c/ M. Kechichian et autres. See also Morand, pp. 850-51.

[228] Conseil d'Etat, Assemblée, 30 novembre 2001, n° 219562, Ministre de l'économie, des finances et de l'industrie c/ M. Kechichian et autres (30 November 2001) ; see also the submissions of the commissaire du gouvernement: Conclusions sous Conseil d'Etat, Assemblée, 30 novembre 2001, n° 219562, Ministre de l'économie et des finances c/ M. Kechichian et autres.

[229] See Conseil d'Etat, Section des Etudes, Responsibilité et socialisation du risque, p. 234 (Kechichian *faute lourde* requirement is likely to apply to all independent regulatory authorities – "on peut penser que [l'exigence de la *faute lourde*] vaudra pour l'ensemble des autorités indépendantes dites de régulation »).

[230] See, e.g., Conclusions sous Conseil d'Etat, Assemblée, 30 novembre 2001, n° 219562 in *Kechichian*, p. 8-9 (noting that where the loss is only pecuniary or may be covered by other indemnification, a *faute lourde* requirement is more likely and appropriate).

e. Japan[231]

State liability law in Japan is based on the State Redress Act (Act No. 125 of 1947). Where the conditions of the statute are satisfied, the State or public entity assumes the liability for damages caused by an official.

The regime for damages liability is fault based: intentional or negligent conduct is required to obtain damages (but not for primary remedies). The Supreme Court has repeatedly affirmed that there is a higher standard to obtain damages than for primary remedies; the Court accordingly considers the unlawfulness of an act leading to the grant of primary remedies does not necessarily entail secondary remedies.[232]

It does not appear that any investors have sought or obtained substantial damages from the State under domestic law for claims relating to economic regulation since the State Redress Act was adopted in 1947.[233] In one case, a construction company that was barred from bidding for a public works contract in a village on the basis that it was not headquartered in the village challenged that requirement and sought damages in the amount of 140 million yen (approx. 1.4 million euros). The Supreme Court found that the requirement was unreasonable: although it was legitimate to carry out public works to ensure the economic survival of the village (which was underpopulated), that goal could be achieved without totally excluding companies not headquartered in the village. After the case was remanded to the Takamatsu High Court to consider the damages issue, the court rejected the damages claim on the ground that the headquarters requirement was widely-imposed by local authorities in the region in question (until the Supreme Court judgment finding it improper) and because there were two dissenting opinions in the Supreme Court.

In denying claims, courts have noted that an official was exercising discretion in taking the decision at issue.[234] In 2004, in a case involving severe bodily injury (pneumoconiosis – miner's lung disease), the State was held liable with regard to an exercise of discretion for the first time.[235]

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Overall, in the domestic systems reviewed here, there appear to be few cases brought by investors for damages in the context of situations similar to those of ISDS cases (other than expropriation).[236] Fewer still

[231] This section has benefitted from input from Professor Shotaro Hamamoto of Kyoto University for which the authors express their appreciation. Professor Hamamoto provided further analysis at the March 2012 Roundtable and his summary report is available on the OECD website. The views expressed here and all remaining errors are the responsibility of the authors.

[232] See Supreme Court, Judgment of 15 January 2004, Minshu, vol. 58, p. 226 (denial of health benefits for patient with brain tumour due to lack of visa status was unlawful; however, no damages were awarded because relevant public official did not act negligently); Judgment of 19 February 2008, Minshu, vol. 62, p. 445.

[233] The few cases granting damages for failure to act or misuse of regulatory powers appear to have involved bodily injury or political rights. See Supreme Court, Judgment of 27 April 2004, Minshu, vol. 58, p. 34 (awarding damages to miners that contracted pneumoconiosis); Supreme Court, Judgment of 14 September 2005, Minshu, vol. 59, p. 2087 (granting damages of 5000 yen (approx. 50 euros) for violations of voting rights). These cases thus do not involve investment.

[234] See Supreme Court, Judgment of 24 November 1989, Minshu, vol. 43, p. 1169 (denying damages claims against State by victims of fraud by a licensed real estate company; claim that regulator should have revoked license was rejected as a basis for damages because the decision was discretionary and was not patently unreasonable).

[235] See Supreme Court, Judgment of 27 April 2004, Minshu, vo. 58, p. 34 (finding it patently unreasonable for the government to have taken measures to reduce mine dust in some mines but not in coal mines until much later; awarding damages to miners that contracted pneumoconiosis).

[236] Most known claims appear to involve issues unrelated to investors such as the liability of social services, highway authorities, the prosecution service or the police.

have succeeded in obtaining damages. As summarised by one recent commentator, "municipal legal orders tend to be reluctant to grant pecuniary damages".[237] The limited availability and role for damages contrasts with ISDS.

There are a number of possible explanations for the apparent relative absence of damages claims by investors under domestic systems. Governments in advanced administrative states may not make serious errors or act unfairly *vis-à-vis* major investments or investors. Where such errors are made, they may usually be promptly corrected with primary remedies in judicial review proceedings; this would limit the damages to those incurred in the intervening period before the error is corrected. Cases to recover such damages would not involve the same amounts as in ISDS with its focus on future lost profits. Investors may absorb the loss (either all of the loss or, in the case of a successful judicial review proceeding, the interim loss) and not sue for damages. Investors may be hesitant to sue because of broader government and regulatory relations concerns in jurisdictions where they are long-term players. Damages may likely not be available under applicable law so that investors, in consultation with their lawyers, decide that it is not worth bringing the claim. Some of these factors may overlap to a significant degree.

