International Arbitration
Syllabus
University of São Paulo School of Law ("USP")
Profs. Garro and Duggal (Columbia Law School) with Profs. Yarshell, Carmona, and Forgioni

Week 2: August 14 to August 17 (Prof. Garro)
The Arbitral Award and its Enforcement

Monday, August 14, 2023: The Award I

- The rendering of the arbitral award: place, date, timing and extensions
- Formal requirements: summary of the proceedings, checklist, reasoning, and the dispositive part
- Scrutiny of the award
- Damages, interest, and indexation
- Dissenting opinion
- Types of awards

Core Readings: **PDF – pages 2 to 26**

Tuesday, August 15, 2023: The Award II

- Correction, clarification, and interpretation of the award
- Res judicata and arbitration
- Application to Set Aside: jurisdiction and procedural mechanism
- Grounds for setting aside: the approach of the UNCITRAL Model Law ("UML") and the Federal Arbitration Act ("FAA") and the case-law.

Core Readings: **PDF – pages 26 to 51**

Wednesday, August 16, 2023: Recognition and Enforcement of Awards

- Recognition of foreign arbitral awards and enforcement of awards: New York Convention awards and other awards. Res judicata and arbitration
- Enforcement of "foreign" and "non-national" arbitral awards: Bergsen v. Joseph Mueller, 710 F.2d 928 (2d Cir. 1983)
- Grounds for denying Recognition and Enforcement of an Arbitration Award
- Disputes subject to international arbitration: Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985)
- Award Annulled in the Country Where the Award was Made: Corporacion Mexicana De Mantenimiento Integral v. Pemex-Exploracion, No. 13-4022 (2d Cir. 2016)

Core Readings: **PDF – pages 51 to 71**

Thursday, August 17, 2023: Investment Arbitration

- Arbitration of investment disputes: The investment treaty arbitration phenomenon
- Principles common to the protection of foreign investments
- Substantive rights of foreign investors: standards of "treatment" (national, most-favored, fair and equitable, etc.); expropriation and compensation standards
- Relevance of general public international law
- Custom in treaty interpretation and its limitations
- The emergence of a common law of foreign investment protections
- How to achieve a "balance" between the rights of investors and host States

Core Readings: **PDF – pages 71 to 175**

Columbia
Law School

INTERNATIONAL ARBITRATION: COMPARATIVE PERSPECTIVES

University of Sao Paulo Prof. Alejandro M. Garro [1]

August 14-17, 2023 9 am to 11 am

Monday, August 14, 2023

Sample Award. Macromex v. Globex: arbitral award and "force majeure"

The rendering of the arbitral award: place, date, timing and extensions

Formal requirements: summary of the proceedings, check-list, reasoning, and the dispositive part

Scrutiny of the award

Damages, interest, and indexation

Dissenting opinion

[1] Prof. Alejandro M. Garro: garro@law.columbia.edu

Macromex vs. Globex: Arbitral award and "force majeure"

AN ARBITRAL AWARD SAMPLE

United Nations Convention on Contracts for the International Sale of Goods

Section IV. Exemptions Article 79

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Article 80 A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

Macromex Srl. v. Globex International Inc.

American Arbitration Association
International Centre for Dispute Resolution
Case No. 50181T 0036406, Award of October 23, 2007
(Paragraph numbers added.)

Interim Award

[1] I, the Undersigned Arbitrator, having been designated by the International Centre for Dispute Resolution ("ICDR") pursuant to an arbitration clause contained in each of the purchase orders dated April 14, 2006 (the "Contracts") between the above-noted parties; having been duly sworn; and having duly heard the allegations, proofs and arguments of the parties; do hereby award on an interim basis as follows with respect to the issues arising in this proceeding:

I. Facts

[2] Globex International ("Seller") is an American company engaged in the export of food products to multiple countries globally, including in Eastern Europe. Seller has contracts containing exclusivity agreements with companies in certain locales. In the ordinary course of business Seller developed a non-exclusive relationship with Macromex Srl. ("Buyer"), a Romanian company, and to ship, among other things, chicken leg quarters to Buyer.

