Chapter 28

ARBITRATION AND INVESTMENT DISPUTES

28-1 Foreign investment is increasingly an integral part of the world economy. In developing countries, major infrastructure projects and the exploitation of

natural resources often require financing by and technical know-how of private foreign investors. Even in developed countries the share of foreign investment in the GNP is significant.[1]

28-2 The investment may be considerable which may need years for the investor to recover. In developing countries foreign investment often relates to core components of the national economy. These factors make foreign investment particularly vulnerable to possible interference by the host state. While clear cut nationalisations are rare there are a number of other measures of a lower threshold which may affect foreign investment, such as currency restrictions preventing repatriation of profits, prohibitions on price increases, tax increases or new taxes and environmental legislation.

28-3 To create a favourable climate for foreign investment, and to protect their own citizens, states have entered into large numbers of bilateral and multilateral treaties. International organisations have been established and have engaged in promoting international or regional treaties and conventions providing a stable framework for investment in an effort to create a worldwide standard for the treatment of foreign investment. Although this effort has finally failed, there are a number of regional or bilateral treaties which aim to promote and protect foreign investment, including the Lomé Agreements, North American Free Trade Agreement, and the Energy Charter Treaty.

28-4 In order to encourage foreign investment some countries have implemented specific investment laws to provide the necessary legal certainty sought by investors. Investment protection legislation can be found in nearly all the Commonwealth of Independent States and most developing countries.

28-5 In these efforts to promote and protect investment the issue of dispute resolution has been of crucial importance. Investors usually have little faith in the courts of the host country. With sensitive infrastructure projects investors are concerned they may not be able to protect their investments. On the other hand states are rarely willing to submit to foreign courts.[2]

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[1] See UNCTAD Book of Statistics. Online version at <http://stats.unctad.org/public/eng/TableViewer/Wdsview/dispviewp.asp?ReportID=60>.

[2] Wälde, "Investment Arbitration Under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation", 12 *Arb Int* 429 (1996) 431 *et seq*; Lörcher, *Neue Verfahren der Internationalen Streiterledigung in Wirtschaftssachen*, 156; Turner, "Investment Protection

28-6 For these reasons arbitration has played a prominent role in the settlement of investment disputes. *Ad hoc* arbitration proceedings in the aftermath of the expropriation of oil concessions have greatly contributed to developing and shaping the laws on investor protection. Most of the international conventions provide for arbitration as the preferred method of dispute settlement. In general they either provide for *ad hoc* arbitration under the UNCITRAL Rules or under the rules of an acceptable arbitration institution, *e.g.* ICC, SCC and in particular ICSID.[3] In addition, some treaties, such as NAFTA, also devise their own arbitration system to take account of the particular circumstances.

28-7 This chapter provides an overview of (1) the special features of investment disputes, (2) dispute settlement under national investment laws, (3) dispute resolution systems in bilateral investment treaties, (4) NAFTA, (5) the Energy Charter Treaty, (6) ICSID as the natural forum for investor-state disputes and the conduct of arbitration proceedings under the ICSID Convention and Arbitration Rules, and (7) the ICSID Additional Facility Rules.

1. Special Features of Investment Disputes Arbitration

28-8 Investment disputes differ in several respects from ordinary commercial disputes. Frequently the amount in dispute is remarkable and the issues may have considerable political implications. Disagreements often concern the objectives of the investment, the repatriation of revenues and the ultimate control and benefit of the investment. The investment may relate to vital infrastructure the completion of which is of significant importance for the national economy. The outcome of the dispute may also affect the general investment climate in a country. In addition, one party is a state vested with sovereign powers, which is nevertheless in need of foreign investment and is bound by international instruments.

28-9 These factors influence the conduct of the arbitration in various respects. In the composition of the tribunal the nationality of the arbitrators may become a more important issue than in ordinary commercial arbitrations. Concerning the

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through Arbitration: The Dispute Resolution Provisions of the Energy Charter Treaty", 1 *Int ALR* 166 (1998) 167.

[3] For an overview see Parra, "Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments", 12 *ICSID Rev-FILJ* 287 (1997).

applicable substantive and procedural laws there is a much stronger tendency to delocalise and apply principles of international law. Investment disputes can have a greater impact on parties other than those involved and thus may be more in the public domain. Investment disputes may relate to legislation which not only affects a specific investor but a complete class of investors, the relationship between the host state and the investor's home state.

28-10 Recognising these diverse interests in the proceedings between *Methanex Corporation v United States* the tribunal under NAFTA Chapter 11 allowed the submission of *amicus curia* briefs by non parties.[4] It considered that in the absence of an express prohibition the decision on whether to allow such briefs fell within the tribunal's procedural powers in accordance with Article 15(1) UNCITRAL Rules. In exercising its discretion the tribunal took into account several factors, in particular the public interest in the case. This greater public interest is also evidenced by the policy adopted in relation to the publication of awards which is much more liberal than in commercial arbitration.[5]

28-11 The greatest difference to commercial arbitrations is the source of the tribunal's power. Commercial arbitrations require an arbitration agreement between the parties. By contrast, in investment disputes arbitration may also be possible without such an arbitration agreement in the ordinary sense. National legislation or treaties may give each party the right to initiate arbitration proceedings against the other.[6] There may even be no contractual relationship between the parties at all which has led to labelling investment arbitration "arbitration without privity."[7]

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4 4 *Int ALR* N-3 (2001).

5 On the publication of NAFTA awards see Eklund, "A Primer on the Arbitration of NAFTA Chapter Eleven Investor-State Disputes", 11(4) *J Int'l Arb* 135 (1994) 156; on the publication of ICSID awards see Washington Convention Rule 48(4).

6 For the avoidance of potential problems arising out of this different source of authority, NAFTA Article 1121 and Energy Charter Treaty Article 26(5) require a special consent by the investor; they further specify that this consent in conjunction with that of the state, as expressed in the treaty provisions, shall be deemed to satisfy the arbitration agreement requirement.

7 See Paulsson, "Arbitration Without Privity", 10 *ICSID Rev-FILJ* 232 (1995); Werner, "Arbitration of Investment Disputes: The First NAFTA Award - Introductory comments on the Ethyl Corporation case", 16(3) *J Int'l Arb* 139 (1999); see, *e.g.*, ICSID, case ARB/97/3, Award of 21 November 2000, *Compañía de Aguas del Aconquija, SA & Compagnie Générale des Eaux (now Vivendi Universal) v Argentine Republic*, 40 ILM 426 (2001).

28-12 Investment arbitrations are frequently based on provisions in national investment protection laws or international treaties by which the state agrees generally to arbitrate investment disputes. These provisions constitute a unilateral standing offer to the public to submit to arbitration with any party fulfilling the requirements. The offer is accepted by the investor when it initiates arbitration proceedings against the state.[8] Until that time the investor is not bound to arbitrate and the state cannot initiate proceedings against the investor.

28-13 Disputes on jurisdiction are often not about interpreting a contract between the parties. Rather the tribunal will interpret the statutes, treaties and conventions, to see whether the dispute falls within the ambit of the state's obligation to arbitrate in these instruments. Consequently, the nationality of the investor is often an issue of the utmost importance, since the offer to arbitrate may only extend to nationals of certain countries. Investments are frequently done by local special purpose companies to meet requirements of local participation and consortia are structured in a way to allow maximum profits and tax advantages. When a dispute arises it may be necessary to determine who is the actual investor: the local company, its direct shareholders or someone further down the line of ownership and control.

2. NATIONAL INVESTMENT LAWS

28-14 Many states have adopted investment protection laws. Their objective is to provide an investor friendly environment and attract foreign investment by guaranteeing certain minimum standards, including national treatment, no discrimination and no expropriation without fair compensation. These national laws usually provide for arbitration as a means of dispute settlement.[9]

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[8] Cremades, "Arbitration in Investment Treaties: Public Offer of Arbitration in Investment Protection Treaties", in Briner, Fortier, Berger and Bredow (eds), *Liber Amicorum Böckstiegel*, 156 *et seq*; for a detailed analysis of the differences see Wälde, "Investment Arbitration Under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation", 12 *Arb Int* 429 (1996) 434 *et seq*.

[9] The Report of the Executive Directors of the World Bank accompanying the 1965 ICSID Convention refers in para 24 to the provisions in national investment legislation as one possible way to submit to the jurisdiction of the Centre. For an overview of provisions found in national investment laws see Parra, "Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments", 12 *ICSID Rev-FILJ* 287 (1997) 314.

28-15 Unlike bilateral or multilateral treaties, the provisions contained in national investment protection laws generally extend to all foreign investors. Such provisions may in effect contain an open offer to arbitrate disputes with the foreign investor. Nevertheless states have in several cases challenged the jurisdiction of tribunals in arbitration proceedings initiated on the basis of investment protection laws.

28-16 An example is provided by the *SPP v Republic of Egypt* arbitration arising out of an abandoned project to construct a hotel complex near the pyramids. It is one of the first cases where a party tried to initiate arbitration on the basis of a provision in a national investment law. After an ICC award rendered in SPPs favour had been annulled for lack of an arbitration agreement with Egypt by the French courts,[10] SPP successfully initiated ICSID arbitration proceedings relying on Article 8 Egyptian Investment Law (Law no 43 of 1974) which provided

> Investment disputes in respect of the implementation of the provisions of this Law shall/are to be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered … where it applies.

28-17 Egypt objected to the jurisdiction of the tribunal for three reasons which were all rejected by the tribunal.[11] First, it submitted that the claimants had not consented to ICSID's jurisdiction since it first initiated ICC proceedings. The tribunal held that by sending a request for arbitration and an earlier letter to the minister the investor consented to ICSID arbitration. It was not barred by either Article 26 ICSID Convention, according to which submission to ICSID excludes all other remedies, or any other principle of international law such as estoppel.[12]

28-18 Second, Egypt denied the applicability of Law no 43, since the approval for the Pyramids project had been withdrawn before the arbitration proceedings were initiated. Egypt alleged that Law no 43 only covered an investment for

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[10] Cour d'appel Paris, 12 July 1984, X *YBCA* 113 (1985); confirmed by the Cour de cassation, 6 January 1987, XIII *YBCA* 152 (1988); for an account of the case see Delaume, "The Pyramids Stand - The Pharaohs Can Rest in Peace", 8 *ICSID Rev-FILJ* 231 (1993).

[11] See the two awards on jurisdiction, 27 November 1985 and 14 April 1988, *Southern Pacific Properties Ltd (Middle East) et al v Arab Republic of Egypt*, XVI YBCA 16 (1991).

[12] *Ibid*, award on jurisdiction of 27 November 1985, paras 7-13.

which an approval existed. The tribunal held that the relevant point was whether the investment when made was covered by Law no 43 not whether an approval had subsequently been withdrawn. In the tribunal's view the withdrawal was invalid.[13] It further held that the dispute was covered by Law no 43 since the withdrawal of the permission constituted a violation of the protection granted under the investment law.

28-19 Third, Egypt argued that even if Law no 43 was applicable, Article 8 would not suffice to establish Egypt's consent to ICSID's jurisdiction. The tribunal rejected that contention. It held that despite the alleged difference between the Arab version and the English and French versions of Article 8 its language was sufficiently clear and broad to create a binding offer for arbitration which covered the case in issue.[14]

28-20 In dealing generally with the interpretation of dispute settlement provisions in national investment laws the tribunal made clear that it was not bound by the interpretation of the provisions submitted by the state party which drafted them. These provisions are governed by the principles of statutory interpretation which may be influenced by the rules of interpretation of treaty law; this is particularly true where the provisions of the national laws relate to obligations under international treaties.[15]

28-21 Comparable objections, as to scope of the offers contained in the dispute settlement provisions of national laws, their general applicability and the effect of withdrawals, have been raised in other arbitrations.[16] In particular, to allow a state to withdraw an offer to arbitrate contained in an investment law after an investment has been made would deprive the investor of its basic protection. Therefore the time when the investment is made should usually be relevant for determining whether it enjoys the benefits of a national protection law.