[237] See van Aaken, in Schill, op. cit., p. 723.

ANNEX 5.

Selection of arbitrators in ICSID and UNCITRAL cases, and the regulation of arbitrators

Arbitrators must be selected for each case either by the parties or a by a third-party institution, in contrast to national judges who are assigned to cases without party input. Selection methods and practices vary. It is useful to distinguish between selection of the two co-arbitrators and selection of the presiding arbitrator.

1. Selection of co-arbitrators

Both the ICSID and UNCITRAL rules provide for each party selecting one arbitrator unless the parties agree on another method.[238] There are few limits on parties' choice of arbitrator. The applicable criteria are couched in general terms.[239]

Commentators note that parties generally try to identify candidates who will be sympathetic to their case and who have the right character, reputation and in some cases personal relations to convince the other two arbitrators and in particular the likely presiding arbitrator.[240] Views about how to achieve this goal, however can vary.[241] Counselling the client about the arbitrators who are perceived to be most likely to lead to success may be an ethical obligation for parties' counsel.[242]

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[238] See ICSID Convention art. 37(2)(b) (in absence of party agreement otherwise, "the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties."); UNCITRAL Rule 9(1) ("If three arbitrators are to be appointed, each party shall appoint one arbitrator.").

[239] ICSID arbitrators, for example, must 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". See ICSID Convention, Arts. 14(1) and 40(2). Other rules add an express requirement of impartiality to the independence requirement.

[240] See Seppälä, p. 7; Rogers, Regulating international Arbitrators, p. 113; Paulsson, Moral Hazard in International Dispute Resolution. For convenience, we refer herein to parties. Typically, however, it the parties' legal counsel, who frequently have greater experience with arbitration, arbitrators and the selection processes, who take the lead role in this area, in consultation with their client.

[241] Compare Alexis Mourre, Are unilateral appointments defensible? On Jan Paulsson's Moral Hazard in International Arbitration, Kluwer Arbitration Blog (5 October 2010) ("The bottom line is that if parties really want to enhance their chances of success, they should appoint experienced, impartial, arbitrators rather than super-advocates.") with Hans Smit, The pernicious institution of the party-appointed arbitrator, Perspectives on topical foreign direct investment issues by the Vale Columbia Center on Sustainable International Investment, No. 33, (14 December 2010) ("While Alexis Mourre argued that party-appointed arbitrators are selected for their reputation of impartiality, I disagree. I believe that lawyers feel that their duty to advocate for their clients' interests takes precedence over institutional concerns."). See also Martin Hunter, Ethics of the International Arbitrator, 53 Arbitration 219, 223 (1987) ("[W]hen I am representing a client in an arbitration, what I am really looking for in a party-nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias"); Doak Bishop and Lucy Reed, Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration (differentiating between a general favourable predisposition, which can be overcome by consideration of the merits, and actual bias, which encompasses a willingness to decide a case in favour of the appointing party regardless of the merits or without critical examination of the merits; suggesting most parties seek an arbitrator with a favourable predisposition but without bias).

The lack of clear rules can lead to some uncertainty about appropriate procedures. For example, ex parte communications between the parties and co-arbitrators are not excluded in arbitration, but their appropriate scope can be at time somewhat unclear. (Ex parte communications occur in the absence of other parties to the matter and without notice and opportunity for all parties to participate, and give rise to concerns about due process.)[243] It is generally recognised that ex parte contacts between a party and an arbitrator are entirely excluded once the tribunal is constituted. Ex parte contacts arise principally in two earlier contexts: (1) discussions with prospective co-arbitrators, often referred to as "interviewing"; and (ii) after the co-arbitrator has been selected, discussions with him/her about potential presiding arbitrators (see below). Because the scope of these is not subject to any binding rules and because little publicly-available case law has addressed them, soft law ethics standards are the primary source of guidance.[244]

As outlined in the main text, party selection of arbitrators, particularly in the context of ISDS, has recently been criticized by some senior arbitrators and experts, while others have strongly defended party-selection of arbitrators.

2. Selection of the Presiding arbitrator

Appointing the presiding arbitrator is widely seen as the most important step in the constitution of an investment tribunal. Recent empirical research has confirmed the widely-held view that presiding arbitrators play a key role in arbitration decision-making.[245]

Although some leading institutional commercial arbitration rules now provide for the institution choosing the presiding arbitrator as the default rule[246], agreed appointment remains the default rule in both leading ISDS systems.

However, the ICSID and UNCITRAL systems provide different default methods for agreeing on the presiding arbitrator. In ICSID, the parties are given the power to agree whereas in UNCITRAL it is up to the two co-arbitrators.

Under rules providing for the selection of the presiding arbitrator by the parties, such as the ICSID Rules, the parties frequently engage in ex parte discussions with their appointed co-arbitrator about the selection

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[242] See Hans Smit, The pernicious institution of the party-appointed arbitrator, Perspectives on topical foreign direct investment issues by the Vale Columbia Center on Sustainable International Investment, No. 33, (14 December 2010).

[243] Ex parte communication with judges and arbitrators are generally prohibited. Ex parte communications are widely viewed as unacceptable in adjudicative proceedings because they involve an opportunity by one party to influence the decision maker outside the presence of the other party. Such communications are not subject to rebuttal or comment by the other party.