[3] The Contracts in question involved order confirmation/sales agreements dated April 14, 2006 for chicken leg quarters to be shipped to Buyer, which had an address

in Bucharest, Romania. The shipment dates were expressly established in each order as follows:

No. 38268-38297: 4/24/06 + 1–2 weeks

No. 38298-30297: 5/1/06 + 1–2 weeks

No. 38328-38353: 5/8/06 + 1–2 weeks

No. 38354,38379: 5/15/06 + 1–2 weeks

[4] As such, all product was to be shipped no later than May 29, 2006. No particular supplier of the chicken products was specified in the Contracts. The Contracts are governed by the U.N. Convention on International Sale of Goods ("CISG").

[5] Evidence at hearing established that in the normal course of dealing within the industry, as well as between the two parties to this proceeding, some flexibility in delivery was allowed at times, albeit with industry players utilizing somewhat different (rather than uniform) purchase order language on shipment terms. After the conclusion of the Contracts between the parties, the price of chicken increased very substantially, and Seller's supplier failed to ship to it in a timely manner. Seller impacted this supply situation—unknowingly perhaps, at least initially—by allocating such product to two breakbulk shipments for itself, rather than to container sales for customers like Buyer. While Buyer did become more insistent regarding prompt delivery as the month of May progressed, Buyer did not formally claim breach; nor did Buyer set another delivery date prior to the issuance of a decree by the Romanian government, which established a chicken product importation ban with virtually no notice.

[6] To explain, an avian flu outbreak prompted the Romanian government to bar all chicken imports not certified as of June 7, 2006. The Romanian Bulletin addressing the restriction stated that: "Transports loaded within 5 days of June 2, 2006 will be allowed to be imported into Romania." An extension of one day was subsequently granted. Had Seller loaded the chicken within the two week window expressly provided for in the Contracts, or even within a week thereafter, the chicken would have been allowed into Romania. However, Seller was unable to certify all the remaining chicken in the order in time, so the final delivery was deficient. Buyer then proposed that Seller ship the balance of the chicken order to it at a location outside of Romania, suggesting certain ports. Another supplier to Buyer provided such alternative performance following implementation of the ban with respect to shipments on which it too was late. Seller ultimately refused the proposal, maintaining that the unfilled portions of the Contracts were voided by the Romanian government's action, which constituted a force majeure event. Seller thereafter sold the undelivered chicken to another buyer at a substantial profit. Buyer now seeks a damages remedy with respect to the undelivered product under the Contracts.

II. The Merits and Applicable Law

[7] The facts of this case are less complicated than the applicable law. Seller's defense to the claim is grounded in a legal exemption provided by Article 79 of the CISG.

Its ability to invoke the defense is dependent on whether the initial delay in delivery constituted a fundamental breach. This issue, in turn, potentially impacts whether Seller's tardiness under the Contracts prevents a finding that the governmental ban impediment caused the fundamental breach. The second basic legal issue is whether Buyer's proposed alternative of a different destination was a commercially reasonable alternative such that Seller was obligated to comply. This issue, in turn, is impacted by whether resort to private law, and specifically the UCC (to define what is "commercially reasonable" in the circumstances), is appropriate under Article 7(2) of the CISG. As explained below in detail, I hold in Buyer's favor and award damages, as the weightier facts and more persuasive precedent/scholarly commentary all support that result.

A. Breach of Contract under the CISG

[8] The CISG states that the "seller must deliver the goods . . . if a period of time is fixed by or determinable from the contract, at any time within that period." CISG Article 33. The goods delivered must be "of the quantity, quality and description required by the contract and . . . contained or packaged in the manner required by the contract." CISG Article 35. In the event that "seller delivers only a part of the goods . . . [buyer's rights] apply in respect [to] the part which is missing. . . ." CISG Art. 51(1).