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[13] *Ibid*, paras 14-21.

[14] *Ibid*, paras 21-24; award on jurisdiction, 27 November 1985, paras 43-69.

[15] *Ibid*, paras 33-37.

[16] Comparable objections were raised in *Gaith Pharaon v Republic of Tunisia* - an ICSID arbitration based on Tunisian investment law - which was, however, settled before the tribunal could deal with them; see Paulsson, "Arbitration Without Privity", 10 *ICSID Rev-FILJ* 232 (1995) 235. See also ICSID, Decision on Jurisdiction, 24 December 1996, *Tradex Hellas SA v Republic of Albania*, 14 ICSID Rev-FILJ 161 (1999) where the main issue was the retroactive application of law.

3. BILATERAL INVESTMENT TREATIES

28-22 Bilateral Investment Treaties (BITs) have proliferated over the last three decades and are an effective and well used mechanism to guarantee protection of foreign investments.[17] In addition to substantive rules they usually contain dispute resolution provisions for certain defined categories of investments, invariably providing for arbitration. The scope and the content of these clauses differ considerably, depending on the states involved and their respective bargaining power. In the majority of cases they constitute a unilateral offer by the state involved to all investors from the other state party to settle disputes by arbitration. Some, however, only contain declarations of intent to make such offers in the future.[18] Some BITs provisions cover all types of disputes under a very wide definition of investment; others only cover certain types of disputes, for example, those relating to expropriation or specific types of investment.[19] Often the exhaustion of local remedies is made a prerequisite for the right to arbitration.

28-23 Differences not only exist in the scope of investor protection provided in each BIT, but the type of arbitration provided for will also vary. Frequently the clauses provide for ICSID arbitration, or give the investor a choice between ICSID and other institutions such as the ICC, the AAA or the SCC. Often arbitration is the final stage in a multi-tier dispute resolution clause, providing first for negotiations or other diplomatic efforts to settle the dispute amicably.[20]

28-24 There have been numerous arbitration proceedings, which are based on provisions in BITs.[21] In a recent case a party successfully invoked a BIT despite an exclusive jurisdiction clause for the main claim. In *Vivendi Universal v*

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[17] See Obadia, "L'evolution de l'activité du CIRDI", *Rev Arb* 633 (2001), according to whom there were approximately 2000 bilateral investment treaties in the beginning of 2001.

[18] Cremades, "Arbitration in Investment Treaties: Public Offer of Arbitration in Investment Protection Treaties", in Briner, Fortier, Berger and Bredow (eds), *Liber Amicorum Böckstiegel*, 159 *et seq*.

[19] Paulsson, "Arbitration Without Privity", 10 *ICSID Rev-FILJ* 232 (1995) 236 *et seq*.

[20] See Blessing, *Introduction to Arbitration*, para 332; for an overview see Parra, "Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments", 12 *ICSID Rev-FILJ* 287 (1997) 322 *et seq*.

[21] See, *e.g.*, *Asian Agricultural Products Ltd v Republic of Sri Lanka,* 6 ICSID Rev-FILJ 526 (1991), 30 ILM 577 (1991); XVII YBCA 106 (1992); *Joseph Charles Lemire v Ukraine,* 15 ICSID Rev-FILJ 528 (2000).

Argentine Republic,[22] the French investor had entered into a concession contract with Tucumán, a province of Argentina. The contract did not make any reference to the BIT between Argentina and France. It provided that disputes relating to the interpretation and application of the contract should be submitted to the exclusive jurisdiction of the administrative courts in Tucumán. Vivendi started ICSID proceedings against the Republic of Argentina, which had neither been a party to the concession nor participated in the negotiations. Vivendi alleged that the actions of the Tucumán authorities constituted a breach by Argentina of the provisions in the relevant BIT, according to which investors are guaranteed fair and equitable treatment and prohibited expropriation. Vivendi argued that for this reason its claims against Argentina were covered by Article 8 BIT providing for ICSID arbitration. The tribunal assumed jurisdiction stating the need to distinguish between contractual claims against Tucumán and the claims for breach of the BIT brought by the investor against Argentina. The latter were not affected by the exclusive jurisdiction clause in the Concession Contract but could be referred to arbitration under the ICSID Convention.[23]

28-25 In *Ceskoslovenska Obchodni Banka AS v The Slovak Republic*[24] the relevant treaty had never entered into force but the parties had provided in their agreement that it should be governed by the treaty. The tribunal considered this sufficient to establish its jurisdiction as the parties had made the article part of their contract.[25] BITs have given foreign investors the possibility of relying on dispute resolution options that best suit their needs. Many investments made by a subsidiary of a global corporation will now fall under at least one BIT.[26]

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[22] ICSID, *Compañía de Aguas del Aconquija, SA & Compagnie Générale des Eaux (now Vivendi) v Argentine Republic*, ARB/97/3, 21 November 2000, 40 ILM 426 (2001); see also the preliminary decision on jurisdiction in *Lanco International Inc.v The Argentine Republic*, ARB/97/6, 8 December 1998, 40 ILM 457 (2001).

[23] *Ibid,* 435 *et seq*. The decision on jurisdiction was confirmed in the annulment proceedings.

[24] ICSID, Decision on Objections to Jurisdiction, 24 May 1999, *Ceskoslovenska Obchodni Banka, AS (Czech Republic) v The Slovak Republic*, XXIVa YBCA 44 (1999); 14 ICSID Rev-FILJ 250 (1999); Decision on further and partial objection to jurisdiction, 1 December 2000, 15 ICSID Rev-FILJ 542 (2000).

[25] *Ibid*, 57-60.

[26] See the two *ad hoc* Lauder arbitrations *CME Czech Republic BV v Czech Republic* and *Lauder v Czech Republic* available at <*www.cme.cz/doc10/en/oo.htm*>.

4. THE NORTH AMERICAN FREE TRADE AGREEMENT

28-26 The North American Free Trade Agreement (NAFTA) was entered into in 1993 by the United States, Canada and Mexico to provide for a widely liberalised common market between the three countries. In addition to a general encouragement to settle disputes by arbitration or other means of alternative dispute resolution NAFTA contains dispute settlement mechanisms in three different chapters, the most relevant of which is Chapter 11. It deals with investments and has three parts: Part A sets out the substantive obligations of the contracting states; Part B provides a dispute settlement mechanism; and Part C defines the significant terms used in the Chapter.[27]

28-27 According to Part A the three contracting states guarantee certain standards of treatment, *i.e.* national or most favoured nation treatment, whichever is better, freedom from performance requirements, the right to control the investment through senior management of whatever nationality, the right to repatriate profits without restrictions, certain conditions of expropriation and information requirements.[28] Any dispute arising out of an alleged violation of any of these duties in relation to an investment, as defined in Article 1139, is to be settled under the provisions of Part B.

28-28 According to the non-mandatory provisions of Article 1118 the disputing parties shall first try to settle any disputes amicably. If such an attempt fails the investor from a state party to NAFTA can proceed to arbitration on giving a 90 days notice of an intention to submit a claim and provided that six months have elapsed since the events giving rise to the claim.[29] The investor has the choice to initiate arbitration under the ICSID Convention, the ICSID Additional Facility

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[27] For a detailed analysis of Chapter 11 see Eklund, "A Primer on the Arbitration of NAFTA Chapter Eleven Investor-State Disputes", 11(4) *J Int Arb* 135 (1994); Horlick and Marti, "NAFTA Chapter 11B - A Private Right of Action to Enforce Market Access through Investments", 14(1) *J Int Arb* 43 (1997); Alvarez, "Arbitration Under the North American Free Trade Agreement", 16 *Arb Int* 393 (2000); see also Trakman, "Arbitrating Investment Disputes Under the NAFTA", 18(4) *J Int Arb* 385 (2001) dealing with a hypothetical case under NAFTA on the "expropriation" of a salmon farm by a tax raise intended to protect the environment.

[28] *Ibid*, 137-140.

[29] Articles 1119, 1120(1), which are intended to give the state the opportunity to reconsider the alleged violation, essentially a cooling off period; see Trakman, "Arbitrating Investment Disputes Under the NAFTA", 18(4) *J Int'l Arb* 385 (2001) 397; in the *ad hoc* arbitration, *Ethyl Corporation v The Government of Canada*, 38 ILM 708 (1999) the tribunal waived the six month period.

Rules or as an *ad hoc* arbitration under UNCITRAL Rules.[30] According to Article 1121 the investor when doing so has to submit to arbitration under NAFTA to ensure that any adverse award is also binding on him and to waive the right to continue the same claim before other courts or tribunals.[31]

28-29 Unless otherwise agreed by the parties the tribunal will consist of three arbitrators, one to be appointed by each party. While the proceedings will generally be governed by the relevant ICSID or UNCITRAL Rules there are several peculiar features of NAFTA arbitrations. The first is the right to demand consolidation if a controversial state measure affects several investors under Article 1126 NAFTA. In particular the state party should be protected from having to defend numerous arbitrations for the same measures with the threat of conflicting awards. Therefore the state or investor may ask the Secretary General to establish a "super-tribunal" under UNCITRAL Rules to hear all claims in a single arbitration.[32]

28-30 The second special feature of Chapter 11B arbitrations is that questions of the interpretation of NAFTA must, upon the request of one party, be transferred to the Commission. It must render in writing within 60 days an interpretation binding on the arbitration tribunal. The Commission has not yet been called on to exercise this role but it did issue a note on the interpretation of certain Chapter 11 provisions.[33]

28-31 The investor's right to initiate arbitration proceedings under Chapter 11 NAFTA has generated substantial case law already. This is largely due to the fact that the requirements relevant to reaching the threshold of Chapter 11B, in particular the notions of "investment" and "measure" are defined and interpreted very broadly. According to the definition in Article 1139[34] "investment" only excludes financial rights arising out of contracts of sale and services but covers a

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[30] Article 1120; in certain cases ICSID or ICSID Additional Facility arbitration may not be available since the dispute does not fall within the ambit of these rules; see Alvarez, "Arbitration Under the North American Free Trade Agreement", 16 *Arb Int* 393 (2000) 404.

[31] Alvarez, *ibid*, 408.

[32] For details see Eklund, "A Primer on the Arbitration of NAFTA Chapter Eleven Investor-State Disputes", 11(4) *J Int'l Arb* 135 (1994) 149.

[33] See Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commision, 31 July 2001 at <www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp>.

[34] For the text of the provision see <www.sice.oas.org/trad/nafta/naftatce.asp> or 32 *ILM* 289 (1993).

number of issues which go beyond the classical definition of investment. "Measures" which might give rise to the right to arbitration include, *inter alia*, legislative actions but also court decisions. It is, however, important that the investor claims a violation of an obligation under Chapter 11. A claim for breach of an investment contract as such is not sufficient if it does not at the same time constitute a violation of Chapter 11.[35]

28-32 The jurisdiction of a tribunal established under Chapter 11B had to be considered in *Ethyl Corporation v Canada,*[36] one of the first arbitrations under NAFTA. It arose out of a legislative ban by Canada of certain fuel additives produced by Ethyl. Canada challenged the jurisdiction of the tribunal. The tribunal rejected the objections since at the time of the decision the legislation had been enacted and therefore constituted a "measure" in the sense of Chapter 11 and the cooling off period had expired. Furthermore, it held that there was no need to give a restrictive application to the relevant provision of Chapter 11B the interpretation of which is governed by Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

28-33 The right to initiate arbitration proceedings may be lost when the investor pursues its rights by other means of dispute settlement. In *Waste Management v United Mexican States*[37] the Municipality of Acapulco de Juárez in Mexico granted a concession to a wholly owned subsidiary of the US claimant to run a public waste management service. The claimant submitted the waiver required by Article 1121 NAFTA but added a qualification that it did not extend to proceedings based on other sources of law. The tribunal held by majority that though the waiver fulfilled the formal requirements of Article 1121 it was not valid. Since Waste Management had initiated arbitration proceedings against the Municipality of Acapulco de Juárez for the payment of its services and proceedings against the guarantor bank, it had shown that it did not want to abdicate its rights as required by Article 1121.[38]

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[35] ICSID, 1 November 1999, *Robert Azinian, Kenneth Davitian & Ellen Bacca v The United Mexican States*, 14 ICSID Rev-FILJ 538 (1999).

