INTERNATIONAL LAW ASSOCIATION
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RULE OF LAW AND INTERNATIONAL INVESTMENT LAW

Members of the Committee:

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Professor Andrea K. Bjorklund (American): *Co-Rapporteur*
Professor Andreas R. Ziegler (Swiss): *Co-Rapporteur*

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FINAL REPORT

I. Relevant Practices and Recommendations Concerning the Rule of Law and International Investment Law

1. In its 2020 Interim Report, the Committee indicated its intention to draft recommendations or guidelines that could be adopted as an ILA resolution. These recommendations or guidelines should emphasize rule of law criteria relevant for investment law and investment arbitration. Following the Committee's twofold mandate, the recommendations or guidelines should cover both substantive and procedural issues, i.e. both the rule of law criteria found in investment standards as well as the rule of law requirements to be followed in investment arbitration.[1]

2. In its 2022 Interim Report, the Committee first explained the rule of law criteria it used for the purposes of analysing the relevant investment dispute settlement practice and then focused on the first aspect of its mandate, the rule of law criteria found in investment standards.[2]

3. The 2022 Interim Report was the outcome of intensive deliberations between the Committee officers and the Committee at various meetings, leading to a consensus on the terminology to be used for the descriptive as well as for the prescriptive part of what should eventually become part of a final resolution to be adopted at the ILA Conference receiving the Committee's final output. Based on an analysis of the practice of investment dispute settlement, i.e. mostly investment treaty arbitration, the Committee identified in a descriptive summary the main approaches that could be qualified as 'relevant practices' for the purposes of analysing the rule of law content of investment standards. The term 'relevant' was preferred over 'established', 'existing' or other qualifications in order to avoid at this stage any suggestion of a normative endorsement. Committee members also agreed to use the expression 'recommendations' in order to denote the prescriptive elements that should be followed by adjudicators in order to strengthen the rule of law.

4. Subsequent to the 2022 Lisbon Conference, the Committee turned to rule of law criteria which are relevant to the practice of investor-state dispute settlement (ISDS) and which primarily investment arbitral tribunals ought to consider and respect in their practice. Taking into account the current debate of creating a more permanent mechanism for ISDS, possibly in the form of an investment court, the Committee decided to refer generally to 'ISDS' and 'adjudicators' in order to encompass both arbitration and adjudication.

5. The Committee also discussed the issue of the scope of addressees of the recommendations, recognizing that some issues may be taken up by adjudicators, while others may only be effectively addressed by law-makers, i.e. treaty-makers. After an extensive debate it considered that addressing treaty-makers would considerably broaden the task of the Committee and entail the danger of disagreement over policy choices. Thus, it was agreed that the present recommendations should be directed primarily towards adjudicators.

6. Following the descriptive and normative approach, the Committee first analysed to what extent

[1] Rule of Law and Investment Law Committee description 2014; available at file:///C:/Users/aberj/Downloads/Rule%20of%20Law%20&%20International%20Investment%20Law%20Committee%20Description.%20(2).pdf (The Committee's mandate was 'to study rule-of-law implications of international investment law on both substantive and procedural matters,' and to analyze a) '[…] how substantive protections found in treaties attempt to ensure government decision-making based on the rule of law,' and b) the extent to which 'investment arbitration itself operates in a manner that is consistent with the rule of law.').

[2] See also August Reinisch and Stephan Schill (eds), *Investment Protection Standards and the Rule of Law* (OUP 2023).

rule of law standards are found in the practice of ISDS, in particular, in its currently dominant form of investment arbitration. Based on these practices it formulated recommendations for adjudicators of investment disputes to adhere to rule of law demands when deciding investment disputes.

7. As discussed with the ILA's Director of Studies and the Executive Council, expressing the wish of the Association to produce perceptible outcome of the work of its committees, the Committee suggests combining Relevant Practices and Recommendations concerning the rule of law criteria found in investment standards, as contained in its 2022 Interim Report, with the Relevant Practices and Recommendations concerning rule of law requirements to be adhered to in ISDS, as contained in the Final Report. Together, they should be proposed as a resolution of the Committee on Rule of Law and International Investment Law to be adopted at the ILA Conference in 2024.

II. The Rule of Law and Investment Dispute Settlement

8. This final report relies on the rule of law criteria used by the Committee for the purposes of analysing the rule of law aspects of the most widely used investment protection standards contained in IIAs in its 2022 Interim Report. The criteria are briefly summarized in the following subsection (III.).

9. The report will then address rule of law issues in the practice of ISDS. While not claiming to exhaustively deal with all such issues, it focuses on frequently arising ones, such as access to justice, fair trial/due process (including the right to be heard and equality of arms), independence and impartiality of adjudicators, consistency and predictability, as well as transparency. The report draws heavily on the work of the members of this ILA Committee.[3]

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[3] José Alvarez, 'Is Investor-State Arbitration 'Public'?', Journal of International Dispute Settlement, 7(3) (2016), 534-576; José Alvarez, *The Boundaries of Investment Arbitration: The Use of Trade and European Human Rights Law in Investor-State Disputes* (Juris 2018); David Attanasio and Juan Felipe Merizalde Urdaneta, *Annulment and Set-Aside of Awards*, in Patrick McCrory et al. (eds), *Business Guide to Trade and Investment, Vol. II* (ICC 2018); Andrea K. Bjorklund, 'The Independence and Impartiality of Adjudicators in Investment Arbitration under Treaty-based Rules', in Giuditta Cordero-Moss (ed.), *Independence and Impartiality of International Adjudicators* (Intersentia 2023), 263-281; Andrea K Bjorklund and Jonathan Brosseau, 'L'accord commercial entre le Canada et l'Union européenne prévoit-il une résolution des différends par arbitrage ou règlement judiciaire ?" (2018) 31:1 *Revue québécoise de droit international* 1-36; Andrea Bjorklund, Marc Bungenberg, Manjiao Chi, and Catharine Titi, 'Selection and Appointment of International Adjudicators: Structural Options for ISDS Reform', Academic Forum on ISDS Concept Paper 2019/11, 17 September 2019; Andrea K Bjorklund, Stefan Kröll, and Franco Ferrari (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (Cambridge University Press, 2023); Jonathan Brosseau, 'The Distinction Between Arbitration and Judicial Settlement in International Law: Three Characteristics and Why They Matter for Reforms', in Andrea Biondi and Giorgia Sangiuolo (eds), *Beyond TTIP: A New Season for EU FTAs?* (LAwTTIP Working Papers 2018/3, King's College London, 17-20 October 2018) 93-105; Marc Bungenberg, 'The Multilateral Investment Court-Royal Road or Dead End for the EU Legal Order? / Le Tribunal Multilatéral des Investissements – Voie Royale ou Impasse Pour l'Ordre Juridique de L'Union?', Revue de Droit des Affaires Internationales, 5 (2019), 471-487; Marc Bungenberg and Bianca Böhme, 'Friends or Foes? The Interplay Between the ICSID and Permanent Investment Courts Regimes', in Richard Happ and Stephan Wilske (eds), *ICSID Rules and Regulations* (Nomos 2022) 791-80; Marc Bungenberg and Andrés Alvarado Garzón, 'One-Size-Fits-All? Transparency in Investment and Commercial Arbitration', in Zlatan Meškić et al (eds), *Balkan Yearbook of European and International Law 2019* (Springer 2020), p. 1-22; Marc Bungenberg, Jörn Griebel, Stephan Hobe, and August Reinisch (eds), *International Investment Law – A Handbook* (Nomos/C.H. Beck/Hart 2015); Marc Bungenberg and August Reinisch (eds.), *CETA Investment Law. Article-by-Article Commentary* (C.H.Beck – Nomos – Hart 2022); Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement*, 2nd ed. (Springer 2019); Marc Bungenberg and August Reinisch, *Draft Statute of the Multilateral Investment Court* (Nomos 2021); Manjiao Chi, 'Transparency of ISDS in the Making of a China-EU CAI: The Consensus and the Difference', in Yuwen Li, Tong Qi and Bian Cheng (eds.), *China, EU and International Investment Law: Reforming Investor-State Dispute Settlement* (Routledge 2019) 170-184; Giuditta Cordero-Moss (ed.), *Independence and Impartiality of International Adjudicators*

10. This final report contains analyses of investment dispute settlement practice under the heading 'ISDS Practice'. These findings provide the basis for the Committee's descriptive summaries under the title of 'Relevant Practices' which are then followed by concise prescriptive sections entitled 'Recommendations'. Together with the corresponding sections of the 2022 Interim Report, it is envisaged that the latter two shorter sections, the 'Relevant Practices' and 'Recommendations', will form the substance of a final Committee resolution.

(Intersentia 2023); Charles-Emmanuel Côté, 'Investor State Arbitration in Recent International Trade Agreements', International Journal of Doctrine, Judiciary, and Legislation, 1 (2020), 195-206; Charles-Emmanuel Côté, 'Le Règlement des Différends Internationaux Économiques en Amérique du Nord Après l'Accord Canada – États-Unis – Mexique', Revue québécoise de droit international, (2022), 237-256; Anna De Luca, 'Investor-State Arbitration as a 'Sub-System' of State Responsibility', International Economic Law, 26 (2017), 27-51; Arnaud de Nanteuil, *International Investment Law* (Edward Edgar 2020); Mathias Forteau, 'General Principles of International Procedural Law', in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (OUP 2018); Ursula Kriebaum, 'Human Rights and International Investment Arbitration', in Thomas Schultz and Federico Ortino (eds), *Oxford Handbook of International Arbitration* (OUP 2020) 150-185; Ursula Kriebaum, 'The European Court of Human Rights and Arbitration', in Stefan Kröll, Andrea K Bjorklund and Franco Ferrari (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (Cambridge University Press, 2023) 1981-2005; Ursula Kriebaum, 'The European Court of Human Rights' Case Law on International Investment Issues' in Hélène Ruiz-Fabri and Edoardo Stoppioni (eds), *International Investment Law: An Analysis of Major Decisions* (Hart 2022) 481-506; Marcin Menkes, 'ISDS Reform: Financing of the Permanent Investment (Appeals) Body', Journal of International Dispute Settlement, 12 (2021), 462-476; Junji Nakagawa (ed), *Transparency in International Trade and Investment Dispute Settlement* (Routledge 2013); Federico Ortino, 'ISDS and its Transformations', Journal of International Economic Law, 26 (2023), 177-187; Federico Ortino and Karl Sauvant, 'Extending International Legal Aid from Trade to Investment: An Advisory Centre on International Investment Law', Global Trade and Customs Journal, 16 (2021), 548-554; Asif H. Qureshi, 'An Appellate System in International Investment Arbitration?', in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 1154-1170; Yannick Radi, 'Realizing Human Rights in Investment Treaty Arbitration: Perspective From Within the International Investment Law Toolbox', North Carolina Journal of International Law and Commercial Regulation, 37(4) (2012), 1107-1186; August Reinisch, 'The Rule of Law in International Investment Arbitration', in P. Pazartzis and M. Gavouneli *et al.* (eds.), *Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade* (Hart, 2016), 291-307; August Reinisch, 'Investment Arbitration and the Rule of Law', in Stefan Kröll, Andrea K Bjorklund and Franco Ferrari (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (Cambridge University Press, 2023) 211-243; August Reinisch, *Advanced Introduction to International Investment Law* (Edward Elgar Publishing 2020); Christian Riffel, 'Does Investor-State Dispute Settlement Discriminate Against Nationals?', German Law Journal, 21(2) (2020), 197-222; Stephan W. Schill, 'Legitimacy of Investment Arbitration', in Andrea K Bjorklund, Stefan Kröll, and Franco Ferrari (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (Cambridge University Press, 2023); Stephan W. Schill, Chiara Giorgetti, Steven Ratner, Jeffrey Dunoff, Shotaro Hamamoto, Luke Nottage, and Michael Waibel, 'Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options', The Journal of World Investment & Trade, 21(2-3) (2020), 441-474; Stephan Schill and Marc Jacob, 'Fair and Equitable Treatment: Content, Practice, Method' in Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds), *International Investment Law. A Handbook* (C.H. Beck-Hart-Nomos 2015) 700-763; Stephan Schill, Julian Scheu, Rainer Hofmann, and Christian Tams (eds), *Investment Protection, Human Rights, and International Arbitration in Extraordinary Times* (Nomos 2022); Stephan Schill and Geraldo Vidigal, 'Investment Dispute Settlement à la carte: A Proposal for the Reform of Investor-State Dispute Settlement', in Manfred Elsig et al. (eds) *International Economic Dispute Settlement* (2021) 220-263; Christoph Schreuer, 'The View of Investment Tribunals: The Relevance of Human Rights Law for Investment Tribunals', in Walid Ben Hamida and Frédérique Coulée (eds), *Convergences et Contradictions du Droit des Investissements et des Droits de l'Homme : Une Approche Contentieuse* (Pedone 2017) 289; Christoph Schreuer and Andrea de la Brena Meléndez, 'Does ISDS Need an Appeals Mechanism?', *Austrian Yearbook on International Arbitration* (2019) 493-500; Christoph Schreuer; Rudolf Dolzer, and Ursula Kriebaum, *Principles of International Investment Law*, 3rd ed (OUP 2022); Catharine Titi et al., 'Excessive Costs and Recoverability of Costs Awards in Investment Arbitration', *The Journal of World Investment & Trade*, 21(2-3) (2020), 251-99; Catharine Titi, Freya Baetens, Robert Howse, Marcin J. Menkes, and Walter Elochukwu Abah, 'Comparative Costs and Financing of Permanent Dispute Settlements Mechanisms', Academic Forum on ISDS Concept Paper 2022/1 (2022); Catherine Titi and Katia Fach Gómez, 'Facilitating Access to Investor-State Dispute Settlement for Small and Medium-Sized Enterprises: Tracing the Path Forward', European Business Law Review, 34 (2023).

III. The Rule of Law Criteria Used

11. As outlined in detail in the Committee's 2022 Interim Report, it has devoted considerable time and energy to identifying a broadly acceptable concept of the rule of law.[4] Building on different national and international traditions the Committee decided to rely on rule of law elements endorsed by the United Nations, such as the 2004 UN Secretary-General's *Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*[5], the 2012 High Level General Assembly Declaration on the Rule of Law,[6] as well as annual General Assembly resolutions.[7]

12. Based on an analysis of investment arbitration practice, the Committee considered that the following aspects are of particular relevance in order to ascertain the rule of law conformity of ISDS:

- Access to dispute settlement, as expressed in 'the right of equal access to justice for all',
- Adjudicatory (judicial and arbitral) independence and impartiality,
- Due process, fair trial and the absence of denial of justice,
- Legal certainty, consistency and predictability of dispute settlement outcomes,
- Legality, including a transparent, accountable, and rules-based/democratic process for enacting legislation,
- Prohibition of arbitrariness,
- Proportionality,
- Transparency,
- Respect for human rights,
- Non-discrimination and equality before the law.

IV. Access to Justice

13. The 'right of equal access to justice for all' figures prominently in UN rule of law instruments. It is emphasised both in the 2012 High Level Declaration on the Rule of Law[8] as well as in the annual General Assembly resolutions, stressing the obligation of states to 'promote access to justice for all.'[9] Goal 16 of the 2015 Sustainable Development Goals expressly includes the aim

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[4] ILA Committee on the Rule of Law and International Investment Law, Report 2022 (2022) 80 Int'l L Ass'n Rep Conf 569, paras. 13-17; ILA Committee on the Rule of Law and International Investment Law, Report 2018 (2018) 78 Int'l L Ass'n Rep Conf 380; ILA Committee on the Rule of Law and International Investment Law, Working Session Report (2016) https://www.ila-hq.org/en_GB/documents/working-session-report-johannesburg-conference-2016-5.