[9] It is also worth noting that the language of the CISG concerning damages is very broad: it states that: "[i]f the seller fails to perform *any* of his obligations under the contract or this Convention, the buyer may" either "exercise the rights provided in arts. 46–52;" or "claim damages as provided in arts. 74–77." CISG Art. 45(1) (emphasis added). However, there is nothing in the Convention provisions to suggest that a failure to perform a minor contractual obligation would trigger the full amount of damages sought herein. While it is unclear on the existing record reflected in the evidentiary record what damages would be available for an immaterial breach if sought, it is clear that for the Buyer to be entitled to the full damages sought in this proceeding, the Seller would have to have been in fundamental breach of the Contracts.

[10] Under a strict reading of the CISG provisions above and the language on the face of the Contracts, Seller breached the Contracts upon the expiration of the additional two weeks expressly granted in the Contracts beyond the fixed delivery date. The lapse in time between the contractual shipment periods and the Romanian government's blockage of imports was a matter of weeks or days, depending upon the particular Contract. However, this delay in performance did not amount to a fundamental breach for several reasons. As explained below, first, the parties' prior course of dealing and industry practice allowed for some flexibility in the delivery date—a flexibility that was shown in Buyer's responses here, at least at the onset of the delivery delay. Second, the Buyer and Seller appear to have revised the contract as to shipment dates as a matter of law under the CISG, at least for a limited period, through their continued dealing, based on the email chains reflected in the evidentiary record. Third, even if the breach could have been considered fundamental,

Buyer failed to notify Seller of Buyer's avoidance, which is legally significant as explained below.

[11] While there is no "bright-line" rule for what constitutes a reasonable delay, if the delay was within the parties' and/or industry's definition of "reasonable" it would not be sufficient to find a fundamental breach under Article 49. *See Valero Marketing & Supply Co. v. Greeni Oy*, No. Civ. 01-5254 at *7-8, 2006 WL 891196 (D.N.J. Apr. 4 , 2006) (finding two day delay did not amount to fundamental breach under Article 49 because it was reasonable within industry). Provided that the delay here was within the scope of the course of business of the Seller and Buyer and/or their industry, then Seller's actions could not be found to constitute a fundamental breach. However, the evidence does not permit a specific finding in this regard, as only general latitude was referenced in postponement practice testimony, rather than specific temporal parameters. The absence of specificity cuts against the Seller since it is seeking to invoke it as an excuse, and therefore had the burden of proof on industry practice. At the same time though, the parties behaved until June 2, 2006—the date of the Romanian government ban—in a manner that did not rise to the level of Buyer either declaring or acting upon a fundamental breach.

[12] Second, "[a] contract may be modified or terminated by the mere agreement of the parties." CISG Article 29(1). Modifications or terminations are only required to be in writing when the contract contains a provision requiring such. CISG Article 29(2). The failure to object to a unilateral attempt to modify a contract is not an agreement to modify a contract. *See Chateau des Charmes v. Sabate USA, Inc.*, 328 F.3d 528, 531 (9th Cir. 2003). However, "[f]ollowing arts. 29(1) and 11 CISG, any agreement, regardless of the form in which it came about, can in principle be changed or ended by the mere agreement of the parties, which may be proved by any means, including the behavior of the parties themselves." Belgium, 15 May 2002 Appellate Court Ghent (*NV A.R. v. NV I.*) (*Design of radio phone case*) <http://cisgw3.law.pace.edu/cases/020515b1.html> (finding a "positive meaning attached in trade to silence when receiving all kinds of documents, correspondence and so on."). Here, Buyer acquiesced for a time to the shipment delay, albeit while pressing for action to be taken and status information provided by Seller.

[13] Third, "according to Article 26 CISG, a contract is not avoided automatically when a fundamental breach of contract occurs; the Buyer must explicitly declare the avoidance." Evelien Visser, *Gaps in the CISG: In General and with Specific Emphasis on the Interpretation of the Remedial Provisions of the Convention in the Light of the General Principles of the CISG*, § 2.3 (1998) <http://www.cisg.law.pace.edu/cisg/biblio/visser.html> [hereinafter *Gaps in the CISG*]. There is nothing in the record to indicate that Buyer provided such notice, written or otherwise, to Seller of any intent to avoid the contract in the circumstances, which occurred during a steep increase in poultry prices in the global marketplace between April and June, 2006.