[244] In ex parte interviews, parties can inquire about the prospective arbitrator's experience, availability, interest, rates of compensation and whether they may have conflicts. Discussion about the merits of the case, other than a general description sufficient to allow discussion of the arbitrator's relevant experience is widely seen as inappropriate. See IBA Guidelines, Green List, ¶1.5.1; G. Born, International Commercial Arbitration, p.1391 (2009). Some arbitrators have established their own practices, such as taping the conversations or taking careful notes that will be disclosable to interested parties if appropriate. These practices, however, are at present left to each arbitrator's discretion.

[245] Waibel & Wu, p. 37.

[246] LCIA Rules, art. 5(6) ('the chairman (who will not be a party-appointed arbitrator) shall be appointed by the LCIA Court."); ICC Rule 8(4) (The third arbitrator, who will act as chairman of the Arbitral Tribunal, shall be appointed by the Court, unless the parties have agreed upon another procedure for such appointment, in which case the nomination will be subject to confirmation pursuant to Article 9. ")

of the chair. Since the process of selecting a presiding arbitrator can involve many possible candidates and last for several months, these discussions are frequently extended.[247] As noted above, ex parte contacts are regarded as improper once the tribunal is constituted.

Under the UNCITRAL Rules, the proper scope of party involvement, if any, in the co-arbitrators' choice of a presiding arbitrator appears to be unclear with some case law suggesting the parties should have only very limited input.[248] In contrast, some soft law principles suggest that is acceptable for the co-arbitrator (although he/she is not so required) to obtain the views of the party who nominated him. In a third approach, a leading treatise on commercial arbitration argues for (and describes current practice as involving) extensive party input while falling short of a veto over the co-arbitrator's views.[249]

There is little doubt that negotiations between the parties and/or the co-arbitrators over the potential presiding arbitrator are frequently lengthy and intense, and "involve[] delicate tactical and negotiating considerations".[250] Although the rules generally impose time limits, the parties can jointly ask for extra time to try to reach an agreed choice.

Both ICSID and the UNCITRAL Rules provide for an appointing authority selecting the presiding arbitrator in the event the parties or the co-arbitrators cannot agree on the presiding arbitrator. The default appointing authority for ICSID cases is the Chairman of the Administrative Council (de facto the president of the World Bank) who makes appointments after receiving recommendations from the ICSID Secretariat. The default rule under the UNCITRAL Rules is a two-tier system: the Secretary-General of the of the Permanent Court of Arbitration in the Hague (PCA) chooses an appointing authority who in turn selects the presiding arbitrator; the parties can also directly select the Secretary-General of the PCA as the appointing authority.[251]

The appointing authority generally involves the parties in its choice but methods differ. As noted by a leading commentator, "[d]ifferent arbitral institutions take different approaches – both formally and informally – towards fulfilling their roles as appointing authority. … [T]hese different approaches can produce significantly different selections of sole and presiding arbitrators."[252] Since sophisticated counsel are aware of this dynamic, it can affect, where they represent investors, the investor's choice of forum. Expectations about a possible institutional choice can also affect each party's choice of party-appointed arbitrator and negotiating position about an agreed choice.

ICSID maintains a Panel of Arbitrators, which is comprised of State appointees (four per State) plus 10 selected by the president of the World Bank (known as the Chairman's list) after receipt of recommendations and biographical information from the ICSID Secretariat. The quality of appointees to the Panel has varied, with some for example lacking relevant experience.[253] ICSID has recently engaged in

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[247] See Mourre ("a considerable amount of time is often devoted by party-appointed arbitrators to these consultations with the parties and their counsels").

[248] See *XL Ins. Ltd v. Toyota Motor Sales USA Inc.*, unreported judgment (England Q.B. 14 July 1999) (no say for the parties in the appointment of the presiding arbitrator unless there is an overriding issue of conflict of interest), cited in G. Born, International Commercial Arbitration, p. 1405 n.271 (2009).

[249] See IBA Ethics, Rule 5.2 (it is acceptable for [the co-arbitrator] (although he is not so required) to obtain the views of the party who nominated him"). See also Born, p. 1405-06 (arguing for a broader role for parties as both representative of current actual practice by the arbitration bar and the preferable rule).

[250] See Piero Bernardini, ICSID Versus Non-ICSID Investment Treaty Arbitration, p. 13 (2009); Born, p. 1400.

[251] See UNCITRAL Rules 6(2) & 9(3).

[252] See Born 1409-10.

[253] See Lucy Reed et al., Guide to ICSID Arbitration, p. 130 (2d ed. 2010).

efforts to strengthen the Panel. Articles 38 and 40(1) of the ICSID Convention provide that institutional appointments are to be made from the Panel of Arbitrators. However, in September 2009, ICSID informally adopted a new two-tier appointment process for institutional appointments that allows the parties an opportunity to agree on appointments from outside the Panel.[254]

Appointing authorities have been criticised by some commentators for allegedly lacking neutrality. For example, the ICSID system has been criticised for the role of the president of the World Bank, by tradition an American, as the appointing authority, and because the World Bank's lending and other operations can allegedly give it an interest in particular cases or investors that could affect ICSID's neutrality.[255] ICSID, however, has its own Secretariat which operates independently from the World Bank. In 2009, ICSID's Administrative Council elected its first full-time Secretary-General.[256] ICSID's affiliation to the World Bank is sometimes perceived as an important aspect contributing to effective compliance with ICSID awards.

It appears that ICSID appointed approximately 22% of the arbitrators (both presiding arbitrators and co-arbitrators) in arbitration proceedings between 1972 until June 2011.[257] In addition, ICSID appoints all members of annulment committees that review arbitration awards (96 members to mid-2011).

