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Navigating the parallel universe of investor–State arbitrations under the UNCITRAL Rules

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I Introduction

Most investment treaties include a dispute-resolution clause presenting the parties with a range of options for arbitration, the two most common of which are (i) arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington on 18 March 1965 (ICSID Convention),[1] and (ii) arbitration under the United Nations Commission on International Trade Law Arbitration Rules (the UNCITRAL Rules).[2]

Much has been said about the practice and procedure of arbitrations conducted under the auspices of ICSID. ICSID decisions are published.[3] ICSID makes available on its website a list of pending and past cases.[4] There are detailed commentaries on the ICSID Convention and cases

* The views expressed herein are those of the author alone.

1 Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature 18 March 1965, 575 UNTS 159, (entered into force 14 October 1966) (ICSID Convention).

2 United Nations Commission on International Trade Law Arbitration Rules (1976). Throughout this chapter reference is made to the 1976 version of the UNCITRAL Rules. UNCITRAL adopted a revised version of the UNCITRAL Rules (Revised UNCITRAL Rules) on 29 June 2010, which took effect from 15 August 2010; available at www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised.pdf (last accessed 19 January 2011).

3 The awards in most of the cases conducted under the original ICSID Rules were published in the ICSID Review, the ICSID website or ILM. Since April 2006, Art. 48(4) of the ICSID Rules provides that ICSID 'shall promptly include in its publications excerpts of the legal reasoning of the Tribunal' regardless of whether the parties have consented to the publication of the award.

4 See http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases (last accessed 19 January 2011).

decided thereunder.[5] Practice guides to ICSID arbitration have been produced by specialists.[6] ICSID recently released a report of statistics about all cases it has ever administered.[7] The ICSID website contains a bibliography of 648 publications about ICSID (and two items about investor–State arbitration under the UNCITRAL Rules).

By contrast, information about investor–State arbitration under the UNCITRAL Rules is less readily accessible, due to different publicity requirements and the fact that no single institution is responsible for administering all cases under the UNCITRAL Rules.[8] Although it is a challenge to find out about investor–State cases under the UNCITRAL Rules, one cannot assume that such cases are any less worthy of attention. They are significant in terms of their volume, the guidance they may offer on procedural and substantive questions, and the impact that they have on the parties, stakeholders and public in each case.

It is possible to glean from various public sources significant numbers – over 120 – of investor–State cases brought under the UNCITRAL Rules. One might assume that even more investor–State disputes have been taking place away from the public eye. One source suggests that in recent years there were more investor–State arbitrations commenced under the UNCITRAL Rules than the ICSID Convention.[9] As discussed below, it appears safe to estimate that at least 25 per cent of new investor–State arbitrations are initiated pursuant to the UNCITRAL Rules. As one indication of the increase in investor–State disputes under

[5] See e.g. C. Schreuer *et al.* (eds.), *The ICSID Convention: A commentary*, 2nd edn (Cambridge University Press, 2009); R. Happ, *Digest of ICSID Awards and Decisions: 2003–2007* (Oxford University Press, 2009); E. Gaillard, *La Jurisprudence du CIRDI (ICSID Case Law)* (Paris: Pedone, 2010), II.

[6] See e.g. L. Reed, J. Paulsson and N. Blackaby, *Guide to ICSID Arbitration* 2nd edn (The Hague: Kluwer, 2010).

[7] ICSID Secretariat, *The ICSID Caseload: Statistics*, 2 (2010), http://icsid.worldbank.org/ICSID/Index.jsp (last accessed 21 January 2011).

[8] For general commentary on the UNCITRAL Arbitration Rules (not specific to investor–State disputes), see J. J. van Hof, *Commentary on the UNCITRAL Arbitration Rules: The application by the Iran–US Claims Tribunal* (The Hague: Kluwer, 1991); D. Caron, L. Caplan and M. Pellonää, *The UNCITRAL Arbitration Rules: A commentary* (Oxford University Press, 2006); J. Paulsson and G. Petrochilos, *Revision of the UNCITRAL Arbitration Rules* (Report Commissioned by UNCITRAL, 2006), www.uncitral.org/pdf/english/news/arbrules_report.pdf (last accessed 19 January 2011); J. Castello, 'UNCITRAL Rules' in F.-B. Weigand (ed.), *Practitioner's Handbook on International Commercial Arbitration*, 2nd edn (Oxford University Press, 2009).

[9] L. Peterson, *Investment treaty news: 2006 – A year in review* (2006), www.iisd.org/pdf/2007/itn_year_review_2006.pdf (last accessed 19 January 2011).

the UNCITRAL Rules, the Permanent Court of Arbitration in The Hague (the PCA) has administered over fifty such cases in the last ten years compared to none in the previous decade.[10]

The purpose of this chapter is to shed some light on the number and nature of investor–State disputes submitted to arbitration under the UNCITRAL Rules, a lesser-explored 'parallel universe' to the well-understood ICSID system. The aim is to assist those advising investors and States should they face an UNCITRAL arbitration either by choice (at the stage of drafting an investment agreement or when a dispute has already arisen) or otherwise. Section II covers preliminary issues, including a brief description of the UNCITRAL Rules, an examination of the circumstances in which parties to an investor–State dispute may find themselves submitting to UNCITRAL arbitration, and information about the numbers of investor–State disputes actually submitted to UNCITRAL arbitration. Section III highlights some of the practical and legal features of UNCITRAL arbitration that may distinguish it from ICSID arbitration. Section IV contains some conclusions and considers recently proposed and enacted revisions to the UNCITRAL Rules that account for their application to investor–State disputes.

II Preliminary matters

A What are the UNCITRAL Rules?

The United Nations Commission for International Trade Law (UNCITRAL) was established in 1966 as a subsidiary body of the General Assembly of the United Nations.[11] While international arbitration is one facet of UNCITRAL's work, UNCITRAL itself is not an arbitral institution and has no role in the day-to-day running of any arbitrations.

The UNCITRAL Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings. The UNCITRAL Rules were designed for use in any type of

[10] Data about PCA cases which the parties have agreed to make public are available at the PCA website, www.pca-cpa.org (last accessed 19 January 2011). The PCA is currently providing registry services in 32 investor–State disputes under the UNCITRAL Rules.

[11] The general mandate of UNCITRAL is 'to further the progressive harmonization and unification of the law of international trade': see UNCITRAL, *Origin, Mandate and Composition of UNCITRAL* (2007), www.uncitral.org/uncitral/en/about/origin.html (last accessed 19 January 2011).

commercial dispute anywhere in the world. A majority of cases under the rules are ad hoc international commercial arbitrations where the parties have agreed in their contract to submit disputes to arbitration under the UNCITRAL Rules. The UNCITRAL Rules have also been indirectly used in cases administered by regional and international arbitral institutions with rules modeled on the UNCITRAL Rules.[12] Several bodies resolving public international law disputes have also adopted and adapted the UNCITRAL Rules.[13]

Although the UNCITRAL Rules were not specifically tailored for claims brought by foreign investors against a host State government, they have actually been used in that context since 1981, when the Iran–US Claims Tribunal adopted a modified version of the UNCITRAL Rules for resolving claims in the wake of the 1979 hostage crisis and the subsequent freeze of Iranian assets by the USA.[14] More recently, the UNCITRAL Rules have increasingly been applied to investor–State disputes under bilateral and multilateral investment treaties, in which a State expresses a standing offer to arbitrate investment disputes that an investor can accept at the time a dispute arises. This trend led to the recommendation of some investor–State inspired changes to the rules, discussed in more detail in section IV.[15]

[12] e.g. the Australian Centre for International Commercial Arbitration; Kuala Lumpur Regional Centre for Arbitration; Cairo Regional Centre for International Arbitration; and Swiss Chambers Court of Arbitration and Mediation.

[13] e.g. the PCA's various sets of Optional Rules are adapted from the UNCITRAL Rules, www.pca-cpa.org/showpage.asp?pag_id=1188 (last accessed 19 January 2011); the United Nations Compensation Commission was established in 1991 to process claims for compensation stemming from the Gulf War: see SC Res 692, UN SCOR, 2987th meeting, UN Doc. No. S/RES/692 (20 May 1991), which used the rules as a procedural fall back mechanism.

[14] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), 1981, www.iusct.org/claims-settlement.pdf (last accessed 19 January 2011). See also G. Sacerdoti, 'Investment arbitration under ICSID and UNCITRAL Rules: Prerequisites, applicable law, review of awards', *ICSID Review – Foreign Investment Law Journal*, 19(1) (2004), 1, 8 (citing UNCTAD's explanation for the inclusion of UNCITRAL Rules as an alternative to ICSID in BITs partly because 'the successful use of UNCITRAL rules by the Iran–United States Claims Tribunals seemed to suggest that these rules were specially adaptable to investor-to-State dispute-settlement').

[15] For a discussion of the UNCITRAL Rules revision process, see J. Levine, 'Current trends in international arbitral practice as reflected in the revision of the UNCITRAL Arbitration Rules', *University of New South Wales Law Journal*, 31(1), (2008), 266; Castello, 'UNCITRAL Rules'.

B *When is there an option to submit an investor–State dispute to arbitration under the UNCITRAL Rules?*

Before considering what factors may play a role in choosing UNCITRAL arbitration over other possible forms of resolving investor–State disputes, it is helpful to establish whether such a choice exists in the first place. Most investment treaties provide the investor with a choice of dispute-resolution options. Article 10(5) of the Netherlands–Argentina bilateral investment treaty (BIT) is typical,[16] in that it provides that 'the investor concerned may submit the dispute either to': (a) ICSID, or (b) an ad hoc arbitration tribunal established under the UNCITRAL Rules. The choice between ICSID and UNCITRAL (among other options) is also offered under most multilateral investment agreements.[17]

Many publicly known investor–State arbitrations under the UNCITRAL Rules involve respondent States or investors from States that have signed but not ratified the ICSID Convention (e.g. Canada, Kyrgyz Republic, Thailand), have never signed the ICSID Convention (e.g. India, Mexico, Poland, Russia), or have ratified but later denounced the ICSID Convention (e.g. Bolivia and Ecuador).[18] Thus, while some investment treaties, such as

[16] Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Argentine Republic, signed 20 October 1992 (entered into force 1 October 1994).

[17] See e.g. Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010), Art. 21(1) (AANZFTA); United States–Dominican Republic–Central America Free Trade Agreement, signed 28 May 2004 (entered into force for the United States on 28 February 2006; El Salvador 1 March 2006; Honduras and Nicaragua 1 April 2006; Guatemala 1 July 2006; Dominican Republic 1 March 2007; Costa Rica 1 January 2009), Art. 10.16(3) (offering ICSID, ICSID Additional Facility, UNCITRAL Arbitration Rules); Energy Charter Treaty, signed 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998), Art. 26(4).