[36] See the decision on the place of arbitration and the award on jurisdiction, XXIVa *YBCA* 211 (1999); however, the case was settled before an award on the merits was rendered.

[37] *Waste Management, Inc v United Mexican States*, 15 ICSID Rev-FILJ 211 (2000).

[38] *Ibid*, 231-239; in a dissenting opinion the US arbitrator appointed by claimant rejected this view since in his opinion the proceedings concerned other issues not covered by Chapter 11.

5. THE ENERGY CHARTER TREATY[39]

28-34 The Energy Charter Treaty was entered into in 1994 by 49 countries from Western, Central and Eastern Europe, Japan and Australia.[40] Its objective is to provide a legal framework for a continuing cooperation between the Contracting States in the energy sector, in particular to create a level playing field for investment in the eastern European energy sector.[41] Part III sets out the provisions for the promotion, protection and treatment of investments in the energy sector. These include a non discriminatory and national or most favoured nation treatment of investments, the removal of barriers and restrictions such as domestic content requirements, compensation for harm to the investment through state actions and prompt, adequate and effective compensation in the event of expropriation. The Treaty essentially provides the same type of investment protection available to foreign investors from other industries.[42]

28-35 Part V contains the rather innovative regime for dispute settlement; creating a direct investor/state obligation of compulsory arbitration. According to Article 26(2) an investor from a Contracting State alleging a violation of treaty obligations has the right to bring a direct claim against the state (a) in the courts or administrative tribunals of the host state, or (b) in line with a pre-agreed dispute settlement procedure, or (c) in arbitration proceedings. The investor is not bound by earlier contractual commitments when making its choice. It may opt for arbitration even though the contract with the state included a forum selection clause in favour of the host state's court or a different type of arbitration.[43] An investor opting for arbitration can choose between arbitration under the ICSID

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[39] For a detailed account see Wälde, "Investment Arbitration Under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation", 12 *Arb Int* 429 (1996); Turner, "Investment Protection through Arbitration: The Dispute Resolution Provisions of the Energy Charter Treaty", 1 *Int ALR* 166 (1998).

[40] The ECT came into force on 16 April 1998 and there are now 51 signatories. <www.encharter.org>.

[41] See Wälde (ed), *European Energy Charter Treaty: An East-West Gateway for Investment & Trade?* (Graham & Trotman, 1996).

[42] Energy investment, given its political and economic importance, was often excluded from BITs; see Elshihabi, "The Difficulty Behind Securing Sector-Specific Investment Establishment Rights: The case of the Energy Charter", 35 *Int Lawyer* 137 (2001).

[43] Paulsson, "Arbitration Without Privity", 10 *ICSID Rev-FILJ* 232 (1995) 249; contra: Wälde, "Investment Arbitration Under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation", 12 *Arb Int* 429 (1996) 445.

Rules, the ICSID Additional Facility Rules, the SCC Rules or *ad hoc* under UNCITRAL Rules.

28-36 Unlike NAFTA, the Energy Charter Treaty contains few amendments to the arbitration proceedings under the chosen rules. It only provides that the tribunal has to decide the case on the basis of the treaty itself and applicable rules and principles of international law. There have been no cases decided under the Treaty although one case was filed under ICSID and subsequently settled.[44]

28-37 The Energy Charter Treaty does not contain a special enforcement regime. Therefore with the exception of arbitration under ICSID rules, enforcement has to be based on the New York Convention. However, if a contracting state refuses to enforce or comply with an award such non-compliance amounts to a breach of the Treaty for which interstate arbitration under Article 27 is possible.

6. Arbitration Proceedings under the ICSID Convention

28-38 ICSID was established by the 1965 Washington Convention on the Settlement of Investment Disputes Between States and Nationals of the Other States.[45] The purpose of the Convention, prepared under the auspices of the World Bank, was to provide a special forum for the settlement of investment disputes in order to encourage foreign investment and world development.[46] In 1978 ICSID created the "Additional Facility" to cover cases which fall outside the ambit of the ICSID Convention, in particular where one of the parties is not from a Contracting State.

28-39 To date over 130 states have ratified the ICSID Convention and over 100 disputes have been referred to ICSID arbitration.[47] Of more significance is the scale of investment covered by ICSID clauses. In addition to arbitration agreements in favour of ICSID in investment contracts numerous bilateral and multilateral investment protection treaties and national investment laws now

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[44] *AES Summit Generator Ltd v Republic of Hungary*, Arb/01/4 at <www.worldbank.org/icsid/cases/cases.htm>.

[45] Text reproduced in 4 *ILM* 532 (1965).

[46] See generally Schreuer, *The ICSID Convention: A Commentary* (CUP 2001).

[47] A list of the cases filed can be found at <http://www.worldbank.org/icsid/cases/cases.htm>.

provide for arbitration under ICSID or the Additional Facility.[48] As a consequence there has been a constant increase in the number of cases filed per year.

28-40 ICSID arbitration is an example of delocalised arbitration proceedings governed solely by international rules and not submitted to the provisions of any one national arbitration law.[49] In particular, an ICSID award is not submitted to the scrutiny of national courts for annulment or enforcement. The only means of redress is the delocalised internal ICSID annulment procedure and a facilitated procedure for the recognition and declaration of enforceability by ICSID.

28-41 ICSID arbitration by definition involves a state party and so the rules are based on the assumption that no state can invoke its sovereign immunity in order to challenge the jurisdiction of the tribunal. Submission to ICSID arbitration is considered to be a waiver of sovereign immunity for questions of jurisdiction including *exequatur* proceedings.[50] By contrast, Article 55 makes clear that such waiver does not extend to issues of execution where the national rules are relevant and are not affected by the ICSID rules.

28-42 If no special reservation is made, the existence of a valid ICSID arbitration clause, according to Article 26, excludes any other means of legal recourse to enforce claims, including interim relief. The parties may agree that an ICSID arbitration can only be brought after the means of recourse against a decision available under national law have been exhausted. However, such clauses have been rare in practice. National courts as well as other arbitration

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[48] There are around 1500 different Bilateral and Multilateral Investment agreements which refer disputes to ICSID; see Obadia, "L'evolution de l'activité du CIRDI", *Rev Arb* 633 (2001); Parra, "Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments", 12 *ICSID Rev-FILJ* 287 (1997); Schreuer, "Commentary on the ICSID Convention", 11 *ICSID Rev-FILJ* (1996) 318; see also Cremades, "Arbitration in Investment Treaties: Public Offer of Arbitration in Investment Protection Treaties", in Briner, Fortier, Berger and Bredow (eds), *Liber Amicorum Böckstiegel*, 161.

[49] Broches, "Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965 - Explanatory Notes and Survey of its Application", XVIII *YBCA* 627 (1993) 629; Parra, "Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments", 12 *ICSID Rev-FILJ* 287 (1997) 301 *et seq*; Schreuer, "Commentary on the ICSID Convention", 11 *ICSID Rev-FILJ* (1996) 318; Cremades, *Ibid*, 149; Arnoldt, *Praxis des Welthandelsübereinkommens*, 169.

[50] Delaume, "Sovereign Immunity and Transnational Arbitration", 3 *Arb Int* 28 (1987) 32; Arnoldt, *Ibid*, 170.

tribunals have enforced this exclusivity and generally denied jurisdiction when proceedings where started before them.[51] Under Article 27 diplomatic protection by the investor's country of origin is excluded by the arbitration clause.

6.1. The Scope of the ICSID Convention

28-43 It is of considerable practical importance whether a dispute can be referred to arbitration under the ICSID Convention. The scope of the Convention is defined in Article 25(1)

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

28-44 Consequently, investment disputes fall within the ambit of the ICSID Convention if the following four requirements are met:

- it must be a legal dispute;
- the parties must have agreed to submit their dispute to ICSID;
- the dispute must be between a Contracting State or its subdivisions and a foreign investor from another Contracting State;
- it must arise directly out of an investment.

28-45 The first requirement is fulfilled whenever there is a dispute about legal rights.[52] The other three requirements have been relied upon by states to challenge the jurisdiction of tribunals formed under the ICSID Rules. Some states have also made use of their right under Article 25(4) to limit their consent to ICSID to a certain category of investment disputes.

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[51] For the exceptional cases where jurisdiction was assumed despite the existence of ICSID arbitration clause, see Broches, "Convention on the Settlement of Investment Disputes, XVIII *YBCA* 627 (1993) 647, paras 49 *et seq*.

[52] ICSID, Decision of 11 July 1997 on Objections to Jurisdiction and award of 9 March 1998 in case no ARB/96/3, *Fedax NV v Republic of Venezuela*, XXIVa YBCA 23 (1999) 24, paras 1-2, 37 ILM 1378 (1998); ICSID, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, *Ceskoslovenska Obchodni Banka, AS (Czech Republic) v The Slovak Republic*, XXIVa YBCA 44 (1999) 60, para 46; 14 ICSID Rev-FILJ 250 (1999).

(a) Consent to arbitration

28-46 ICSID arbitrations require that all parties concerned have agreed to submit to ICSID arbitration. The mere ratification of the ICSID Convention is not in itself consent to arbitration by a state. As the Preamble of the Convention clearly sets out, ratification does not oblige the state to submit a given dispute to arbitration. It serves only to make the state party to the ICSID Convention but does not grant jurisdiction to an ICSID tribunal.[53]

28-47 The necessary consent may be contained in an arbitration agreement concluded between the state and the investor within the framework of the investment contracts or after the dispute has arisen.[54] It is, however, by no means necessary that the consent is contained in a single document or documents exchanged at the conclusion of the investment. Often the contract underlying the investment is not even concluded between the state and the investor but between the investor and a separate private entity incorporated in the state of investment.[55]

28-48 The state in practice often declares its consent to ICSID arbitration in its investment legislation or in BITs. The standing offer by the state to arbitrate may be accepted at any time, including after the dispute has arisen. It is sufficient for an acceptance that an investor files a request for arbitration or invokes the provisions in a letter written to government officials.[56]

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[53] For the required "double consent" to the ICSID Convention and the arbitration agreement see Cremades, "Arbitration in Investment Treaties: Public Offer of Arbitration in Investment Protection Treaties", in Briner, Fortier, Berger and Bredow (eds), *Liber Amicorum Böckstiegel*, 152 *et seq*.

[54] For one of the rare cases where a state agreed under strong pressure from the investor's home state (delaying a loan of the Inter-American Development Bank) to ICSID arbitration after the dispute had arisen see the award of 17 February 2000, *Compania del Desarrollo de Santa Elena, SA v Republic of Costa Rica*, , 15 ICSID Rev-FILJ 169 (2000).

[55] In *SPP v Egypt*, *e.g.*, the investment contract was concluded between SPP and the Egyptian General Organization for Tourism and Hotels, a public entity with separate legal personality under the Ministry of Tourism.