[5] See United Nations Security Council, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, 23 August 2004.

[6] United Nations General Assembly, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, A/RES/67/1, 30 November 2012.

[7] See e.g. United Nations General Assembly, *The rule of law at the national and international levels*, A/RES/77/110, 7 December 2022; United Nations General Assembly, *The rule of law at the national and international levels*, A/RES/76/117, 17 December 2021; United Nations General Assembly, *The rule of law at the national and international levels*, A/RES/75/141, 22 December 2020.

[8] United Nations General Assembly, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, A/RES/67/1, 30 November 2012, para. 14 ('We emphasize the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights, and in this regard we commit to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid.').

[9] United Nations General Assembly, *The Rule of Law at the National and International Levels*, A/RES/69/123, 18 December 2014, para. 14 ('*Recalls* the commitment of the Member States to take all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice

to 'provide access to justice for all.'[10]

14. At the same time access to justice is often conceived of as a human right. Frequently, it is not separately contained in human rights instruments, but forms part of the general due process/fair trial guarantees. This notion clearly underlies the customary international law concept of denial of justice, which may occur not only when court or administrative proceedings fall short of international standards, but equally where no remedies are available.[11] Access to justice is also enshrined in human rights instruments, though implicitly. Thus, some human rights bodies clarified that access to justice is inherent in the right to a fair trial.[12]

15. Access to justice in its simplest form implies access to national courts. This understanding has been applied by investment tribunals which have held that host states denying the right of access to courts (or other adjudicatory or administrative decision-making bodies) could lead to a denial of justice or violation of due process.[13] On the international level, however, there is no general right of access to dispute settlement mechanisms.[14] This is also true for investment arbitration or a future international investment court. Such a right is granted either individually in contractual arrangements between investors and host states or more generally in investment treaties or even national host state legislation – constituting an offer of consent to arbitration to be accepted by investors through instituting arbitral proceedings.[15]

16. However, from a policy perspective it may be arguable that access to international dispute settlement mechanisms is desirable for stakeholders, including investors, affected by host state measures.

17. In the context of a human rights-anchored right of access to justice, investment arbitration is more frequently addressed as a potential opt-out from the right to access to national courts. Therefore, the focus of human rights bodies is on the question whether an agreement to arbitrate

for all, including legal aid, encourages further dialogue and the sharing of national practices in strengthening the rule of law through access to justice, including with regard to legal aid, where appropriate, in both criminal and civil proceedings, and in this regard stresses the need to intensify the assistance extended to Governments upon their request').

[10] United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development, Sustainable Development Goals*, A/RES/70/1, 21 October 2015 ('16.3 Promote the rule of law at the national and international levels and ensure equal access to justice for all.').

[11] Jan Paulsson, *Denial of Justice* (2005) 134 *et seq.*

[12] *See* for Article 6 ECHR *Golder* v. *United Kingdom*, Application no. 4451/70, 21 February 1975, Series A no. 18, [1975] ECHR 1, para. 36; *Waite and Kennedy* v. *Germany*, European Court of Human Rights, Application no. 26083/94, European Court of Human Rights, February 18, 1999, para. 50.

[13] *Robert Azinian, Kenneth Davitian, & Ellen Baca* v. *The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, para. 102 ('[a] denial of justice could be pleaded if the relevant courts refuse to entertain a suit […].'); *Limited Liability Company AMTO* v. *Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, para. 75 ('[d]enial of justice relates to the administration of justice, and some understandings of the concept include both judicial failure and also legislative failures relating to the administration of justice (for example, denying access to the courts).'). See also ILA Committee on the Rule of Law and International Investment Law, Report 2022 (2022) 80 Int'l L Ass'n Rep Conf 569, para. 53.

[14] See also ILC Report 2023, A/78/10, p. 21 (stating that 'the right of access to courts that invariably exists across national legal systems […] cannot be transposed to international courts and tribunals because it would be incompatible with the fundamental principle of consent to jurisdiction in international law, which underlies the structure and functioning of international courts and tribunals.'). Consent in international adjudication varies by its breadth and specificity, with international courts often having multilateral and broad consent, while commercial arbitration and ISDS typically exhibit bilateral and narrower consent. See Jonathan Brosseau, 'The Distinction Between Arbitration and Judicial Settlement in International Law: Three Characteristics and Why They Matter for Reforms' in Andrea Biondi and Giorgia Sangiuolo (eds), *Beyond TTIP: a new season for EU FTAs?* (King's College London) 93-105, at 97-98.

[15] Stephan Schill, 'Article 25' in Stephan Schill, Loretta Malintoppi, August Reinisch, Christoph Schreuer, and Anthony Sinclair (eds), *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 3rd edn (Cambridge University Press 2022), paras. 759 et seq.

is a valid waiver of the right of access to court and whether such validity may depend upon certain guarantees complied with by the arbitral process.[16] In fact, some human rights bodies have expressly confirmed that the ‘waiver’ of the right to have access to regular courts is compatible with the notion of access to court as long as the alternative dispute settlement procedure such as arbitration complies with basic notions of a fair trial.[17]

18. This interpretation of the right of access to justice provides another important policy reason for demands on arbitration systems to afford due process/fair trial, as discussed below.

A. ISDS Practice

19. Investment instruments, like BITs and multilateral trade and investment agreements, regularly contain dispute settlement provisions offering investors from other contracting parties consent to arbitrate potential future disputes. In addition, host state legislation may contain similar offers.[18] Alternatively, access to arbitration is often agreed upon directly in investor-state contracts.[19] Some investment treaties envisage the creation of more permanent forms of ISDS, including a multilateral investment court.[20]

20. Such offers to engage in dispute settlement come in addition to (or sometimes, in case of so-called fork in the road-clauses,[21] alternatively to) the regular court system available in the state in which an investment has been made and may go beyond what is demanded by general international law, or human rights obligations to afford access to justice. Granting access to ISDS on the international level is considered to be a tool enhancing the protection of foreign

[16] See Ursula Kriebaum, ‘The European Court of Human Rights and Arbitration’, in Stefan Kröll, Andrea K Bjorklund and Franco Ferrari (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (Cambridge University Press 2023) 1981-2005.

[17] See *Deweer* v. *Belgium,* ECtHR, 27 February 1980, Series A no. 35, para. 49 (‘In the Contracting States’ domestic legal systems a waiver of this kind is frequently encountered both in civil matters, notably in the shape of arbitration clauses in contracts’); *Lithgow and Others* v. *United Kingdom*, 8 July 1986, Series A no. 102, para. 201(‘the word ‘tribunal’ in Article 6 para. 1 (art. 6-1) is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country (see, inter alia, the Campbell and Fell judgment of 28 June 1984, Series A no. 80, p. 39, para. 76); thus, it may comprise a body set up to determine a limited number of specific issues, provided always that it offers the appropriate guarantees’); *Kolgu* v. *Turkey*, ECtHR, 27 August 2013, Application no. 2935/07, para. 40 (‘As regards the merits, the Court recalls at the outset that Article 6 of the Convention does not preclude the setting up of arbitration tribunals in order to settle disputes between private entities. Indeed, the word ‘tribunal’ in Article 6 is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country; thus, it may comprise a body set up to determine a limited number of specific issues, provided always that it offers the appropriate guarantees…’); *Suda* v. *Czech Republic*, ECtHR, 28 October 2010, Application no. 1643/06, paras. 48-9; *Regent Company* v. *Ukraine,* ECtHR, 3 April 2008, Application no. 773/03; *Lundgren* v. *Sweden,* European Commission of Human Rights, 17 May 1995, Application no. 22506/93; *Axelsson and Others* v. *Sweden*, European Commission of Human Rights, 13 July 1990, Application no. 11960/86.

[18] See e.g. Michele Potestà, ‘The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws’ *Arbitration International*, 27(2) (2011), 149.

[19] Andrea Marco Steingruber, *Consent in International Arbitration* (OUP 2012) 199-200. See also *ST-AD GmbH v. Republic of Bulgaria,* PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction, 18 July 2013, para. 337 (‘As far as investment arbitration is concerned, such consent can be given in a contract, a domestic law or an international bilateral or multilateral treaty. In all these different hypotheses, the State can shape its consent as it sees fit by providing the conditions under which it is given – in other words, the conditions subject to which an ‘offer to arbitrate’ is made to the foreign investors.’).

[20] See e.g. Articles 8.27-8.29 Canada-EU CETA (2016); Articles 3.9-3.10, 3.12 EU-Singapore Investment Protection Agreement (2018); Articles 3.38-3.39, 3.41 EU-Vietnam Investment Protection Agreement (2019); see also the Arab Investment Court established in 1985 under the Unified Agreement for the Investment of Arab Capital in the Arab States (1980). See also Marc Bungenberg and August Reinsch (eds.), *CETA Investment Law. Article-by-Article Commentary* (C.H.Beck – Nomos – Hart 2022).

[21] See Christoph Schreuer, ‘Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road’ 5 Journal of World Investment and Trade (2004) 231-256.

investors, employed in order to attract more investments.[22]

21. States may choose to offer foreign investors such protection through access to ISDS, but are not required to do so and are not required to offer it unconditionally. Rather, it is up to states to define the extent and pre-requisites of consent to ISDS proceedings.[23]

22. In general, arbitration rules do not provide for access to ISDS. Rather, they are premised on the acceptance of jurisdiction of investment tribunals by the parties in a separate consent instrument. In the case of the ICSID Convention, Article 25 clarifies that jurisdiction *ratione voluntatis* must exist in addition to the other jurisdictional requirements for a tribunal to decide a dispute.[24] Other arbitration rules also stipulate consent to arbitration as a crucial prerequisite for the jurisdiction of an arbitral tribunal.

23. Article 52(1)(b) ICSID Convention, providing for annulment in the event of a manifest excess of powers, ensures that the right of access to justice is guaranteed to the extent the instrument of consent conferred jurisdiction on an investment arbitration tribunal. ICSID *ad hoc* committees have ensured this through acknowledging the concept of a 'negative' excess of powers.[25]

1. Access to ISDS

24. The precise scope of access to dispute settlement may be limited according to the wishes of the negotiating parties to the relevant instruments, whether treaties, national legislation or contractual arrangements. Such limitations usually find their expression in jurisdictional and admissibility limits on the claims that can be brought to investment arbitration.[26] More recent investment treaties typically provide for an arbitral tribunal's jurisdiction over any alleged violations of the substantive protection standards contained in them; some are broader and even confer jurisdiction over any dispute arising out of an investment.[27] A number of older BITs provided only for narrow dispute settlement clauses, typically allowing arbitral tribunals to assess only the amount of compensation owed in case of expropriation.[28] These clauses triggered a partly diverging jurisprudence regarding whether this authority also encompasses the power

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[22] See e.g. Jeswald W. Salacuse and Nicholas P. Sullivan, 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and their Grand Bargain' in Karl P. Sauvant and Lisa E. Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP 2009) 109.

[23] See e.g. *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 168; *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction, 18 July 2013, paras. 336-337.

[24] Article 25(1) Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159 (referring to 'to any legal dispute arising directly out of an investment […] which the parties to the dispute consent in writing to submit to the Centre.').

[25] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 86 ('It is settled and neither party disputes that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments.').

[26] See Andrea Marco Steingruber, *Consent in International Arbitration* (OUP 2012); Lars Markert, *Streitschlichtungsklauseln in Investitionsschutzabkommen* (Nomos, 2010).

[27] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd ed. (Oxford University Press 2022) 372-73; Christoph Schreuer, 'Consent to Arbitration', in Peter T Muchlinski, Federico Ortino and Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008), 830, at 837-38; August Reinisch, 'The Scope of Investor-State Dispute Settlement in International Investment Agreements', Asia Pacific Law Review, 21(1) (2013), 3-26, at 6-7.

[28] August Reinisch, 'How Narrow are Narrow Dispute Settlement Clauses in International Investment Treaties?', *Journal of International Dispute Settlement*, 2(1) (2011), 115-174; J. Romesh Weeramantry and Claire Wilson, 'The Scope of 'Amount of Compensation' Dispute-Resolution Clauses in Investment Treaties', in Chester Brown and Kate Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 409.

to determine whether an expropriation has occurred in the first place.[29]

25. In practice, considerable time and effort is spent in investment arbitration on questions concerning the jurisdiction of tribunals and the admissibility of claims. Often, proceedings are bifurcated for this purpose and as a result of jurisdictional and admissibility limits many investors will have only limited access to having their claims heard on the merits.

2. Non-discriminatory Access to ISDS

26. Access to justice is usually conceived of as a right granted on a non-discriminatory basis – at least this is the understanding of human rights instruments.[30] The UN rule of law concept also envisages 'access to justice for all.'[31] The International Court of Justice (ICJ), in its advisory opinion concerning *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development,*[32] had the opportunity to consider that the principle of the equality of the parties 'must now be understood as including access on an equal basis to available appellate or similar remedies.'[33]

27. In the field of investment arbitration, however, access to ISDS is usually limited by the special jurisdictional and admissibility requirements referred to above, and, at least in the context of the prevailing treaty arbitration, by being available only to nationals of treaty counterparties. As mentioned above, states regard investment protection in general, and the offer of ISDS in particular, as a policy instrument to be made available at their discretion.