The frequency of recourse to the appointing authority is unknown in ISDS cases under the UNCITRAL rules, but may be significant. Based on the limited public information, it appears that 12 requests to the PCA in 2010 relating to requests for an appointing authority involved claims by companies against states and may be ISDS cases.[258]

3. Competencies required by investment arbitrators

The requirements for the competence of investment arbitrators are couched in very general terms. ICSID Convention Article 14 requires, for example, "recognized competence in the fields of law, commerce, industry or finance". Very few investment treaties specify required competencies that arbitrators must possess. The general nature of the applicable criteria means that challenges to arbitrators for allegedly lacking the required competencies are almost unknown.

Some commentators, however, have noted that ISDS tribunals rarely include members with public law (administrative and constitutional law) expertise.[259] They note that it is increasingly recognised that ISDS

[254] The UNCITRAL Rules provide for a list procedure as the default method unless the parties jointly, or the appointing authority, decide not to use it. UNCITRAL Rule 8(2). The appointing authority provides the parties with a list of potential presiding arbitrators; the parties can strike objectionable candidates and rank the remainder; the arbitrator with the highest joint ranking is then appointed. Other variants may be agreed by the parties or used by the appointing authority.

[255] See, e.g., Silvia Karina Fiezzoni, The Challenge of UNASUR Member Countries to Replace ICSID Arbitration, 2 Beijing Law Review 134 (2011), available at http://www.scirp.org/Journal/blr/; Gus Van Harten, Investment Treaty Arbitration and Public Law, p. 169-171 (2007).

[256] Previously, the General Counsel of the World Bank was also the Secretary-General of ICSID.

[257] Statistics on the ICSID website provide aggregate information for arbitrators, annulment committee members (all of whom are appointed by ICSID) and conciliators (who are few in number). The percentage with regard to arbitrators is an estimate.

[258] See Permanent Court of Arbitration, Annual report 2010, pp. 14-16. Some or all of these cases may be based on contracts rather than investment treaties.

[259] See, e.g., William Burke-White and Andreas von Staden, The need for public law standards of review in investor-State arbitrations, in Stephan Schill, ed., International Investment Law and Comparative Public law, (Oxford 2010), p. 712.

tribunals, albeit composed as arbitral tribunals, are frequently engaged in review of administrative action analogous in many respects to the review of administrative action by domestic courts. Investors frequently face a choice of contesting a measure in the domestic courts and/or in ISDS arbitration proceedings. Some contend that arbitrators from the commercial arbitration bar are not sensitive to the public law issues in ISDS or to the need to provide persuasive reasons for decisions in ISDS cases.

ISDS arbitrators have also been criticised by some for not always demonstrating adequate professionalism. It is contended that some arbitrators are content to "copy-paste" material from previous cases without engaging in the analysis necessary to determine whether the cases and issues in question are in fact similar. There have been some academic efforts to evaluate the quality of arbitral reasoning.

Obligations of independence and impartiality are widely mandated, as discussed further below, and are often considered to be the most critical qualities for arbitrators. Commentators have noted that "there is substantial controversy and divergence in approaches as to the precise content of these obligations".[260]

4. Characteristics of the ISDS arbitrator pool and recent efforts to improve gender and regional balance

As outlined above in the section on the characteristics of investment arbitrators (Part II.F.1), available statistics about ISDS arbitrators show that they mostly originate from Europe and North America, and are 95% male. While the parties' choices of arbitrators are the primary determinant of those statistics, arbitration institutions and their selection of arbitrators also play a role in defining the corps of arbitrators. Jan Paulsson's advocacy for an increased role for institutional appointments (rather than party appointments) notes that arbitration institutions, especially where they nominate all three arbitrators (rather than only the chair), can introduce qualified new entrants as one of three arbitrators, which helps expand the pool of experienced arbitrators.[261]

As outlined by an ICSID representative at the March 2012 FOI Roundtable, ICSID is seeking to address the imbalances in the pool of ISDS arbitrators. When ICSID is asked to select an arbitrator, it seeks to select qualified candidates with relevant experience (including public international law, investment law and arbitration) and makes a particular effort to identify qualified candidates who are female and/or who are from developing States. It regularly proposes such candidates on the ballot of potential arbitrators that it sends to the parties. In some cases, the ICSID Convention requires that ICSID select from the ICSID Panel of Arbitrators. Here again, it considers all relevant factors (including expertise, potential conflicts of interest, language ability and availability) while seeking to include appointees who are female or from developing States. The parties are then provided with the name and curriculum vitae of the arbitrator(s) proposed by ICSID, giving them an opportunity to raise any compelling concerns.[262]

The quality of State appointees to the ICSID Panel of Arbitrators is critical to efforts to maintain and improve the quality of ICSID appointments and to improve the balance of the pool of ISDS arbitrators. Some States have not replaced appointees whose terms have expired.[263] As noted above, ICSID actively encourages its member States to ensure they place qualified persons on the list when they have a vacancy.

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[260] Born, p. 1464; Charles Brower pp. 4-5 (emphasis added).

[261] See Unilaterally appointed arbitrators – A good idea?, debate between Jan Paulsson and Alexis Mourre at the London School of Economics, (24 Nov. 2010), available here.

[262] The ICSID website provides statistics about the nationality of arbitrators in ICSID cases.

[263] ICSID maintains and publishes on its website the list of members of the Panel, including appointees from each State.