[56] ICSID, Decision on jurisdiction, 27 November 1985, South Pacific Properties (Middle East) Ltd *and South Pacific Properties Ltd (Hong Kong) v The Arab Republic of Egypt*, XVI YBCA 19 (1991), and ICSID, Decision of 14 April 1988, XVI YBCA 28 (1991); *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka,* 30 ILM 580 (1991); XVII YBCA 106 (1992); *Tradex Hellas SA v Republic of Albania,* Decision on Jurisdiction, 24 December 1996, 14 ICSID Rev-FILJ 161 (1999) 187; *Ceskoslovenska Obchodni Banka, AS (Czech Republic) v The Slovak Republic,* Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, XXIVa YBCA 44 (1999) 54; for other cases see Broches, "Convention on the Settlement of Investment Disputes", XVIII *YBCA* 627 (1993) 643, paras 36 *et seq*; out of the 44 cases pending in 2001

28-49 Once an arbitration agreement has been concluded, no party can unilaterally revoke its effect. Although this follows from general contract law and is clearly provided for in Article 25(1), the issue arose in *Alcoa v Jamaica.*[57] Shortly before it changed its legislation relating to the production of bauxite and the imposition of a production levy, Jamaica informed ICSID that it had withdrawn certain classes of disputes from the ICSID Convention. On the basis of that declaration, Jamaica contested the jurisdiction of the tribunal. The tribunal held that Jamaica had consented to arbitration in the investment agreement with *Alcoa* and could not unilaterally withdraw from that agreement. Jamaica's declaration could only be effective for future agreements.

(b) Requirements as to the parties involved

28-50 For the Convention to be applicable, one of the parties to the dispute must be a Contracting State or a "constituent subdivision or agency" which has been registered with the Centre. The registration, however, has primarily an evidentiary purpose in order to avoid doubts on whether a state entity can be a party to ICSID arbitration. Therefore, the lack of formal registration does not prevent an entity becoming an eligible party if it has been made clear that it is a constituent subdivision or agency of a Contracting State.[58]

28-51 The other party must be a national of another Contracting State.[59] This requirement must be fulfilled with regard to a natural person, both at the time of the conclusion of the arbitration agreement and at the time of the application for arbitration. For a legal entity, it is sufficient that it has the nationality of another Contracting State only at the time that they entered into the arbitration agreement. It is also not necessary that the legal entity is a privately owned

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nearly two third were based on consent either in national laws, bilateral or multilateral treaties; see Obadia, "L'evolution de l'activité du CIRDI", *Rev Arb* 633 (2001).

[57] *Alcoa Minerals of Jamaica v Government of Jamaica*, IV YBCA 206 (1979) 207 *et seq*.

[58] See the jurisdictional decision in *Manufacturers Hanover Trust Company v Arab Republic of Egypt and General Authority for Investment and the Free Zones*, (ARB/89/1), unpublished, Annual Report 1991, 7; for a different view see *Cable Television of Nevis Ltd and Cable Television of Nevis Holding, Ltd v The Federation of St Christopher (St Kitts) and Nevis*, 18 ICSID Rev-FILJ 329 (1998) 345, where the tribunal declined jurisdiction because the state was not a party to the contract containing the arbitration clause and the subdivision which signed the contract had not been registered with ICSID.

[59] See ICSID Convention Article 25(2).

company; partly or wholly state owned companies also are covered. The nature of its activities is relevant. They must be private and commercial.[60]

28-52 Article 25(2)(b) states that a legal entity with the nationality of the host state may under certain circumstances be considered as a "national of a different Contracting State". This takes into account the fact that foreign investors are often required to channel their investment through locally incorporated companies. The parties may agree that in these circumstances the local legal entity may be given the status of a "national of a different Contracting State" so that ICSID procedures are available. In *Amco v Indonesia* the tribunal held that it was not necessary to expressly give this status to the local company. It was sufficient for the state party to know that the local company was owned by an investor from a different Contracting State.[61]

28-53 Often the local company is not controlled directly by the foreign investor but is at the end of a pyramid of control. Questions as to the nationality of the controlling party may arise if certain parts of the pyramid are not nationals of Contracting States. In *Amco v Indonesia* the tribunal considered the direct parent company to be the relevant party which had to have the nationality of another Contracting State.[62] In *SOABI v Senegal* the local company was a 100% subsidiary of a Panamanian company which was in turn controlled by Belgian interests. Though Panama was not a contracting state the tribunal rejected the challenge to its jurisdiction.

28-54 It held that the purpose of the final clause of Article 25(2)(b) was to allow the foreign investor access to arbitration despite being required to carry out the investment through locally incorporated companies. In this respect it was irrelevant whether the investor was a direct shareholder of the local company or channelled its investment through intermediary companies, exercising the same control over the local company. Therefore the tribunal considered the party at the top of the pyramid of control to be relevant in determining whether an investor

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[60] See ICSID, 24 May 1999, *Ceskoslovenska Obchodni Banka, AS (Czech Republic) v The Slovak Republic,* Decision on Objections to Jurisdiction, XXIVa YBCA 44 (1999) 48; 14 ICSID Rev-FILJ 250 (1999).

[61] ICSID, *Amco Asia Corp and others v Republic of Indonesia*, Decision on Jurisdiction, 23 ILM 351 (1984) 359 *et seq*.

[62] *Ibid*, 362 *et seq*.

from a Contracting State was involved.[63] The tribunal in *Vacuum Salt v Ghana* confirmed that foreign control within the context of Article 25(2)(b) does not require or infer a particular percentage of share ownership. Each case must be looked at on the facts of the particular dispute. "There is no "formula". It stands to reason, of course, that 100 percent foreign ownership almost certainly would result in foreign control… and that a total absence of foreign shareholding would virtually preclude the existence of such control."[64] The question of how much control is enough is not always easy to answer and is of paramount importance for a large company seeking to commence a claim through one or more of its subsidiaries against a host state.

28-55 It is not possible to bring a claim within the ambit of the Convention by assigning it to a party from a Contracting State which would fulfil the requirements of Article 25. This would violate the basic principle that arbitration requires the consent of both parties and would defeat the carefully structured system of jurisdiction under the ICSID Convention.[65]

(c) Investment

28-56 An "investment" within the scope of Article 25 is not defined in the ICSID Convention. The draftsmen wanted to leave it primarily to the parties to decide what constituted an investment.[66] An arbitration clause providing for ICSID arbitration is an implied agreement that their "investment" falls under Article 25. The same applies to the unilateral offers to arbitrate contained in the various investment protection laws and investment treaties. They extend the ICSID arbitration option to all types of investment covered by the relevant legal instrument. As a consequence the wide definitions of investment contained, for example, in NAFTA or the Energy Charter Treaty are indirectly also relevant for

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[63] ICSID, Decision on Jurisdiction, *Société Ouest Africaine des Bétons Industriels v Republic of Senegal*, 6 ICSID Rev-FILJ 217 (1991) 225, paras 35 *et seq*.

[64] *Vacuum Salt Production Limited v Government of the Republic of Ghana*, 4 ICSID Reports 320 (1997) 346 para 43; see further Amerasinghe, "Jurisdiction Ratione Personae Under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States", *BYBIL* 227 (1971-75) 264-265.

[65] ICSID, 15 March 2002, ARB/00/02, *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka*, 17(7) Mealey's IAR A1 (2002) A2.

[66] Shihata, "Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA", 1 *ICSID Rev-FILJ* 1(1986) 5; see also ICSID, Decision on Objections to Jurisdiction, 24 May 1999, *Ceskoslovenska Obchodni Banka, AS (Czech Republic) v The Slovak Republic*, XXIVa YBCA 44 (1999) 61.

the determination of what constitutes an investment for the purposes of Article 25.

28-57 In *Ceskoslovenska Obchodni Banka, AS (Czech Republic) v The Slovak Republic*[67] the tribunal stated that while the consent given by the parties is an important element in determining whether a dispute qualifies as an investment under the Convention it is not conclusive. The tribunal confirmed that

> The concept of an investment as spelled out in … [Article 25] is objective in nature in that the parties may agree on a more precise or restrictive definition of their acceptance of the Centre's jurisdiction, but they may not choose to submit disputes to the Centre that are not related to an investment. A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the parties' consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Art. 1 of the BIT.[68]

28-58 In dealing with the objective notion of "investment" under the Convention the Tribunal held

> … that investment as a concept should be interpreted broadly because the drafters of the Convention did not impose any restrictions on its meaning. Support for a liberal interpretation of the question whether a particular transaction constitutes an investment is also found in the first paragraph of the Preamble to the Convention, which declares that 'the Contracting States [are] considering the need for international cooperation for economic development, and the role of private international investment therein'. This language permits an inference that an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention.[69]

28-59 These proceedings arose out of a series of contracts concluded for the privatisation of claimant. Non performing loan portfolio assets were to be transferred to two "Collection Companies" which had to pay for the transfer. The necessary funds for the payment were to be provided by a loan by claimant to the

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[67] *Ibid*, XXIVa YBCA 44 (1999); 14 ICSID Rev-FILJ 250 (1999).

[68] ICSID, Decision on Objections to Jurisdiction, 24 May 1999, *Ceskoslovenska Obchodni Banka, AS (Czech Republic) v The Slovak Republic*, XXIVa YBCA 44 (1999) 62 para 53.

[69] *Ibid,* 61, para 49.

two companies; security for its repayment was given by the two states. The dispute concerned the alleged non-fulfilment of the obligation to cover the losses of the Slovak Collection Company by the Slovak Republic. The tribunal came to the conclusion that, considering the whole contractual framework the allegedly breached undertaking constituted an investment by claimant in the sense of Article 25. In determining whether the undertaking would qualify as an investment the tribunal took into account the whole contractual relationship, in particular the loan agreement. Taken together with a number of other obligations it served to ensure a further presence of the claimant in the Slovak Republic and therefore constituted an investment in the Slovakian territory.

28-60 Another case dealing with the interpretation of investment was *Fedax v Republic of Venezuela.*[70] It concerned promissory notes issued by Venezuela in the acknowledgement of a debt for services rendered by a Venezuelan corporation. These notes had been assigned to Fedax, a company from the Dutch Antilles, which initiated ICSID proceedings when a dispute arose in connection with the repayment of the notes. Venezuela objected to the jurisdiction of the tribunal contending that the promissory notes did not constitute an investment within the meaning of Article 25(1) ICSID Convention. It argued that an investment required the "laying out of money or property in business ventures, so that it might produce a revenue or income."

28-61 The tribunal, after analysing the drafting history of the Convention and subsequent case law, rejected the objections.[71] It held that Article 25(1) covers direct and indirect foreign investments. The tribunal then held that the notes as such were not excluded from the Convention so that the definition given to the term investment by the parties was relevant. The tribunal looked to Article 1 of the BIT between the Netherlands and Venezuela on which the investor had relied when initiating the arbitration. Since the Treaty covered "every kind of assets" the tribunal was of the view that the promissory notes fell within the scope of the ICSID Convention.

28-62 To what extent pre-investment expenditures made in the process of preparing an investment fall within the ambit of the Convention became an issue

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[70] ICSID, Decision, 11 July 1997, on Objections to Jurisdiction and award, 9 March 1998, case no ARB/96/3, *Fedax NV v Republic of Venezuela*, 37 ILM 1378 (1998), XXIVa YBCA 23 (1999).

[71] The tribunal held the meaning of investment under Article 25 to be wider than the meaning under the MIGA Convention, Article 12.

in *Mihaly International v Sri Lanka*.[72] The dispute arose out of a Build Operate and Transfer (BOT) project for the construction of a power plant in Sri Lanka. At the end of the bidding process, a letter of intent was issued to the claimant that further negotiations would be made exclusively with it for a certain period. This was followed by two further documents extending the time period and recording the agreements reached so far. When the project was dropped the claimant initiated arbitration proceedings for the expenses made in preparation of the project from the time of the letter of intent.