28. The selective granting of access to ISDS to certain groups of investors only, usually on the basis

[29] For decisions denying the Tribunal's jurisdiction to determine whether an expropriation took place see, e.g., *AsiaPhos Limited and Norwest Chemicals Pte Ltd v. People's Republic of China*, ICSID Case No. ADM/21/1, Award of the Tribunal, 16 February 2023, para. 187 ('The scope of the arbitration clause is limited to disputes involving the amount of compensation, whereas disputes on the occurrence and legality of an expropriation can only be brought before domestic courts […]'); *Austrian Airlines AG v. The Slovak Republic*, UNCITRAL, Final Award, 9 October 2009, para 96 ('The scope of Article 8 is therefore limited to disputes about the amount of the compensation and does not extend to the review of the principle of expropriation.'); *Vladimir and Moise Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006, para. 153 ('[…] the ordinary meaning of the provision excludes from the scope of the arbitration clause […] disputes concerning whether or not an act of expropriation actually occurred').
For decisions taking an expansive interpretation of narrow dispute settlement clauses see, e.g., *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009, para. 188 ('[…] to give meaning to all the elements of the article, it must be interpreted that the words 'involving the amount of compensation for expropriation' includes not only the mere determination of the amount but also any other issues normally inherent to an expropriation, including whether the property was actually expropriated in accordance with the BIT provisions and requirements, as well as the determination of the amount of compensation due, if any.'); *European Media Ventures SA v. Czech Republic*, UNCITRAL, Award on Jurisdiction, 15 May 2007, para. 58 (holding that absent another forum which can determine whether an expropriation occurred in the first place, 'these determinations must be made by the tribunal which is determining the amount of compensation payable, or the system of investment protection created by the Treaty will be rendered wholly ineffective.'); *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, para. 92 (noting that a '"narrow" interpretation would undermine achievement of the BIT's object and purpose').
[30] See e.g. Human Rights Committee, 'General Comment No 32: Right to Equality Before Courts and Tribunals and to Fair Trial' (23 August 2007) CCPR/C/GC/32; see also IACHR 'Access to Justice as a Guarantee of Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights' (7 September 2007) Doc OEA/Ser.L/V/II.129.; ACHPR 'Principles and Guidelines to a Fair Trial and Legal Assistance in Africa' (29 May 2003) DOC/OS(XXX)247.
[31] See United Nations General Assembly, *The Rule of Law at the National and International Levels*, A/RES/69/123, 18 December 2014, para. 14.
[32] *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion [2012] ICJ Rep 10.
[33] Ibid., para. 44.

of their nationality, is not necessarily legally problematic under human rights law. Sometimes irritation is voiced from a policy perspective and broader rule of law demands. There are calls questioning the 'privileged' status of foreign investors over domestic ones.[34] Thus, the permissibility of granting access to ISDS only to certain nationals has been questioned under EU law as well as domestic constitutional law. Yet judicial challenges have been largely unsuccessful.[35]

29. Another equal access to justice, or rather asymmetry, problem stems from the design of investment treaties which unilaterally offer access to ISDS to investors, but do not permit states to initiate claims. It leads to a situation that only investors are able to commence investment treaty arbitration, whereas host states will only have limited possibilities to raise (counter-)claims once sued.[36] This 'asymmetrical' right has been criticized.[37]

30. However, the 'asymmetrical' right of investors is a result of the concept of treaty arbitration according to which host states make standing offers in BITs and other IIAs which investors can 'accept' at any time through the institution of arbitral proceedings. Investors, conversely, do not consent to being sued in advance since the investment treaties, to which they are not parties, are concluded by their home states. In addition to this formal explanation, there may be more substantive reasons why only investors can trigger investment claims. States have an entire legal system at their disposal to enforce their own law vis-à-vis foreign investors who have invested in their territories. Investment arbitration is intended to serve as a tool to remedy deficiencies in the application, adjudication and enforcement of host state law.[38]

31. The above described 'unequal' access to ISDS by investors does not arise in so-called contract arbitration, which is based on a contract between an investor and a host state containing an arbitration clause. In these cases, states and investors may equally trigger the right to arbitrate disputes.[39]

3. Financial Barriers to Effective Access to ISDS

32. Effective access to dispute settlement means that potential claimants should have the possibility to have their 'day in court' regardless of their economic means.[40] This implies that such access

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[34] See Krista Nadakavukaren Schefer, 'Domestic Investors, the Rule of Law, and Equality' in August Reinisch and Stephan Schill (eds), *Investment Protection Standards and the Rule of Law* (OUP 2023) 327.

[35] See e.g. Decision No 2017-749 DC, Conseil constitutionnel (31 July 2017); Opinion 1/17 (CETA) [2019] Court of Justice of the European Union, ECLI:EU:C:2019:341, paras. 179 et seq.; Final decision, C-252-19, Constitutional Court of Colombia (6 June 2019) ILDC 3198 (CO 2019).

[36] P. Lalive and L. Halonen, 'On the Availability of Counterclaims in Investment Arbitration', *Czech Yearbook of International Law*, 2 (2011), 141-56; Y. Kryvoi, 'Counterclaims in Investment Arbitration', Minnesota Journal of International Law, 21(2) (2012), 216; A. K. Bjorklund, 'Role of Counterclaims in Rebalancing Investment Law', Lewis & Clark Law Review, 17(4) (2013), 461; A. K. Hoffman, 'Counterclaims in Investment Arbitration', ICSID Review, 28(2) (2013), 438.

[37] See e.g. Maggie Ng, 'Can Human Rights Counterclaims Succeed in Investment Treaty Arbitration?' (2018) 5 Transnational Dispute Management; Mees Brenninkmeijer and Fabien Gélinas, 'Counterclaims in Investment Arbitration: Towards an Integrated Approach' ICSID Review (2023).

[38] See also IDI (18th Commission), 'Resolution: Equality of Parties before International Investment Tribunals' (The Hague 2019) 80-I AnnIDI (2019) 1 et seq., Art 1(2) (stating that ISDS 'is designed to secure equality between the parties in circumstances where the State has the sovereign power to enforce its own law and adjudicate its claims against investors for breach of its laws before its own courts.').

[39] See, e.g., *Republic of Peru v. Caravelí Cotaruse Transmisora de Energía S.A.C.*, ICSID Case No. ARB/13/24; Procedural Order Taking Note of the Discontinuance of the Proceedings, 26 December 2013; *Laos v. Lao Holdings & Sanum*, SIAC Case No. ARB 143/14/MV, Final Award, 29 June 2017; *Yemen v. Canadian Nexen Petroleum Yemen et al.*, ICC Arbitration No. 19869/MCP/DDA, Final Award, 4 February 2020.

[40] See Opinion 1/17 (CETA) [2019] Court of Justice of the European Union, ECLI:EU:C:2019:341, para. 209 ('Section F of Chapter Eight of the CETA is an expression, in that regard, of the objective of the Parties to structure the ISDS mechanism in such a way that the investors who have limited resources to pursue a costly procedure, such as natural persons and small and medium-sized enterprises, have, no less than enterprises that

should also be available to potential litigants who may not have sufficient resources for funding their litigation.

33. In the human rights context this translates into obligations to make financial assistance available to indigent litigants before domestic courts.[41] The UN's rule of law concept also emphasizes the importance of 'access to justice for all, including legal aid.'[42]

34. On a practical level, the costs of investment arbitration have increased considerably over the last two to three decades. The reasons for this development are manifold. Party submissions have become increasingly elaborate with multiple rounds of extensive pleadings; prolonged proceedings are often bi- or even trifurcated; and massive legal teams work for the parties.

35. The resulting costs of ISDS have triggered intensive criticism.[43] Investment arbitration is often criticized for its prohibitive costs making the effective pursuit of claims of investors difficult, if not outright impossible. Exorbitant costs also weigh heavily on host states. As a practical matter, the high costs of investment arbitration may lead to situations where some investors will be (financially) unable to institute investment arbitration in order to vindicate their rights and where some host states will have difficulties to defend themselves properly.[44]

36. At the same time it must be recognized that arbitration costs are also a function of the thoroughness of the adjudicatory process and the length and level of detail with which claims are scrutinized. Reducing expenses merely for efficiency and cost-saving purposes may conflict with other rule of law demands such as providing a full and fair hearing.

37. In practice, such considerations often lead arbitral tribunals to act cautiously when asked to use their (inherent) directory powers to conduct proceedings in an efficient way by limiting unnecessary and costly filings. They often abstain from limiting party submissions in order not to be regarded as depriving them of their right to a full and fair hearing.[45]

38. The affordability of access to ISDS has been subject to many debates over the last few years. Within UNCITRAL Working Group III, institutional responses have been discussed, such as the creation of an advisory centre that could provide legal assistance to state parties to ISDS.[46]

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have greater resources, an effective access to the envisaged tribunals.').

[41] See e.g. ECtHR, *Airey v Ireland*, App no 6289/73 (9 October 1979) paras. 26-28; IACtHR, Advisory Opinion OC-11/90 (10 August 1990), para. 22; CAT Committee 'General Comment No 3: Implementation of Article 14 by States Parties' (13 December 2012) UN Doc CAT/C/GC/3, para. 30.

[42] United Nations General Assembly, *The Rule of Law at the National and International Levels*, A/RES/69/123, 18 December 2014, para. 14 ('*Recalls* the commitment of the Member States to take all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid, encourages further dialogue and the sharing of national practices in strengthening the rule of law through access to justice, including with regard to legal aid, where appropriate, in both criminal and civil proceedings, and in this regard stresses the need to intensify the assistance extended to Governments upon their request').

[43] See e.g. Gabriel Bottini, Catharine Titi, Facundo Pérez Aznar, Julien Chaisse, Marko Jovanovic, and Olga Puigdemont Sola.; 'Excessive Costs and Recoverability of Costs Awards in Investment Arbitration', Journal of World Investment and Trade 21(2-3) (2020) 251; for an overview over ISDS costs see e.g. Luke Nottage and Ana Ubilava, 'Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry' International Arbitration Law Review 21(4) (2018) 1; For a data-driven attempt to map out cost-related issues in investment arbitration see Susan Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (Oxford University Press, 2019).

[44] See also IDI (18th Commission), 'Resolution: Equality of Parties before International Investment Tribunals' (The Hague 2019) 80-I AnnIDI (2019) 1 et seq., Art 12(1) ('The ability of parties, whether investors or States, to pursue or defend claims before a tribunal should not be determined on grounds of cost. Particular regard should be paid in this context to the position of small and medium-sized enterprises and to that of developing States.').

[45] Lucy Reed, 'Allocation of Costs in International Arbitration', ICSID Review, 26(1) (2011), 84-7.

[46] UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), 'Draft provisions on the establishment of an advisory centre on international investment law. Note by the Secretariat' UN Doc

The replacement of investment arbitration by a permanent court or appellate mechanism is also often seen as a potentially less expensive form of dispute settlement.[47]

39. In practice, claimants with limited financial resources have increasingly turned to third-party funding. This enables them to have access to investment arbitration, thus serving the rule of law-goal of access to justice. However, third-party funding has been criticized as potentially triggering unnecessary claims or only funding claims above a certain threshold value excluding smaller investors. Increasingly, third-party funders have become subject to more detailed disclosure obligations.[48]

B. Relevant Practices

a) 'The rule of law- and human rights-inspired demands of access to justice are not considered to imply a right of access to ISDS. Rather, they are policy demands calling for increased third party dispute settlement. Whether access to ISDS exists depends upon the legal instruments conferring such a right.'

b) 'The policy demands for non-discriminatory access to justice have not led to an extension of the right of access to ISDS specifically conferred upon certain persons in various legal instruments. Courts and tribunals have not considered that providing access to ISDS to a predetermined group (of nationals of contracting states parties to investment treaties) would violate international or domestic equal treatment obligations.'

c) 'The increasing costs of ISDS reduce the effective access to ISDS by parties under financial constraints. Interested parties have tried to mitigate this effect in various ways.

C. Recommendations

a) 'Adjudicators should take into account the rule of law-inspired demands of access to justice when determining their jurisdiction on the basis of the legal instruments conferring that power.'

b) 'Adjudicators should be mindful of costs imposed on parties in ISDS – respondents as well as claimants.'

c) 'Adjudicators should conduct proceedings in a cost-efficient manner in order to provide

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A/CN.9/WG.III/WP.230 (30 June 2023). Draft provision 7(1) as a rule foresees measures of assistance only for members of the centre, while draft provision 4(1) limits membership to states or regional economic integration organizations. However, pursuant to draft provision 7(3), non-members may submit a request for assistance in 'exceptional circumstances' and upon approval by the Centre's Executive Director. See also Karl Sauvant, 'An Advisory Centre on International Investment Law: Key Features', University St Thomas Law Journal, 17 (2021), 354-72; Enrique Fernandez Masia and Margherita Salvadori, 'What Is Being Discussed in the UNCITRAL: Evolution or Revolution in the Investor-State Dispute Settlement System', Cuadernos Derecho Transnacional, 12 (2020), 203-2018, at 216-218, noting that currently it seems to be intended to offer its services only to states, not to investors.

[47] See e.g., Catharine Titi et al., 'Excessive Costs and Recoverability of Costs Awards in Investment Arbitration', Journal of World Investment & Trade, 21(2-3) (2020), 251-99, at 261-62; Marcin Menkes, 'ISDS Reform: Financing of the Permanent Investment (Appeals) Body', Journal of International Dispute Settlement, 12 (2021), 462-476 (laying out several ways in which a permanent institution could save costs); Gabriel Bottini, 'Reform of the Investor-State Arbitration Regime: The Appeal Proposal', in Jean E. Kalicki and Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System* (Brill Nijhoff 2015) 455-473, at 472 (arguing that with the right structure and contributions from member states, the financial burden of an appeals facility 'would gradually diminish').

[48] See Victoria Shannon Sahani, 'Third-Party Funders', in Stefan Kröll, Andrea K Bjorklund and Franco Ferrari (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (Cambridge University Press 2023) 305-329.

effective access to justice.'

V. Independence and Impartiality

40. Independence and impartiality of adjudicators is a core aspect of the procedural rule of law concept.[49] It serves as the pillar upon which public confidence in adjudication is built.[50]

41. Most human rights instruments demand 'independent and impartial' adjudicators as an element of the right to a fair trial/due process.[51] Independence and impartiality are also universally required for national judges across diverse legal systems.[52]

42. Investment tribunals have held that the availability of independent and impartial adjudicators (on the national level) is a due process/fair trial requirement the absence of which might amount to a denial of justice under international law.[53]

43. 'Independence' usually focuses on the relationship between an arbitrator and the parties or their

[49] United Nations General Assembly, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, A/RES/67/1, 30 November 2012, para. 13 ('We are convinced that the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice'). See also Robert McCorquodale, 'Defining the International Rule of Law: Defying Gravity?', 65(2) International & Comparative Law Quarterly (2016) 277-304, at 282.

[50] Jonathan Brosseau, 'Applicable Ethical Framework in Commercial and Investment Arbitration', in Stefan Kröll, Andrea K Bjorklund and Franco Ferrari (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (Cambridge University Press 2023) 586-666, at 616-625.

[51] Article 10 Universal Declaration of Human Rights, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948), 71 ('Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'); Article 14(1) International Covenant on Civil and Political Rights ('ICCPR'), 19 December 1966, 999 U.N.T.S. 171 (1976) ('All persons are equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'); Article 6(1) European Convention on Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4 November 1950, entered into force 3 September 1953, 213 UNTS 221 ('In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'); Article 8(1) American Convention on Human Rights: 'Pact of San José, Costa Rica' (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 ('Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.'); Article 7(1)(d) African Charter on Human and Peoples' Rights (adopted 1 June 1981, entered into force 21 October 1986) 1520 UNTS 217 ('The right to be tried within a reasonable time by an impartial court or tribunal.').

[52] See e.g. Basic Principles on the Independence of the Judiciary, 6 September 1985: https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary#:~:text=The%20judiciary%20shall%20decide%20matters,quarter%20or%20for%20any%20reason.

[53] *Rupert Binder* v. *The Czech Republic*, UNCITRAL, Final Award, 15 July 2011, para. 448 ('An important part of fair and equitable treatment is the investor's access to independent and impartial courts in order to vindicate his rights and protect his investment. If the courts are unable to give effect to the law in an impartial and fair manner, the investor may find himself in a situation of denial of justice which is clearly incompatible with the notion of fair and equitable treatment.'); *Vannessa Ventures Ltd.* v. *The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, para. 228; *Chevron Corporation and Texaco Petroleum Corporation* v. *The Republic of Ecuador [II]*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, paras. 8.56 et seq.

counsel,[54] whereas impartiality relates more to the views and opinions held by an arbitrator[55].[56]

A. *ISDS Practice*

44. The rule of law (and human rights) requirement of independent and impartial adjudicators is generally made applicable in investment arbitration through the independence and impartiality rules contained in the applicable arbitration rules, and often made more specific through detailed conflict of interest rules. Such standards are enforced by challenge proceedings as well as by the *ex post* control of the fairness of arbitral proceedings through national courts or annulment committees in the case of ICSID arbitration.

1. Applicable Independence and Impartiality Requirements

45. Most arbitration rules applied in investment arbitration contain specific independence and impartiality rules. Similarly, plans for institutionalized ISDS in the form of courts envisage rules on the independence and impartiality of judges.

46. Most arbitration rules expressly refer to independence and impartiality,[57] while some contain similar language[58] that in practice has been largely interpreted to also mean independence and impartiality.[59]

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[54] See e.g. Loretta Malintoppi, 'Independence, Impartiality, and Duty of Disclosure of Arbitrators' in Peter T Muchlinski, Federico Ortino, Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 789, 807('Independence, the notion most frequently employed in national laws and arbitration rules suggests the absence of any connection, financial or otherwise, with a party to the proceedings.').