5. Regulation of investment arbitrators

a. Independence and impartiality

It is widely recognised that the independence and impartiality of arbitrators are fundamental to due process and the legitimacy of investment treaty arbitration.[264] The regulation of independence and impartiality occurs to some degree through initial declarations by arbitrators in which they are required to disclose potential conflicts of interest. It also occurs through challenges to proposed or sitting arbitrators which are increasingly common.

Some commentators consider that ICSID has a lower standard for independence and impartiality than other institutional rules, national laws or the IBA Guidelines while others consider that the differences rarely if ever affect decisions about arbitrators in practice.[265] Three differences between ICSID and other systems have been cited: (i) a requirement of a "manifest lack" of independence for a successful challenge to an ICSID arbitrator whereas other regimes require "justifiable doubts"[266]; (ii) an express reference in ICSID only to independence whereas other rules refer to both independence and impartiality[267]; and (iii) resolution of challenges at ICSID in principle by the remaining two arbitrators – who may be concerned about their future relations with the challenged arbitrator[268] or about their own exposure to disqualification in future cases under a low standard – rather than by a separate body such as an appointing authority with the possibility of immediate review by national courts.[269] Parties have sought to agree on a different

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[264] See Sheppard, p. 131.

[265] See Sheppard, p. 156.

[266] *Compare* ICSID Convention Arts. 57, 14(1) (referring to "manifest lack" of independence or other arbitrator qualifications as the standard for a successful challenge), *with* UNCITRAL Model Law art. 12(2) (requiring that "circumstances exist that give rise to justifiable doubts as to his impartiality or independence"); UNCITRAL Rules article 12(1) (same); IBA Guidelines, General Standard 2(b).

A recent ICSID challenge decision noted that the "manifest lack" standard has been "generally acknowledged" to mean "obvious" or "evident". See *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, (20 May 2011) (dismissing challenges to two arbitrators).

[267] In some recent cases, it has been accepted that the concept of "independence" in Article 14(1) of the ICSID Convention encompasses a duty to act with both independence and impartiality. See *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, § 70 (20 May 2011).

[268] The concerns about the risks of "mutual back-scratching" between arbitrators in this context are related to those raised more generally by some with regard to the system of party-appointed arbitrators. See above section II.F.2.

[269] In the ICSID system, challenges to a single member of a tribunal are normally resolved by the other two tribunal members. If the two remaining co-arbitrators disagree on the challenge or cannot come to a conclusion, the Chairman of the ICSID Administrative Council decides the challenge. As a matter of practice, such decisions are made by the Chairman personally; they are then incorporated into a draft decision by the ICSID Secretary-General, or under his/her supervision, and sent to the Chairman for final approval and signature. There is no role for national courts. See Art. 58, ICSID Convention; Art. 9, ICSID Rules.

Other leading institutional rules generally provide for a different mechanism to resolve arbitrator challenges. See, e.g, UNCITRAL Rules 13(4) and 6(2) (appointing authority decides on challenges in the absence of party agreement on another method). National courts frequently have an oversight role (under the national law of the situs of the arbitration) and can review the institutional decision. See, e.g., UNCITRAL Model Law art. 13(3) (rejection of challenge by institution agreed by parties can be further reviewed in immediate challenge brought in national court); *Republic of Ghana v Telekom Malaysia Berhard*, District Court of The Hague, 18 October 2004, Challenge No. 13/2004; Petition No. HA/RK 2004.667 (finding that service as both ISDS arbitrator and counsel in another ISDS case involving related issues was improper under Dutch law).

challenge mechanism and standard for disqualification in ICSID cases, but it is not clear that this is possible in light of Art. 57 of the ICSID Convention.[270]

Evaluation of practice in this area is hampered to some degree by limited publicity. National court decisions on ISDS arbitrator challenges, such as *Republic of Ghana v Telekom Malaysia Berhard*[271], are publicly available but rare. ICSID challenge decisions are usually but not always publicly available. Appointing authorities nominated by the PCA have published challenge decisions in some cases.[272] Many other institutional decisions on arbitrator challenges do not result in publicly-available or reasoned decisions and the existence of the challenge may never become public.[273] Some commentators have called for "greater clarity, predictability and transparency in arbitrator ethics".[274]

Over 30 arbitrator challenges have been adjudicated at ICSID since the early 1980s. One resulted in a disqualification and in nine other cases, the arbitrator resigned voluntarily. In some cases, arbitrator resignations may be a face-saving gesture in the face of an imminent negative decision; in others, they may be a pre-emptive move to avoid even the slightest controversy. Statistics are not available for other institutional decisions on arbitrator challenges because they often do not result in publicly-available or reasoned decisions.

Arbitral rules generally require arbitrators to disclose (both at the outset of the case and on a continuing basis) facts that might give rise to concerns about their independence.[275] Timely and complete disclosure of potential conflicts is recognised as vital to the arbitral process.[276] Disclosure gives the parties the opportunity to challenge the prospective arbitrator or accept him/her notwithstanding the disclosed circumstances. However, the applicable rules do not describe in detail what needs to be disclosed. Some commentators have criticised leaving disclosure to the arbitrators' discretion.[277] The IBA Guidelines provide guidance with regard to particular fact situations in some areas, but do not address in any detail the important area of issue conflicts (see below).

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[270] See *Perenco v. Ecuador and Petroecuador*, Decision on challenge to Arbitrator, (8 December 2009) (parties agreed between themselves that any challenges would be decided by the Secretary-General of the PCA (rather than by the remaining members of the ICSID arbitration tribunal) and under the "justifiable doubts" standard in the IBA Guidelines, rather than the ICSID "manifest lack" standard; challenge upheld by PCA and arbitrator resigned).