28-63 On the specific circumstances the tribunal held that the costs incurred did not constitute an investment in the sense of Article 25 ICSID Convention. Sri Lanka had consistently made it clear that the documents exchanged did not create any obligation to enter into a contract for the construction of the power plant. The tribunal concluded that the costs of the preliminary phase were prior to authorisation for an investment.[73] The tribunal made clear that without the insistence on the non-binding character of the documents the result may have been different and that a successful negotiation might have brought the pre-investment costs under the umbrella of the investment protection.[74]

6.2. Specifics of ICSID Arbitration Proceedings

28-64 ICSID arbitration proceedings are in many respects similar to other types of institutional arbitration. They are governed by the ICSID Convention and the ICSID Arbitration Rules in force at the time of the parties' consent to arbitration.[75] No national law is applicable to the proceedings which has led many legal authorities to consider ICSID arbitration as an object of delocalised arbitration. If the procedural rules found in the Convention and the arbitration

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[72] ICSID, 15 March 2002, ARB/00/02, *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka*, 17(7) Mealey's IAR A1 (2002).

[73] See Award in *Metalclad Corporation v United Mexican States,* 5 ICSID Reports 209 (2002) para 125 where expenditure made pre-investment was also deemed not to be included as part of the investment.

[74] ICSID, 15 March 2002, ARB/00/02, *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka*, 17(7) Mealey's IAR A1 (2002) A6.

[75] ICSID Convention Article 44.

rules do not provide for a certain problem, the tribunal has a residual power to decide that issue in a manner which it deems appropriate.[76]

28-65 The relevant ICSID provisions contain a number of special rules which concern the composition of the tribunal, the proceedings, the tribunal's powers generally and the power to grant interim relief as well as substantive rules of law.

(a) Composition of the arbitration tribunal

28-66 The parties are free to agree the number of arbitrators. In the absence of an agreement a three member tribunal will decide the case; one arbitrator appointed by each party and the two party appointed arbitrators together agree on the chairman.[77] The parties are not bound to appoint people from the panel of arbitrators maintained by ICSID but they must comply with Article 39, according to which the majority of arbitrators must have a different nationality from those of the parties. The effect of this provision is that only if the parties appoint all members of the tribunal together can they appoint arbitrators of their nationality. In this respect the ICSID Convention differs from the rules of other institutions which only require that the chairman or sole arbitrator is a neutral national.[78]

28-67 If the arbitrators have not been appointed within 90 days after sending the notification, or within any period agreed by the parties, their appointment can be made by ICSID from members of its panel who should not be of the same nationality as any of the parties.[79] To minimise the threat of annulment proceedings, ICSID recommends that the tribunal asks the parties to confirm that it has been properly constituted.[80]

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[76] Broches, "Convention on the Settlement of Investment Disputes", XVIII *YBCA* 627 (1993) 676, para 136; Schreuer, "Commentary on the ICSID Convention", 12 *ICSID Rev-FILJ* 365 (1997) 404.

[77] Washington Convention Article 37(2)(b); ICSID Rules Rule 2.

[78] Parra, "Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments", 12 *ICSID Rev-FILJ* 287 (1997) 308.

[79] This was the case in ICSID, *Ceskoslovenska Obchodni Banka, AS (Czech Republic) v The Slovak Republic*, XXIVa YBCA 44 (1999), 14 ICSID Rev-FILJ 250 (1999), where the chairman was appointed under Article 38; and *Tradex Hellas SA v Republic of Albania*, 14 ICSID Rev-FILJ 161 (1999), where the chairman and the arbitrator for defendant also had to be appointed by ICSID

[80] Broches, "Convention on the Settlement of Investment Disputes", XVIII *YBCA* 627 (1993) 663, para 101.

28-68 Article 14 requires that the arbitrators should be people of high moral standards and qualifications and that they can be relied upon to render an independent judgment. The notion of independent judgment relates to the independence of the appointing party as well as to the impartiality of the arbitrators.[81] The parties may challenge any arbitrator who does not fulfil these requirements. A decision on any challenge is taken by the other members of the tribunal or, if they cannot agree (or a sole arbitrator has been appointed) by ICSID.[82]

(b) Proceedings before the arbitration tribunal

28-69 Proceedings are initiated by the request for arbitration which must contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration. The request has to be lodged with the Secretary General. To avoid any misuse of ICSID, the Secretary General may refuse to register the request if, on the basis of the information provided, the dispute is manifestly outside the jurisdiction of the Centre.[83]

28-70 The ICSID Rules provide for two distinct phases of the proceedings: written proceedings followed by oral proceedings. After the constitution of the tribunal, the chairman or sole arbitrator should hold a pre-hearing conference to agree the form of the proceedings. Objections to the jurisdiction of the tribunal must be raised as early as possible and no later than the time fixed for the counter-memorial or the rejoinder, if they relate to a counterclaim. As the tribunal may ascertain its jurisdiction at any stage of the proceedings on its own motion, the consequences of a late filing are not serious.[84] Objections to jurisdiction will in general be dealt with in an interim procedure while the proceedings on the merits are stayed.

28-71 According to Rule 21(2) ICSID Arbitration Rules, on the request by one party a pre-hearing conference may be held to reach an amicable settlement.

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[81] Broches, *ibid*, 638, para 20.
[82] Washington Convention Article 58.
[83] *Ibid*, Article 36(3).
[84] Schreuer, "Commentary on the ICSID Convention", 12 *ICSID Rev-FILJ* 365 (1997) 383.

(c) Powers of the arbitration tribunal

28-72 The arbitration tribunal can decide on its own jurisdiction. The registration of a request for arbitration by the Secretary General does not influence the decision of the tribunal. Even if the Secretary General finds that *prima facie* an arbitration agreement exists, the tribunal can come to the opposite conclusion.[85] The tribunal at its discretion can either decide on its jurisdiction as a preliminary question or join it to the decision on the merits. It is a question of procedural economy. In general it makes little sense to enter into an expensive and time consuming trial on the merits if the tribunal's jurisdiction has not been authoritatively determined. Therefore most tribunals have dealt with objections to jurisdiction in a preliminary decision. There may, however, be cases where questions of jurisdiction cannot be separated from the merits.[86]

28-73 A preliminary decision finding jurisdiction, however, does not of itself constitute an award for the purposes of Rule 50 or 52 ICSID Rules which could be the object of a separate action for annulment. In *SPP v Egypt* the acting Secretary General rejected a request for annulment by Egypt against a decision in favour of jurisdiction. He referred Egypt to the annulment procedure against the final award to raise its objections to jurisdiction.[87] Without doubt the non-availability of immediate relief against such a preliminary decision in favour of jurisdiction will speed up the rendering of an award on the merits. It is not necessary to wait for the results of a lengthy annulment procedure.[88]

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[85] ICSID, Decision on jurisdiction, *Holiday Inns S A and others v Morocco*, 1 ICSID Reports 655 (1993); ICSID, *AMT v Zaire*, award 21 February 1997, 36 ILM 1542 (1997); Schreuer, "Commentary on the ICSID Convention", 12 *ICSID Rev-FILJ* 365 (1997) 374.

[86] See ICSID, Decision on Jurisdiction, 1 August 1984, *Société Ouest Africaine des Bétons Industriels v Republic of Senegal*, 2 ICSID Reports 180 (1994) 189 where out of the two objections raised against jurisdiction one was dealt with in a preliminary decision while the other was joined to the merits; for a similar approach see ICSID, Decision on Jurisdiction, 25 September 1983, *Amco Asia Corp and others v Republic of Indonesia*, 23 ILM 351 (1984); *Tradex Hellas SA v Republic of Albania*, Decision on Jurisdiction, 24 December 1996, 14 ICSID Rev-FILJ 161 (1999).

[87] See ICSID, award of 20 May 1992, *South Pacific Properties (Middle East) Ltd and South Pacific Properties Ltd (Hong Kong) v The Arab Republic of Egypt*, 3 ICSID Reports 193 (1995) 2; see also Schreuer, "Commentary on the ICSID Convention", 13 *ICSID Rev-FILJ* 478 (1998) 540 *et seq*, paras 64 *et seq*.

[88] Hirsch, *The Arbitration Mechanism of ICSID*, 46; Schreuer, "Commentary on the ICSID Convention", 12 *ICSID Rev-FILJ* 365 (1997) 380. Whether this solution is more in line with procedural economy than the approach taken in most other types of arbitration where preliminary awards on jurisdiction can be appealed separately, seems to be at least questionable.

28-74 The internal annulment proceedings are the only way to control the decision of the arbitration tribunal. Following Article 53(1) it cannot be controlled in domestic courts. As an annulment under Article 52(1)(b) is only possible if the tribunal "manifestly exceeded it powers" the standard of control in this respect is more lenient than it would be in front of a national court. In a national court, any excess of jurisdiction would justify an appeal or refusal to recognise the award under the New York Convention. The question arose in the annulment proceedings in the case between *Klöckner v Cameroon*. The tribunal left open the question whether the first tribunal actually had jurisdiction as that tribunal's decision was at least tenable and did not constitute a manifest excess of powers.[89] Annulment proceedings for manifest excess of powers must also be available for awards denying the existence of jurisdiction.[90]

28-75 The tribunal can engage in default proceedings if one party does not take part in the arbitration. Default is not considered to be an admission of the other party's claim. By contrast, Rule 42(4) ICSID Rules requires the tribunal to examine its jurisdiction and, provided that it has jurisdiction, decide whether the submissions are well founded in both law and fact. It may require the party not in default to present evidence as to any issues relevant for the decision.

(d) Provisional measures

28-76 In ICSID arbitrations interim relief can only be granted by the tribunal. Without an agreement to the contrary no party can apply to a state court for interim measures of protection.[91] In the aftermath of the *Atlantic Triton* arbitration, where interim relief was granted by the French courts,[92] the Centre

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If at a later stage it is determined that the arbitration tribunal had no jurisdiction, all proceedings on the merits would have been futile.

89 ICSID, Decision on Annulment, 3 May 1985, *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais*, 1 ICSID Rev-FILJ 89 (1986) 93 *et seq*.

90 Schreuer, "Commentary on the ICSID Convention",12 *ICSID Rev-FILJ* 365 (1997) 378.

91 ICSID Convention Article 26.

92 See Cour de cassation, 18 November 1986, *Atlantic Triton Company v Republic of Guinea and Soguipeche*, XII YBCA 184 (1987): the court confirmed an attachment order for three Guinean ships in favour of Atlantic Triton; it held that the arbitration clause in favour of ICSID did not exclude the jurisdiction of French courts to grant interim relief. A different view was taken by Swiss and Belgian courts in comparable situations; see Delaume, "Sovereign Immunity and Transnational Arbitration", 3 *Arb Int* 28 (1987) 36; *Atlantic Triton Company v People's Revolutionary Republic of Guinea*, 3 ICSID 13 (1995).

clarified in its arbitration rules that the parties cannot apply for interim relief in the state courts unless agreed between the parties. Rule 39(5) ICSID Rules now provides

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

28-77 State parties will generally refuse to submit expressly to the jurisdiction of the courts of third countries for interim relief.

28-78 The power of a tribunal to grant interim relief is limited. According to Article 47 it cannot order measures but merely recommend them.[93] Though the failure to accept those recommendations can be taken into account in the final award the limited experience with this type of non binding interim relief does not allow a final evaluation of its effectiveness. In *AGIP v Congo* the tribunal's recommendation to assemble the financial reports of the nationalised subsidiary and keep them available for presentation was not followed by the respondent.[94] By contrast in *Mine v Guinea* the claimant followed the recommendation and did not pursue its actions in court.[95] Given the possibility of the tribunal drawing negative inferences from non-compliance and the economic pressure exerted by the World Bank as sponsoring institution, these recommendations have often *de facto* the same effect as orders.[96]

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[93] Article 47 ICSID Convention provides

> 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.