[55] See e.g. Loretta Malintoppi, 'Independence, Impartiality, and Duty of Disclosure of Arbitrators' in Peter T Muchlinski, Federico Ortino, Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 789, 807 ('Impartiality suggests the absence of prejudice or bias.').

[56] *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17 and *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19 and *AWG Group Limited v. Argentina*, UNCITRAL Arbitration, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal of 12 May 2008, para. 28 ('[…] independence relates to the lack of relations with a party that might influence an arbitrator's decision. Impartiality, on the other hand, concerns the absence of bias or predisposition toward one of the parties.'); *Ickale Insaat Limited Sirketi* v. *Turkmenistan*, ICSID Case No. ARB/10/24, Decision on Claimant's Proposal to Disqualify Professor Philippe Sands, 11 July 2014, para. 116 ('It is also generally accepted in ICSID practice that 'impartiality' refers to the absence of bias or predisposition towards a party, whereas 'independence' is defined as the absence of external control.' [footnote omitted]).

[57] *See, e.g.*, Article 6(7) UNCITRAL Arbitration Rules as revised in 2010, UN Doc A/Res/65/22 (2010) ('independent and impartial arbitrator'); Article 18 SCC Arbitration Rules 2017 ('(1) Every arbitrator must be impartial and independent'); Article 10.1 LCIA Arbitration Rules 2014 ('10.1 The LCIA Court may revoke any arbitrator's appointment upon its own initiative, at the written request of all other members of the Arbitral Tribunal or upon a written challenge by any party if: […] (iii) circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence.'); Article 10 SIAC Investment Arbitration Rules 2017 ('10.1 Any arbitrator appointed in an arbitration under these Rules, whether or not nominated by the Parties, shall be and remain at all times independent and impartial…').

[58] Article 14(1) Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention'), 18 March 1965, 575 UNTS 159 ('Persons […] of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment').

[59] *Universal Compression International Holdings, S.L.U.* v. *Bolivian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Professor Brigitte Stern and Professor Guido Santiago Tawil, Arbitrators, 20 May 2011, para. 70; *Abaclat and others (formerly Giovanna a Beccara and others)* v. *Argentine Republic*, ICSID Case No. ARB/07/05, Recommendation on Proposal for Disqualification of Prof. Pierre Tercier and Prof. Albert Jan van den Berg, 19 December 2011, para. 46; *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Claimant Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention, 27 February 2013, para. 55; *Ickale Insaat Limited Sirketi* v. *Turkmenistan*, ICSID Case No. ARB/10/24, Decision on Claimant's Proposal to Disqualify Professor Philippe Sands, 11 July 2014, para. 115; *Ayat Nizar Raja Sumrain and others* v. *State of*

47. In investment arbitration practice, often the IBA rules on conflicts of interest[60] serve as an additional yardstick to address more specific questions of independence and impartiality. They are regularly referenced by tribunals[61] and they may be made applicable in investment treaties.

48. Some recent IIAs contain express language concerning duties of independence and impartiality, like those in the EU-Singapore FTA 'code of conduct for arbitrators',[62] or those in the CETA text, which expressly refer to the IBA standards of independence and impartiality of arbitrators.[63]

49. In July 2023, UNCITRAL finalized codes of conduct for arbitrators[64] and adjudicators[65] in international investment dispute resolution prepared by UNCITRAL WG III in cooperation with the ICSID Secretariat.[66] These codes, which were developed in light of concerns identified by UNCITRAL Working Group III about the 'the lack or the apparent lack of independence and impartiality of decision makers in ISDS'[67], include specific rules on independence and impartiality and far-reaching disclosure obligations of arbitrators and judges. In addition, they contain provisions concerning the limitation of multiple roles, the possession of the necessary competence and knowledge, duties of diligence, *ex parte* communications, confidentiality as well as fees and expenses. The codes may be used if the disputing parties agree; in future they will likely be included in investment treaties and in any multilateral investment court formed in the aftermath of the UNCITRAL Working Group III process.

50. In order to secure the formal independence of adjudicators, different models in regard to their nationality have been adopted. While in ICSID arbitration arbitrators usually do not have the

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Kuwait, ICSID Case No. ARB/19/20, Decision on the Claimants Proposal to Disqualify Prof. Zachary Douglas and Mr. V.V. Veeder, 2 January 2020, para. 104.

[60] 2014 IBA Guidelines on Conflicts of Interest in International Arbitration (adopted by resolution of the IBA Council on 23 October 2014) available at <https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918>.

[61] See e.g. *Participaciones Inversiones Portuarias SARL* v. *Gabonese Republic*, ICSID Case No. ARB/08/17, Decision on the Proposal to Disqualify an Arbitrator, 12 November 2009, para. 24; *Highbury International AVV, Compañía Minera de Bajo Caroní AVV and Ramstein Trading Inc*. v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/14/10, Decision on the Proposal for Disqualification of Professor Brigitte Stern, 9 June 2015, paras. 79, 84; see also the decision of the ICSID Chairperson in *Ayat Nizar Raja Sumrain and others* v. *State of Kuwait*, ICSID Case No. ARB/19/20, Decision on the Claimants Proposal to Disqualify Prof. Zachary Douglas and Mr. V.V. Veeder, 2 January 2020, para. 131.

[62] Annex 9-F to the ISDS Section of the EU-Singapore Free Trade Agreement, 2. Responsibilities to the process ('Throughout the proceedings, every candidate and arbitrator shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interests and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved. Arbitrators shall not take instructions from any organisation or government with regard to matters before a tribunal. Former arbitrators must comply with the obligations established in paragraphs 15, 16, 17 and 18 of this Code of Conduct.').

[63] Article 8.30(1) Revised 2016 CETA text ('The Members of the Tribunal shall be independent… They shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted pursuant to Article 8.44.2…'). see also Article 14.D.6(5) (a) USMCA ('Arbitrators appointed to a tribunal for claims submitted under Article 14.D.3.1 shall: (a) comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration […].').

[64] UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), 'Draft code of conduct for arbitrators in international investment dispute resolution and commentary' UN Doc A/CN.9/1148 (28 April 2023).

[65] UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), 'Draft code of conduct for judges in international investment dispute resolution and commentary' UN Doc A/CN.9/1149 (28 April 2023).

[66] Report of the United Nations Commission on International Trade Law, Fifty-sixth session (3-21 July 2023), A/78/17, p. 19.

[67] UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), 'Draft report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session', A/CN.9/964 (6 November 2018).

nationality of one of the parties,[68] the two-tiered investment court system envisaged by CETA aims at an equilibrium of nationals on its tribunals.[69] Arbitration rules additionally often require the expertise necessary for adjudicating investment disputes.[70]

51. In practice, independence and impartiality are secured by increasingly detailed disclosure obligations for prospective and actual adjudicators requiring them to disclose 'any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.'[71] For example, the draft UNCITRAL Working Group III Code of Conduct requires that an arbitrator, or a candidate to be named as arbitrator, disclose all international investment disputes and related proceedings in which he or she was involved as counsel, arbitrator, or expert for the past five years; any appointment as arbitrator, counsel, or expert by a disputing party or its legal representative within the past five years; and any prospective concurrent appointment as legal representative or as an expert witness in any other international investment dispute or related proceeding.[72] It also stipulates that arbitrators have an ongoing obligation to make appropriate disclosures; that they have an obligation to inform themselves of any potential conflict, and that "[a] Candidate and an Arbitrator shall err in favour of disclosure if he or she has any doubt as to whether a disclosure shall be made;"[73] and that "[a] Candidate shall not accept an appointment and an Arbitrator shall resign or recuse himself or herself from the IID proceeding, if he or she is not able to comply with the Code.'[74]

2. Procedural Safeguards of Independence and Impartiality

52. From a procedural perspective, the independence and impartiality of arbitrators are primarily safeguarded through various challenge procedures, which are themselves contained in the applicable arbitration rules.[75] Challenge procedures, operating during the course of arbitration, provide a direct avenue for parties to question an arbitrator's suitability, focusing on potential

[68] See Article 39 ICSID Convention ('The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; […].').

[69] Article 8.27(2) Revised 2016 CETA text ('The CETA Joint Committee shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada and five shall be nationals of third countries.').

[70] Article 14(1) ICSID Convention ('Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.'); Article 8.27(4) Revised 2016 CETA text ('The Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements.').

[71] Article 11 UNCITRAL Arbitration Rules 2010 ('When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.'); Article 11(2) and (3) ICC Arbitration Rules (2012); see also the additional, more detailed disclosure obligations contained in Article 11(2) UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), 'Draft code of conduct for arbitrators in international investment dispute resolution and commentary' UN Doc A/CN.9/1148 (28 April 2023).

[72] Art. 11(2)(c) – (e) UNCITRAL code of conduct for arbitrators, *supra* note 64. ICSID already requires these disclosures from candidates to be named as arbitrator as part of its appointment process.

[73] Art. 11(3) – (5) UNCITRAL code of conduct for arbitrators, *supra* note 64.

[74] Art. 11(2) UNCITRAL code of conduct for arbitrators, *supra* note 64.

[75] Article 57 ICSID Convention ('A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14'); Article 12(1) UNCITRAL Arbitration Rules ('Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence'). See also Chiara Giorgetti, *The Selection and Removal of Arbitrators in Investor-State Dispute Settlement* (Brill Nijhoff 2019) 41 et seq.

conflicts of interest or bias. These mechanisms acts as a pre-emptive safeguard, enabling parties to address concerns about arbitrators' neutrality proactively.

53. These challenge proceedings follow different patterns. Challenges are often handled by outside institutions such as appointing authorities, like the PCA,[76] which is generally regarded as the preferred method of arbitrator disqualification.[77] Under the ICSID Convention, the non-challenged arbitrators have the power to rule on challenges to their co-arbitrators or, if a majority of arbitrators are challenged, the ICSID Chairperson rules on disqualification requests.[78] The ICSID Arbitration Rules have recently been amended to provide more detailed rules and shorter timelines for proposing a disqualification of arbitrators.[79]

54. At the post-award stage, independence and impartiality are also guaranteed by annulment proceedings under the ICSID Convention[80] and residual local court control in non-ICSID Convention cases, which also usually make the lack of independence and impartiality a ground for annulment or set-aside/non-recognition of awards.[81] ICSID annulment committees have annulled awards for lack of independence or impartiality as this may constitute a 'serious departure from a fundamental rule of procedure'[82] or as they might consider 'that the Tribunal was not properly constituted'.[83] Under the New York Convention, local courts have denied recognition and enforcement of arbitral awards, when there was evidence of arbitrator partiality or independence being compromised.[84]

3. Practical Problems in Securing the Independence and Impartiality of Arbitrators

55. The issue of investment arbitrator independence and impartiality has led to controversy over the

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[76] Article 13(4) UNCITRAL Arbitration Rules.

[77] IDI (18th Commission), 'Resolution: Equality of Parties before International Investment Tribunals' (The Hague 2019) 80-I AnnIDI (2019) 1 et seq., Art 3(4) ('Challenges to the impartiality of a member of an arbitral tribunal should be determined by an independent third party decision-maker external to the tribunal.').

[78] Article 58 ICSID Convention ('The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.').

[79] See Rules 22 and 23 ICSID Arbitration Rules 2022. Cf Rule 9 ICSID Arbitration Rules 2006.

[80] Article 52(1) ICSID Convention ('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').

[81] Article 34(2)(a)(iv) UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, UN Doc A/Res40/72 (1985) and UN Doc A/Res61/33 (2006) ('the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law'); Section 1059(2)(d) German Code of Civil Procedure; Section 611(2)(4) Austrian Code of Civil Procedure; D. Hascher, 'Independence and Impartiality of Arbitrators: 3 Issues', American University International Law Review, 27(4) (2012), 801-6.

[82] Article 52(1)(d) ICSID Convention; see e.g. *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A.* v. *Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, 5 February 2016, paras. 122-125; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l.* v. *Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on Annulment, 11 June 2020, paras. 239, 241-242.

[83] Article 52(1)(a) ICSID Convention; see e.g. *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A.* v. *Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, 5 February 2016, paras. 126-129; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l.* v. *Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on Annulment, 11 June 2020, paras. 167-168.

[84] Jonathan Brosseau, 'Applicable Ethical Framework in Commercial and Investment Arbitration', in Stefan Kröll, Andrea K Bjorklund and Franco Ferrari (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (Cambridge University Press 2023) 586-666, at 598-599.

last decades. Criticism ranges from denouncing ISDS as a system that generally fails to guarantee adjudication by independent and impartial adjudicators to locating deficiencies either in specific applicable standards or in the enforcement regime.

56. It is often asserted that arbitrators have a systemic pro-investor bias,[85] while repeat appointments by states have given rise to criticism alleging that some arbitrators evidence a pro-state bias.[86]

57. Another core problem raised in investment arbitration practice is the question of 'double hatting', denoting a practice of acting both as counsel and arbitrator. Such practices are particularly problematic if they lead to situations where arbitrators may be in a position to create useful 'precedent' for cases in which they represent client interests.[87] In addition, problems with respect to the principle of equality of parties[88] may arise if one member of a tribunal serves multiple roles or serves as arbitrator in multiple proceedings related to the same facts since the arbitrator may (inadvertently) use information gained in the other proceedings in the case at bar.[89]

58. Some instruments have expressly responded to this practice.[90] For instance, the CETA rules explicitly prohibit candidates for appointment to the CETA court, as well as members of the tribunal, from 'acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement.'[91] The USMCA provides that appointed arbitrators shall 'not, for the duration of the proceedings, act as counsel or as party-appointed expert or witness in any pending arbitration under the annexes to this Chapter'.[92] Similarly, the Code of Conduct for ISDS under the CPTPP provides that '[u]pon selection, an arbitrator shall refrain, for the duration of the proceeding, from acting as counsel or party-appointed expert or witness in any pending or new investment dispute under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership or any other international agreement.'[93]

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[85] G. van Harten, 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law', in S. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010), 643-56; W. Park, 'Arbitrator Integrity', in M. Waibel *et al.* (eds.), *The Backlash Against Investment Arbitration* (Kluwer, 2010), 211-6; S. Brekoulakis, 'Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making', Journal of International Dispute Settlement, 4(3) (2013), 563-70.

[86] John Beechey and Niccolò Landi, 'The Question of Systematic Appointments of Given Individuals by Investors or Respondent State Parties in Investment Arbitration' BCDR International Arbitration Review *2020* 7(2) (2022), 409, 419-420. See also e.g. claimant's argument in *Ayat Nizar Raja Sumrain v. Kuwait* that multiple appointments by States implies a pro-state bias, *Ayat Nizar Raja Sumrain and others v. State of Kuwait*, ICSID Case No. ARB/19/20, Decision on the Claimants' Proposal to Disqualify Prof. Zachary Douglas and Mr. V. V. Veeder, 2 January 2020, paras. 43-53.

[87] On 'double hatting', see e.g. Malcolm Langford, Daniel Behn, Runar Hilleren Lie, 'The Revolving Door in International Investment Arbitration', Journal of International Economic Law 20(2) (2017) 301, 321-327; Andrea K. Bjorklund, 'The Independence and Impartiality of Adjudicators in Investment Arbitration under Treaty-based Rules', in Giuditta Cordero-Moss (ed.), *Independence and Impartiality of International Adjudicators* (Intersentia 2023), 263-281.

[88] See below on equality of parties paras. 72 et seq.

[89] See e.g. *EnCana Corporation versus Republic of Ecuador*, LCIA Case No. UN 3481, Partial Award on Jurisdiction, 27 February 2004, paras. 44-45.