[14] Finally, even if Seller were found liable for damages, Seller potentially could avoid this liability if the Romanian government's decision to block chicken imports

constituted a force majeure event, such that Seller qualified for an "exemption" under CISG Article 79. Force majeure, of course, is an event or effect that can be neither anticipated nor controlled. The CISG codified an "exemption" in Article 79, which states in relevant part that:

> "A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences."

[15] The term "exemption" was purposefully used in lieu of the more common term "force majeure" in an effort to avoid unintentional reference to private law, Catherine Kessedjian, *Competing Approaches to Force Majeure and Hardship*, in 25 International Review of Law and Economics 64I, § 1.I.1. (Sept. 2005) available at< http:www.cisg.law.pace.edu/cisg/biblio/ kessedjian.html>. Although the Contracts contained no "force majeure" clause, the CISG helps to fill the "gap" in the Contracts in this regard; there is no legal significance here to the differing practice of Seller evident in at least one of its agreements with another entity in the evidentiary record regarding inclusion of a force majeure clause.

[16] Irrespective of whether Seller's delay prior to the Romanian government's ban on chicken imports constituted a fundamental breach, Seller's ultimate failure to deliver all of the contracted for chicken would be a fundamental breach, unless Seller can claim the "exemption" under Article 79.

B. Qualification for an "Exemption" under the CISG

[17] If successfully proven, an Article 79 "exemption" bars the party from "liability for failure to perform any of his obligations." CISG Article 79. "The effect . . . is to exempt the non-performing party only from liability for damages. All of the other remedies are available to the other party." Secretariat Commentary, Guide to CISG Article 79, §§7, 8. Article 79 only exempts from certain liabilities, and does not "address other types of relief, such as a buyer's right to reduction on price (Article 50), the right of compel performance [sic] (Articles 46, 62), the right to avoid the contract (Articles 49, 64), the right to collect interest (Article 78), or the right to collect penalties or liquidated damages if local law permits. Indeed, it specifically reserves a party's right to these remedies." Carla Spivack, *Of Shrinking Sweatsuits and Poison Vine Wax: A Comparison of Basis for Excuse under U.C.C. §2-615 and CISG Article 79*, in 27 Pennsylvania Journal of International Economic Law 757, 799 (Fall 2006) available at <http://cisgw3.law.pace.edu/cisg/biblio/ spivack.html> [hereinafter *Of Shrinking Sweatsuits*].

[18] Article 79 contains four factors a party must meet to qualify for the exemption. First, there must be "an impediment beyond the defaulting party's control." CISG Article 79; see also Chengwei Liu, *Force Majeure: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law*, §4 (2d ed. Apr. 2005) available at <http://www.cisg.law.pace.edu/cisg/biblio/liu6.html> [hereinafter *Force Majeure*].

Second, the impediment "could not have been reasonably taken into account by the defaulting party at the conclusion of the contract." *Id.* Third, the impediment or the consequences of the impediment "could not have been reasonably avoided or overcome." *Id.* Fourth, the "defaulting party proves that the challenged non-performance was due to such an impediment." *Id.* The burden of proof is on the party failing to perform. Germany, 9 January 2002 Supreme Court (*Powdered milk case*) <http://cisgw3.law.pace.edu/cases/020109g1.html>.

[19] The Romanian government's decision to stop all chicken imports on virtually no notice to the industry was certainly beyond Seller's control, and it would not have been reasonably contemplated as a risk assigned to the Seller at the conclusion of the contract, as no prior ban experienced by either party was taken as precipitously. The third and fourth factors are closer questions, and are addressed in greater detail below (in reverse order) because of their ultimate importance to the determination of the merits.

i. Meeting the Fourth Factor of Causality

[20] This requirement essentially requires a showing of causality between the impediment and the non-performance. "The non-performance of the contract must be 'due to' the impediment." Chengwei Liu, *Force Majeure* §4. Causality exists here between Seller's inability to deliver the chicken and the Romanian government's ban on imports. The question is whether Seller's delay in performance beyond the shipment "window" expressly provided for in the Contracts and/or by industry practice bars the Seller from claiming protection of the exemption by precluding Seller's ability to show causation.