[18] On 6 July 2009, the World Bank received a written notice of denunciation of the ICSID Convention from the Republic of Ecuador. In accordance with Art. 71 of the ICSID Convention, the denunciation took effect six months after the receipt of Ecuador's notice, i.e. on 7 January 2010. On 2 May 2007, the World Bank received a written notice of denunciation from the Republic of Bolivia, which, in accordance with Art. 71, took effect on 3 November 2007. For States that have entered BITs with Bolivia and Ecuador, the ICSID option in those BITs may be thrown into question in light of the denouncement of the ICSID Convention by Bolivia and Ecuador. Thus, Art. XIII(4) of the Agreement between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments, signed 29 April 1996 (entered into force 6 June 1997), appears to provide the investor with three choices – ICSID, ICSID Additional Facility or UNCITRAL Rules.

the North American Free Trade Agreement (NAFTA),[19] *appear* to offer the investor a choice of arbitral options, in reality, there may be no effective choice if one of the contracting parties falls into one of these categories.

Some BITs, such as the UK–Argentina BIT,[20] make the choice between ICSID and UNCITRAL subject to agreement by *both* the investor party and the State Party, and provide for UNCITRAL Rules as a default failing agreement by the parties. Different again, the Canada–Venezuela BIT provides for UNCITRAL Rules arbitration *only* if ICSID and the ICSID Additional Facility are *unavailable*.[21] Certain BITs provide for UNCITRAL Rules as the *only* arbitration option (subject to the parties agreeing otherwise), for example Article 10 of the Hong Kong–Australia BIT.[22] On the other hand, some treaties, such as the United Kingdom–Malaysia BIT,[23] provide for ICSID as the only arbitration option. Under the Egypt–Thailand BIT,[24] the only arbitration option is ICSID, but as Thailand has never ratified the ICSID Convention, the sole avenue of recourse for an investor would be the local courts.

Quite apart from treaties, investor–State disputes may be submitted to arbitration under the UNCITRAL Rules by virtue of the parties' direct choice to do so in their investment contracts, and/or if the national

[19] North American Free Trade Agreement, signed 17 December 1992, 32 ILM 289 (entered into force 1 January 1994), Art. 1120.

[20] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, signed 11 December 1990 (entered into force 19 February 1993), Art. 8(3).

[21] Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, signed 1 July 1996 (entered into force 28 January 1998), Art. 3. For interpretation of this provision, see *Nova Scotia Power Incorporated (NSPI)* v. *Bolivarian Republic of Venezuela* (Decision on Jurisdiction of 22 April 2010).

[22] Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, signed 15 September 1993 (entered into force 15 October 1993), Art. 10. Similarly, Art. 8(5) of the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed 29 April 1991 (entered into force 1 October 1992), which is the basis of five of the cases listed in the Appendix, provides only for arbitration by tribunals using the UNCITRAL Rules.

[23] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments, signed 21 May 1981 (entered into force 21 October 1988).

[24] Agreement between the Government of the Kingdom of Thailand and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments, signed 18 February 2000 (entered into force).

investment legislation of the host State provides for arbitration of investment disputes pursuant to the UNCITRAL Rules.[25]

The above survey demonstrates that investors and States can find themselves in arbitration under the UNCITRAL Rules by choice of one party, by agreement of both, or by default. Whichever way it happens, it is happening increasingly often, as the following section shows.

C *The number of investor–State disputes under the UNCITRAL Rules*

Unlike ICSID, there is no single repository of data about investor–State disputes under the UNCITRAL Rules. UNCITRAL itself does not possess or process such information. A 2010 United Nations Conference on Trade and Development (UNCTAD) study reported the following figures:

> Of the total 357 known disputes, 225 were filed with [ICSID] or under the ICSID Additional Facility, 91 under the [UNCITRAL Rules], 19 with the Stockholm Chamber of Commerce, eight were administered with the Permanent Court of Arbitration in the Hague, five with the International Chamber of Commerce (ICC) and four are ad hoc cases. One further case was filed with the Cairo Regional Centre for International Commercial Arbitration. In four cases the applicable rules are unknown so far.[26]

Those figures suggest that UNCITRAL cases constitute over 25 per cent of all investor–State disputes. The proportion may vary from year to year. According to one report – prepared using published data and off-the-record interviews with counsel, arbitrators and institutions – UNCITRAL cases represented 52 per cent of investor–State disputes commenced in 2006 (see Figure 17.1).[27]

[25] The case of *Centerra Gold Inc. (Canada) and Kumtor Gold Company (Kyrgyz Republic)* v. *The Kyrgyz Republic*, administered by the PCA, is a recent example, brought on the basis of an investment agreement and the 2003 Kyrgyz Law No. 66 on investments.

[26] UNCTAD, *Latest Developments in Investor–State Dispute Settlement*, IIA Issues Note No. 1 (2010), UNCTAD Doc. No. UNCTAD/WEB/DIAE/IA/2010/3, www.unctad.org/en/docs/webdiaeia20103_en.pdf (last accessed 19 January 2011).

[27] L. Peterson, *Investment Treaty News: 2006 – A year in review* (2006), www.iisd.org/pdf/2007/itn_year_review_2006.pdf (last accessed 19 January 2011). Peterson found that:

> the ICSID facility – the most visible and well-known forum for investment disputes – handled less than half of the treaty-based investment arbitrations launched in 2006 . . . [F]urther number of cases could have been launched without being detected . . . Certainly, it is possible that the proportion of cases taking place *outside* of ICSID is even more pronounced . . .

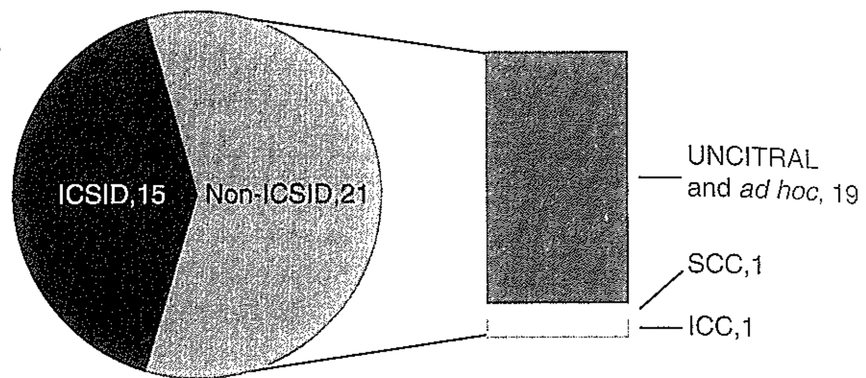

Figure 17.1: 2006 known treaty cases by rules of arbitration

In 2009, there were twenty-five cases commenced at ICSID and fifteen publicly known cases commenced under the UNCITRAL Rules. One leading commentator notes that it is possible that a 'non-trivial percentage' of investor–State arbitrations are proceeding under the UNCITRAL Rules which public sources have not managed to identify.[28] There are several other public sources from which one can estimate that at least 25 per cent of investor–State disputes are commenced under the UNCITRAL Rules.[29] Such sources cumulatively show over 120 publicly known investor–State disputes commenced since 1994, more than half of which were commenced in the last five years.

III In what ways is investor–State arbitration under the UNCITRAL Rules really that different from ICSID arbitration?

This section draws attention to some of the differences that practitioners can expect between an ICSID arbitration and an investor–State arbitration under the UNCITRAL Rules. Two general observations are made at the outset.

[28] G. Born and E. Shenkman, 'Confidentiality and transparency in commercial and investor–State international arbitration' in C. Rogers and R. Alford (eds.), *The Future of Investment Arbitration* (Oxford University Press, 2009), pp. 4, 28.

[29] These sources include UNCTAD (http://www.unctad.org/iia-dbcases/cases.aspx), Investment Claims (www.investmentclaims.com), Investment Treaty Arbitration (http://ita.law.uvic.ca/), Investment Arbitration Reporter (www.iareporter.com), *Investment Treaty News* (www.investmenttreatynews.org), *Global Arbitration Review* (www.globalarbitrationreview.com), Energy Charter Secretariat (www.encharter.org) and the Permanent Court of Arbitration (www.pca-cpa.org).

First, typically investor–State arbitrations will in reality be similar in most respects under both sets of rules. One should expect that the substantive outcome of the dispute would be the same irrespective of the chosen forum to the extent the same BIT governs the dispute.[30] Procedurally also, there will be similarities, including a preliminary phase involving constitution of the tribunal, procedural conferences, establishment of a timetable, document exchanges and possibly requests to the tribunal for provisional measures. Under both systems, tribunals determine their own competence and often bifurcate proceedings into separate jurisdictional and merits phases.[31] There will usually be written and oral pleadings, and the award will be signed, reasoned and final, subject only to limited recourse for review.[32]

Secondly, factors distinct from the rules and forum can influence how an arbitration plays out in practice. These might include the amount at stake, the parties' budgets, the legal and cultural background of counsel and arbitrators, and the attitudes of the arbitrators to cross-examination and document production. Such factors can impact an arbitration's cost, speed, length and style as much as the choice of any rules.[33]

[30] See discussion of *Romak SA* v. *The Republic of Uzbekistan*, below in section III.G.

[31] UNCITRAL Rules, Art. 21; ICSID Rules, Art. 42; see also Revised UNCITRAL Rules, Art. 23.

[32] The fact that the two procedures can be similar in practice is illustrated by the related cases of *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA* v. *Argentine Republic* (ICSID Case No. ARB/03/19) (*Suez*); *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA* v. *Argentine Republic* (ICSID Case No. ARB/03/17) (*InterAguas*); and *AWG Group Ltd* v. *Argentine Republic* (*AWG*) (under the UNCITRAL Rules). Those cases arose from similar circumstances concerning all three claimants' investments in a water concession in Buenos Aires and the alleged failure by Argentina to apply a previously agreed tariff system. Claimants Suez and Vivendi relied on the Agreement between the Government of the French Republic and the Government of the Republic of Argentina on the Encouragement at Reciprocal Protection of Investments, signed 3 July 1991 (entered into force 3 March 1993) (which allowed them to choose ICSID arbitration), but the claimant AWG relied on the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, signed 11 December 1990 (entered into force 19 February 1993) which, as noted above, requires both parties to agree on the forum, failing which arbitration under the UNCITRAL Rules is the default. The members of the tribunal are identical in all three cases and the cases are joined for all purposes. One set of pleadings was filed in all three cases, one hearing was held for all three cases at both the jurisdiction and merits phases, and one decision on jurisdiction was issued by the tribunal covering all three cases. See procedural history discussion in *InterAguas* (Decision on Jurisdiction of 16 May 2006) and *InterAguas* (Decision on Liability of 30 July 2010).

[33] See R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008), p. 226: 'Given the freedom of arbitrators to determine the

A Confidentiality and publicity

Because it affects whether we are aware of the very existence of a dispute, a natural starting place to consider the differences between ICSID and UNCITRAL is the extent to which case details are made public. Given the public-interest implications of many foreign investment disputes, the lack of transparency requirements for cases under the UNCITRAL Rules has been the source of criticism and was a hotly contested issue in discussions of the Working Group tasked with revising the UNCITRAL Rules.[34] Differences between the ICSID and UNCITRAL regimes relate to: (i) publicity about the commencement of the arbitration; (ii) submissions by non-disputing parties; (iii) public access to hearings; and (iv) publication of awards.