[90] See most recently, Art. 4 UNCITRAL code of conduct for arbitrators, *supra* note 64.

[91] Article 8.30(1) CETA (2016); See also Article 4 Decision No 001/2021 of the Committee on Services and Investment of January 29, 2021 adopting a code of conduct for Members of the Tribunal, Members of the Appellate Tribunal and mediators, containing additional independence and impartiality requirements for members of the Tribunal and article 3, containing disclosure obligations for members of the Tribunal and Candidates for the Tribunal.

[92] Article 14.D.6(5) USMCA.

[93] Rule 3(d) Code of Conduct for Investor-State Dispute Settlement under Chapter 9 Section B (Investor-State Dispute Settlement) of the Comprehensive And Progressive Agreement For Trans-Pacific Partnership (2019). See also e.g. Article 29.13 SADC Model Bilateral Investment Treaty Template (2012) ('For greater certainty, the above requirements include the requirement not to act concurrently as counsel in another actual or potential treaty-based arbitration involving a foreign investor and a State.'); Article 35(4) Morocco Model Investment Agreement (2019);

59. Empirically assessable is the fact that arbitrator challenges have significantly increased over the last decades.[94] However, actual disqualifications are still rather rare.[95] The implications that can be drawn from these figures remain contested. They may signify that there is in fact rarely an absence of the required independence and impartiality of adjudicators in investment arbitration. They may equally indicate that an overly restrictive application of the independence and impartiality standards in challenge proceedings leads to a situation where arbitrators are not disqualified although they do in fact lack independence and impartiality.

60. Annulments of awards under the ICSID system for a lack of independence or impartiality are also rare. However, recently an award was annulled on that basis due to a prior business relationship between an arbitrator and an expert witness who testified in the proceedings on behalf of the claimant.[96]

B. Relevant Practices

a) 'The independence and impartiality of adjudicators is a core aspect of the rule of law and is essential for maintaining the integrity of arbitration and lending legitimacy to the arbitral process in the eyes of the parties and the general public.'

b) 'Independence has been regarded as a duty to remain structurally or financially remote from the parties and their counsel, whereas impartiality has been considered to refer to an absence of bias or predisposition towards one of the parties and the subject matter of the dispute.'

c) 'Proactive and comprehensive disclosure helps to ensure the independence and impartiality of adjudicators.'

d) 'Mechanisms such as challenge procedures as well as set-aside and non-recognition/non-enforcement proceedings represent important procedural tools to guarantee the independence and impartiality of adjudicators at various stages of the arbitral process.'

C. Recommendations

a) 'Adjudicators should respect the rule of law demands of the requirements of independence and impartiality to uphold the fairness and integrity of arbitral proceedings.'

b) 'Adjudicators should maintain both structural independence and the appearance of independence from the parties and their counsel, and should remain free from actual and/or perceived bias.'

c) 'Adjudicators should proactively and comprehensively disclose any circumstances that could reasonably be perceived as impacting their independence and impartiality. Disclosure should be made as early as possible and updated continuously throughout the

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Article 18.4 Slovak Republic Model Investment Agreement (2019); Article 20(5) Netherlands Model Investment Agreement (2019).

[94] Meg Kinnear, 'Challenge of Arbitrators at ICSID—An Overview' *Proceedings of the Annual Meeting (American Society of International Law)* 108 (2014), 412; Emilia Onyema, 'African Participation in the ICSID System: Appointment and Disqualification of Arbitrators' ICSID Review 34(2) (2019), 365-387, at 378.

[95] According to Antonio Parra, as of 30 June 2020, there had been more than 100 disqualification proposals in ICSID arbitration proceedings. In approximately 25% of the cases arbitrators resigned. In nearly all other cases the disqualification proposals were rejected, see Antonio Parra, 'Three Approaches to Challenges of ICSID Arbitrators for Manifest Lack of Reliability for Independent Judgment' *BCDR International Arbitration Review 2019* 6(1) (2021), 27, 31.

[96] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l.* v. *Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on Annulment, 11 June 2020.

arbitration process. It should be detailed, providing sufficient context and clarity to allow parties to make informed decisions about the adjudicators' suitability.'

VI. Due Process, Fair Trial and Absence of Denial of Justice

61. The notion of a denial of justice has its roots in customary international law concerning the treatment of foreign nationals. It has been traditionally understood as occurring where a foreigner is denied access to justice or subjected to serious 'deficiency in the administration of judicial or remedial process',[97] such as undue delay or lack of fair and equal treatment by the adjudicators. Investment tribunals have also held that the concepts of due process and fair trial are related to the international law standard prohibiting denial of justice, in the sense that they can be regarded as two sides of the same coin.[98]

62. The rule of law requirements of due process/fair trial are also contained in many human rights instruments, such as, e.g., Article 10 Universal Declaration of Human Rights,[99] Article 6 ECHR,[100] Article 14 ICCPR,[101] Article 8 American Convention on Human Rights,[102] and Article 7 African Charter on Human and People's Rights.[103]

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[97] See, e.g., Article 9 Harvard Research Draft on the Law of State Responsibility, cited in: E. M. Borchard, 'The Law of Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners' (1929) 23 *American Journal of International Law Spec. Suppl.* 131, 173 ('Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.'); Draft Article 4(2) on International Responsibility proposed by ILC Special Rapporteur García Amador, in: *Yearbook of the International Law Commission* (1957), vol. II, 104, 108 and 113, ('[…] a 'denial of justice' shall be deemed to have occurred if the court, or competent organ of the State, did not allow the alien concerned to exercise any one of the rights specified in article 6, paragraph 1 (f), (g) and (h) of this draft;'); the provisions of Article 6, referred to in Article 4, stated as follows: ('[…] (f) The right to apply to the courts of justice or to the competent organs of the State, by means of remedies and proceedings which offer adequate and effective redress for violations of the aforesaid rights and freedoms; (g) The right to a public hearing, with proper safeguards, by the competent organs of the State, in the determination of any criminal charge or in the determination of rights and obligations under civil law; (h) In criminal matters, the right of the accused to be presumed innocent until proved guilty; the right to be informed of the charge made against him in a language which he understands; the right to speak in his defence or to be defended by a counsel of his choice; the right not to be convicted of any punishable offence on account of any act or omission which did not constitute an offence, under national or international law, at the time when it was committed; the right to be tried without delay or to be released.').

[98] *Waguih Elie George Siag & Clorinda Vecchi* v. *The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award and Dissenting Opinion, 1 June 2009, para. 452 ('[t]he concepts of 'due process' and 'denial of justice' are closely linked. A failure to allow a party due process will often result in a denial of justice.'); *Liman Caspian Oil BV and NCL Dutch Investment BV* v. *Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, para. 218 ('[…] fair treatment implies that there is no denial of justice.').

[99] Article 10 Universal Declaration of Human Rights, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 ('Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.').

[100] Article 6(1) European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR) ('In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.').

[101] Article 14(1) International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) ('All persons are equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.').

[102] Article 8(1) American Convention on Human Rights: 'Pact of San José, Costa Rica' (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 ('Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.').

[103] Article 7(1) African Charter on Human and People's Rights (adopted 28 June 1981, entered into force 21

63. Equality of arms or equality before adjudicatory bodies has been identified as a core element of a fair trial under many human rights treaties.[104]

64. In the jurisprudence of the ICJ the principle of equality of the parties also figures prominently. As early as in its 1956 advisory opinion in *Judgments of the Administrative Tribunal of the ILO upon complaints made against UNESCO*, the principle was considered to follow from 'the requirements of good administration of justice.'[105] In its advisory opinion in *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*,[106] the ICJ reconfirmed that the 'principle of equality in the proceedings' was an expression of the 'the good administration of justice.'[107]

A. *ISDS Practice*

65. Some of the traditional due process/denial of justice elements are echoed in investment jurisprudence when tribunals assess the compliance of adjudicatory organs on the national level with the due process requirements inherent in the fair and equitable treatment standard.[108] This was discussed in the 2022 Lisbon Interim Report dealing with the rule of law elements contained in investment standards.[109]

66. The core aspects of due process/fair trial such as absence of undue delay, fair and equal treatment of the disputing parties and the right to be heard are also relevant to the adjudication of investment claims before international tribunals. The grounds to challenge arbitral awards equally require arbitral tribunals to ensure the fairness and integrity of the proceedings.[110]

October 1986) 1520 UNTS 217 ('Every individual shall have the right to have his cause heard. This comprises: a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; b) The right to be presumed innocent until proved guilty by a competent court or tribunal; c) The right to defence, including the right to be defended by counsel of his choice; d) The right to be tried within a reasonable time by an impartial court or tribunal.').

[104] *Weiss* v. *Austria*, Communication no. 1086/2002, 24 May 2002, UN.-Doc. CCPR/C/77/D/1086/2002, para. 9.6; *Frank* v. *Jamaica*, Communication no. 223/1987, 4 April 1989, UN.-Doc. CCPR/C/35/D/223/1987, para. 10.4; *Rowe and Davis* v. *United Kingdom*, Application no. 28901/95, 16 February 2000, ECHR, paras. 59-66; *Ernst and Others* v. *Belgium*, Application no. 33400/96, 15 July 2003, ECHR, paras. 60-61; Human Rights Committee, *General Comment 32, Right to Equality Before Courts and Tribunals and to a Fair Trial (Article 14)*, 23 August 2007, UN.-Doc. CCPR/C/GC/32; *see* also M. Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, 2nd ed. (Engel, 2005), 321; W. A. Schabas, *Nowak's CCPR Commentary: U.N. Covenant on Civil and Political Rights*, 3rd ed (Engel, 2019) 350; P. van Dijk *et al.* (eds.), *Theory and Practice of the European Convention on Human Rights*, 4th ed. (Intersentia, 2006), 580.

[105] *Judgments of the Administrative Tribunal of the ILO upon complaints made against UNESCO*, Advisory Opinion, [1956] ICJ Rep 77, 86 ('The principle of equality of the parties follows from the requirements of good administration of justice.').

[106] *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion [2012] ICJ Rep 10.

[107] Ibid., para. 47.

[108] *Iberdrola Energía S.A.* v. *Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012, para. 432 ('[...] that under international law a denial of justice could constitute: (i) the unjustified refusal of a tribunal to hear a matter within its competence or any other State action having the effect of preventing access to justice; (ii) undue delay in the administration of justice; and (iii) the decisions or actions of State bodies that are evidently arbitrary, unfair, idiosyncratic or delayed. In this matter, the Tribunal shares the position of the Claimant in that '… denial of justice is not a mere error in interpretation of local law, but an error that no merely competent judge could have committed and that shows that a minimally adequate system of justice has not been provided.').

[109] ILA Committee on the Rule of Law and International Investment Law, Report 2022 (2022) 80 Int'l L Ass'n Rep Conf 569, paras. 47-54.

[110] See below para. 79.

67. Investment arbitration has come under scrutiny for its compliance (or lack thereof) with these requirements. Failure to meet them would decrease its legitimacy and could lead to legal challenges directed against the outcomes of deficient proceedings. Criticism has been voiced, with regard to the length of ISDS proceedings, whereas no comparable issues have been raised in regard to the equal treatment of the parties and respect of the right to be heard and due process more generally afforded in ISDS.

1. Decisions within a Reasonable Time

68. Investment tribunals are duty-bound to conduct their proceedings in an efficient fashion. Many arbitration rules make explicit provision for time-sensitive case management.[111] Some rules contain specific provisions aimed at avoiding delay, such as case management sessions,[112] early dismissal of claims manifestly without legal merit,[113] and time-frames within which tribunals have to render decisions,[114] coupled with reporting duties,[115] and financial (dis-)incentives.[116]

69. Investment tribunals are often criticized for failing to deliver justice in an efficient way. The average investment arbitration proceedings last between three and four years.[117] The acceptable length of proceedings evidently varies depending on whether the arbitration proceedings end at the jurisdictional phase or proceed to the merits.[118] In addition, annulment proceedings at the ICSID level or, in non-ICSID cases, set-aside proceedings at the domestic level, may follow and thereby increase the overall duration of a particular investment dispute.

70. When investment tribunals have dealt with allegations that undue delay by national court proceedings might constitute a denial of justice, and thus violate the due process element of fair and equitable treatment,[119] they often stress that a long duration alone is not sufficient to meet the standard. Rather, 'the complexity of the case, the behaviour of the litigants involved, the significance of the interests at stake, and the behaviour of the courts themselves are factors to

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[111] Article 17 para. 1 last sentence UNCITRAL Arbitration Rules 2021 ('The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.').

[112] Rule 31 ICSID Arbitration Rules 2022 (providing for case management conference '[w]ith a view to conducting an expeditious and cost-effective proceeding […]'); Article 9 UNCITRAL Expedited Arbitration Rules (requiring a case management conference within 15 days after constitution of the tribunal).

[113] See, e.g., Rule 41 ICSID Arbitration Rules 2022; Article 22.1(viii) LCIA Rules 2020 (providing for 'early determination' of claims based on manifest lack of jurisdiction or legal merit);

[114] Article 17 para. 2 UNCITRAL Arbitration Rules 2021 ('As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties.'); Article 16 UNCITRAL Expedited Arbitration Rules (setting a six month time limit subject to extension); Rule 12 ICSID Arbitration Rules 2022 (setting a 'best efforts' time limit on the Tribunal and stipulating a reporting obligation to the parties if the tribunal cannot meet an applicable limit); Rule 31 ICC Arbitration Rules 2021.

[115] Rule 12 ICSID Arbitration Rules 2022.

[116] Additional examples include forfeiture of part of the arbitrator honorarium (Art. 2(2) Appendix III to the ICC Arbitration Rules 2021); Consolidation and Coordination of Arbitrations (Rule 46 ICSID Arbitration Rules 2022).

[117] José Manuel Álvarez Zárate, Crina Baltag, Daniel Behn, Jonathan Bonnitcha, Anna De Luca, Holger Hestermeyer, Malcolm Langford, Loukas Mistelis, Clara López Rodríguez, Gregory Shaffer, and Simon Weber, 'Duration of Investor-State Dispute Settlement Proceedings' Journal of World Investment and Trade 21(-23) (2020) 300, 310-314; Matthew Hodgson, Yarik Kryvoi, Daniel Hrcka, '2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration' BIICL/Allen Overy (2021) available at <https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf> accessed 7 August 2023.

[118] Ibid.

[119] *Victor Pey Casado and President Allende Foundation* v. *Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, para. 659; *Valores Mundiales, S.L. and Consorcio Andino S.L.* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017, para. 583.

consider in the analysis' of whether a delay was undue.[120] Similar considerations appear apposite in assessing the duration of ISDS proceedings.

71. Investment arbitrations are complex. Respondent states often have to manage a complicated process in finalizing their positions that involves attorneys from different government departments and sometimes people at different levels of government. Thus, even if speedier processes are regarded as desirable they might not be achievable or in the interests of all of the parties in all cases.