An earlier draft allowing further reaching powers met strong opposition and was rejected; for the drafting history see Schreuer, "Commentary on the ICSID Convention", 12 *ICSID Rev-FILJ* 365 (1997) 206, 212 para 3; a tribunal may also order interim relief under Article 47 Additional Facility Rules, upon the request of a party.

[94] See ICSID, *AGIP Company v Popular Republic of the Congo*, 21 ILM 726 (1982) 731, para 42.

[95] ICSID, *Maritime International Nominees Establishment v Republic of Guinea*, XIV YBCA 82 (1989); see also Broches, "Convention on the Settlement of Investment Disputes", XVIII *YBCA* 627 (1993) 678, paras 144 *et seq*; ICSID, Decision on Objections to Jurisdiction, 24 May 1999, *Ceskoslovenska Obchodni Banka, AS (Czech Republic) v The Slovak Republic*, XXIVa YBCA 44 (1999); 14 ICSID Rev-FILJ 250 (1999) (Suspension of bankruptcy proceedings).

[96] Lörcher, *Neue Verfahren der Internationalen Streiterledigung in Wirtschaftssachen*, 353 *et seq*.

28-79 The third peculiar feature of interim relief within the ICSID framework is the power of the tribunal to recommend measures on its own initiative.[97] This also includes the power to recommend measures which differ from those requested by the parties as was, for example, the case in the *Holiday Inn v Morocco* case.[98]

28-80 The prerequisites under which interim relief can be granted are not specified in the Convention or the Rules. They state only that measures can be granted if the tribunal "considers that the circumstances so require." The case law and the *travaux préparatoires* reveal that measures will only be granted where the question cannot await the outcome of the award on the merits.[99] All parties involved must be heard before the recommendation is issued.[100]

(e) Applicable law

28-81 The law applicable to the substance of the case can be chosen by the parties. Such choice does not have to be express or even in a specific form if the tribunal finds clear evidence of the parties' agreement on law.[101] Since Article 42(1) refers to the "rules of law as may be agreed by the parties" the parties may also choose a non-national law, such as *lex mercatoria* or international law.[102] Article 42(3) provides that the parties can also empower the tribunal to decide *ex aequo et bono*. This can either be done in the arbitration clause or during the proceedings as was the case in *Benvenuti & Bonfant v Congo.*[103]

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[97] ICSID Rules Rule 39(3) provides

> The tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

[98] See Lalive, "The First 'World Bank' Arbitration (Holiday Inns v Morocco) – Some Legal Problems", 51 *BYBIL* 123 (1980) 136 *et seq*. None of the actual proceedings in this case have been made public; see 1 ICSID Reports 645 (1995) for an account of the case.

[99] Schreuer, "Commentary on the ICSID Convention", 12 *ICSID Rev-FILJ* 365 (1997) 206, 217, para 14 *et seq*.

[100] ICSID Arbitration Rules Rule 39(4).

[101] See, *e.g.*, *Compania del Desarrollo de Santa Elena, SA v Republic of Costa Rica*, 17 February 2000, 15 ICSID Rev-FILJ 169 (2000) 190, where allegations of such an agreement were rejected by the tribunal.

[102] Broches, "Convention on the Settlement of Investment Disputes", XVIII *YBCA* 627 (1993) 667, para 113.

[103] ICSID, *Benvenuti & Bonfant Sarl v Government of the People's Republic of the Congo,* 21 ILM 740 and 1478 (1982).

28-82 In the absence of an express choice of law by the parties, the tribunal has to apply the law of the state party, including the relevant conflict of laws rules, and "such rules of international law as may be applicable". This reflects the general presumption that a state will not submit to foreign national law. By corollary it is presumed the private party will be concerned about unilateral and unfavourable changes of the law by the state party, if the law of the latter is applicable. To accommodate these concerns it is usually the law of the state party which applies, with the results of such application to be tested against the rules of international law. If international law is violated by the application of the host state's national law, the national law will not be applied.

28-83 The question of the applicable law has been addressed in several cases and by *ad hoc* committees during annulment actions.[104] The relationship between the law of the host state and the rules of international law was explored in detail by the *ad hoc* committee constituted for the annulment action in the *Amco v Indonesia* arbitration. The Committee held that

> [t]he law of the host State is, in principle, the law to be applied in resolving the dispute. At the same time, applicable norms of international law must be complied with since every award has to be recognized, and pecuniary obligations imposed by such award enforced, by every Contracting State of the Convention (Article 54(1), Convention). Moreover, the national State of the investor is precluded from exercising its normal right of diplomatic protection during the pendency of the proceedings and even after such proceedings, in respect of a Contracting State which complies with the award (Article 27, Convention). The thrust of Article 54(1) and of Article 27 of the Convention makes sense only under the supposition that the award involved is not violative of applicable principles and rules of international law.
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> The above view on the supplemental and corrective role of international law in relation to the law of the host State as substantive applicable law, is shared in case law …. and in literature …., and finds support as well in the drafting history of the Convention ….[105]

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[104] The application of rules other than those chosen by the parties or determined according to Article 42(1) or an unauthorised decision *ex aequo et bono* constitute a manifest excess of power which can be the basis for an annulment under Article 52(1)(b); see Schreuer, "Commentary on the ICSID Convention", 12 *ICSID Rev-FILJ* 365 (1997) 406 *et seq*.

[105] ICSID, Decision on Annulment, 16 May 1986, *Amco Asia Corp and others v Republic of Indonesia,* 25 ILM 1441 (1986) 1446, para 21; see also the Decision of the *ad hoc* Committee in

28-84 In *Asia Agricultural Products v Sri Lanka* the tribunal came to the conclusion that the law applicable to the merits was the BIT on the basis of which the arbitration proceedings were initiated. It based its findings on the submissions of the parties which it considered to be an *ex post* selection of the applicable law since both parties had referred to the provisions of this treaty.[106]

(f) ICSID awards

28-85 Awards can be rendered by the majority of the tribunal. Every arbitrator has the right to have an individual opinion, agreeing or dissenting, attached to the award. Article 48(3) requires that the award has to address every issue presented to the tribunal with reasons given. Several *ad hoc* committees considered the ambit of this requirement, the non-fulfilment of which constitutes a reason for annulment in accordance with Article 52(1)(e).

28-86 The effects of the awards are regulated in Article 53(1)

> The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

28-87 The binding nature of the arbitration award, which prevents a party from re-litigating the same issue in a different court, is inherent in the concept of arbitration. In this respect Article 53(1) has primarily a declaratory and clarifying function. Distinctive features of ICSID arbitration follow from the other two parts of Article 53(1). The obligation to comply with the award is, as far as the State is concerned, an international treaty obligation; for the non-state party it is an obligation arising under the arbitration agreement. Therefore non-compliance with an award is a breach not only of a contractual duty to the investor but also of an international commitment in relation to all other

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ICSID, Decision on Annulment, 3 May 1985, *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais*, 1 ICSID Rev-FILJ 89 (1986) 112, para 69 which explains the dual role of the general principles: complementary and corrective.

[106] ICSID, *Asian Agricultural Products Ltd v Republic of Sri Lanka*, 27 June 1990, 6 ICSID Rev-FILJ 526 (1991) 533 *et seq*; in the dissenting arbitrator's view the parties had not really agreed on the applicable law and the second sentence of Article 42(1) should have been applied, with Sri Lankan law including the BIT, as primary source.

Contracting States, including the home state of the investor. The duty to comply with the award is not affected by the possibility of a state party seeking to resist enforcement by relying on its sovereign immunity under Article 55.

6.3. Remedies against Awards

28-88 The most distinctive feature of ICSID arbitration is the self-contained and exhaustive nature of its review procedures. Unlike other arbitration regimes, control is exercised by internal procedures rather than by the courts. Remedies against the award are limited to those provided for in the Convention and do not include court involvement. The Convention provides for rectification of minor clerical errors (Article 49(2)), interpretation (Article 50), revision (Article 51), and annulment (Article 52) of the award.

(a) Rectification, interpretation and revision

28-89 Rectification, interpretation and revision are not remedies in a true sense as they do not require the referral of a dispute to a different decision making body. The ICSID Convention provides that rectification can only be granted from the original tribunal. The two other requests, interpretation and revision, should preferably be handled by the original tribunal which is in the best position to grant those remedies. If that tribunal is for any reason no longer available, then requests for interpretation and revision can be referred to a new tribunal, constituted in accordance with the procedure adopted for the original tribunal. In both cases enforcement of the award can be stayed while a decision is pending and the application for revision leading to an automatic preliminary stay.

28-90 Rectification of clerical, arithmetical or similar errors, as well as decisions on omitted issues, can be requested from the tribunal by any party within 45 days of the award being rendered. According to Rule 49 the request has to be directed to the Secretary General and must state in detail what error should be rectified or what question has been omitted. Rectification may not be used to modify the award and the other side must be heard before the remedy is granted.[107] The decisions become part of the award which for the purposes of

[107] In the appeal against AMCO II award (unpublished) the *ad hoc* Committee annulled the rectification of the award because the tribunal had not given the respondent the opportunity to present its views properly. Indonesia had submitted its objections to the jurisdiction of the tribunal and reserved the right to submit its observations on the merits. The tribunal never set a

time limits is considered to be rendered on the day of the rectification or completion.

28-91 A revision of the award is only possible if a fact which could decisively affect the award was only discovered after the award was made and the lack of knowledge is not based on negligence. A request for revision can, however, only be brought within three years after the award has been rendered and it should be made within 90 days after the fact was discovered. No time limits exist for requests for interpretation. In practice these remedies have not played a major role, with only one application for revision made to date.[108]

(b) Annulment proceedings

28-92 The annulment proceedings under Article 52 are a distinct feature of ICSID arbitrations. Under all other arbitration regimes, the review of an award in challenge proceedings is effected by state courts, in general those of the place of arbitration. Article 52 provides for internal control through a so-called *ad hoc* committee. This internal ICSID control of the award is intended to avoid protracted and long lasting proceedings in state courts. Furthermore, it takes account of the special factual situation in state contracts. The state party would not want to submit to the jurisdiction of a different state and the private party may not trust the courts of the host state.

28-93 Up to December 2002 annulment proceedings have been instituted in seven cases, two of which settled or were discontinued before a decision.[109] In

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time limit for submissions but dealt with the request for rectification in a summary fashion; for a commentary on this decision see Broches, "Convention on the Settlement of Investment Disputes", XVIII *YBCA* 627 (1993) 693; for a more recent example of a rectification see *Compania del Desarrollo de Santa Elena, SA v Republic of Costa Rica*, 17 February 2000, 15 ICSID Rev-FILJ 169 (2000) 205.

[108] Schreuer, in "Commentary on the ICSID Convention", 14 *ICSID Rev-FILJ* 493 (1999) 495 *et seq*, refers to the Democratic Republic of Congo's application for revision of the ICSID award of 21 February 1997, *AMT v Zaire*, 36 ILM 1531 (1997).