Under ICSID Administrative and Financial Regulation 22, the Secretary-General of ICSID is required to make public information on the registration of all requests for conciliation or arbitration and to indicate in due course the date and method of the termination of each proceeding. A list of pending and concluded cases appears on the ICSID website.

Since amendments introduced in 2006, ICSID Rule 37 provides that: 'After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute to file a written submission with the Tribunal regarding a matter within the scope of the dispute.' Rule 37 sets out the factors a tribunal should consider in determining whether to allow such a filing. The tribunal can allow such submissions even if a party objects. Both parties have an opportunity to present their observations on non-disputing party submissions. This rule has been applied recently to allow submissions by human rights organisations in a case brought by European mining investors challenging so-called Black Economic Empowerment measures as contrary to South Africa's BITs,[35] and

procedure, a major difference often lies less with the written rules than with the personal background and experience of the arbitrator, especially in regard to their familiarity with the principles of common law and civil law'. Given the typically large size of claims under investment treaty claims (at least 50 cases being for claims over $100 million), it is usual that highly experienced, confident and sophisticated arbitrators are selected to oversee the procedure.

[34] See Levine, 'Current trends', pp. 279–80; Castello, 'UNCITRAL Rules', para. 16.25; Born and Shenkman, 'Confidentiality and transparency', p. 33; S. Jagusch and J. Sullivan, 'A comparison of ICSID and UNCITRAL arbitration' in M. Waibel *et al.* (eds.), *The Backlash against Investment Arbitration: Perceptions and reality* (The Hague: Kluwer, 2010), p. 95.

[35] *Piero Foresti, Laura de Carli and ors* v. *Republic of South Africa* (ICSID Case No. ARB (AF)/07/01). In that case, the NGOs were granted limited access to documents. The claimants in that case have since discontinued the proceedings.

by environmental non-governmental organisations (NGOs) seeking to participate in a case between a UK investor and Tanzania over water supply facilities.[36]

Non-parties might also attend ICSID hearings under certain conditions. Rule 32 of the ICSID Arbitration Rules provides that:

> Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements.

Finally, under ICSID Institution Rule 22, the ICSID Secretary-General is required to publish, with the consent of both disputing parties, reports of awards rendered by arbitral tribunals in ICSID proceedings. Since the 2006 amendments, ICSID Arbitration Rule 48(5) provides that excerpts of the Tribunal's legal reasoning shall be published by ICSID even absent consent.

The UNCITRAL Rules, by contrast, contain no obligation on the parties or any tribunal to publicise the existence of their dispute. They are silent on the participation of non-disputing parties. With respect to hearings, Article 25(4) of the UNCITRAL Rules states that: 'Hearings shall be held *in camera* unless the parties agree otherwise.'[37] Under Article 32(5), the award 'may be made public only with the consent of both parties'.[38]

The fact that the UNCITRAL Rules do not *oblige* public disclosure of all or part of the proceedings does not mean that arbitration under the UNCITRAL Rules is always and necessarily opaque. Rather, it leaves the decisions about how public the proceedings will be in the hands of the parties and the tribunal in any given case. Here, Article 15(1) of the UNCITRAL Rules is also important as a guiding provision on the conduct of proceedings under the UNCITRAL Rules.[39]

[36] *Biwater Gauff (Tanzania) Ltd* v. *United Republic of Tanzania* (ICSID Case No. ARB 05/22, Procedural Order No. 5 on *amicus curiae* of 2 February 2007).

[37] See also Revised UNCITRAL Rules, Art. 28(3).

[38] See also Revised UNCITRAL Rules, Art. 34(5).

[39] Art. 15(1) provides that: 'Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.' See also Revised UNCITRAL Rules, Art. 17(1), which adds that: 'The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.'

That rule has been relied on by several tribunals to allow the participation of *amici curiae*, the first of which was *Methanex Corporation* v. *United States*,[40] involving a claim of over almost US$1 billion arising from a ban on a gasoline additive that had environmental implications. The *Methanex* tribunal held that 'by Article 15(1) of the UNCITRAL Arbitration Rules it has the power to accept *amicus* submissions' of environmental NGOs, and considered that it could be appropriate to *exercise* that power in the case, having weighed the undoubted public interest of the arbitration against other factors such as cost and the risk of imposing an extra burden on the parties.[41] This approach has been followed by other tribunals, including ICSID tribunals before the ICSID Rules were amended to provide expressly for non-disputing party submissions,[42] and was an impetus to the NAFTA Free Trade Commission issuing a statement on the participation of non-disputing parties in NAFTA arbitrations.[43]

The PCA has seen different approaches to confidentiality across its investor–State caseload. In some cases neither party wishes to make the proceedings public, and additional confidentiality provisions might in fact be included in terms of appointment or procedural orders to bolster the limited provisions present in the UNCITRAL Rules. In other cases, the party urging for the proceedings to be kept private is the respondent State. And in other cases, it is the investor who urges the proceedings be kept private, often expressing concerns about revealing business information or overly politicising a dispute.

Where both parties have agreed to publicise details of the dispute, the source of the consent and the extent of transparency varies from case to case. Two examples of PCA cases in which the parties agreed to 'full' transparency are *TCW* v. *Dominican Republic*,[44] and the *Abyei Arbitration*.[45] The former was a dispute between a US investor in the

[40] *Methanex Corporation* v. *United States* (Decision on *Amici Curiae* of 15 January 2001); see also *United Parcel Service of America Inc.* v. *Government of Canada* (Decision on *Amici Curiae* of 17 October 2001); *Glamis Gold Ltd* v. *United States of America* (Decision on Application and Submission by Quechan Indian Nation of 16 September 2005).

[41] *Methanex*, paras. 47–51.

[42] In *Suez*, the tribunal followed *Methanex* in allowing *amicus* briefs, on the basis that Art. 44 of the ICSID Convention gave the tribunal similarly broad powers as Art. 15(1) of the UNCITRAL Rules: see *Suez* (Order in Response to a Petition for Participation as *Amicus Curiae* of 17 March 2006).

[43] NAFTA Free Trade Commission, *Statement of the Free Trade Commission on Non-Disputing Party Participation*, www.naftaclaims.com/Papers/Nondisputing-en.pdf (last accessed 20 January 2011).

[44] *TCW Group Inc. and Dominican Energy Holidings LP* v. *The Dominican Republic.*

[45] *The Government of Sudan* v. *The Sudan People's Liberation Movement/Army.*

electricity sector and the Dominican Republic brought pursuant to the Central America–Dominican Republic–United States Free Trade Agreement (DR–CAFTA). Article 10.20(3) of DR–CAFTA gives the tribunal 'the authority to accept and consider *amicus curiae* submissions' and Article 10.21 sets out detailed provisions on transparency, including publication of documents and public hearings. On the basis of the treaty provisions and consultations among the tribunal, the PCA and the parties, all of the documents in the case, including pleadings, transcripts and orders, are available on the PCA's website. Public hearings had been planned in New York and detailed procedural directions were issued for submissions by non-disputing CAFTA Member States and interested *amici curiae*. The case settled.

The *Abyei Arbitration* between the Government of Sudan and the Sudanese People's Liberation Movement/Army was not an investor–State dispute, but a case brought under the PCA's Optional Rules for Disputes between Two Parties only one of which is a State, which are a modified version of the UNCITRAL Rules with identical Articles 24(5) and 32(4). Given the importance of that case to peace, stability and resources in the region, the parties agreed in their *compromis* and at the first procedural hearing[46] that the proceedings would be fully transparent and all the pleadings, transcripts and orders were made available on the PCA website. The hearings were open to the public (hundreds of Sudanese people, diplomats and members of the public attended), were webcast live and video-archived on the PCA's website (attracting thousands of hits). These two cases illustrate that maximal transparency is feasible for disputes under the UNCITRAL Rules, if the parties so agree.

Alternatively, parties may agree to publicise only *some* details about their case, and to do so *after* the dispute is resolved. In some PCA-administered cases, the parties have agreed to make certain details available on the PCA's website,[47] or have maintained confidentiality throughout the proceedings but agreed to publication of the award after

[46] Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area (7 July 2008), Art. 8, www.pca-cpa.org/upload/files/Abyei%20Arbitration%20Agreement.pdf (last accessed 20 January 2011) and Transcript of Proceedings, *The Government of Sudan* v. *The Sudan People's Liberation Movement/Army* (Permanent Court of Arbitration, Procedural Hearing, 24 November 2008), www.pca-cpa.org/upload/files/Transcript_Abyei_241108%20_rev2.pdf (last accessed 20 November 2011).

[47] The list of cases on the PCA website includes e.g. *HICEE BV* v. *The Slovak Republic*, *Telekom Malaysia Berhad* v. *Government of Ghana* (initiated 2003), and *Centerra Gold Inc. & Kumtor Gold Co.* v. *Kyrgyz Republic* (2009).

completion of the case or a certain phase of the case.[48] This latter approach is consistent with what the authors of a recent commentary urge should be a 'balanced approach' concluding that 'confidentiality should not automatically be abandoned in favor of transparency in the investor–State context'.[49]

One commentator has observed that one reason why 'UNCITRAL investment arbitration is still an attractive alternative to ICSID arbitration' is that decisions by tribunals acting under the UNCITRAL Rules:

> have achieved a balance between the interests of those who wanted to open the proceedings to non-disputing parties and the public, on the one hand, and the interests of the parties to have an efficient dispute settlement without undue delay, extra costs and lack of confidentiality, on the other, on the basis of a flexible interpretation of article 15 of the Rules on the power of the tribunal, and article 25(4) on confidentiality.[50]

Details about investor–State disputes under the UNCITRAL Rules have come into the public domain via means other than party agreement or tribunal direction. For example, basic facts about a case can emerge via reporting obligations under securities legislation affecting publicly held companies and requests under freedom of information legislation affecting States. Details can also come to light as a result of related court proceedings.[51] Interesting questions arise about the appropriate remedy when one of the parties makes unilateral statements to the media, in the absence of consent of the parties to go public and sometimes notwithstanding confidentiality orders in place in the arbitration.

B *Institutional support*

One of the main features of the ICSID Convention was the creation of a specialised centre for investor–State disputes,[52] described by Dolzer and Schreuer as follows:

[48] See e.g. *Eureko* v. *The Slovak Republic* (2010), *Romak SA (Switzerland)* v. *The Republic of Uzbekistan* (2009) and *Saluka Investments BV* v. *Czech Republic* (2008).

[49] Born and Shenkman, 'Confidentiality and transparency', p. 37 (offering practical ways in which tribunals can address public-interest concerns without endangering the benefits associated with confidentiality).

[50] N. Horn, 'Current use of the UNCITRAL Arbitration Rules in the context of investment arbitration', *Arbitration International*, 24(4) (2008), 587, 600.

[51] Recently, details relating to a dispute between Chevron and Ecuador have come to light as a result of the proceedings before courts in New York and a case between a telecommunications company and the Government of Belize by virtue of a Supreme Court proceeding in Belize: see e.g. www.globalarbitrationreview.com (last accessed 20 January 2011).

[52] ICSID Convention, Chapter I.