2. Fair Trial, Equality of the Parties and Right to be Heard

72. In arbitration, the principles of the 'equality of the parties' and the right to be heard equally ('equality of arms') have long been considered to be the cornerstone of arbitral due process[121] and an element of the rule of law.[122]

73. Many arbitration rules provide for equal treatment of the parties as the core procedural guideline for tribunals. For instance, the UNCITRAL Rules demand that 'the parties [be] treated with equality.'[123] Similarly, they emphasize the parties' right to be heard. In this sense, the UNCITRAL Rules require that 'each party [be] given a reasonable opportunity of presenting its case.'[124]

74. Investment arbitration tribunals regularly address fair trial/due process requirements when assessing domestic proceedings in fair and equitable treatment claims.[125] Echoing the ICJ's famous *ELSI* standard,[126] investment tribunals often only regard rather extreme deficiencies in the administrative or judicial process, such as 'a manifest failure of natural justice,'[127] or 'serious procedural shortcomings,'[128] as amounting to due process violations,[129] although sometimes

[120] *Jan Oostergetel and Theodora Laurentius* v. *The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, para. 290; *White Industries Australia Limited* v. *The Republic of India*, UNCITRAL, Final Award, 30 November 2011, paras. 10.4.10 et seq; *Spyridon Roussalis* v. *Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, paras. 602 et seq.

[121] A. Redfern *et al.*, *Redfern and Hunter on International Arbitration*, 5th ed. (Oxford University Press, 2009), 6.11 *et seq.*; T. Wälde, ''Equality of Arms' in Investment Arbitration: Procedural Challenges', Transnational Dispute Management, (2011), 1.

[122] IDI (18th Commission), 'Resolution: Equality of Parties before International Investment Tribunals' (The Hague 2019) 80-I AnnIDI (2019) 1 et seq. (referring in its preamble to 'the principle of equality of the parties [as] a fundamental element of the rule of law that ensures a fair system of adjudication […].').

[123] Article 17 (1) first sentence UNCITRAL Arbitration Rules 2021 ('Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case.').

[124] Ibid.

[125] See ILA Committee on the Rule of Law and International Investment Law, Report 2022 (2022) 80 Int'l L Ass'n Rep Conf 569, paras. 47-54.

[126] *Elettronica Sicula SpA (ELSI)* (*United States of America* v. *Italy*) (Judgment) [1989] ICJ Reports 15, para. 128 ('Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. [...] It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.').

[127] *Waste Management* v. *United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 ('A lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice.').

[128] *Frontier Petroleum Services Ltd.* v. *The Czech Republic*, UNCITRAL, Final Award, 12 November 2010, para. 292.

[129] *Joseph Charles Lemire* v. *Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 418 ('In the opinion of the Tribunal, Respondent's above described practice constitutes a violation of the FET standard established in Article II.3 of the BIT, because it facilitates the secret awarding of licences, without transparency, with total disregard of the process of law and without any possibility of judicial review. The practice must be considered arbitrary, since it meets the *Saluka* test of 'manifestly violat[ing] the requirements of consistency, transparency, even-handedness and non-discrimination'. The lack of propriety is

'justified concerns as to the judicial propriety of the outcome' appear sufficient.[130] A violation of the right to be heard has often been crucial for a finding of a fair and equitable treatment breach.[131] Tribunals have equally recognized that, exceptionally, a violation of due process may also result from a judgment or administrative decision that is not merely erroneous, but rather egregiously wrong or 'manifestly unjust or incorrect',[132] sometimes referred to as a 'substantive denial of justice'.[133] These developments have partly been codified in more recent IIAs, specifying that a 'denial of justice in criminal, civil or administrative proceedings' constitutes a violation of fair and equitable treatment.[134]

75. In regard to their own proceedings, investment tribunals have also pointed out that the principle of equality of the parties or equality of arms is central to the conduct of arbitration proceedings.[135] The principle of equality has sometimes been derived from arbitration rules, in particular the UNCITRAL Rules[136], with occasional references to the annulment grounds under the ICSID Convention,[137] but has also been used without reference to a particular set of arbitration rules or treaties whilst being called 'one of the most fundamental principles of international arbitration'.[138]

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such that – as the test was articulated in *Tecmed* and *Loewen* **-** the practice also 'shocks, or at least surprises, a sense of juridical propriety.' [footnotes omitted]).

130 *Mondev International Ltd.* v. *United States of America*, ICSID Case No. ARB(AF)/99/2 (NAFTA), Final Award, 11 October 2002, para. 127.

131 *Middle East Cement Shipping and Handling Co. S.A.* v. *Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, paras. 143 et seq.; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S.* v. *Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 617.

132 *Pantechniki S.A. Contractors & Engineers (Greece)* v. *The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 94 ('Wrongful application of the law may nonetheless provide 'elements of proof of a denial of justice.' But that requires an extreme test: the error must be of a kind which no 'competent judge could reasonably have made.' Such a finding would mean that the state had not provided even a minimally adequate justice system.'); *Mr. Franck Charles Arif* v. *Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 442 ('[…] denial of justice is engaged if and when the judiciary has rendered final and binding decisions […] which misapplied the law in such an egregiously wrong way, that no honest, competent court could have possibly done so.'); *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft* v. *Argentine Republic*, ICSID Case No. ARB/14/32, Award, 5 November 2021, para. 377 ('In the exercise of due deference, and taking into account that arbitrariness is more than a violation of *a* rule of law, but rather of *the* rule of law, the Tribunal's examination is limited to the issue of whether the decisions in question appear so manifestly incorrect that they must be deemed to constitute an abuse of power and thus constitute arbitrary conduct from the perspective of international law.').

133 *Jan Oostergetel and Theodora Laurentius* v. *Slovakia*, UNCITRAL, Final Award, 23 April 2012, para. 291 et seq.

134 Article 8.10(2)(a) Consolidated Comprehensive Economic and Trade Agreement (CETA) Text, revised text of 29 February 2016.

135 See e.g. *Biwater Gauff (Tanzania) Limited* v. *United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 2, 24 May 2006, para. 13; *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures, 31 July 2009, para. 100; *Canfor Corporation and others v. United States of America*, UNCITRAL, Terminal Forest Submission in Opposition of Request for Consolidation, 10 June 2005, para. 52.

136 See e.g. *Pope & Talbot Inc.* v. *Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, para. 193; *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, 3 August 2005, Part II, Chapter I, para. 54; *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, para. 205; *EnCana Corp and Republic of Ecuador*, LCIA Case No. UN3481, Partial Award on Jurisdiction, 27 February 2004, para. 44 (applying the 1976 UNCITRAL Rules); *Merrill & Ring Forestry LP v. Canada*, ICSID Case No. UNCT/07/1, Decision of the Tribunal on Production of Documents, 18 July 2008, para. 21 (applying the 1976 UNCITRAL Rules).

137 Article 52(1)(d) ICSID Convention ('a serious departure from a fundamental rule of procedure'), see e.g. *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Annulment Proceeding, 5 February 2002, paras. 56-57.

138 *Biwater Gauff (Tanzania) Limited* v. *United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 2, 24 May 2006, para. 13. See also *Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V. and Conocophillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013, para. 274 ('throughout the process each is treated on an equal

76. The principle of equality of arms entails the right of each party to respond to submissions of the other party and the right to equal treatment in regard to procedural issues such as timing, pleading, document production and evidentiary considerations.[139]

77. These due process obligations of the right to be heard may sometimes require (procedural) steps that counter the objective of speed and efficiency discussed above. Tribunals regularly have to balance these demands.

3. Procedural Safeguards of Due Process

78. Requirements of due process may stem not only from the applicable arbitration rules and treaties, but also from the laws of the seat of arbitration in non-ICSID arbitration proceedings.

79. The predominant mechanism ensuring respect for due process by investment tribunals is the possibility to challenge arbitral awards resulting from proceedings that did not conform to fundamental fair trial requirements, either through the ICSID annulment procedure or in national courts. Their respective annulment[140] or set-aside grounds allow[141] scrutiny of the compliance of investment tribunals with basic fair trial requirements. ICSID annulment committees have specifically held that the principle of equality of the parties,[142] as well as the right to be heard and to be fairly heard, belong to the core notion of a fundamental rule of procedure, departure from which might constitute an annulment ground.[143] Despite this possibility, in ICSID practice few awards have been annulled because of lack of due process.[144]

B. Relevant Practices

a) 'Investment tribunals have generally considered that they are duty bound to respect due process/fair trial obligations as a result of the procedural rules under which they are operating.'

b) 'Investment tribunals have recognised that the rule of law requirement of avoiding undue delay forms part of the obligation to provide a fair trial/due process.'

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footing, as indeed the principles of due process and natural justice require.'); *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, para. 647 ('the international law principle that parties ought to arbitrate fairly, in good faith and with equality of arms').

[139] See also IDI (18th Commission), 'Resolution: Equality of Parties before International Investment Tribunals' (The Hague 2019) 80-I AnnIDI (2019) 1 et seq., Art 8(1) ('The equality of the parties includes the principle of the equality of arms, namely that: (a) Each party shall have the right to be heard on the submissions of the other (*audi alteram partem*); and, (b) Each party shall enjoy reciprocal treatment in the procedural timetable and in matters of pleading, production of documents and evidence.')

[140] Article 52(1)(d) ICSID Convention ('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: …(d) that there has been a serious departure from a fundamental rule of procedure…').

[141] See, e.g. Article 34(2)(a)(ii) UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, UN Doc A/Res 40/72 (1985) and UN Doc A/Res 61/33 (2006); *see* also Redfern *et al.*, *Redfern and Hunter* (2009), 10.50 *et seq.*

[142] *Maritime International Nominees Establishment (MINE) v Guinea*, ICSID Case No ARB/84/4, Decision on Annulment (1989) 4 ICSID Rep 87, para. 5.06 ('a clear example of such a fundamental rule is to be found in Article 18 of the UNCITRAL Model Law on International Commercial Arbitration which provides: "The parties shall be treated with equality and each party shall be given full opportunity of presenting his case.".').

[143] *Victor Pey Casado and President Allende Foundation* v. *Republic of Chile*, ICSID Case no. ARB/98/2, Decision on Annulment, 18 December 2012, para. 73 (fundamental rules 'include the right to be heard, the fair and equitable treatment of the parties, proper allocation of the burden of proof and absence of bias.').

[144] Anthony Sinclair, 'Article 52' in Stephan Schill, Loretta Malintoppi, August Reinisch, Christoph Schreuer, and Anthony Sinclair (eds), *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 3rd edn (Cambridge University Press 2022), paras. 332-415.

c) 'The principle that each party to an investment dispute be given the right to be heard and treated with equality by the tribunal, as laid down in most applicable arbitration rules, is a core element of the rule of law.'

d) 'Investment proceedings that fall short of these fair trial/due process guarantees may be set aside or annulled according to the applicable procedural rules.'

C. Recommendations

a) 'Adjudicators should respect the rule of law demands of due process/fair trial.'

b) 'Adjudicators should conduct ISDS proceedings in an efficient manner so as to avoid any undue delay.'

c) 'Adjudicators are under the obligation to afford the parties the right to be heard and to be treated with equality.'

d) 'Adjudicators should balance the due process-based right to be heard against speed and efficiency.'

e) 'Respect for these rule of law-inspired due process requirements should be guaranteed by supervisory bodies, ensuring that fundamental rules of procedures are complied with in ISDS.'

VII. Consistency and Predictability of Dispute Settlement Outcomes

80. It is broadly accepted that stability and predictability correspond to the core values of 'legal certainty and legal security' found in most legal systems that adhere to the rule of law.[145] Such legal certainty also extends to expectations of generally predictable legal outcomes in case of dispute settlement, leading, for instance, the ICJ to explain that it will generally follow its own jurisprudence[146] even in the absence of a system of binding precedent.[147]

A. ISDS Practice

81. Expectations of generally predictable legal outcomes also extends to ISDS.[148] Investment

[145] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 214-15. See also IDI (2nd Commission), 'Draft Resolution: Case Law and Precedents in Interstate Litigations and Advisory Proceedings' (Angers 2023) ##-I AnnIDI (2023) ##, (referring in its preamble to the desire 'to contribute to legal certainty by promoting the consistency and predictability of international law […].').

[146] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, para. 53 ('To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so.').

[147] Art 59 Statute of the International Court of Justice ('The decision of the Court has no binding force except between the parties and in respect of that particular case').

[148] M. Jacob and St. W. Schill, 'Fair and Equitable Treatment: Content, Practice, Method' in M. Bungenberg, J. Griebel, St. Hobe and A. Reinisch (eds), *International Investment Law. A Handbook* (C.H. Beck-Hart-Nomos 2015) 700, 729 ('The essence is again traceable to rule of law ruminations that are familiar to most legal systems, often expressed as legal certainty and legal security (*Rechtssicherheit, sécurité juridique*).' [italics in original]). See also *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL)* v. *Republic of India,* PCA Case No. 2016-07, Award, 21 December 2020, para. 1741 ('The principle of legal certainty is widely recognised as a fundamental component of the rule of law which, in turn, has long been recognised by international law. [...] The use of 'rule of law' as a foundational concept in these judgments has in turn been reflected in investment treaty jurisprudence.').

arbitration, like other forms of dispute settlement in public international law, knows no system of binding precedent.[149] Awards and decisions issued in investment arbitration proceedings are only binding on the parties to the dispute.[150]

82. However, tribunals have repeatedly noted that reasoning adopted by tribunals in previous cases should also be adopted in subsequent cases if the reasoning is persuasive and forms part of consistent case law.[151] Tribunals have even pointed out that '[t]he arbitrators would be hesitant to depart from a proposition followed in a series of fully-reasoned decisions reflecting a *jurisprudence constante*.'[152]

83. Following consistent case law has even been regarded as resulting in 'promoting legal certainty and the rule of law'.[153] Generally, 'the consistency and predictability of legal decisions is a goal of the most fundamental importance'[154] in a system based on the rule of law. It is a 'basic judicial principle that 'like cases should be decided alike,''.[155] Thus, for instance, the tribunal in *Bayindir*

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[149] See e.g. *AES Corporation* v. *Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, para. 23(d); *Víctor Pey Casado and President Allende Foundation* v. *Republic of Chile [I]*, ICSID Case No. ARB/98/2, Award, 8 May 2008, para. 119; *Daimler Financial Services AG* v. *Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 52; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Decision of the ad hoc Committee on the Application for Annulment, 29 June 2012, para. 99; *Landesbank Baden-Württemberg and others* v. *Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the Intra-EU Jurisdictional Objection, 25 February 2019, para. 106; August Reinisch, 'Article 53' in Stephan Schill, Loretta Malintoppi, August Reinisch, Christoph Schreuer, and Anthony Sinclair (eds), *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 3rd edn (Cambridge University Press 2022), paras. 21-24.

[150] Cf Article 53(1) ICSID Convention ('The award shall be binding on the parties').

[151] See e.g. *Metalpar S.A. and Buen Aire S.A.* v. *Argentine Republic*, ICSID Case No. ARB/03/5, Decision on Jurisdiction, 27 April 2006, para. 50; *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 293.

[152] *Quasar de Valors SICAV S.A. and others (formerly Renta 4 S.V.S.A and others)* v. *Russia*, SCC Case No. 24/2007, Award on Preliminary Objections, 20 March 2009, para. 16. See also *InfraRed Environmental Infrastructure GP Limited and others* v. *Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019, para. 260 (noting that with respect to the intra-EU objection to jurisdiction there is 'an arbitral *jurisprudence constante* which, short of binding this Tribunal, provides nonetheless a persuasive, reasoned and documented analytical framework that the Tribunal endorses and adopts without the need to spell it out in detail below.'). See Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity, or Excuse' (2007) 23(4) Arbitration International 357; Andrea K. Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante' in C Picker, I Bunn and D Arner (eds), *International Economic Law: The State and Future of the Discipline* (2008) 265; August Reinisch, 'The Role of Precedent in ICSID Arbitration' [2008] Austrian Arbitration Yearbook 495; Andrés Rigo Sureda, , 'Precedent In Investment Treaty Arbitration', in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 830-842.

[153] *Muszynianka Spólka z Ograniczona Odpowiedzialnoscia* v. *Slovak Republic*, PCA Case No. 2017-08, Award, 7 October 2020, para. 166.