[21] Two cases have addressed whether a party can claim an exemption under Article 79 when it is in breach of the terms of the contract. In one case where the Buyer was supposed to have paid for a caviar delivery prior to the imposition of U.N. sanctions that made payment impossible, the court held that when "Buyer was in default before the sanctions [the force majeure] became effective, he could have and should have paid at a date when payment was possible and his status of being a defaulting party cannot be changed by a later force majeure." Hungary, 10 December 1996 Budapest Arbitration Vb 96074 (*Caviar case*) <http://cisgw3.law.pace.edu/cases/961210h1.html> ("Buyer was supposed to pay US $15,000 before delivery, while the balance was due 'within two weeks after delivery'."). A second court found that a party to a contract could not claim that a strike was an impediment because it occurred after the seller was already in arrears. Bulgaria, 24 April 1996 Arbitration Case 56/1995 (*Coal case*) <http://cisgw3.law.pace.edu/cases/960424bu.html> However, these cases can be distinguished here since the Seller is found not to be in fundamental breach prior to the occurrence of the impediment, and no CISG case was found directly addressing a fact pattern involving immaterial breach.

[22] Two scholarly approaches to access the ability of a seller to raise a force majeure exemption when the seller has already failed to perform some portion of the

contractual obligations are also available and to be considered. Compare, e.g., Denis Tallon, Article 79, in Commentary on the International Sales Law: the 1980 Vienna Sale Convention, 581–82 (Bianca & Bonell, eds.) (Milan 1987) available at <http://www.cisg.law.pace.edu/cisg/biblio/tallon-bb79.html>, with Chengwei Liu, *Force Majeure* (citing Enderlein & Maskow, International Sales Law: United Nations Convention on Contracts for the International Sale of Goods 322 (1992)). Tallon argues that "the exempting event must necessarily be the exclusive cause of the failure to perform. If goods not properly packaged are damaged following an unforeseeable and unavoidable accident, the seller remains nonetheless liable. . . . The judge cannot reduce, even partly, the damages owed by the seller on account of that latter accident. The loss is attributable to the seller's failure to provide adequate accident-proof packaging." Denis Tallon, *Article 79.* Chengwei Liu adopts the position of *Enderlein & Maskow*, that "on the contrary . . . 'it cannot be required that the impediment is the exclusive cause of a breach of contract;' . . . the impediment should also be accepted when a cause overtakes another cause . . . 'It is decisive . . . whether the impediment lastly has caused the breach of contract. If this is so, it consumes other breaches of contract for which there are no grounds for exemption insofar as those no longer appear independently." Chengwei Liu, *Force Majeure* 4.6.

[23] However, Chengwei Liu also stresses that "[t]he force majeure must have come about without the fault of either party. There will be no excuse if an unforeseeable event impedes performance of the contract when the event would not have affected the contract if the party had not been late in performing." *Id.* Chengwei Liu goes on to state that it is a general rule that "a change in circumstances will not be taken into account if it occurred during a delay in performance of the person alleging application of the doctrine" due to the good faith requirements of the CISG, and that when "the impediment occurs during the delay, its causality for the breach of contract is given only if it had an effect in the case of delivery within the period prescribed'." Chengwei Liu, *Force Majeure.*

[24] Seller has argued that its failure to ship the chicken within the time period set by the contract did not constitute fundamental breach, and was within acceptable commercial norms of the industry. The logical implication is that it is distinguishable from the cases and commentary above because the Romanian government's action overtook its prior minor breach. Seller's argument may be frustrated, however, as the intent of this rule is that "[t]he obligor is always responsible for impediments when he could have prevented them but, despite his control over preparation, organization, and execution, failed to do so." Germany, 24 March 1999 Supreme Court (*Vine wax case*) <http://cisgw3.law.pace.edu/cases/990324g1.html>. Still, the CISG case law and commentary on it does not expressly address the issue of whether a seller in non-fundamental breach is barred from proving causation when the impediment would not have resulted in fundamental breach had the non-fundamental breach not occurred. As such, persuasive precedent and related commentary is of limited import on this potentially dispositive factor.