> [ICSID] offers standard clauses for the use of the parties, detailed rules of procedure, and institutional support. The institutional support extends not only to the selection of arbitrators but also the conduct of arbitration proceedings: for instance, each tribunal is assisted by a legal secretary who is a staff member of ICSID; venues for hearings are arranged by ICSID; all financial arrangements surrounding the arbitration are administered by ICSID.[53]

The UNCITRAL Rules do not expressly provide for administrative support from any institution.[54] But UNCITRAL arbitration does not need to be in an administrative vacuum in a purely ad hoc sense. One practitioner observed in 2008 that:

> the fact that the parties select arbitration under UNCITRAL Rules does not necessarily deprive them of the benefits of the administrative support of an institution. In particular, the Permanent Court of Arbitration in The Hague, the world's oldest standing arbitral institution, has considerable institutional expertise in handling claims involving sovereign states and is being chosen to administer an increasing number of investment treaty cases under UNCITRAL Rules.[55]

A 2008 study found that institutional arbitration is generally preferred to ad hoc arbitration, with corporations interviewed indicating 'that the main reason for using institutional arbitration was the reputation of the institutions and the convenience of having the case administered by a third party'. [56] Most investor–State arbitrations these days are handled by an institution to some degree, whether it be the PCA, the International Chamber of Commerce (ICC), Stockholm Chamber of Commerce (SCC), London Court of International Arbitration (LCIA) or the ICSID

[53] Dolzer and Schreuer, *Principles of International Investment Law*, p. 223. See also Sacerdoti, 'Investment arbitration', p. 46.

[54] The PCA is the only institution mentioned in the UNCITRAL Rules, but that is in the context of its Secretary-General being the default body to designate an appointing authority for arbitrator selections and challenges where the parties have not already agreed an appointing authority: Arts. 6–8 and 12).

[55] C. McLachlan, 'Investment treaty arbitration: The legal framework' in A. J. van den Berg (ed.), *ICCA Congress Series No. 14* (Alphen aan den Rijn: Wolters Kluwer, 2009), pp. 95, 128. See also *UNCITRAL Notes on Organizing Arbitral Proceedings* (1996), paras. 21–3, www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1996Notes_proceedings.html (last accessed 20 January 2011); and P.-J. Le Connu and D. Drabkin, 'Assessing the role of the Permanent Court of Arbitration in the peaceful settlement of international disputes' (2010) 27 *L'Observateur des Nations Unies* 181.

[56] Price Waterhouse Coopers and Queen Mary University, *International Arbitration: Corporate attitudes and practices 2008* (the *PWC Study*), www.pwc.co.uk/eng/publications/international_arbitration_2008.html (last accessed 20 January 2011). Note that the study was not exclusively concerned with investor–State disputes in particular, but rather international commercial arbitration generally.

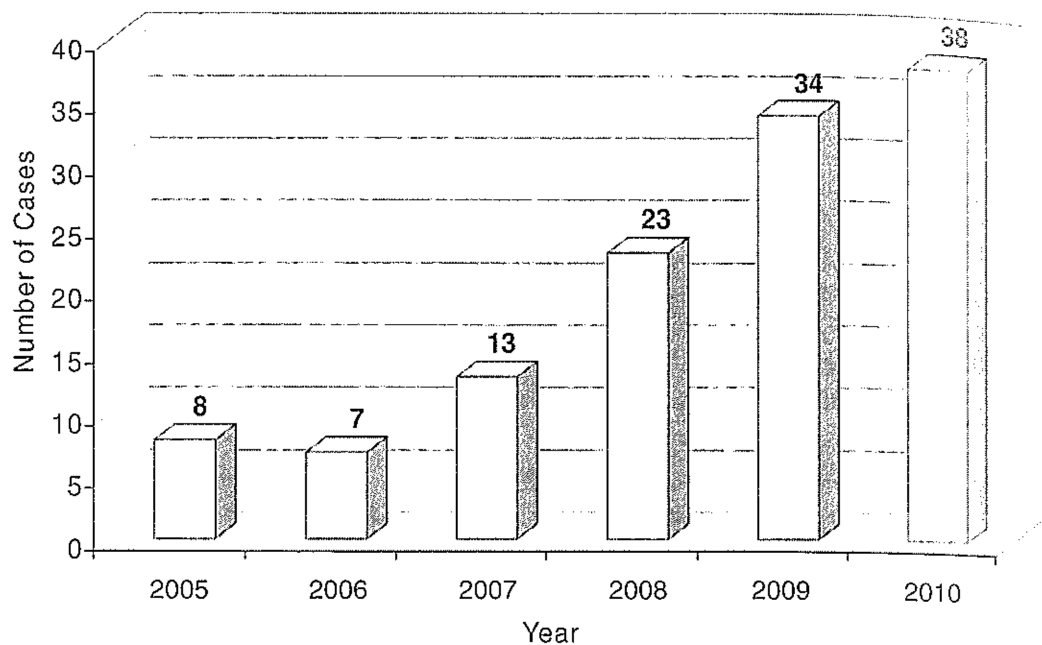

Figure 17.2: BIT and MIT-based investor–State arbitrations administered by the PCA under the UNCITRAL Arbitration Rules

itself. As already mentioned, the PCA has seen an increase in investor–State activity, as Figure 17.2 illustrates.

Institutional administration can save on costs because it lightens the arbitrators' load with respect to administrative tasks. An institution provides support in running the case, managing deposits, maintaining archives and arrangements for hearings. The PCA benefits from highly qualified multinational and multilingual staff lawyers with experience in the public and private sector, who serve as administrative secretaries to tribunals. An institution can also serve sensitive roles as intermediary in coming to fee arrangements between the parties and arbitrators, and resolving arbitrator appointments and challenges. Having an award associated with an established organisation may also be perceived as adding a certain gravitas.[57]

For cases administered by the PCA, a respondent State may also have access to the PCA's Financial Assistance Fund to defray

[57] See e.g. P. D. Friedland, *Arbitration Clauses for International Contracts* (Juris, 2007), p. 40: 'an enforcing court can be assured that an award rendered under the aegis of an established arbitral institution has ensued from a proceeding under well-tested rules applied by accomplished arbitrators'; J. D. M. Lew, L. Mistelis and S. Kroll, *Comparative International Commercial Arbitration* (The Hague: Kluwer, 2003), p. 34: 'A strongly perceived advantage of institutional arbitration is the cachet behind the name of the institution.'

costs,[58] the parties may use the Peace Palace hearing facilities free of charge, and may hold hearings abroad through a network of co-operation agreements with other institutions and Host Country Agreements with PCA Member States.[59]

Parties to an investor–State dispute under the UNCITRAL Rules have a large degree of flexibility in how much administrative support they may seek from an institution, whether full service, none at all, or an 'institution-lite' model, which might, for example, entail just the management of a deposit and maintenance of an archive of correspondence.

C *Appointment of arbitrators*

Under both the UNCITRAL Rules and ICSID Convention, the default number of arbitrators is three,[60] but the two regimes differ when a party has failed to appoint an arbitrator or the two sides have been unable to agree on a presiding arbitrator.

Under Article 7 of the UNCITRAL Rules, if a party has failed to appoint an arbitrator within thirty days of being notified on the other party's choice, then the first party may request an 'appointing authority' to appoint the second arbitrator.[61] The appointing authority 'may exercise its discretion in appointing the arbitrator'. If there is no agreement on a presiding arbitrator in thirty days, then the presiding arbitrator shall be appointed by the appointing authority, by way of a list procedure or exercise of discretion.[62]

[58] A description of the Financial Assistance Fund and its Terms of Reference appear in the PCA's *Annual Reports*: see e.g. PCA, *Annual Report 2009*, http://www.pca-cpa.org/showpage.asp?pag_id=1069 (last accessed 20 January 2011).

[59] e.g. in a recent investor–State dispute involving parties from the Americas, hearings were held in San Jose, Costa Rica, pursuant to the PCA's agreement with Costa Rica and co-operation agreement with the InterAmerican Court of Human Rights. Hearings in another investor–State dispute are to be held this year in Singapore pursuant to the PCA's agreement with Singapore and cooperation agreement with the Singapore International Arbitration Centre, and pursuant to a 2009 Host Country Agreement with the Government of Mauritius, the PCA has opened an office in Africa, operational since 2011. For practical examples of how tribunals and parties use the PCA, see *TCW* v. *Dominican Republic* (Procedural Order No. 1 of 23 June 2008), at www.server.nijmedia.nl/pca-cpa.org/upload/files/10%20PO1.pdf (last accessed 20 January 2011), or *Abyei Arbitration* (Terms of Appointment of 24 November 2008), para. 6, www.pca-cpa.org/upload/files/Abyei_Terms_of_Appointment_signed_241108.pdf (last accessed 20 January 2011).

[60] UNCITRAL Rules, Art. 5; ICSID Rules, Art. 37(2)(b)). See also Revised UNCITRAL Rules, Art. 7(1).

[61] See also Revised UNCITRAL Rules, Art. 9.

[62] Art. 6(4) of the UNCITRAL Rules provides the following guidance to the appointing authority: 'In making the appointment, the appointing authority shall have regard to

The parties may agree upon an appointing authority in advance. Some investment treaties, including the ASEAN–Australia–New Zealand Free Trade Agreement (AANZFTA),[63] and the France–India BIT,[64] specify that the PCA Secretary-General shall serve as the appointing authority,[65] others designate the ICSID Secretary-General, President of the ICC or the ICJ, but many remain silent. If the appointing authority has not been agreed, the UNCITRAL Rules provide that a party may request the Secretary-General of the PCA to designate an appointing authority. The PCA Secretary-General has received over 400 requests to designate or act as an appointing authority under the UNCITRAL Rules since they were promulgated in 1976[66] (approximately 10 per cent in the last ten years have arisen from investor–State disputes), following a pattern of growth demonstrated in Figure 17.3.

Under ICSID Convention Article 38, if the tribunal has not been constituted within 90 days after notice of registration of the request by the Secretary-General or such other period as the parties may agree, the President of the World Bank (the Chairman) shall, 'at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed'.[67] Arbitrators appointed by the Chairman shall not be nationals of either party to the dispute.

such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.' See also Revised UNCITRAL Rules, Art. 6(7). The Revised Rules clarify that the parties may appoint the Secretary-General of the PCA directly as the appointing authority.

[63] Agreement Establishing the Association of Southeast Asian Nations (ASEAN)-Australia-New-Zealand Free Trade Area, signed 27 February 2009 (entered into force 1 January 2010 for Australia, New Zealand, Brunei, Burma, Malaysia, the Philippines, Singapore and Vietnam; 12 March 2010 for Thailand; 1 January 2011 for Laos; 4 January 2011 for Cambodia).

[64] Agreement between the Government of the French Republic and the Government of the Republic of India on the Encouragement and Reciprocal Protection of Investments, signed 2 September 1997 (entered into force 17 May 2000).

[65] AANZFTA defines 'appointing authority' for purposes of the Article referring to UNCITRAL Arbitration as 'the Secretary-General of the Permanent Court of Arbitration': Chapter 11, Art. 18(4)(a)(ii); France–India BIT, Art. 9(3)(b).