[154] *Mathias Kruck and others* v. *Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction and Admissibility, 19 April 2021, para. 115 ('The Tribunal wishes to record that the succinct comments submitted at this stage by the Parties have a particular value in the context of the overall system of international investment arbitration. While there can be no doctrine of binding precedent among the *ad hoc* tribunals adjudicating upon investment disputes, the consistency and predictability of legal decisions is a goal of the most fundamental importance. No tribunal is an island entire of itself. It is one element of a much more extensive, evolving system for the protection of parties' rights; and individual tribunals are, rightly, slow to depart from principles and analyses that are generally accepted and established within the system. This axiomatic point has a particular poignancy in investment arbitration, given the roles placed by the principles of non-discrimination and of fair and equitable treatment within the applicable substantive law. The point has, moreover, a special significance in situations where one and the same factual matrix has given rise to many arbitrated disputes. The Tribunal has, accordingly, given very careful consideration to the decisions of other tribunals, including those to which the Parties have referred in their December 2020 comments.').

[155] *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A.* v. *Argentina*, ICSID Case No. ARB/03/19 and *AWG Group Limited* v. *Argentina*, UNCITRAL Arbitration, Decision on Liability, 30 July

v. *Pakistan* noted that

> [t]he Tribunal is not bound by previous decisions of ICSID tribunals. At the same time, it is of the opinion that it should pay due regard to earlier decisions of such tribunals. The Tribunal is further of the view that, unless there are compelling reasons to the contrary, it ought to follow solutions established in a series of consistent cases, comparable to the case at hand, but subject of course to the specifics of a given treaty and of the circumstances of the actual case. By doing so, it will meet its duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[156]

84. Consistent case law on certain legal and factual questions may *de facto* give rise to precedent-like *jurisprudence constante*. However, the 'precedential' value of decisions depends not only upon the quality and the persuasiveness of the reasoning, but also on the specific wording of the investment treaties and whether the reasoning can be transferred to treaties which are similarly, but not identically, worded.[157] In addition, a different factual context may militate against the comparability of cases based on the same or similar investment treaties.[158] With respect to the 'precedential value' of decisions, the tribunal in *Daimler* v. *Argentina* noted that several considerations had to be taken into account, namely:

> a) how 'like' the prior and present cases are, having regard to all relevant considerations; b) the degree to which a clear *jurisprudence constante* has emerged in respect of a particular legal issue; and c) the Tribunal's independent estimation of the persuasiveness of prior tribunals' reasoning.[159]

85. While a *de facto* case law on many issues may have emerged, there are still significant divergences in the interpretation of certain core issues of investment law. This has led to concerns and criticism about legal certainty and the predictability of case law,[160] which in turn renders it difficult for host states to determine how they have to act in order to comply with investment treaties and for investors to determine the prospects of success in arbitration

2010, para. 189.

[156] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.* v. *Islamic Republic of Pakistan [I]*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 145 [footnotes omitted]; *Austrian Airlines* v. *Slovak Republic*, Award, 20 October 2009, para. 84. See also *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 100.

[157] See e.g. *Daniel W. Kappes and Kappes, Cassiday & Associates* v. *Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent Preliminary Objections, 13 March 2020, para. 125; *Beijing Everyway Traffic and Lighting Co Ltd* v. *Republic of Ghana*, Final Award on Jurisdiction, 30 January 2023, para. 150. See also *SGS Société Générale de Surveillance S.A.* v. *Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, para. 97.

[158] See e.g. *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P.* v. *Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim), 2 August 2004, paras. 43-45. See also IDI (2nd Commission), 'Draft Resolution: Case Law and Precedents in Interstate Litigations and Advisory Proceedings' (Angers 2023) ##-I AnnIDI (2023) ##, Art 4 ('The court or tribunal seized must determine whether the precedent is relevant to the case before it by ensuring that it concerns the same type of situation or legal problem as the one it is called upon to decide […].').

[159] *Daimler Financial Services AG* v. *Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para.52.

[160] See e.g. 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23-27 April 2018)', UN Doc A/CN.9/935 (14 May 2018) paras. 20 et seq.; Anna De Luca, Mark Feldman, Martins Paparinskis, and Catharine Titi, 'Responding to Incorrect Decision-Making in Investor-State Dispute Settlement: Policy Options' Journal of World Investment & Trade, 21 (2020), 374–409; Susan D. Franck, 'The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions' Fordham Law Review, 73(4) (2005), 1521-1626; Jürgen Kurtz, 'Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence and the Identification of Applicable Law', (4 March 2014) Melbourne Legal Studies Research Paper No 670, 23.

proceedings resulting in potentially unnecessary costs for both claimants and respondents.

86. Inconsistency in the interpretation of similar or identical legal rules and the resulting unpredictability of case law have resulted in calls for reforming the current *ad hoc* arbitration system by introducing a multilateral investment court system with an appellate mechanism (two levels of adjudication) or maintaining *ad hoc* arbitration but adding an appellate mechanism to ensure consistency.[161] Such an appellate mechanism could be coupled with a rule of *stare decisis*.[162] The establishment of an appellate mechanism (within the framework of a two-tier multilateral permanent investment court system) is being discussed within the framework of UNCITRAL WG III.[163]

87. Apart from these structural reforms, there have also been more pragmatic approaches, which do not concern a multilateral reform of the investment arbitration system. Since they have been adopted by individual treaty negotiators they are thus outside the scope of what ISDS adjudicators may do of their own volition, though they are intended to influence adjudicatory decisions. Among them are, in particular, the revision of old or the conclusion of new investment treaties with more detailed and well-defined investment protection standards and the adoption of joint interpretative statements of the contracting parties to an investment treaty.[164]

88. Joint interpretative statements may qualify as subsequent practice or subsequent agreements in terms of Article 31 VCLT,[165] to be taken into account in a contextual interpretation of treaty provisions, or even as authentic interpretations binding on the tribunals.[166] Some investment

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[161] See e.g. Mark Feldman, 'Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power' *ICSID Review* 32(3), (2017), 528; Jeffrey Kuci and Sergio Puig, 'Towards an Effective Appellate Mechanism for ISDS Tribunals' World Trade Review (2023) 1; Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court Options Regarding the Institutionalization of Investor-State Dispute Settlement* (Springer 2020); see also UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), 'Possible Reform of Investor-State Dispute Settlement (ISDS) – Appellate and multilateral court mechanisms: Note by Secretariat' UN Doc A/CN.9/WG.III/WP.185 (29 November 2019) paras. 52-54.

[162] See, e.g., UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), Draft Provisions on an Appellate Mechanism. Draft Working Paper (September 2023), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_provisions_on_an_appellate_mechanism_sept.2023.pdf> accessed 7 November 2023; but see 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fortieth session (Vienna, 28 June-16 July 2021)', UN Doc A/CN.9/1050 (17 March 2021) para. 60 ('Views were expressed that decisions rendered through an appellate mechanism should not have precedential value').

[163] See e.g. UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), 'Possible Reform of Investor-State Dispute Settlement (ISDS) – Appellate and multilateral court mechanisms: Note by Secretariat' UN Doc A/CN.9/WG.III/WP.185 (29 November 2019); UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), 'Possible Reform of Investor-State Dispute Settlement (ISDS) – Appellate and multilateral court mechanisms: Note by the Secretariat: Note by Secretariat' UN Doc A/CN.9/WG.III/WP.202 (12 November 2020); UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), 'Possible Reform of Investor-State Dispute Settlement (ISDS) – Appellate mechanism: Note by the Secretariat: Note by Secretariat' UN Doc A/CN.9/WG.III/WP.224 (17 November 2022).

[164] See, e.g., *National Grid plc v The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, para 85 (Argentina and Chile's joint declaration after the *Siemens* award). Individual State submissions also provide unilateral interpretations of treaty provisions, see e.g. 'Interpretation of Article 11 of the Bilateral Investment Treaty between Switzerland and Pakistan in the light of the decision of the Tribunal on Objections to Jurisdiction of ICSID in Case No ARB/01/12 SGS Société Générale de Surveillance SA versus Islamic Republic of Pakistan' (2004) 1(3) TDM, <www.transnational-dispute-management.com/article.asp?key=216> accessed 8 August 2023.

[165] Article 31(2) Vienna Convention on the Law of Treaties (opened for signature on 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. See also ILC Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries 2018.

[166] See e.g. Katharina Diel-Gligor, *Towards Consistency in International Investment Jurisprudence* (Brill Nijhoff 2017) 336-341.

treaties foresee the possibility of binding interpretative statements by the contracting parties[167] or even include an institutional mechanism for the issuance of binding interpretations by the contracting parties.[168] Irrespective of whether such a mechanism is included or not, contracting parties as the masters of their treaties may issue such interpretative statements. As far as the rule of law is concerned, the issuing of such interpretative statements with a view of influencing the decisions of tribunals in pending disputes has been met with criticism by tribunals.[169]

89. Curiously, the most obvious measure to increase the consistency of ISDS outcomes, the harmonisation/unification of applicable investment standards, has not been broadly discussed. This may have to do with the unsuccessful attempts to establish a multilateral agreement on investment in the late 1990s.[170] Given the fact that much of the current divergence of investment jurisprudence may be due to different wording in the applicable investment agreements, a uniform multilateral set of standards may be adopted in the future in order to enhance predictability and consistency of outcomes.[171]

B. Relevant Practices

a) 'Consistency of outcomes in ISDS and the legal certainty and predictability resulting from consistent case law are core aspects of the rule of law.'

b) 'Investment tribunals have emphasized that there is no binding system of precedent in the current *ad hoc* arbitration system and tribunals are not required to follow the interpretations adopted by other tribunals. However, consistent case law on many questions has led to a *jurisprudence constante*.'

c) 'Investment tribunals have noted that, subject to the specific facts of each case and the specifics of the applicable treaties, tribunals should generally follow existing case law to the extent that has given rise to a *jurisprudence constante* in order to foster predictability and legal certainty.'

d) 'Joint interpretative statements of the parties to an international investment agreement may provide helpful guidance to ensure consistent interpretation of investment standards.'

C. Recommendations

a) 'When deciding a particular case, adjudicators should take into account the requirements of the rule of law for consistency and predictability of dispute settlement outcomes.'

b) 'Adjudicators should determine the extent to which a consistent jurisprudence has developed on a particular legal issue and can be regarded as persuasive. Taking into account the specific wording of the investment treaties on which their jurisdiction is based and the

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[167] See e.g. Article 9 Czech Republic-Netherlands BIT (1991); see also e.g. *CME Czech Republic B.V.* v. *The Czech Republic*, UNCITRAL, Final Award, 14 March 2003, paras. 87-93.

[168] See e.g. NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 31 2001, available at <http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp> (accessed 8 August 2023); for case law on the binding nature of FTC Notes, see e.g. *Crompton (Chemtura) Corp.* v. *Government of Canada*, PCA Case No. 2008-01, Award, 2 August 2010, para. 120; *Grand River Enterprises Six Nations, Ltd. and others* v. *United States of America*, UNCITRAL, Award, 12 January 2011, para. 175.

[169] Cf. *Pope & Talbot v Canada*, NAFTA Award in Respect of Damages, 31 May 2002, para. 13 (referring to the 'rule of international law that no-one shall be judge in its own cause.'); *Infinito Gold Ltd.* v. *Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 03 June 2021, para. 339.

[170] Peter T. Muchlinski, 'The Rise and Fall of the Multilateral Agreement on Investment: Where Now' (2000) 34 International Lawyer 1033.

[171] See August Reinisch, 'Reform of Substantive Standards in a Multilateral Instrument and the Rule of Law', in Marc Bungenberg und August Reinisch (eds.), *New Frontiers for EU Investment Policy: Internal and External Dimensions* (Springer 2023) 11-29.

factual context of the particular case, adjudicators should avoid departing from consistent jurisprudence absent cogent reasons for so doing.'

VIII. Transparency

90. Transparency in investment arbitration concerns public access to arbitral proceedings, information about proceedings and to documents related to them.[172] In addition, transparency also concerns the possibility of third-party participation in the form of non-disputing party submissions (*amicus curiae* and other submissions), which can provide different perspectives and additional information about the public interest being relevant to the case.[173]

91. In contrast to commercial disputes, typically involving two private parties, investment arbitration concerns disputes between a private party and a host state and often touches upon questions of public interest, such as public policy, human rights, or the environment, which – together with the fact that in case of liability it will ultimately be taxpayers' money that compensates the investor – justifies the need for transparency. However, there is also a need for confidentiality which may conflict with the need for transparency. Certain sensitive business information or governmental information may need to be kept confidential. Moreover, both investors and states might prefer the confidentiality of proceedings for a variety of reasons.[174] However, given the public interests involved, '[c]onsiderations of confidentiality and privacy have not played the same role in the field of investment arbitration, as they have in international commercial arbitration.' [175]

92. Transparency in terms of publication of awards and the accessibility of information about the existence of disputes contributes to the development of a consistent and predictable body of law,[176] thereby constituting an important prerequisite to ensuring the crucial rule of law values of predictability and certainty in ISDS. Moreover, it guarantees equality between parties and their legal representatives as all have access to the same information about how tribunals have decided certain legal issues. Transparency also ensures public accountability for actions taken during the arbitration process, such as settlements. Transparency in terms of third-party participation facilitates the taking into account of the public interest by broadening the types of

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[172] Loretta Malintoppi and Natalie Limbasan, 'Living in Glass Houses? The Debate on Transparency in International Investment Arbitration', BCDR International Arbitration Review 2(1), (2015), 31-57; Esmé Shirlow, 'Three Manifestations of Transparency in International Investment Law: A Story of Sources, Stakeholders and Structures', Goettingen Journal of International Law, 8(1), (2017), 73-99; Esmé Shirlow and David D. Caron, 'The Multiple forms of Transparency in International Investment Arbitration: Their implications, and their limits', in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (Oxford University Press 2020) 469-490; Dimitrij Euler at al. (eds.), *Transparency in International Investment Arbitration : a Guide to the UNICTRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (Cambridge University Press, 2015).

[173] IDI (18th Commission), 'Resolution: Equality of Parties before International Investment Tribunals' (The Hague 2019) 80-I AnnIDI (2019) 1 et seq., Art 7(1) (stating that '[t]hird person submissions may valuably assist a tribunal to determine the dispute, where they bring a perspective, knowledge or insight that is different from that of the disputing parties.'). See also Maciej Zachariasiewicz, 'Amicus Curiae in International Investment Arbitration: Can It Enhance the Transparency of Investment Dispute Resolution?' Journal of International Arbitration 29(2), (2012), 205-224; James Harrison, 'Human Rights Arguments in *Amicus Curiae* Submissions: Promoting Social Justice?' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009) 396.

[174] See e.g. August Reinisch and Christina Knahr, 'Transparency versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise' Law and Practice of International Courts and Tribunals 6 (2007) 97, 109-110; Cindy Galway Buys, 'The Tensions between Confidentiality and Transparency in International Arbitration', *American Review of International Arbitration* 14(121) (2003), 121, 123.

[175] *Biwater Gauff (Tanzania) Limited* v. *United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, para. 114.

[176] Andrea K. Bjorklund, 'The emerging civilization of investment arbitration' Penn State Law Review, 113(4) (2009), 1269, 1273 ('The public availability of arbitral awards facilitates the subsequent referral to prior awards in the development of a *jurisprudence constante* in international investment law' [footnote omitted]).

submissions heard by the adjudicatory body.