[271] *Republic of Ghana v Telekom Malaysia Berhard*, District Court of The Hague, 18 October 2004, Challenge No. 13/2004; Petition No. HA/RK 2004.667; and Challenge 17/2004, Petition No. HA/RK/2004/778, November 5, 2004.

[272] See Nigel Blackaby et al, Redfern and Hunter on International Arbitration (5th ed. 2009), p. 280 n.117.

[273] Born, p. 1559.

[274] C. Rogers, Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct, 41 Stanford Journal Of International Law 53, 112 (2005). The LCIA has recently decided to publish all challenge decisions to respond to calls for greater transparency and to provide guidance regarding the challenge process.

[275] ICSID requires a statement of relationships (if any) with the parties and of "any other circumstance that might cause the prospective arbitrator's reliability for independent judgment to be questioned by a party". ICSID Rule 6(2). The UNCITRAL Rules require disclosure of "any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence." UNCITRAL Art. 11 (emphasis added). These formulations are designed to encourage disclosure extending beyond facts sufficient to justify disqualification under each system.

[276] Born, p, 1543.

[277] Rogers, Regulating International Arbitrators, pp. 71-73.

b. Principal factual grounds for challenges and proliferation of challenges

The number of challenges to arbitrators has risen in recent years in both commercial and investor arbitration. In addition to issue conflicts (addressed immediately below), three types of challenges dominate among challenges that become public.[278] First, parties (mainly states) have argued that arbitrators had some connection with the other party. These have generally been rejected on the grounds that the connection is insufficient to meet the standard for a successful challenge.

Second, states and investors have challenged arbitrators based on their relationship with opposing counsel or party-appointed experts. Overall, these challenges have led to different conclusions, including, in few occasions, the person involved stepping down either as arbitrator, counsel or expert.[279]

Third, states and investors have challenged arbitrators based on previously-expressed opinions on an issue in the case, either in a previous award, a public statement or in academic work. The recurring nature of ISDS issues means that this situation will frequently arise in investment arbitration. These challenges have not been successful.[280] Challenges on the three bases can also be accompanied by complaints about an arbitrator's failure to disclose the facts in question.

The proliferation of challenges has been criticised by some as wasteful and inefficient. Noting that the vast majority are rejected, some commentators contend that some challenges are being used for tactical reasons, including to delay proceedings and raise costs. Opportunistic challenges, however, are often perceived to backfire because the challenged arbitrator remains in place and continues to adjudicate the dispute; such challenges can also undermine a party's credibility with the tribunal.

c. Arbitrators' "dual hats" and the question of issue conflicts

Issue conflicts can arise because, following the longstanding practice in commercial arbitration, many ISDS arbitrators simultaneously serve as counsel for parties in other ISDS cases. Recent research indicates that a majority of ICSID investment arbitrators also serve as counsel for investors in other cases while it has been estimated that approximately 10% also serve as counsel for States.[281] In this context, arbitrators may potentially face the same or similar issues as arbitrator and counsel.

Republic of Ghana v Telekom Malaysia Berhard[282], a Dutch court case, illustrates the issues in an ISDS context. The arbitrator was challenged because he was counsel in another ISDS case. In that other case, his client was seeking to annul an earlier award. Ghana was relying on that award as a precedent in case before the arbitrator under challenge. Ghana argued, *inter alia*, that the arbitrator would not have an open mind towards the value of a precedent that he was elsewhere seeking to annul. The other members of the tribunal

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[278] For a review of recent cases in these areas, see A. Sheppard, Arbitrator Independence in ICSID Arbitration, in C. Binder et al., eds., International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer (2009).

[279] See Sheppard, pp. 144-149; Park, pp. 685-688.

[280] See Sheppard, pp. 149-155; Park, pp. 648-655; N. Rubins and B. Lauterburg, Independence, Impartiality and Duty of Disclosure in Investment Arbitration, in (C. Knahr, C. Koller, W. Rechberger and A. Reinisch, eds.), Investment and Commercial Arbitration – Similarities and Divergences, pp. 171-79.

[281] Waibel & Wu, p. 28 ("a majority of investment arbitrators also serve as counsel for investors in other cases"); Email from Michael Waibel, on file with the Secretariat (estimating percentage of investment arbitrators who also serve as counsel for States in other cases based on the raw data in a database on investment arbitrators).

[282] *Republic of Ghana v Telekom Malaysia Berhard*, District Court of The Hague, 18 October 2004, Challenge No. 13/2004.

and subsequently the PCA Secretary-General rejected two challenges by Ghana. After Ghana took the challenge to the Dutch courts (where the arbitration was sited), the court emphasised the incompatibility of the arbitrator's role as attorney and arbitrator.[283] The court decided that the arbitrator could only continue to serve if he resigned as counsel in the other case.[284]

Thomas Buergenthal, a judge at the ICJ, has criticised the dual arbitrator-counsel role. He considers that the dual role raises questions of due process and should be eliminated in order to ensure that an arbitrator "will not be tempted, consciously or unconsciously, to seek to obtain a result in an arbitral decision that might advance the interests of a client in a case he or she is handling as counsel."[285] Professor Philippe Sands has similarly criticised the "revolving door" roles of lawyers in investment treaty arbitration.[286] NGOs and press reporters have also criticised the dual role of arbitrators as counsel in ISDS as incompatible with appropriate standards of independence and impartiality.[287]

Investment arbitration is particularly vulnerable to issue conflicts because of the recurring legal issues under the same or similar legal instruments (eg., BITS and/or the ICSID Convention). Issue conflicts rarely arise in commercial arbitration and they are not addressed in laws and rules developed for commercial arbitration.