[66] See generally UNCITRAL, *Settlement of Commercial Disputes – UNCITRAL Arbitration Rules: Report of the Secretary-General of the Permanent Court of Arbitration on its activities under the UNCITRAL Arbitration Rules since 1976* (7 December 2006), www.uncitral.org/uncitral/en/commission/sessions/40th.html (last accessed 20 January 2011); and S. Grimmer, 'The expanding role of the appointing authority under the UNCITRAL Arbitration Rules 2010' (2011) 28 *Journal of International Arbitration* 5.

[67] See Jagusch and Sullivan, 'A comparison', pp. 81–2.

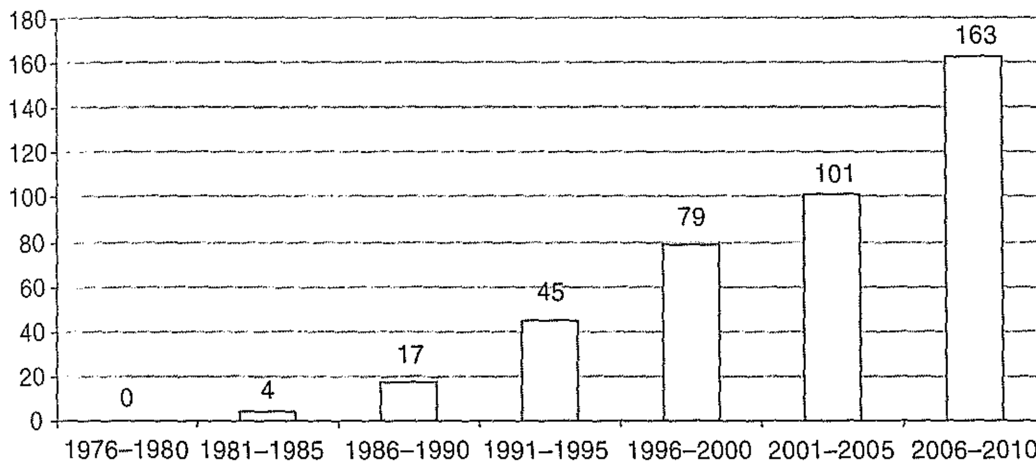

Figure 17.3: Growth in PCA appointing authority cases since 1976

Article 40 provides that when the Chairman appoints arbitrators according to Article 38 he must do so from the ICSID Panel of Arbitrators. The ICSID Panel is comprised of up to four persons nominated by each Contracting State and ten persons designated by the Chairman. Under Article 14 of the ICSID Convention, those on the Panel shall be 'persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment'. Arbitrators appointed (by the parties) from outside the Panel shall possess the same qualities.

There are thus two limitations in appointments under the ICSID Convention that are not present in the UNCITRAL Rules. First, in ICSID appointments, if the parties have not appointed arbitrators, the pool from which the Chairman can choose is limited to the ICSID Panel. Secondly, the Chairman is not permitted to appoint a national of one of the parties (even for the co-arbitrators), whereas under Article 6(4) of the UNCITRAL Rules the appointing authority is required only to take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties and only to do so in relation to the presiding arbitrator.

A further difference is that whereas the UNCITRAL Rules reference the need for arbitrators to be 'independent and impartial', Article 14 of the ICSID Convention refers to 'independent judgment' with no mention of impartiality, an issue discussed further below in the section on challenges.

Lastly, the timing of arbitrators' disclosures is slightly different. Under Article 9 of the UNCITRAL Rules:

> A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.[68]

Any conflict is thus likely to come to the parties' attention *before* formal appointment, which is earlier than a conflict is likely to come to the parties' attention in an ICSID arbitration, as ICSID arbitrators do not need to sign a declaration until the first session of the tribunal, *after* their formal appointment.[69]

D Challenges to arbitrators

On the subject of arbitrator challenges, the ICSID Rules differ from the UNCITRAL Rules in terms of: (i) the timing of challenges; (ii) the standard to be applied to challenges; and (iii) the method of resolving challenges.

Article 10 of the UNCITRAL Rules provides that 'any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence'.[70] Article 11 sets a fifteen-day limit from the date of appointment or of the challenging party becoming aware of the circumstances giving rise to the challenge, after which date any challenge is deemed waived.[71] The challenge must be in writing, state reasons, and be notified to the other party, the challenged arbitrator and other members of the tribunal. Under Article 12, if the other party does not agree to the challenge or the arbitrator does not withdraw, then the challenge is submitted to the appointing authority for decision.[72] The appointing authority might already have

[68] See also Revised UNCITRAL Rules, Art. 11.

[69] ICSID Rules, Rule 6(2). Such declaration should contain a statement of '(a) . . . past and present professional, business and other relationships (if any) with the parties and (b) any other circumstances that might cause [the arbitrator's] reliability for independent judgment to be questioned by a party'.

[70] See also Revised UNCITRAL Rules, Art. 12.

[71] See also Revised UNCITRAL Rules, Art. 13(1).

[72] See also Revised UNCITRAL Rules, Art. 13(4).

been specified in the arbitration agreement, be agreed by the parties at the time, or designated by the Secretary-General of the PCA.

Article 1 of the UNCITRAL Rules states that where the parties have agreed to refer their disputes to arbitration under the UNCITRAL Rules 'then such disputes shall be settled in accordance with these Rules *subject to such modification as the parties may agree*'.[73] Thus, the above-described procedures can be modified by the parties if they so choose. No equivalent provision exists in the ICSID Convention or Rules. While certain provisions in the ICSID Convention are predicated with the words 'except as the parties otherwise agree', those pertaining to arbitrator challenges are not.

Article 57 of the ICSID Convention provides that a party may propose the disqualification of an arbitrator 'on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14'. Article 58 of the ICSID Convention provides that:

> [the] decision on any proposal to disqualify a[n] arbitrator shall be taken by the other members of the . . . Tribunal . . . provided that where those members are equally divided, or in the case of a proposal to disqualify a sole . . . arbitrator, or a majority of . . . arbitrators, the Chairman [of the World Bank] shall take that decision . . .

ICSID Rule 9 states that a 'party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is closed, file its proposal with the Secretary-General, stating its reasons therefor'. The proposal is then submitted to the members of the tribunal and the other side. The challenged arbitrator may furnish explanations without delay. The other arbitrators shall promptly consider and vote on the proposal in the absence of the challenged arbitrator. If they are divided, then the Chairman is informed via the Secretary-General. The arbitration proceeding is suspended until a decision is taken on the challenge.

With respect to the timing of challenges, the ICSID Rules are less certain than the UNCITRAL Rules (which impose a specific time limit), because they require a party to propose disqualification 'promptly' and set the latest time at the close of proceedings. This 'anomaly' has led to the suggestion that the ICSID Rules set a period of thirty days from the date of the arbitrator's Rule 6(2) declaration or from the date when the

[73] Emphasis added.

challenging party knew or ought to have known of the circumstance giving rise to the challenge.[74]

It has already been noted that the ICSID Convention refers to 'independence' (in the sense of lack of connection to a party) but not 'impartiality' (in the sense of lack of predisposition). In one other respect the standard for challenges under the ICSID Convention has been described as out of line with the UNCITRAL Rules, international best practices as reflected in the International Bar Association (IBA) Guidelines on Conflict of Interest in International Arbitration,[75] national law and the rules of other arbitral institutions. Where the UNCITRAL Rules (and most other sets of rules) require the disqualification of an arbitrator if circumstances create 'justifiable doubts' as to his or her impartiality and independence, Article 57 of the ICSID Convention requires circumstances 'indicating a manifest lack of the qualities required' of arbitrators.

The difference came into play in a challenge to an arbitrator in the three Argentine water cases mentioned in note 32 – *Suez*, *InterAguas* and *AWG*. The respondent challenged an arbitrator when they learned that she was a non-executive director of a bank that held shares in two of the claimants. It was agreed by the parties that the two co-arbitrators who needed to decide the challenge for the purposes of the two ICSID cases would also decide the challenge for purposes of the UNCITRAL arbitration (the UNCITRAL Rules permitting the parties to modify any of the procedural rules set out therein).[76] The co-arbitrators described the UNCITRAL Rules test as being an objective, not a subjective, standard,

[74] A. Sheppard, 'Arbitrator independence in ICSID abitration' in C. Binder *et al.* (eds.), *International Investment Law for the 21st Century: Essays in honour of Christoph Schreuer* (Oxford University Press, 2009), p. 131.

[75] IBA, *IBA Guidelines on Conflicts of Interest in International Arbitration* (22 May 2004), www.ibanet.org/Document/Default.aspx?DocumentUid=E2FE5E72-EB14–4BBA-B10D-D33DAFEE8918 (last accessed 20 January 2011), Part I (General Standards Regarding Impartiality, Independence and Disclosure). Part I(1) provides that: 'Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding . . .'; Part I(2)(b) provides that an arbitrator should be disqualified 'if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence . . .'; Part I(2)(c) provides that: 'Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.'

[76] See especially *Suez*, *InterAguas* and *AWG* (Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal of 12 May 2008).

with the relevant question being: 'Would a reasonable, informed person viewing the facts be led to conclude that there is a justifiable doubt as to the challenged arbitrator's independence and impartiality?'[77] The bank in question was not a shareholder of the claimant in the UNCITRAL case, and so the connection was held insufficient to give rise to justifiable doubts. The approach of the co-arbitrators for the two ICSID claimants was different because the test under Article 57 of the ICSID Convention is not a 'justifiable doubts' standard but a 'manifest lack of qualities' standard. The arbitrators cited an earlier ICSID challenge decision, which described the ICSID test as setting a high threshold as follows:

> It is important to emphasise that the language of Article 57 places a heavy burden of proof on the Respondent to establish facts that make it obvious and highly probable, not just possible, that [the challenged arbitrator] is a person who may not be relied upon to exercise independent and impartial judgment.[78]

Applying the criteria of proximity, intensity, dependence and materiality, the arbitrators ultimately rejected the challenge.

Under ICSID, challenges are decided by the other two arbitrators, whereas under the UNCITRAL Rules (and most other systems), the challenge is resolved by a neutral third party (the appointing authority). This is described by one commentator as an 'unusual feature of ICSID' which makes it:

> inevitable that a challenging party will have further doubts as to whether the remaining arbitrators will have a conflict of interest themselves when determining a challenge, in that they may have been or might expect one day to be challenged themselves, and may have a (subliminal) desire to set the test at a high level.[79]

That same commentator, after providing a survey of ICSID arbitrator challenges noted that: 'It is interesting to speculate whether any of these cases would have been decided differently if (i) the test had been justifiable doubts rather than manifest lack of independent judgment and/or (ii) the challenge had been decided by a third party rather than the co-arbitrators.'[80] He recommends that the ICSID rules be changed such that (i) arbitrators must be expressly 'independent and impartial'; (ii) the 'manifest lack' of qualities test be replaced with a 'justifiable doubts' test;

[77] *Ibid.*, para. 22.

[78] *Compaña de Aguas del Aconquija & Vivendi Universal* v. *Argentine Republic* (ICSID Case No. ARB/97/3, Decision on the Challenge to the President of 3 October 2001).

[79] Sheppard, 'Arbitrator independence', pp. 155–6.

[80] *Ibid.*, p. 144.