[109] In *SPP v Egypt* a settlement was reached, while in ICSID, case no ARB/99/3, *Philippe Gruslin v Malaysia*, 5 ICSID Reports 183 (2002) also Helgeson and Lauterpacht (eds), *Reports of Cases Decided under ICSID*, the proceedings were terminated by an order for discontinuance on 2 April 2002 for non-payment of the advances pursuant to Administrative and Financial Regulation 14(3)(d); the annulment application was dismissed in *Wena Hotels Ltd v Egypt* Annulment decision of 5 February 2002, ICSID case no ARB/98/4 unpublished see <www.worldbank.org/icsid/cases/conclude.htm>; see Annulment of 21 March 2001 in ICSID, case no ARB/97/3, 21 November 2000, *Compañía de Aguas del Aconquija SA and Vivendi*

three cases the awards or at least parts of it were annulled. In *Mine v Guinea* the partial annulment of the award led to an agreement between the parties.[110] In *Klöckner v Cameroon*[111] and *Amco v Indonesia*[112], the annulment of the award resulted in a second set of arbitration proceedings in front of newly constituted tribunals. The awards rendered by those second tribunals were challenged again by the parties, but without success.[113] The strict standards applied by the first *ad hoc* committees in *Klöckner v Cameroon* and *Amco v Indonesia* have raised criticism as to whether the annulment proceedings were not turned into a means of reviewing the awards on the merits.[114]

28-94 Irrespective of whether the criticism is justified and of the control actually exercised, all *ad hoc* committees have emphasised the fact that the annulment proceedings are not supposed to be an appeal. They are limited to controlling the legitimacy of the decision making process.

28-95 The right to have the award controlled in annulment proceedings cannot completely be waived in advance. Not all grounds which justify an annulment primarily protect the interest of the parties. Some of them, for example the impartiality of the arbitrator, also serve to protect the integrity of the arbitration process as such and are therefore not at the disposition of the parties. The parties are still obliged to raise the grounds of challenge as early as possible. A party which knowingly fails to challenge a serious procedural irregularity before the tribunal may be barred by Rule 27 from seeking annulment on that basis.[115]

28-96 The grounds for an annulment are exhaustively listed in ICSID Convention Article 52(1)

Universal v Argentine Republic, 40 ILM 426 (2001), publication announced in 42 *ILM* 2003 and forthcoming 6 ICSID Reports; for an overview of the recent applications for annulment see Gaillard, "Chronique des sentences arbitrales", 129 *Clunet* 189 (2002).

[110] XVI YBCA 40 (1991).

[111] XI YBCA 162 (1986).

[112] XII YBCA 129 (1987); 25 ILM 1141 (1986).

[113] For a summary of those cases, see Schreuer, "Commentary on the ICSID Convention", 13 *ICSID Rev-FILJ* 478 (1998) 524, paras 21 *et seq*.

[114] See the summary of the discussion by Schreuer, *ibid*, 13 *ICSID Rev-FILJ* 478 (1998) 529, paras 36 *et seq*; Arnoldt, *Praxis des Welthandelsübereinkommens*, 225 *et seq*.

[115] For an analysis of the entire waiver mechanism see Schreuer, "Commentary on the ICSID Convention", 13 *ICSID Rev-FILJ 478 (*1998) 534 paras 51 *et seq*.

> Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
> (a) that the Tribunal was not properly constituted;
> (b) that the Tribunal has manifestly exceeded its powers;
> (c) that there was corruption on the part of a member of the Tribunal;
> (d) that there has been a serious departure from a fundamental rule of procedure; or
> (e) that the award has failed to state the reasons on which it is based.

28-97 Most of the grounds mentioned are also found in the provisions for control of awards contained in other arbitration regimes. The grounds mentioned in Article 52 are, however, narrower in that not every excess of power or departure from a rule of procedure is sufficient to annul an award. By contrast the ICSID Convention requires a qualified form, or a manifest excess of powers. Furthermore, violation of public policy is not mentioned as a separate ground for annulment. Proper constitution of the tribunal and corruption of an arbitrator have been of no practical importance to date. The ICSID secretariat manages the appointment process carefully and the arbitrators appointed are usually of such quality that these grounds do not arise.

i. Excess of powers (Article 52(1)(b))

28-98 An excess of power exists if the tribunal lacks jurisdiction either because the dispute is not covered by the arbitration agreement or the other requirements of Article 25 are not met. Any tribunal which has not been authorised by the parties exceeds its powers if it renders an award.[116] The same applies if the award goes beyond what the parties have requested. The *ad hoc* committee in *Vivendi Universal v Argentine Republic*[117] also considered the failure to exercise existing jurisdiction to be a manifest excess of power; annulling the award on the merits in part.

28-99 An excess of power may also exist when the tribunal disregards the applicable law. The provisions on the applicable law are essential elements of the

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[116] Broches, "Convention on the Settlement of Investment Disputes", XVIII *YBCA* 627 (1993) 689, paras 180 *et seq*; Schreuer, "Commentary on the ICSID Convention", 13 *ICSID Rev-FILJ* 478 (1998) 565 paras 147 *et seq*.

[117] ICSID, *Compania de Aguas del Aconquija, SA and Vivendi Universal (formerly Compagnie Générale des Eaux v Argentine Republic*, ARB/97/3, paras 86 *et seq*.

parties' agreement to arbitrate and constitute important parameters for the tribunal's activity. Tribunals which base their award on a law other than that applicable under Article 42 or even decide *ex aequo et bono* without being authorised to do so manifestly exceed their powers.[118]

28-100 Annulment proceedings based on allegations of the non-application of the applicable law are more problematic. The dividing line between non-application and wrong application is thin and easily transgressed.[119] An incorrect application of a law often consists in the non-application of a single rule of that law which should have been applied. Therefore, to control whether single rules of the applicable law have been applied may have the potential of turning the annulment proceedings into an appeal on the merits.[120]

28-101 In *Klöckner v Cameroon*, the first case which came up for annulment, the tribunal determined that Cameroon law was applicable to the case. In relation to the relevant duty of disclosure it held that

> ... the principle according to which a person who engages in close contractual relations, based on confidence, must deal with his partner in a frank, loyal and candid manner is a basic principle of French civil law, as is indeed the case under other national codes we know of …[121]

28-102 The *ad hoc* committee annulled the award on the basis that the tribunal did not ascertain the principle, but just postulated its existence without any reference to legislative texts, judgments or scholarly opinions. In its view the reasoning of the award made it impossible to derive whether or not the postulated

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[118] ICSID, *Maritime International Nominees Establishment (MINE) v Government of Guinea*, ICSID Rev-FILJ 95 (1990) 104, para 5-03; Schreuer, "Commentary on the ICSID Convention", 13 *ICSID Rev-FILJ* 478 (1998) 574, paras 167 *et seq*.

[119] Arnoldt, *Praxis des Welthandelsübereinkommens*, 187.

[120] In this respect the annulment of the first award in *Amco v Indonesia* for an alleged non-application gave rise to concern. The non-application was derived from the fact that in the light of a provision of Indonesian law according to which only registered investment could be counted the tribunal had overstated the claimant's investment by 250%; see ICSID, Decision on Annulment, 16 May 1986, *Amco Asia Corp and others v Republic of Indonesia,* 25 ILM 1441 (1986) 1449, paras 92 *et seq*.

[121] ICSID, Final Award, *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais*, X YBCA 71 (1985); see Paulsson, "The ICSID *Klöckner v Cameroon* Award: The Duties of Partners in North-South Economic Development Agreements", 2(1) *J Int'l Arb* 145 (1984) 157, 2 ICSID Reports 3 (1994).

principle of French law came from positive French law but bears every appearance of

> … a simple reference to equity, to the 'universal' principles of justice and loyalty, such as those which would be invoked by amiables compositeurs …In conclusion, it must be recognized that, by reasoning as it has done, that is to say by limiting itself to postulating the existence of a principle, without either proving its existence or attempting to identify the rules which form the context of the principle in question, the arbitration tribunal did not apply 'the law of the Contracting State'.[122]

28-103 Later *ad hoc* committees have adopted more lenient standards as to the required substantiation of the legal sources.[123] In particular, it has to be kept in mind that not every reference to "equitable principles" implies that the tribunal has decided *ex aequo et bono*. These principles are often part of the applicable law.[124] If the annulment proceedings are not to be turned into a review on the merits the requirement that only a manifest excess of power justifies annulment must be taken seriously. Manifest does not refer to the gravity of the excess but to the ease with which its perceived.[125] An excess of power is manifest if it can be discerned with little effort and without deeper analysis.[126]

ii. Serious departure from a fundamental rule of procedure (Article 52(1)(d))

28-104 A double qualification is required for annulments based on the departure from a rule of procedure. Not only has the departure to be serious but it must also be a "fundamental" rule of procedure, *i.e.* rules of natural justice such as the right

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[122] Decision on Annulment, *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais*, 1 ICSID Rev-FILJ 90 (1986) 114, paras 77, 79.

[123] See, *e.g.*, ICSID, Decision on Annulment, *Maritime International Nominees Establishment (MINE) v Government of Guinea*, 5 ICSID Rev-FILJ 95 (1990), para 6-50 where the *ad hoc* Committee did not consider it a reason for annulment that the tribunal instead of referring to the applicable provision of Guinea law constantly referred to the nearly identical provision of French law on which the Guinean law was based; see Schreuer, "Commentary on the ICSID Convention", 13 *ICSID Rev-FILJ* 478 (1998) 585, paras 190 *et seq*.

[124] ICSID, Decision on Annulment, 16 May 1986, *Amco Asia Corp and others v Republic of Indonesia,* 25 ILM 1441 (1986) 1446, para 26; Schreuer, "Commentary on the ICSID Convention", 13 *ICSID Rev-FILJ* 478 (1998) para 206.

[125] Schreuer, "Commentary on the ICSID Convention", 13 *ICSID Rev-FILJ* 478 (1998) 561, paras 138 *et seq*.

[126] Feldmann, "The Annulment Proceedings and the Finality of ICSID Arbitral Awards", 2 *ICSID Rev-FILJ* 85 (1987) 100 *et seq*.

to be heard, equal treatment of the parties and impartiality of the arbitrators. The *ad hoc* committee in *Mine v Guinea* held that the notion of "serious departure" entailed quantitative as well as qualitative elements. It required a substantial departure of the kind which deprived the party of the protection or benefits the rule was intended to provide.[127]

28-105 Article 52(1)(d) was successfully invoked by Indonesia in the annulment proceedings against the rectification of the second *Amco v Indonesia* award. Indonesia had previously contested the jurisdiction of the tribunal and reserved its right to present arguments on the issue as to whether the rectification required by Amco was not in reality a modification of the award. The tribunal rectified the contract without taking note of Indonesia's reservation and without giving it a chance to present its arguments on that point. The *ad hoc* committee held this to be a serious violation of Article 49(4); giving a party a right to be heard before an award is rectified was considered to be a fundamental rule of procedure. It annulled the rectification of the award. [128]

iii. Failure to state reasons (Article 52 (1) (e))

28-106 A failure to state the reasons for the award has been invoked by the applicants in all published annulment decisions. Besides the complete absence of reasons it covers cases where the reasons given contradict each other and the award cannot be based on the reasoning of the remaining parts.[129] The alleged failure to state reasons usually only relates to certain questions. *Ad hoc* committees have often adopted a very generous standard and supplied reasons themselves if they considered the result to be correct but not sufficiently reasoned.[130]

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[127] ICSID, Decision on Annulment, *Maritime International Nominees Establishment (MINE) v Government of Guinea*, 5 ICSID Rev-FILJ 95 (1990) 104, paras 5-05 *et seq*.

[128] For a summary of this decision, see Broches, "Convention on the Settlement of Investment Disputes", XVIII *YBCA* 627 (1993) 693, paras 194 *et seq*.

[129] See ICSID, Decision on Annulment, *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais*, 1 ICSID Rev-FILJ 90 (1986) 125 para 116.

[130] See *Amco Asia Corp and others v Republic of Indonesia,* Decision on Annulment, 16 May 1986, 25 ILM 1441 (1986) 1452 para 58 *et seq* (Indonesia was found responsible for acts of army and police personnel); see also Schreuer, "Commentary on the ICSID Convention", 13 *ICSID Rev-FILJ* 478 (1998) 623 paras 276 *et seq*.