ii. Meeting the Third Factor that Impediment Could Not Reasonably Be Overcome

[25] The remaining key legal issue is whether the Seller should have complied with the Buyer's proposed alternative shipment to a location outside of Romania. Article 79 states that party will be exempted from liability if it "could not reasonably be expected to . . . have avoided or overcome it or its consequences." Article 79(1). There is very little case law under Article 79 defining what the Secretariat Commentary to the CISG terms a "commercially reasonable substitute." Secretariat Commentary, Guide to CISG Article 79, § 7. As such, there is no clear answer to this question under the CISG. Given the paucity of CISG case law, it is necessary to draw from private law to explicate "commercially reasonable substitute" in the circumstances of this case; and I conclude I am able to do so under CISG Article 7(2).

(a) Interpretation of CISG Provisions Generally

[26] Material "for interpretation of the Convention unless CISG expressly provides otherwise, [must] be taken from the convention itself . . . CISG is not a law complementary to national laws but is meant to be an exhaustive regulation." Gyula Eörsi, *General Provisions*, in International Sales: the United Nations Convention on Contracts for the International Sale of Goods, 2-1 to 2-36 (Galston & Smit eds.) (1984), available at <http://www.cisg.law.pace.edu/cisg/biblio/eorsi1.html>. In order to determine what material outside of the Convention may be used to define commercially reasonable substitute, Article 7(2) requires the determination of two issues. First, "[i]s the matter governed by the Convention? If not, that is the end of the inquiry as a gap can only exist in relation to matters that are governed by the Convention." Mark N. Rosenberg, *The Vienna Convention: Uniformity in Interpretation for Gap-filling—An Analysis and Application*, 445–46 available at <http://www.cisg.law.pace.edu/cisg/ biblio/rosenberg.html> [hereinafter *The Vienna Convention*]. Second, "[i]f the matter is governed by the Convention, the next question is whether it is expressly settled under it. If so, a gap cannot exist as the Convention already deals with the matter." *Id.* There is scholarly commentary about provisions of Article 79 supporting the conclusion that the provision is not settled. See, e.g., Joseph Lookofsky, Walking the Article 7(2) Tightrope Between CISG and Domestic Law, 25 Journal of Law and Commerce 87, 99–105 (2005–6) (considering the matters governed, but not settled by the CISG and specifically whether Article 79 preempts private law regarding hardship).

(b) Interpretation within the Case Law and CISG

[27] First, the actual language and relevant case law requires a preliminary determination of the meaning of the relevant CISG's provisions. Following this initial inquiry the "[c]onvention permits three methods which should be applied subsidiarily." Nives Povrzenic, *Interpretation and Gap-Filling under the United Nations Convention on Contracts for the international Sale of Goods*, <http://www.cisg.law.pace.edu/cisg/text/gap-fill.html>. First, "specific provisions by analogy[,]" second,

"general principles on which the Convention is based[,]" and finally, "private international law." *Id.*

[28] The four corners of the CISG provide little guidance as to what constitutes a commercially reasonable substitute. CISG Article 79. The general principles of the CISG provide a preference for performance and the international character and promotion of good faith. *See* CISG Article 7(1); Evelien Visser, *Gaps in the CISG* ("Overall, the aim of the CISG is to give preference to the performance remedies."). These principles do little to advance the definition of commercially reasonable substitute in present circumstances. The Secretariat Commentary to the CISG provides some illuminating guidance, stating in pertinent part that:

> "Even if the non-performing party can prove that he could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, he must also prove that he could neither have avoided the impediment nor overcome it nor avoided or overcome the consequences of the impediment. This rule reflects the policy that a party who is under an obligation to act must do all in his power to carry out his obligation and may not await events, which might later justify his non-performance. This rule also indicates that a party may be required to perform by providing what is in all the circumstances of the transaction a commercially reasonable substitute for the performance, which was required under the contract." (Secretariat Commentary, Guide to CISG Article 79, § 7.)