(iii) challenges should be decided by an independent ad hoc challenge committee which should consider a doubt to be justifiable if a 'fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was not independent or not impartial'; and (iv) the time for challenging an arbitrator be a fixed period.[81]

E Provisional measures

Provisional measures ordered by domestic courts have been described as a 'normal feature of international commercial arbitration'.[82] In the investor–State context, Schreuer, Malintoppi, Reinisch and Sinclair point out that 'provisional measures may be initiated by the host State, usually in its own courts, or by the foreign investor, usually in the courts of another State'.[83]

Under Article 26 of the UNCITRAL Rules, a party may request an arbitral tribunal to take necessary interim measures and that such interim measures may be established in the form of an interim award.[84] Article 26(3) of the Rules states that: 'A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.'

Article 47 of the ICSID Convention provides that: 'Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.' The interaction of Article 47 with Article 26 of the ICSID Convention has generated some controversy about whether parties to an ICSID arbitration could approach national courts for interim measures. Article 26 of the ICSID Convention states that: '[the] [c]onsent of the parties to arbitration

[81] *Ibid.*, p. 156. It has become publicly known that in one ICSID case, some modifications along the lines of the above were in fact agreed by the parties in writing in 2008, the terms of which agreement were applied when a challenge arose in 2009. The parties agreed that arbitrator challenges would be resolved by the PCA Secretary-General applying the IBA Guidelines. A challenge to an arbitrator under this agreed process was upheld. The arbitrator then resigned and was replaced in accordance with Art. 15 of the ICSID Convention. Any concerns expressed by some commentators about the capacity of parties to modify challenge procedures set out in the ICSID Convention thus became theoretical.

[82] Schreuer *et al.* (eds.), *The ICSID Convention*, p. 394.

[83] *Ibid.*, p. 395. [84] Cf. Revised UNCITRAL Rules, Art. 26.

under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy'.

Up until an amendment to the ICSID Rules in 1984, judicial and arbitral practice and scholarly debate were sharply divided on the permissibility of provisional measures by domestic courts in the context of an ICSID arbitration.[85] The question was clarified when ICSID Arbitration Rule 39(6) was introduced, stating:

> Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.

Thus, provisional measures by domestic courts in ICSID arbitration are permissible *only if* the parties have expressly agreed to them in the instrument recording their consent to arbitration. One commentator has expressed some doubts about the practical significance of this difference for certain types of interim measures because of limited jurisdiction by courts over sovereign States and immunities preventing pre-award attachment of a State's assets.[86]

One new feature of the ICSID Rules with respect to interim measures is ICSID Rule 39(5):

> If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

There is no equivalent provision in the UNCITRAL Rules.

F Preliminary avenues for disposing of frivolous claims

ICSID arbitration involves two potential opportunities for a case to be dismissed at a preliminary stage. Article 36(3) of the ICSID Convention provides that the Secretary-General 'shall register the request unless he finds, on the basis of the information contained in the request, that the

[85] The debate is summarised in Schreuer *et al.* (eds.), *The ICSID Convention*, pp. 395–400.

[86] McLachlan, 'Investment treaty arbitration', p. 133. Jagusch and Sullivan likewise note that 'it is inherently unlikely that that the parties will reach [an agreement under ICSID Arbitration Rule 39(6)]' because one party will desire the provisional measures, while the other will oppose them: Jagusch and Sullivan, 'A comparison', p. 90.

dispute is manifestly outside the jurisdiction of the Centre'. There is no equivalent provision in the UNCITRAL Rules, partly because there is no equivalent to Article 25 of the ICSID Convention ('Jurisdiction of the Centre') and partly because there is no single institution involved in administering all cases.

However, a comparable check against the institution of manifestly baseless claims under the UNCITRAL Rules lies in the appointing authority process. Article 8 of the UNCITRAL Rules provides that:

> When an appointing authority is requested to appoint an arbitrator . . . the party which makes the request shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitral agreement if it is not contained in the contract. The appointing authority may require from either party such information as it deems necessary to fulfil its function.[87]

The PCA Secretary-General requires similar information in serving the role of designating authority under the rules.[88] While the appointing authority does not have the power to dismiss a claim, it can ensure that the proceeding has properly been commenced by a notice of arbitration served on the respondent, before proceeding to constitute a tribunal.

In 2006, ICSID Rule 39(5) was introduced to allow parties within thirty days of the constitution of the tribunal and before the first session of the tribunal to 'file an objection that a claim is manifestly without legal merit'. The tribunal, 'after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection'. No equivalent exists under the UNCITRAL Rules. There have so far been three decisions under this rule.[89] In the first two cases, the tribunals held there to be a high threshold for any respondent wishing to make a Rule 41(5) objection. Only when a claim is clearly, certainly and obviously without legal merits is such a preliminary objection likely to be

[87] See also Revised UNCITRAL Rules, Art. 6(6).

[88] See PCA, *Designation of Appointing Authority*' (2009), www.pca-cpa.org/showpage.asp?pag_id=1062 (last accessed 20 January 2011).

[89] *Trans-Global Petroleum Inc.* v. *Jordan* (ICSID Case No. ARB/07/25, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules of 12 May 2008); *Brandes Investment Partners LP v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/3, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules of 2 February 2009); and *Global Trading Resource Corp. and Globex International Inc.* v. *Ukraine* (ICSID Case No. ARB/09/11, Award of 1 December 2010) (*Global Trading*).

successful. In neither case did the respondent succeed in having the case dismissed.[90] In the third case, Ukraine was successful in having the case dismissed on the basis that 'the sale and purchase contracts entered into by the Claimants are pure commercial transactions that cannot on any interpretation be considered to constitute "investments" within the meaning of Article 25 of the ICSID Convention'.[91]

G Jurisdictional limitations

Whether proceeding under ICSID or the UNCITRAL Rules, the tribunal is the judge of its own competence.[92] Both systems provide that challenges to jurisdiction be made as soon possible, and no later than in the counter-memorial or statement of defence.[93] Both systems provide that a tribunal may rule on a plea concerning its jurisdiction as a preliminary question.[94] Where the two systems diverge with respect to jurisdiction is Article 25 of the ICSID Convention.[95] There has been debate about whether the terms of Article 25 impose 'outer limits of ICSID jurisdiction', restricting a tribunal's jurisdiction beyond any limitations present in a BIT.

For example, different approaches have applied to the requirement that the dispute arise 'directly out of an investment', as well as nationality considerations set out in Article 25(2)(b) of the ICSID Convention. Writing in 2004, one commentator speculated that:

> It could happen that the subject matter of a dispute qualifies as an investment under a BIT, but does not qualify as such for the purposes of ICSID jurisdiction. This might explain the reference to arbitration under the UNCITRAL Arbitration Rules or to the rules of some private arbitral institution[s] in provisions of BITs, even when both States are

[90] For a discussion of this provision, see C. Lamm, H. Pham and C. Giorgetti, 'Interim measures and dismissal under the 2006 ICSID Rules' in C. A. Rogers and R. P. Alford (eds.), *The Future of Investment Arbitration* (Oxford University Press, 2009), p. 89.

[91] *Global Trading*, para. 57.

[92] See ICSID Convention, Art. 41(1); UNCITRAL Rules, Art. 21; Revised UNCITRAL Rules, Art. 23(1).

[93] See ICSID Convention, Art. 41(1), UNCITRAL Rules, Art. 21(3); Revised UNCITRAL Rules, Art. 23(2).

[94] See ICSID Convention, Art. 41(4); UNCITRAL Rules, Art. 21(4)); Revised UNCITRAL Rules, Art. 23(3).

[95] Art. 25 of the ICSID Convention provides that: 'The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre . . .'

> parties to the ICSID Convention. Under those rules, the qualification of the dispute as arising out of an investment would be immaterial for competence purposes.[96]

The question of whether Article 25 of the ICSID Convention imposes criteria additional to the often broad definition of 'investment' found in BITs was at the heart of *MHS* v. *Malaysia*,[97] where a sole arbitrator found that the resources spent by a company that contracted with the Malaysian government to salvage a shipwreck did not constitute an investment within the meaning of Article 25(1) of the ICSID Convention. The claimant argued that it had made an investment as broadly defined in the BIT.[98] However, the sole arbitrator first turned to the meaning of 'investment' in Article 25(1) of the ICSID Convention and reviewed seven cases of importance 'to discern a broad trend which emerges from ICSID jurisprudence on the "investment" requirement'. He identified typical hallmarks of an 'investment', from cases such as *Salini* v. *Morocco*,[99] and *Joy Mining* v. *Egypt*.[100] These hallmarks were 'Regularity of Profits and Returns', 'Contributions', 'Duration of the Contract', 'Risks Assumed Under the Contract', and 'Contribution to the Economic Development of the Host State'. The arbitrator held that the question of contribution to the host State's economic development assumed significant importance because the other typical hallmarks of 'investment' were either not decisive or appeared only to be superficially satisfied. In this respect, the claimant's contract was more like a normal services contract than one that provided lasting benefit to the positive economic development of the State. The arbitrator concluded that the claimant's contract was not an 'investment' within the meaning of Article 25(1) of the ICSID Convention, and, having done so, found it

[96] Sacerdoti, 'Investment arbitration', p. 8.

[97] *Malaysian Historical Salvors, SDN, BHD* v. *Malaysia* (ICSID Case No. ARB/05/10, Decision on Jurisdiction of 17 May 2007).

[98] The BIT stated:

> For the purposes of the Agreement, (1)(a) 'investment' means every kind of asset and in particular, though not exclusively, includes: . . . (iii) claims to money or to any performance under contract, having a financial value; . . . (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

[99] *Salini Costruttori SpA and Italstrade SpA v. Morocco* (ICSID Case No. ARB/00/4. Decision on Jurisdiction of 23 July 2001), paras. 37–40.

[100] *Joy Mining Machinery Limited* v. *Egypt* (ICSID Case No. ARB/03/11, Award on Jurisdiction of 6 August 2004), paras. 31–63.

unnecessary to discuss whether the contract was an 'investment' under the BIT definition.[101]

On review by an ICSID ad hoc annulment committee, the majority sharply disagreed with the sole arbitrator and annulled his award because:

> (a) it altogether failed to take account of and apply the [BIT] defining 'investment' in broad and encompassing terms but rather limited itself to its analysis of criteria which it found to bear upon the interpretation of Article 25(1) of the ICSID Convention;
> (b) its analysis of these criteria elevated them to jurisdictional conditions, and exigently interpreted the alleged condition of a contribution to the economic development of the host State so as to exclude small contributions, and contributions of a cultural and historical nature;
> (c) it failed to take account of the preparatory work of the ICSID Convention and, in particular, reached conclusions not consonant with the travaux in key respects, notably the decisions of the drafters of the ICSID Convention to reject a monetary floor in the amount of an investment, to reject specification of its duration, to leave 'investment' undefined, and to accord great weight to the definition of investment agreed by the Parties in the instrument providing for recourse to ICSID.[102]

A dissenting member of the ad hoc annulment committee argued that a significant contribution to the host State's economy must be made for an investment to exist.[103]

The requirement of nationality has also drawn support from some ICSID tribunals for the notion that Article 25 of the ICSID Convention sets 'outer limits beyond which party consent would be ineffective'.[104] For example, the majority in *TSA* v. *Argentina*[105] held that:

[101] See also *Toto Construzioni Generali SpA* v. *Republic of Lebanon* (ICSID Case No. ARB/07/12, Decision on Jurisdiction of 11 September 2009).