The International Court of Justice has limited the ability of persons serving as ad hoc Judges to serve as counsel before the Court.[288] Recent reforms (following high-profile litigation challenging alleged conflicts of interest) also prevent the same person from acting as counsel and arbitrator in simultaneous proceedings at the Court of Arbitration for Sport (CAS), which adjudicates cases involving top international athletes at Olympic and other sporting events.[289] The recent Hague Principles on Ethical Standards for Counsel

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[283] The court found that his duty as counsel to put forward all possible arguments against the award under challenge in the annulment proceeding was incompatible with his duty as arbitrator to be unbiased and open towards the validity of the same award as a precedent (on which Ghana was relying) in the arbitration.

[284] After the arbitrator resigned as counsel but remained as arbitrator, Ghana sought to have him disqualified due to his (by then past) role as counsel in the other arbitration. The court, with a different judge, rejected this challenge, noting that international arbitration frequently involves such situations. *Republic of Ghana v Telekom Malaysia Berhard*, District Court of The Hague, Challenge 17/2004, Petition No. HA/RK/2004/778 (5 November 2004).

[285] Thomas Buergenthal, The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law, 22 Arb. Int'l 495 (2006); see also Leading Figures in International Dispute Resolution: A Conversation with Thomas Buergenthal, ASIL International Courts and Tribunals Interest Group (uploaded 8 Feb. 2012) (video minute 39:40) (reaffirming view that issue conflicts in arbitration raise serious due process concerns and expressing scepticism at the argument that stricter regulation of issue conflicts would create difficulties in finding qualified arbitrators).

[286] Luke Eric Peterson, Arbitrator decries "revolving door" roles of lawyers in investment treaty arbitration (25 Feb. 2010).

[287] See, e.g., Fiona Marshall, Defining New Institutional Options for Investor-State Dispute Settlement, IISD, pp, 8-14; M. Goldhaber, Are two hats too many?, American Lawyer Focus Europe, Summer 2005.

[288] See International Court of Justice, Practice Direction VII.

[289] The 2010 CAS rule change occurred following a highly-publicised court challenge to a CAS award based on alleged conflicts of interest in a case relating to alleged drug use by Floyd Landis in the Tour de France. See "In U.S. federal court motion, Landis claims arbitrators had conflicts of interest", Espn.com (26 September 2008). While the court case was settled, the CAS amended its rules to provide that "CAS arbitrators and mediators may not act as counsel for a party before the CAS" in order to limit the risk of conflicts of interest and to reduce the number of challenges. See Court of Arbitration for Sport, 2010 Code of Sports-related arbitration, art. S18; Press release, Court of Arbitration for Sport, The Court of Arbitration for Sport (CAS) Amends its Rules (1 Oct. 2009).

Appearing before International Courts and Tribunals, prepared by a Study Group of the International Law Association, contain a similar principle limiting dual roles apparently including in ISDS.[290]

Proposals to limit simultaneous work as arbitrator and counsel in ISDS cases have been strongly opposed by some members of the arbitration bar.[291] It is argued that (i) the general ethical rules are sufficient for arbitrators to manage issue conflicts on a case by case basis; (ii) parties should be free to choose their own arbitrators; (iii) initial appointments as arbitrator may be sporadic and that it is not economically feasible for new entrants to serve solely as an arbitrator; and (iv) allowing counsel to serve as arbitrators provides needed arbitration expertise.

At present, there are no clear rules addressing dual roles in ISDS. In 2004, the ICSID Secretariat suggested expanding ICSID's disclosure requirements to contain the same rule as the UNCITRAL Arbitration Rules.[292] It was noted that this change "might in particular be helpful in addressing perception of issues conflicts among arbitrators". It further suggested the possible adoption of a code of conduct for arbitrators analogous to the one adopted by the WTO. In one recent case, the former deputy Secretary-General of ICSID acknowledged that the practice of ISDS arbitrators also serving as counsel is generally accepted "[a]s things stand today, and irrespective of the advisability of such a situation".[293]

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[290] See Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals, prepared by the Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals chaired by Professors Sands, Boisson de Chazourne and McLachlan, (Sept. 2010), Principles 1.2, 4.3.4.

[291] See Luke Eric Peterson, Arbitrator decries "revolving door" roles of lawyers in investment treaty arbitration (25 Feb. 2010) (referring to "heated" debates at an arbitration conference).

[292] ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration, Discussion Paper (22 October 2004). Art. 11 of the UNCITRAL Rules use a "justifiable doubts" standard and require disclosure of "any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence."

[293] *Gallo v. Canada*, Decision on the Challenge to Mr. J. Christopher Thomas, QC, § 29 (14 October 2009) (NAFTA/UNCITRAL case in which ICSID Secretary-General serves as appointing authority applying UNCITRAL challenge standard).

ANNEX 6.

Enforcing non-pecuniary awards

This annex examines the issues raised by the enforcement of non-pecuniary (primary or judicial review) remedies in ISDS, both as final remedies and provisional remedies.

1. Final remedies

As discussed in the main paper, non-pecuniary (primary or judicial review) remedies against governments include (i) injunctions (requiring a party to do or refrain from doing something); (ii) the quashing or annulling of a governmental measure or decision; and (iii) a declaration of the rights and obligations of the parties, or a declaration that a particular administrative decision was illegal without otherwise stating any consequences.