[29] The case law only provides limited assistance in defining "commercially reasonable substitute" under Article 79. One court held that there was no exemption where "[t]he two parties did not stipulate in the contract that the contract goods must be Hunan oranges; therefore, even though there was flood in Hunan Province, which caused a shortage of canned mandarin oranges production, it should not be a barrier for the [Seller] to get contract goods from other provinces." China, 30 November 1997 CIETAC Arbitration proceeding (*Canned oranges case*) <http://cisgw3.law.pace.edu/cases/971130c1.html>.

[30] In order to determine if there is an applicable general principle "a uniform rule based on general principles, on which the Convention is based, should be searched for and formulated." Peter Schlechtriem, Requirements of Application and Sphere of Applicability of the CISG, 790 available at <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem9.html> [hereinafter *Requirements of Application*]. The problem with this formulation is that "the Convention . . . does not state [the rules] explicitly. Therefore, they have to be derived from an analysis of concrete provision so to unearth the general principles underlying them." *Id.*

[31] The scholarly discussion provides somewhat more guidance. Chengwei Liu recommends the following approach:

> "Thus, even an unforeseeable impediment exempts the non-performing party only if he can prove that he could neither avoid the impediment, nor

> by taking reasonable steps, overcome its consequences. . . . To 'overcome' means to take the necessary steps to preclude the consequences of the impediment. It is closely associated with the condition of the external character of the impending event. In no event, however should the promisor be expected to risk his own existence by performing his obligations at all costs. What is required here is that a party who is under an obligation to act must do all in his power to carry out his obligation. . . . Again the yardstick used to measure the efforts of the party concerned is what can reasonably be expected from him. And that is what is customary, or what similar individuals would do in a similar situation. The exemption is thus granted when efforts would have been necessary that go beyond the former. Thus, the basis of reference is the same as for unforeseeability, i.e., the reasonable person. In this context, with both the foreseeability condition and the unavoidability condition read together, the concept of CISG Art. 79 may be referred to as, 'exonerations for events which a reasonable person in the same situation was not bound (could not be expected) to take into account or to avoid or to overcome.' This reasonable criterion regarding the unavoidability requirement is, however, to a degree uncertain, because whether an event could have been reasonably avoided or its consequences overcome depends on the facts. Here again a case-by-case analysis is required. If an object is lost at sea and can be fished out in good condition although at great cost, the final solution will not be the same if the object were a highly valuable sculpture or merely a machine tool. Thus, *everything is a question of measure.*" (Chengwei Liu, *Force Majeure* § 4.5. (emphasis added))

[32] The facts of the instant case cut against the Seller in that another supplier to Buyer, Tyson, did deliver the chicken leg quarters to the Buyer in another locale. Even applying "commercial practicability" as a test for excuse (uniform comment 10 to § 2-615) the shipment term was treated in fact as incidental aspect of performance despite the ban; an alternative unloading port was substituted as the destination consistent with U.C.C. § 2-614(1). While Seller raised the prospect that its agreements with other parties made substitute performance impossible without harm to Seller through breach of its other contracts, the Seller admitted that not all markets were covered by exclusive arrangements. Thus, under this approach Seller should have explored possible alternatives in this regard with Buyer, but failed to do so to Buyer's detriment and Seller's enrichment.

(c) Interpretation Aided by Sources Outside the Convention

[33] If the CISG and its case law fail to provide the necessary information the next step is to look beyond that to private law. Mark N. Rosenberg, The Vienna Convention, 445–46. However, the CISG allows recourse to the rules of private international law "only as a last resort." John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention, 472–495 (3d ed. 1999) available at <http://www.cisg.law.pace.edu/cisg/biblio/ho79.html>. The analysis reaches that point.