[102] *Malaysian Historical Salvors, SDN, BHD* v. *Malaysia* (ICSID Case No. ARB/05/10, Decision on the Application for Annulment of 16 April 2009).

[103] *Malaysian Historical Salvors, SDN, BHD* v. *Malaysia* (ICSID Case No. ARB/05/10, Dissenting Opinion of Judge Mohamed Shahabuddeen of 19 February 2009).

[104] *The Rompetrol Group NV* v. *Romania* (ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections to Jurisdiction and Admissibility of 18 April 2008), para. 80. See e.g. *TSA Spectrum de Argentina SA* v. *Argentina Republic* (ICSID Case No. ARB/05/5, Award of 19 December 2008) (*TSA*), para. 134, where the majority held that the criterion of 'foreign control' in Art. 25(2)(b) of the ICSID Convention imposes an objective limit beyond which the tribunal's jurisdiction cannot extend, even where a specific agreement between the States exists.

[105] *Ibid.*

> Article 25 of the ICSID Convention defines the ambit of ICSID's jurisdiction. In other words, it defines the extent, hence also the objective limits, of this jurisdiction (including the jurisdiction of tribunals established therein) which cannot be extended or derogated from even by agreement of the Parties.[106]

For the majority in that case, this meant that they must pierce the veil of a corporate entity to determine whether it was genuinely foreign controlled. Piercing through the Dutch ownership of the Argentine claimant, the majority denied jurisdiction because the latter was ultimately controlled by an Argentine citizen.[107] The dissenting arbitrator argued that the treaty definition of nationality must control and that the 'limit sovereignty imposes on how international law is made, enjoins [arbitrators] to vindicate, rather than ignore, the agreements reached by two states'.[108]

The above discussion shows that under ICSID arbitration, parties should bear in mind not only the terms of the BIT, but also possibly the 'outer limits' of Article 25 of the ICSID Convention. One might expect this to be a clear difference between arbitrations under ICSID and those under the UNCITRAL Rules, but a recent case shows that even under the UNCITRAL Rules, a tribunal might consider importing some objective criteria into the term 'investment' as part of a Vienna Convention analysis to interpret the term as used in a BIT, even absent Article 25 of the ICSID Convention. In *Romak* v. *Uzbekistan*,[109] the tribunal held that a one-off delivery contract for wheat did not amount to an 'investment' for purposes of the Swiss–Uzbekistan BIT.[110] The *Romak* tribunal rejected an argument by the claimant that the definition of the term 'investment' may vary depending on the investor's choice between UNCITRAL or ICSID arbitration, and the claimant's suggestion that the definition of 'investment' in UNCITRAL proceedings (i.e. under the BIT alone) is wider than in ICSID Arbitration. The tribunal considered that such views would 'imply that the substantive protection offered by the BIT would be narrowed or widened, as the case may be, merely by virtue of a choice between the various dispute resolution mechanisms

[106] *Ibid.*, para. 134. [107] *Ibid.*, para. 162.

[108] TSA *Spectrum de Argentina SA* v. *Argentina Republic* (ICSID Case No. ARB/05/5, Dissenting Opinion of Grant D. Aldonas [undated]), para. 34.

[109] *Romak SA* v. *The Republic of Uzbekistan* (Award of 26 November 2009).

[110] Agreement between the Swiss Confederation and the Republic of Uzbekistan Concerning the Promotion and Reciprocal Protection of Investments, signed 16 April 1993 (entered into force 5 November 1993).

sponsored by the Treaty. This would be both absurd and unreasonable.'[111] The tribunal found that the term 'investment' in a BIT has an 'inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk'.[112] The investment made by Romak did not meet those criteria.

This area remains controversial. While a party might consider that opting for arbitration under the UNCITRAL Rules could avoid any potential jurisdictional hurdles encountered by the 'outer limits' of jurisdiction set by Article 25 of the ICSID Convention, even under the UNCITRAL Rules, there is a chance that a tribunal could impose jurisdictional limitations based on the 'inherent' meaning of terms in a BIT.

H Costs

The UNCITRAL Rules and ICSID Convention contain slightly different language with respect to costs. Article 61(2) of the ICSID Convention leaves the question of costs to the broad discretion of the tribunal.[113] The UNCITRAL Rules differ from the ICSID Rules insofar as Article 40(1) of the UNCITRAL Rules creates a presumption that the losing party will 'in principle' cover both sides' administrative costs (including the arbitrators' fees and expenses, expenses of witnesses, institutional support and any appointing authority).[114] On the other hand, the successful party's legal fees are not included in the presumption in Article 40(1), and under Article 40(2), the tribunal has a wide discretion to allocate such expenses.[115] If the tribunal does choose to allocate legal fees, the terms of

[111] *Romak*, para. 194. [112] *Ibid.*, para. 207.

[113] Art. 61(2) provides that:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

[114] Art. 40(1) provides that: 'Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.' See also Revised UNCITRAL Rules, Art. 42(1).

[115] Art. 40(2) provides that: 'With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or

Article 38(1)(e) provides that legal fees will only be allocated 'if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable'.

Although there are differences on the face of the two rules, there does not seem to be great difference in practice because costs decisions under either ICSID or UNCITRAL have been very specific to the circumstances of particular cases. One 2003 study comparing costs decisions under the two regimes confirmed that tribunals under either system have examined cost issues on a case-by-case basis and more often than not divided arbitration costs equally while ordering each party to bear its own legal fees.[116] A recent example of this approach being taken, despite the respondent clearly prevailing, was in *Romak* v. *Uzbekistan* (a case in which the author of the 2003 study sat as arbitrator). The *Romak* tribunal summarised the current state of play with respect to costs in investor–State arbitration under different sets of rules. The tribunal noted that the respondent had 'prevailed entirely as a matter of jurisdiction' and pondered whether 'as a consequence, the Claimant should bear more than half of the arbitration costs and/or pay the Respondent's legal fees and expenses'.[117] The tribunal observed a general trend that costs should be equally apportioned between the investor and State Parties, irrespective of the outcome, while acknowledging some exceptions for obstructive behaviour.[118] The tribunal noted that one of the reasons for this trend is that:

> investment treaty tribunals are called upon to apply a novel mechanism and substantive law to the resolution of these disputes. Thus the initiation of a claim that is ultimately unsuccessful is more understandable than would be the case in commercial arbitration where municipal law applies.[119]

Accordingly, although differences appear on the face of the ICSID and UNCITRAL Rules with respect to costs, the outcome may be similar. One may question whether, in the future as the number of investor–State disputes rises, the novelty of the legal issues will wear off so as to remove the justification for splitting costs equally.

may apportion such costs between the parties if it determines that apportionment is reasonable.'

[116] N. Rubins, 'The allocation of costs and attorney's fees in investor–State arbitration', *ICSID Review – Foreign Investment Law Journal*, 18(1) (2003), 109, 126.

[117] *Romak*, para. 249. [118] *Ibid.*, paras. 250–1. [119] *Ibid.*, para. 250.

Finally, as a practical matter, due to the language of Article 38(e),[120] parties to UNCITRAL arbitrations would be advised to include a claim for legal costs from the outset, and to substantiate these before the proceedings are closed.[121]

I Annulment of awards

One of the most obvious areas of difference between investor–State disputes under the ICSID Convention and those under the UNCITRAL Rules is the review of awards. Proceedings under the ICSID Convention are self-contained and domestic courts have no power to set aside or otherwise review ICSID awards.[122] In place of domestic review, the ICSID Convention establishes a mechanism for review by an Annulment Committee on five specific grounds enumerated in Article 52(1) of the ICSID Convention:

(a) that the Tribunal was not properly constituted;
(b) that the Tribunal has manifestly exceeded its powers;
(c) that there was corruption on the part of a member of the Tribunal;
(d) that there has been a serious departure from a fundamental rule of procedure; or
(e) that the award has failed to state the reasons on which it is based.

By contrast, investor–State awards under the UNCITRAL Rules are subject to review by the national courts at the seat of the arbitration and according to the standards of review provided for arbitral awards generally under national law.[123] Annulment could in theory be sought in hundreds of jurisdictions applying disparate approaches. But, as one commentator has observed:

[120] See also Revised UNCITRAL Rules, Art. 40(1).

[121] The failure by a party to do so in a recent PCA-administered investment arbitration caused some procedural issues in claiming costs after a termination order had already been issued recording the parties' settlement.

[122] Dolzer and Schreuer, *Principles of International Investment Law*, p. 223.

[123] McLachlan, Shore and Weiniger, *International Investment Arbitration*, p. 65: 'domestic courts have consistently held that non–ICSID BIT arbitrations are reviewable as "commercial" for the purposes of Article 1(3) of the New York Convention and the UNCITRAL Model Law' (citing as examples the decisions of the Supreme Court of British Columbia in *CME* v. *Czech Republic*, *United Mexican States* v. *Metalclad Corp.* [2001] BCSC 664; the Svea Court of Appeal in *Czech Republic* v. *CME Czech Republic BV* (Case No. T8735–01) and the England and Wales High Court in *Occidental* v. *Ecuador* [2005] 2 Lloyd's Rep. 707).

> in practice, a degree of consistency has been achieved through homogenizing legislation (e.g., adoption of the UNCITRAL Model Law [which provides limited grounds for review]) and through the choice of a limited number of places of arbitration where judiciaries are perceived to be consistent in their application of annulment standards.[124]

A study of fifty-one non-ICSID treaty awards published in the period from 1996 to early 2008 found that all but one of them was rendered in jurisdictions 'that most of us would consider safe havens for arbitration, with Sweden, Canada, Switzerland, the United States and the United Kingdom being the usual suspects'.[125] The author of that study pointed out that choosing ICSID:

> does not necessarily mean choosing an established set of well-defined standards. While courts in the above jurisdictions can draw on a wealth of commercial arbitration cases applying the relevant standards, there are only fifteen ICSID annulment decisions to date that may shed light on how the ICSID standards will be applied.

He concluded that:

> while excesses do occasionally occur both within and outside the ICSID system, at least in the recent past both ad hoc committees and domestic courts have exercised proper restraint when reviewing treaty awards.[126]

The same author also noted a difference in mindset between ad hoc committees (a subculture within the subculture of treaty arbitration within the subculture of international arbitration, invariably composed of distinguished arbitrators heavily specialised in the field) and those who make up the 'typically sophisticated and experienced judiciary for whom the review of treaty awards represents only a tiny little portion of the immensely more varied mix of matters that they adjudicate on any given day'. He suggests that the latter may be more likely to show deference to the tribunal and less likely than an ad hoc committee to

[124] B. W. Daly and F. C. Smith, 'Comment on the differing legal frameworks of investment treaty arbitration and commercial arbitration as seen through precedent, annulment, and procedural rules' in A. J. van den Berg (ed.), *ICCA Congress Series No. 14* (Alphen aan den Rijn: Wolters Kluwer, 2009), pp. 151, 156. See also Horn, 'Current use of the UNCITRAL Arbitration Rules', p. 591.