A. *ISDS Practice*

93. Over recent years there has been a trend towards greater transparency in investment arbitration both in terms of publication of documents and participation by non-disputing parties. This has been reflected in investment arbitration itself as well as in changes to applicable rules.

1. Publication of Awards and Decisions – Public Hearings

94. Tribunals have noted that in contrast to commercial arbitration, where confidentiality plays a greater role, 'there is now a marked tendency towards transparency in treaty arbitration.'[177] However, tribunals have to apply the rules agreed upon by the parties with respect to the proceedings;[178] this is normally a set of procedural rules, which in the case of arbitration based on an investment treaty are usually explicitly referred to in the dispute settlement provisions of that treaty.

95. Whether awards or other documents can be published must be agreed upon by the parties or regulated in the procedural rules, but one needs to differentiate between whether the institution administering the arbitration can publish awards or whether the parties themselves can publish the award. As has been rightly stated '[…] ICSID awards are not confidential as such. Even if the ICSID Secretariat may publish an ICSID award only with the consent of the parties, it may publish excerpts of the legal reasoning of the tribunal without the parties' express consent; see Rule 48(4) of the ICSID Arbitration Rules. Moreover, unless the parties have specifically agreed otherwise, either party may make the award publicly available, and indeed, this appears to be the way in which ICSID awards often become public in practice.'[179]

96. In order to increase the level of transparency, certain reforms of treaties and procedural rules have been undertaken. For instance, several investment treaties provide for the mandatory publication of awards and other documents.[180] In addition, arbitration rules have been adapted or specific additional rules for transparency created, such the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ('UNCITRAL Rules on Transparency').

97. The UNCITRAL Rules on Transparency[181] apply to all arbitrations initiated under the UNCITRAL Arbitration Rules on the basis of investment treaties concluded on or after 1 April 2014, unless the parties to the treaty agree otherwise. Their application to disputes concerning investment treaties concluded before that date is subject to the consent of the treaty parties or the disputing parties. The UNCITRAL Rules on Transparency provide that information about

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177 *Biwater Gauff (Tanzania) Limited* v. *United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, para. 114.

178 See e.g. *Biwater Gauff (Tanzania) Limited* v. *United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, para. 115; BSG Resources Limited (in administration), *BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL* v. *Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 2, 17 September 2015, para. 9.

179 *Border Timbers Limited, Border Timbers International (Private) Limited and Hangani Development Co. (Private) Limited* v. *Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Decision on Application for Provisional Measures, 17 March 2016, para. 34. See also *Ipek Investment Limited* v. *Republic of Turkey*, ICSID Case No. ARB/18/18, Procedural Order No. 11 on Use of Arbitration Materials, 21 February 2020, para. 14(a) ('Neither the Convention nor the Rules and Regulations made thereunder impose any obligation on the parties to a dispute with regard to confidentiality. The provisions that deal with confidentiality are solely directed to the Arbitral Tribunal and to the Centre.').

180 See e.g. Art. 8.35-8.36, Canada-Korea FTA (2015), Article 3.46 EU-Singapore Investment Protection Agreement (2019).

181 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date, 1 April 2014).

the commencement of arbitral proceedings must be published[182] and subsequently other documents are listed for mandatory publication, including written submissions and orders and decisions, as well as awards, of the arbitral tribunal.[183] Hearings for the presentation of evidence or for oral argument are also public, as are hearing transcripts, if they are prepared.[184] However, exceptions to the publication of documents and public access to hearings are explicitly provided for confidential or protected information as well as for ensuring the integrity of arbitral proceedings.[185]

98. In order to extend the scope of application of the UNCITRAL Rules on Transparency, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ('Mauritius Convention') was adopted.[186] By joining the Mauritius Convention contracting parties consent to the application of the UNCITRAL Rules on Transparency to any investor-state arbitration pursuant to an investment treaty concluded before 1 April 2014, in which both the claimant's home state and the respondent state are parties to the Mauritius Convention. For the application of the UNCITRAL Rules on Transparency on that basis the arbitration proceedings do not have to be initiated under the UNCITRAL Arbitration Rules.[187] Thus far the Mauritius Convention has been ratified by only nine states.[188]

99. Under the ICSID Convention, ICSID is not permitted to publish an award without the consent of the parties.[189] Thus, for ICSID arbitrations the ICSID Arbitration Rules of 2006 only provided for publication of the award with the consent of the parties, but a publication of excerpts of the legal reasoning of the award by ICSID was foreseen.[190] Under the newly updated ICSID Arbitration Rules of 2022 consent to publication is assumed, but if either party to a dispute objects, the award cannot be published by ICSID.[191] In such a case only excerpts will be published. Similarly, hearings are open to the public unless a party objects. In any event, confidential or protected information cannot be disclosed either through publication of documents or in public hearings.[192]

100. In addition to more transparency of the written proceedings also oral proceedings in investment arbitration have increasingly become more transparent, in particularly in the form of hearings that are open to the public and/or are live-streamed or even recorded.

2. Participation of *amici curiae*

101. *Amicus curiae* participation in investment arbitration is a further aspect of transparency. *Amici curiae* are third parties that intervene in the proceedings as non-disputing parties and primarily make written submissions to tribunals. *Amici curiae* are often non-governmental organizations that make submissions on issues of public concern or public interest, but they may also be business associations, indigenous communities, third states or international organizations.[193] In intra-EU cases, the EU Commission has regularly requested and been

[182] Article 2, ibid.
[183] Article 3, ibid.
[184] Article 6, ibid.
[185] Article 7, ibid.
[186] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (adopted 10 December 2014, entered into force 18 October 2017) 3208 UNTS 1.
[187] Article 2(1) ibid.
[188] See <https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status> (accessed 9 August 2023).
[189] Article 48(5) ICSID Convention.
[190] Rule 48(4) ICSID Arbitration Rules 2006.
[191] Rule 62 ICSID Arbitration Rules 2022.
[192] Rule 65 ICSID Arbitration Rules 2022.
[193] See e.g. Gary Born and Stephanie Forrest, 'Amicus Curiae Participation in Investment Arbitration' ICSID Review 34(3) (2019) 626-665.

granted the opportunity to submit *amicus curiae* briefs.[194]

102. *Amicus curiae* submissions are generally viewed as helping adjudicators to reach better informed decisions which requires that the prospective *amici* demonstrate their expertise.[195]

103. Originally, treaties and arbitration rules did not explicitly address the participation of *amici curiae*. In proceedings under the 1976 UNCITRAL Arbitration Rules, some tribunals have referred to their 'more general procedural powers'[196] under Article 15(1) of the Rules[197] to permit the participation of *amici curiae*.[198] Similarly, tribunals have relied on Article 44 of the ICSID Convention[199] to permit such participation.[200] In 2003, the NAFTA Free Trade Commission (FTC) adopted a statement permitting tribunals to accept written submissions if certain conditions were met.[201]

104. The revised UNCITRAL Rules 2013 explicitly include a rule on the participation of *amici curiae*.[202] Under the UNCITRAL Rules, aspiring non-disputing parties have to disclose any connections they have with the parties to the dispute, their interest in the dispute and which specific issues they intend to address.[203] The UNCITRAL Rules grant the tribunal the discretionary power to admit non-disputing party submissions.[204] If a tribunal does so it must ensure that there is no disruption of the proceedings or prejudice to any of the parties because of the submissions of a non-disputing party.[205]

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[194] Alexander G. Leventhal and Akshay Shreedhar, 'The European Commission: Ami Fidèle or Faux Ami? Exploring the Commission's Role as *Amicus Curiae* in ICSID Proceedings', European Investment Law and Arbitration Review Online, 5(1) (2020), 70-91; Olga Gerlich, 'More Than a Friend? The European Commission's Amicus Curiae Participation in Investor-State Arbitration', in Giovanna Adinolfi et al. (eds), *International Economic Law: Contemporary Issues* (Springer 2017); Fernando Dias Simões, 'A Guardian and a Friend? The European Commission's Participation in Investment Arbitration', Michigan State International Law Review 25(2) (2017), 233-303.

[195] *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales v The Argentine Republic*, ICSID Case No ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, 17 March 2006, para. 23 ('The purpose of *amicus* submissions is to help the Tribunal arrive at a correct decision by providing it with arguments, and expertise and perspectives that the party may not have provided. The Tribunal will therefore only accept *amicus* submissions from persons who establish to the Tribunal's satisfaction that they have the expertise, experience, and independence to be of assistance in this case.').

[196] *Methanex Corporation v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae*', 15 January 2001, para. 25.

[197] Article 15(1) UNCITRAL Arbitration Rules 1976 ('Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.').

[198] See e.g. *United Parcel Service of America Inc.* v. *Government of Canad*a, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001, para. 60.

[199] Article 44 ICSID Convention ('Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.').

[200] See e.g. *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A* v. *Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005, para. 16.

[201] NAFTA Commission Meeting Joint Statement, 'Statement of the FTC on Non-Disputing Party Participation' (7 October 2003) available at <http://www.sice.oas.org/tpd/nafta/commission/nondispute_e.pdf> accessed 8 August 2023.

[202] Article 4 UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013). A specific rule for submission by non-disputing treaty parties is included in Article 5.

[203] Article 4(2) UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013).

[204] Article 4(1) UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013) ('[…] the tribunal *may* allow […]').

[205] Article 4(5) UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013)

105. The amended ICSID Arbitration Rules 2006[206] and the ICSID Arbitration Rules 2022,[207] as well as the ICSID Additional Facility Arbitration Rules of 2006[208] and 2022,[209] permit the participation of *amici curiae* subject to certain conditions, including that non-disputing parties are 'bringing a perspective, particular knowledge or insight that is different from that of the disputing parties'[210] and that they have 'a significant interest in the proceeding.'[211] Again, deciding whether to accept the submissions is subject to the tribunal's discretion.[212]

106. In order to ensure equality of arms,[213] non-disputing parties should be 'independent of the Parties' and 'bring a perspective, particular knowledge or insight that is different from that of the Parties.'[214] The purpose of non-disputing party submissions is to assist the tribunal, not the parties.[215] Tribunals must ensure that the participation of *amici curiae* does not 'cause disruption of the proceeding, undue burden or unfair prejudice to the Parties'.[216] Written submissions by *amici curiae* may be subject to word limits.[217] *Amici curiae* are not parties and therefore do not enjoy the same procedural rights and privileges as parties, such as access to submissions or the right to attend hearings.[218]

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[206] Rule 37 ICSID Arbitration Rules 2006.

[207] Rule 67 ICSID Arbitration Rules 2022. With a special rule on non-disputing treaty parties contained in Rule 68.

[208] Article 41(3) ICSID Additional Facility Arbitration Rules 2006.

[209] Rule 77 ICSID Additional Facility Arbitration Rules 2022. With a special rule on non-disputing treaty parties contained in Rule 78.

[210] Rule 37(2)(b) ICSID Arbitration Rules 2006; Rule 67(2)(b) ICSID Arbitration Rules 2022.

[211] Rule 37(2)(c) ICSID Arbitration Rules 2006; Rule 67(2)(c) ICSID Arbitration Rules 2022.

[212] Rule 37(2) ICSID Arbitration Rules 2006; Rule 67(7) ICSID Arbitration Rules 2022. The procedure for permitting or rejecting non-disputing party submissions is more detailed in the updated ICSID Arbitration Rules 2022.

[213] See e.g. *Piero Foresti and others* v. *Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Letter Regarding Non-Disputing Parties, 5 October 2009, paras. 2.2. (noting that the tribunal must ensure 'the fairness and efficiency of the arbitral process'.) see also IDI (18th Commission), 'Resolution: Equality of Parties before International Investment Tribunals' (The Hague 2019) 80-I AnnIDI (2019) 1 et seq., Art 7(2) ('In order to protect the equality of the parties, in accordance with the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014: (a) The third person shall disclose any connection, direct or indirect, which it has with either of the disputing parties, their counsel or members of the tribunal or the subject-matter of the dispute; (b) The tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any third person submission; and, (c) The tribunal shall ensure that any such submission does not unfairly prejudice either disputing party.').

[214] See e.g. *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2, 26 June 2012, para. 49; see also e.g. *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 6 Decision on Non-Disputing Parties Application, 18 February 2019, para. 31 ('An *amicus* submission should assist the Tribunal by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties. The Tribunal will therefore only accept amicus submissions from persons who establish to the Tribunal's satisfaction that they have the expertise, experience and independence to be of assistance in this case.'). See also Rule 37(2)(a) ICSID Arbitration Rules 2006.

[215] See e.g. *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay)* v. *Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Procedural Order No. 3, 17 February 2015, para. 21; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A* v. *Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005, para. 13.

[216] *Infinito Gold Ltd.* v. *Republic of Costa Rica*, ICSID Case No. ARB/14/5, Procedural Order No. 2, 1 June 2016, para. 38. See also *LSF-KEB Holdings SCA and others* v. *Republic of Korea*, ICSID Case No. ARB/12/37, Decision on Minbyun Non-Disputing Party Application, 21 December 2015, paras. 24-25.

[217] See e.g. *Infinito Gold Ltd.* v. *Republic of Costa Rica*, ICSID Case No. ARB/14/5, Procedural Order No. 2, 1 June 2016, para. 38.

[218] *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay)* v. *Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Procedural Order No. 3, 17 February 2015, para. 24. Arbitration Rules also do not provide a right to attend hearings, see e.g. *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2, 26 June 2012, para. 63 ('In light of the Arbitral Tribunals' conclusions above with respect to the Petitioners' request to make a written submission, it is unnecessary for the Arbitral Tribunals to consider their subsidiary requests for access to

B. Relevant Practices

a) 'Investment tribunals have noted the importance of transparency in investment arbitration in relation to the publication of awards and decisions, accessibility of information about proceedings, as well as the participation of *amici curiae*.'

b) 'Investment tribunals and treaty-makers have increasingly provided for more transparency in ISDS.'

c) 'Investment tribunals have increasingly permitted submissions from *amici curiae*.'

C. Recommendations

a) 'Adjudicators should take into account the interplay between transparency and the rule of law-demands of consistency, predictability, efficiency and equality of parties.'

b) 'Adjudicators should take into account the nature of the dispute and the extent of the public interest implicated in considering whether or not to encourage the parties to agree to transparency measures, such as the publication of awards and decisions, as well as making information about proceedings accessible.'

c) 'Adjudicators should take into account the nature of the dispute and the extent of the public interest as well as the interests of non-disputing parties in considering whether or not to admit *amici curiae*.'

IX. Conclusion

107. This report has focused on rule of law aspects of ISDS. The Committee has tried to find balanced formulations resulting from often very controversial discussions. The 'Relevant practices' offer short descriptive summaries of how investment tribunals have identified rule of law aspects in conducting investment arbitration proceedings and how they have applied them. On a normative level, the Committee has endeavoured to formulate concise prescriptive sections entitled 'Recommendations,' which are addressed to adjudicators for the purpose of upholding rule of law criteria in deciding investment disputes.

108. The Committee recommends to the ILA to adopt the Relevant Practices and Recommendations, contained in its 2022 Interim Report as well as in the present Final Report, as a resolution of the Committee on Rule of Law and International Investment Law at the ILA Conference in 2024. The combined text of the Relevant Practices and Recommendations, together with preambular paragraphs, is contained in an annex to this report.

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documents and to attend the hearings in these proceedings. For further certainty, however, the Arbitral Tribunals note that under Rule 32(2), where a Party objects to the request of an NDP to attend the hearings in a proceeding, a tribunal has no discretion to grant such a request over that party's objection. Accordingly, the Petitioners' request to attend the hearings in these proceedings must be denied in any event because the Claimants' objection constitutes an absolute bar to granting the request.').