28-107 The extent to which reasons that are not considered to be sufficient can also justify annulment under Article 52(1)(e) is a controversial issue. Different views exist as to what is required under Article 48(3). The *ad hoc* committee in *Klöckner v Cameroon*, followed in *Amco v Indonesia*, required the reasons to be sufficiently relevant that is, reasonably sustainable and capable of providing a basis for the decision.[131] Such an investigation into the adequacy of the reasons entails the danger of a review on the merits.[132] To avoid a review on the merits, the more lenient standard adopted by the *ad hoc* committee in *Mine v Guinea* seems preferable. It was of the opinion that

> … the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph (1)(e), because it almost inevitably draws an ad hoc Committee into an examination of the substance of the tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention. A Committee might be tempted to annul an award because that examination disclosed a manifestly incorrect application of the law, which, however, is not a ground for annulment.
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> In the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow the tribunal's reasoning from Point A to Point B and eventually to its conclusion, even if it had made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.[133]

28-108 In addition to the duty to state reasons Article 48(3) also obliges the tribunal to deal with all questions submitted to it. Whether a violation of that duty can be subsumed under Article 52(1)(e) is uncertain. Opponents of such an

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[131] ICSID, Decision on Annulment, *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais*, 1 ICSID Rev-FILJ 90 (1986) 126 para 120; in ICSID, Decision on Annulment, 16 May 1986, *Amco Asia Corp and others v Republic of Indonesia*, 25 ILM 1441 (1986) 1450 para 43 the reasons had to be "sufficiently pertinent".

[132] Arnoldt, *Praxis des Welthandelsübereinkommens*, 189; Feldmann, The Annulment Proceedings and the Finality of ICSID Arbitral Awards, 2 *ICSID Rev-FILJ* 85 (1987) 93 *et seq*.

[133] ICSID, Decision on Annulment, *Maritime International Nominees Establishment (MINE) v Government of Guinea*, 5 ICSID Rev-FILJ 95 (1990) 105, paras 5-08 *et seq*; see also the Decision on Annulment in ICSID, *Compañía de Aguas del Aconquija, SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*, ARB/97/3, paras 64 *et seq*.

inclusion rely on the fact that Article 52(1)(e) only refers to the duty to state reasons, while Article 49 contains a special procedure for cases where the tribunal has not dealt with all questions submitted to it.[134] The prevailing view adopted by the different *ad hoc* committees is that the failure to deal with crucial and decisive arguments submitted to the tribunal can also justify annulment under Article 52(1)(e). This is the case, for example, where the questions not dealt with in the award will influence other parts of the award so that only an annulment is appropriate.[135]

iv. Annulment process

28-109 Applications for annulment must be made in writing to the Secretary General who verifies their *prima facie* admissibility before registering them. An application must be made within 120 days after the award is rendered and must contain the grounds on which it is based. If the request is based on an alleged corruption of the arbitrator the time only starts to run after the corruption has been discovered, within the limit of three years. The three member *ad hoc* committee is appointed by the Chairman of the Administrative Council and the parties. None of its members should have the same nationality as the parties or the arbitrators of the original tribunal or should have been appointed to the panel of arbitrators by either the state party or the home state of the private party.[136] These requirements are stricter than those for the original tribunal and should safeguard maximum objectivity. Upon application by either party the enforcement of the award shall be provisionally stayed until the committee has ruled on a stay of enforcement pending its decision.

28-110 Proceedings before the *ad hoc* committee are conducted according to the same rules as for the original proceedings. If the *ad hoc* committee finds that a ground for annulment exists it has discretion whether or not to annul the entire

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[134] Feldmann, "The Annulment Proceedings and the Finality of ICSID Arbitral Awards", 2 *ICSID Rev-FILJ* 85 (1987) 105 *et seq*; Niggemann, "Das Washingtoner Weltbankübereinkommen von 1965 – Das Nichtigkeitsverfahren im Ad-Hoc-Komitee", 4 *Jahrbuch für die Praxis der Schiedsgerichtsbarkeit* 115 (1990).

[135] ICSID, Decision on Annulment, 16 May 1986, *Amco Asia Corp and others v Republic of Indonesia*, 25 ILM 1441 (1986) 1448, para 32; ICSID, Decision on Annulment, *Maritime International Nominees Establishment (MINE) v Government of Guinea*, 5 ICSID Rev-FILJ 95 (1990) 106, para 5-13; see also Broches, "Convention on the Settlement of Investment Disputes", XVIII *YBCA* 627 (1993) 695, paras 201 *et seq*.

[136] ICSID Convention Article 52(3).

award or the incriminated parts of it.[137] It cannot modify the award nor substitute its decision for that of the tribunal. Upon annulment of the award the dispute will be submitted to a new tribunal constituted in the same way as the original one. It is not bound by the reasoning of the *ad hoc* committee[138] and its award may be subject to annulment proceedings, as has happened in both cases where a second award was rendered.[139]

6.4. Recognition and Enforcement

28-111 ICSID awards are subject to a special regime for recognition and enforcement contained in Article 54 of the Convention.[140] All Contracting States are required to recognise the award and enforce its pecuniary obligations as if it were a final judgment of the court of the state. This obligation exists independently from whether or not the state in question or its nationals were a party to the proceedings. While the obligation to recognise awards is not limited to any form of award the facilitated enforcement procedure only covers the pecuniary obligations. Orders for specific performance or other non pecuniary obligations must be enforced under the New York Convention or the law of the state of enforcement.[141]

28-112 Contrary to these systems review is not possible under the special procedure foreseen by the ICSID Convention. Article 54 does not contain any grounds upon which recognition and enforcement can be denied. Those grounds can only be raised within the framework of an annulment procedure. If this is not done, it is sufficient for a party seeking recognition and enforcement to furnish a copy of the award certified by the Secretary General to the competent authority as named by the state. The task of the Secretary General is limited to ascertaining

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[137] ICSID, Decision on Annulment, *Maritime International Nominees Establishment (MINE) v Government of Guinea*, 5 *ICSID Rev-FILJ* 95 (1990) 103, paras 4-09 *et seq*; Schreuer, "Commentary on the ICSID Convention", 13 *ICSID Rev-FILJ* 478 (1998) 660, paras 362 *et seq*; a different view was taken by the *ad hoc* Committee, Decision on Annulment, *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais*, , 1 *ICSID Rev-FILJ* 90 (1986) 144, para 179.

[138] Schreuer, "Commentary on the ICSID Convention", 13 *ICSID Rev-FILJ* 478 (1998) 518 *et seq*.

[139] *Ibid.*

[140] This provision is modelled after Article 192 EEC (now Article 256 EC Treaty). See Schreuer, "Commentary on the ICSID Convention", 14 *ICSID Rev-FILJ* 71 (1999) 75.

[141] Schreuer, "Commentary on the ICSID Convention", 14 *ICSID Rev-FILJ* 46 (1999) 100.

the authenticity of the award and verifying that no intervening stay of enforcement exists.[142]

28-113 The relevant authority is also not allowed to grant an *exequatur* with certain restrictions. An *exequatur* granted by the French Tribunal de grande instance Paris which contained a limiting condition that no measures of execution should be taken without prior authorization by the court[143] was successfully appealed before the Cour d'appel Paris. It held

> The judge at first instance, acting on a request pursuant to Article 54 of the Convention of Washington could not therefore, without exceeding his competence, become involved in the second stage, that of execution, to which the question of the immunity from execution of foreign States relates.
> Consequently that part of the order of 23 December 1980 of the President of the Tribunal de grande instance of Paris which is the object of this appeal must be deleted.[144]

28-114 Article 54 requires the Contracting States to give ICSID awards the same status as final judgments of a local court and to enforce them in the same manner. It does not demand a preferential treatment of awards. Therefore a state party can resist execution of an award by invoking its sovereign immunity if that defence would also exist in relation to a domestic judgment. This is specifically stated in Article 55 according to which the ICSID Convention does not affect the national rules on sovereign immunity from enforcement.

28-115 The second means to ensure the award is enforced is via diplomatic protection through the investor's home state. Article 27(1) provides that the right to diplomatic protection revives if a state does not comply with its obligation to enforce the award. The obligation does not only exist towards the investor party, but also towards the other Contracting States. By not complying with the award, for example, by relying on sovereign immunity from execution, a state violates its international treaty obligation so that an action could be brought to the ICJ under Article 64. Other means of diplomatic protection may be negotiations or set offs against claims which the debtor state may have against the investor's

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[142] Delaume, "Sovereign Immunity and Transnational Arbitration", 3 *Arb Int* 28 (1987) 34.

[143] See Tribunal de grande instance Paris, 13 January 1981, *Benvenuti et Bonfant SARL v Gouvernement de la Republique du Congo*, 108 Clunet 365 (1981) and Cour d'appel Paris, 23 December 1980, 108 *Clunet* 843 (1981).

[144] Cour d'appel Paris, 26 June 1981, 1 ICSID Reports 369 (1993) 371.

home state. As with all other types of diplomatic protection usually the exhaustion of all legal remedies to secure enforcement in the host state is required.

28-116 In practice most awards are performed voluntarily as generally a cost/benefit analysis is in favour of compliance. The damage to the international reputation of the state following from non-compliance and the effect that can have on further investment is, in most cases, greater than the amounts to be paid under the award. In the past the Secretary General of ICSID has officially communicated with recalcitrant parties and reminded them of their obligation.[145]

7. ARBITRATION UNDER ICSID ADDITIONAL FACILITY RULES

28-117 The Additional Facility and its arbitration rules were created in 1978 to provide for dispute settlement facilities under the auspices of the World Bank for disputes between a state and a foreign party which are not covered by the ICSID Convention.[146] According to Article 2(a) Additional Facility Rules jurisdiction requires that either the state or the private party's state of origin is a Contracting States to the ICSID Convention. It is not required that the dispute arises out of an investment in the sense of the ICSID Convention but it must involve a transaction which by the intention of the parties, its duration or importance goes beyond an ordinary commercial contract.[147] The practical importance of the Additional Facility has increased considerably with NAFTA, the Energy Charter Treaty, and a number of BITs referring to its dispute settlement proceedings.[148]

28-118 Arbitration under the Additional Facility Rules are more akin to other institutional arbitrations than ICSID Convention arbitration. Accordingly, awards made under the Additional Facility Rules may be subject to challenge in the courts of the place of arbitration as the self-contained and exhaustive review system of the ICSID Convention is not applicable.[149] Awards rendered under the

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[145] Schreuer, "Commentary on the ICSID Convention", 14 *ICSID Rev-FILJ* 46 (1999) 62.

[146] For the historical background see Broches, *Selected Essays – World Bank, ICSID, and Other Subjects of Public and Private International Law* (Martinus Nijhoff 1995) 249.

[147] Additional Facility Rules Article 4(3).

[148] See, *e.g.*, ICSID, *Joseph Charles Lemire v Ukraine*, 15 ICSID Rev-FILJ 528 (2000), where the dispute arose under a BIT between the US and Ukraine.

[149] See, *e.g.*, the partial annulment by the Supreme Court of British Columbia, 2001 *BCSC* 664, of an award rendered in NAFTA proceedings, ICSID, *United States of Mexico v Metalclad*

Additional Facility Rules do not benefit from the facilitated recognition and enforcement under the ICSID Convention; they have to be enforced under the New York Convention.

28-119 The rapid development and establishment of investment arbitration has influenced international commercial arbitration practice as well. The autonomous and delocalised nature of public international law arbitrations has enhanced the status of institutional and *ad hoc* arbitrations. Essentially there is little difference to the overall structures, procedures and effectiveness, except for the problem of enforcement against sovereign entities. What is clear is that the characteristics of investment arbitrations are seen in commercial arbitrations and vice versa.

Corporation, 40 ILM 36 (2001); also reported in Gaillard, "Chronique des sentences arbitrales", 129 *Clunet* 189 (2002) 190 *et seq*.