[125] G. Verhoosel, 'Annulment and enforcement review of treaty awards: To ICSID or not to ICSID' in A. J. van den Berg (ed.), *ICCA Congress Series No. 14* (Alphen aan den Rijn: Wolters Kluwer, 2009), pp. 285, 292.

[126] *Ibid.* See also McLachlan, 'Investment treaty arbitration', p. 136 (noting that despite the 'self-contained' nature of ICSID as contrasted with investor–State disputes under UNCITRAL being subject to national court review, 'analysis suggests a degree of convergence').

engage in a 'detailed autopsy' of awards.[127] Two very recent decisions by ICSID annulment committees overturning the decisions of arbitral tribunals have reignited discussions about the ICSID annulment system as compared with annulment proceedings before national courts.[128]

J Enforcement

Possibly the feature of ICSID arbitration considered most attractive compared to non-ICSID arbitration of investor–State disputes is the enforcement mechanism under Article 54 of the ICSID Convention, which offers what Dolzer and Schreuer describe as 'an effective system of enforcement'.[129] Article 54 does not necessarily apply to non-pecuniary obligations imposed by an award, for which the national courts may be the only recourse.[130]

One prominent arbitrator recently recalled that 'whenever I had a case as counsel for an investor where arbitration was available under ICSID I would advise the client to use it'.[131] The reasons he gave included that:

[127] Verhoosel, 'Annulment and enforcement', p. 306.

[128] *Sempra Energy International* v. *The Argentine Republic* (ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award of 29 June 2010) and *Enron Corporation and Ponderosa Assets LP* v. *Argentine Republic* (ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic of 30 July 2010).

[129] Dolzer and Schreuer, *Principles of International Investment Law*, p. 224. ICSID Convention, Art. 54 provides:

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

[130] Verhoosel, 'Annulment and enforcement', p. 310.

[131] A. W. Driver, 'A world-class international arbitrator speaks! An interview with Judge Charles Brower', *Metropolitan Corporate Counsel*, 8 (2009), 24.

> ICSID has its own internal system for any review of awards and review is very limited, it's difficult to get a case annulled within that system and there's no other recourse because of the exclusivity of the ICSID Convention [and] . . . [Every] state party is required to enforce in its courts any ICSID award with the same force and effect as if it were a final judgment in that country, not subject to further appeal to the highest courts of that state. The defense of sovereign immunity is preserved, but still it's very helpful to claimants.[132]

However, as noted by that arbitrator, Article 55 of the ICSID Convention expressly preserves the laws relating to sovereign immunity from execution.

Outside of the ICSID system, a party must rely on the New York Convention[133] for recognition and enforcement of awards.[134] The New York Convention allows national courts to refuse recognition and enforcement on one of five grounds: (a) invalidity of the arbitration agreement; (b) lack of due process; (c) excess of mandate by the arbitrators; (d) improper constitution of the tribunal; and (e) the award is not binding or has been set aside or suspended in the country where it was rendered.[135] Additionally, the court may refuse recognition on the grounds of non-arbitrability and public policy of an enforcing State.[136]

There are no reported court decisions refusing to recognise or enforce a non-ICSID investment treaty award. Recently, a US Appeals Court confirmed an award in an investor–State arbitration under the UNCITRAL Rules.[137] According to the 2008 PwC study, parties reported high levels of compliance by States or State enterprises with arbitral awards generally. Compliance often resulted in either the renegotiation of contracts between corporations and the State, or payment of damages to the investor by State enterprises rather than by the State itself. The study actually found that corporations experienced fewer significant problems in enforcing arbitral awards against States or State enterprises than in enforcing awards against private-sector entities. Of the minority of

[132] *Ibid.*, p. 24.

[133] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) (New York Convention).

[134] In court proceedings instituted by Ecuador to set aside the arbitral award in *Occidental Exploration and Production Company* v. *The Republic of Ecuador* (Final Award of 1 July 2004), the England and Wales High Court held that it can review UNCITRAL awards outside the context of the New York Convention: see *Ecuador* v. *Occidental Exploration & Petroleum Company* [2005] EWHC 774 (Comm). See also Jagusch and Sullivan, 'A comparison', p. 103.

[135] *New York Convention*, Art. V(1).

[136] *Ibid.*, Art. V(2).

[137] *Argentine Republic* v. *National Grid plc*, No. 10–7093 (DC Circ., 2011).

participants that had experience of enforcing awards against States or State enterprises, over half experienced no significant problems. A small proportion had experienced significant difficulties and the interviews indicated that there was a correlation between countries where corporations experienced broader business issues and the countries where there were difficulties in enforcing arbitral awards.

It would be interesting to see this notion – that the political will of a State may be more relevant in enforcement than any particular legal rules – play out in the *Suez, InterAguas* and *AWG* cases against Argentina. Argentina has been held liable in all three cases, and the quantification of damages remains to be done. When the cases proceed to three damages awards against Argentina, then the differences between enforcement under Article 54 of the ICSID Convention and enforcement via the New York Convention might be measured in a meaningful and practical way.

IV Conclusions

Investor–State arbitration under the UNCITRAL Rules continues to make up a significant proportion of the total number of investor–State arbitrations. Parties may find themselves arbitrating an investor–State dispute under the UNCITRAL Rules by choice, or because it was the only available option open to them in the circumstances. Unlike ICSID, the UNCITRAL Rules were not specifically designed for investor–State arbitration and do not operate in a self-contained system dedicated to that type of dispute. Nevertheless, as the above survey indicates, UNCITRAL arbitration presents a viable option and has become the most used alternative for investor–State disputes.

The frequent application of the UNCITRAL Rules in the investor–State context led to several suggestions for improvements and amendments to the existing rules, which had not been amended since they were promulgated in 1976. From 2006 until 2010, the rules underwent a wholesale review by a Working Group of UNCITRAL.[138] On 12 July 2010, the Working Group released a revised set of rules.

Some of the investor–State-inspired changes were of a technical (though important) nature. For example, the Working Group

[138] For a discussion of the Working Group's mandate and some of the key proposed changes to the Rules, see Levine, 'Current trends'; Castello, 'UNCITRAL Rules'; and Daly and Smith, 'Comment on the differing legal frameworks'.

recommended that references to a 'contract' in the first article of the rules be broadened and replaced with references to disputes arising out of a 'defined legal relationship, whether contractual or not'.[139] This will clearly encompass investor–State disputes arising out of a treaty.[140]

The special way in which consent to arbitration is formed in an investment treaty arbitration was also taken into account by the Working Group. Under an investment treaty, the State makes an open-ended offer to arbitrate investment disputes. The consent is perfected when the investor accepts that offer. Several years, even decades, might pass between the offer and acceptance. This issue came to light when the Working Group was considering which version of the rules should apply to a dispute once the revisions come into effect. This was accounted for by the following text in Article 1(2) of the Revised Rules:

> The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date.

Article 33 of the UNCITRAL Rules states that the tribunal 'shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.'[141] The revised UNCITRAL Rules remove the reference to 'determined by the conflict of laws rules' to give the tribunal greater flexibility in determining which law, or laws, would be applicable in a given dispute. This would encompass cases where, for example, the host State law as well as public international law would be applicable.[142]

The most heated debate concerning adapting the UNCITRAL Rules to investor–State disputes was whether specific changes were needed to address concerns over transparency. Two observer NGOs proposed that the rules be amended insofar as they apply to investor–State treaty

139 See Revised UNCITRAL Rules, Art. 1(1).

140 See UNCITRAL Working Group II, 'Revision of the UNCITRAL Arbitration Rules' (Report of Working Group II (Arbitration and Conciliation) on the Work of its 52nd Session, No. A/CN.9/WG.II/WP.157, 10 December 2009), www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last accessed 21 January 2011).

141 See Art. 35(1), Revised UNCITRAL Rules.

142 *Ibid.*, Add. 2. See also the in-depth discussion of the different approaches to applicable law under ICSID and UNCITRAL in Sacerdoti, 'Investment arbitration'.

arbitrations by: (1) making the notice of arbitration publicly available; (2) making all copies of pleadings publicly available (subject to redaction of confidential information); (3) allowing for *amicus*-type written submissions to be made on behalf of non-disputing parties; (4) requiring hearings to be made open to the public; and (5) requiring publication of any decision.[143] The February 2008 Working Group meeting saw broad support for the principle of greater transparency in investor–State arbitrations that affect the public interest, but it was not agreed that such changes be introduced to the current revision of the rules, and which apply to many types of commercial arbitration, only a small percentage of which arise under investment treaties.

The issue of transparency, widely agreed to be complex and worthy of further attention, will be considered further by UNCITRAL and is now the subject of special consideration by the Working Group. Some delegations suggested it could lead to an optional or mandatory annex to the rules, a set of model provisions for inclusion in future treaties (as in the Model US BIT 2004) or some other form of instrument or guidelines. The UNCITRAL Commission itself in July 2008 supported this approach, stating that 'it would not be desirable to include specific provisions on treaty-based arbitration the UNCITRAL Arbitration Rules themselves' and agreeing that work on investor–State disputes 'should not delay the completion of the revision of the UNCITRAL Arbitration Rules in their generic form'.[144] The Commission agreed that the topic was 'worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the current revision of the Rules'. As noted in section II.A above, parties to investor–State disputes under the existing UNCITRAL Rules have managed to incorporate greater transparency in their proceedings by choice, whether through detailed provisions in their consent to arbitration (as in DR–CAFTA) or at the time of the dispute.

[143] Center for International Environmental Law and International Institute for Sustainable Development, Submission to UNCITRAL Working Group II (Arbitration and Conciliation), *Revision of the UNCITRAL Arbitration Rules*, 12 September 2007, www.ciel.org/Publications/UNCITRAL_Arbitration_12Sep07.pdf (last accessed 21 January 2011).

[144] UNCITRAL, 'Report of the United Nations Commission on International Trade Law: Forty-first session (16 June–3 July 2008)', UN Doc. No. A/63/17, [undated]), para. 314, www.uncitral.org/uncitral/en/commission/sessions/41st.html (last accessed 21 January 2011). For the latest report of the UNCITRAL Working Group on this project, see www.uncitral.org/en/commission/workinggroups/2Arbitration.html. See also Castello, 'UNCITRAL Rules', para. 16.25.

One of the perceived advantages of UNCITRAL arbitration is the flexibility it offers to the parties throughout the process. Thus different approaches can be seen in different UNCITRAL cases with respect to confidentiality and transparency, the extent of institutional support and the chosen seat of arbitration (entailing the supervisory national jurisdiction that might play a role in granting interim relief or review of the award). The UNCITRAL Rules may also be seen as offering a standard and method of resolving arbitrator challenges more in line with generally accepted international best practices. Differences exist between UNCITRAL and ICSID with respect to the pool of available arbitrators, availability of provisional relief from courts, procedures for dismissal of frivolous claims and means of enforcement. On certain issues where the two systems appear on their face to diverge – such as cost allocation, jurisdictional limitations, and annulment – there is more convergence between the two systems than meets the eye.