Enforcement of injunctions is more complicated than damages. First, compliance with the injunctive order may be disputed in the future.[294] In that case, further proceedings (and adjudicator(s)) may be needed to decide on whether compliance has been achieved and the consequences of non-compliance. Where there is insufficient compliance, additional remedies may be needed to encourage or compel compliance. In national law, such issues are typically resolved by the same permanent courts that heard the original case.

In arbitration, the issues are complicated by the *ad hoc* nature of arbitration tribunals which generally complete their mandate after making a final award.[295] Compliance issues could be addressed by the original arbitration tribunal (by agreement), by a new arbitration tribunal or another body.[296] One commentator has suggested that enforcement difficulties can be exaggerated and that the decision about appropriate remedies in arbitration should not be dictated by concerns about difficulties of enforcement.[297]

Second, under the ICSID Convention, the art. 54 obligation to treat ICSID awards as national judgements is limited to pecuniary obligations. However, it is generally recognised that the ICSID Article 53 obligation of governments to comply with awards applies to all remedies in the award and is not affected by the limitation of the scope of the enforcement obligation in Article 54 to pecuniary obligations.[298] A failure to comply with a primary remedy could give rise to damages in a subsequent proceeding.

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[294] Compliance with a damages award may of course also be disputed, but the issues are in general comparatively easy to resolve. They can be addressed by national courts enforcing the award.

[295] See Born, p. 2514-15.

[296] The WTO system, which relies exclusively on non-pecuniary remedies, has separate proceedings and adjudicators to decide on (i) a reasonable time for compliance; (ii) whether compliance has been achieved; and (iii) the appropriate degree of retaliation in the event of non-compliance. The ECHR provides for the Committee of Ministers assessing the adequacy of measures taken by a state in response to a judgment finding a violation. See Annex 2.

[297] See Born, p. 2483 ("in virtually no case ... is it appropriate for the possibilities of difficulties in enforcement, against a party that might refuse to comply with its obligations under the award, to justify withholding otherwise appropriate relief").

[298] See Antonio R. Parra, The Enforcement of ICSID Arbitral Awards, (16 November 2007); Schreuer, ICSID Commentary, p. 1137.

In contrast to ICSID, enforcement of non-pecuniary awards is generally possible in national courts under the New York Convention. A number of courts in both civil and common law jurisdictions have held, in commercial arbitration cases, that the New York Convention applies to awards granting declaratory or injunctive relief as well as to monetary damages.[299] However, cases of this type are rare and do not appear to have involved State respondents.

Other primary remedies against governments, such as quashing or annulling a government measure, normally do not require follow up with regard to compliance when used in domestic administrative law. As noted above, the use of such remedies in ISDS would likely require appropriate domestic legislation, as in the case of ECHR, and could require follow up.[300] Such remedies typically require the government to engage again in its decision-making process while remediating the identified failings, such as a source of bias. However, the outcome is not mandated and it is possible that the agency reaches the same result. The affected party may try to challenge the decision again, but usually a new proceeding is required and the complainant must put forward grounds based on the second decision-making process.

Final declaratory relief primarily relies on good faith application by the relevant state. Some international law systems, such as the WTO and ECHR, provide for oversight of state responses to such relief.

The difficulties associated with investment arbitration tribunals applying primary or judicial review type remedies have prompted some commentators to suggest expanded use of primary remedies by domestic courts in host states as part of the ISDS system.[301]

2. Provisional remedies

As with final relief, an arbitral tribunal lacks direct coercive power to compel compliance with its awards or orders of provisional measures. Under the New York Convention, such enforcement is the responsibility of national courts, at the application of one or more of the parties. In ICSID cases, recourse to domestic courts for provisional relief is excluded in practice.[302]

Schreuer suggests that ISDS "tribunals imposing … [provisional] non-pecuniary obligations should keep the impossibility of enforcing them in mind. Such awards should provide for a pecuniary alternative in case of non-performance, such as liquidated damages, penalties or another obligation to pay a certain amount of money". [303] Supplementary penalties on states for failure to comply with a tribunal order (beyond compensation for investor losses) could themselves be difficult to enforce due to, *inter alia*, state immunity.

hile tribunals have no direct powers of enforcement, they may under some conditions have somewhat similar powers. A tribunal may, for example, order a party to deliver property or funds into escrow, for safekeeping during the course of arbitral proceedings. If such an order is complied with, the tribunal does in practice generally have authority to enforce its awards insofar as they involve the disputed property because it controls disposition of the disputed property or funds.

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[299] See Born, p. 2481 n.323, 324, 325 (citing cases).

[300] In the absence of such legislation, the remedy could possibly be framed as an injunction to re-open the relevant procedure or decision.

[301] See Anne van Aaken, Primary and secondary remedies in international investment law and national state liability: A functional and comparative view, in Schill, op cit., pp. 721-54.

[302] Under ICSID Rule 39(6), recourse is available only where the relevant treaty or other agreement so provides; such, provisions do not appear to exist in practice.

[303] See C. Schreuer, Non-pecuniary remedies in ICSID Arbitration, 20 Arbitration International 325, 332 (2004).

For provisional remedies, the tribunal can consider issues of compliance as the case progresses. A strong factor encouraging compliance with provisional remedies can be the desire or need not to antagonise, or lose credibility with, a tribunal with the continuing power to decide the merits and award final remedies.

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