[34] Analytic approaches of American courts have certainly included analogizing to the UCC to clarify Article 79 of the CISG. *See Delchi Carrier S.p.A. v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir. 1995); *Raw Materials Inc. v. Manfred Forberich GmbH*, No. 03 C 1154, 2004 WL 1535839 (N.D. Ill., July 7, 2004); *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, No. 01-4447, 2004 WL 116628, at *4 (N.D. Ill. May 21, 2004). One court stated: "that '[w]hile no American court has specifically interpreted or applied Article 79 of the CISG, caselaw interpreting the Uniform Commercial Code's ("U.C.C.") provision on excuse provides guidance for interpreting the CISG's excuse provision since it contains similar requirements as those set forth in Article 79'." That court then concluded that "[t]his approach of looking to caselaw interpreting analogous provisions of the UCC has been used by other federal courts". Thus, in applying the CISG, the court used "caselaw interpreting a similar provision of § 2-615 of the UCC." *Raw Materials Inc. v. Manfred Forberich GmbH*, 2004 WL 1535839 (N.D. Ill., July 7, 2004). This approach is persuasive as the UCC contains a provision on commercially reasonable substitutes, stating in pertinent part: "[i]f without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of performance otherwise becomes commercially impracticable but a commercially reasonable substitute is available, the substitute performance must be tendered and accepted." UCC § 2-614(1).

[35] While there are differences between the exemption provisions under CISG Article 79 and UCC § 2-615, the provisions governing substitute performance are quite similar. Carla Spivack, *Of Shrinking Sweatsuits*, 769–70. "The third requirement of Article 79, that the impediment be one that the party could not have overcome or avoided, does not appear in the text of UCC § 2-615, but finds expression in U.C.C. § 2-615 case law." *Id.* Both of the "regimes apply the reasonable person standard to determine what actions must be taken." *Id.* The relevance of using the UCC to interpret the CISG depends on whether the UCC has been interpreted in such a way that would provide more guidance than the CISG and its provisions. As one scholar put it: "where no principle can be found, gap-filling by uniform rules is impossible, and one has to revert to domestic law. [Thus], recourse to domestic law is unavoidable in most cases." Peter Schlechtriem, *Requirements of Application*.

[36] The general approach of utilizing the UCC by analogy justifies invoking American case law interpreting the UCC § 2-614(1) to help give substance to the CISG mandate of avoiding or overcoming consequences by performing, as the Secretariat's commentary reflects, a commercially reasonable substitute. Such language is found in U.C.C. § 2-614(1), to which U.C.C. § 2-615 is expressly subject. A search for U.S. cases interpreting U.C.C. § 2-614 revealed a fairly small number of relevant cases. See *Jon-T Chemicals, Inc. v. Freeport Chemical Co.*, 704 F.2d 1412, 1416–17 (5th Cir. 1983) (finding that substitute performance through 2-614 had no relevance where the parties provided for "the action to be taken if the agreed type carrier became unavailable."); *Fabrica Italiana Lavorazione Materie Organiche, S.A.S v. Kaiser Aluminum & Chemical Corp.*, 684 F.2d 776, 778–79 (11th Cir. 1982) (holding that

Seller could not avoid the application of U.C.C. § 2-614(1) by reformulating its claim into one of proximate cause when "agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted"); *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976); *American Trading & Production Corp. v. Shell International Marine, Ltd.*, 453 F.2d 939, 942–43 (2d Cir. 1972) (finding a commercially reasonable substitute to shipping); *Camden Iron & Metal, Inc. v. Bomar Resources, Inc.*, 719 F.Supp. 297, 309 (D.N.J. 1989) (concluding that a certain condition "rendered Camden Iron's obligation to load the vessel 'commercially impracticable'."); *United Equities Co. v. First National City Bank*, 52 A.D. 2d 154 (N.Y. App. Div. 1976).

[37] The evidentiary record concerning what alternative steps were commercially reasonable in the limited time availability prior to the Romanian ban taking effect focused in substantial part on: (I) the Herculean effort to load as much product as possible from the supplier Seller had been using; (ii) the labeling requirements of the Romanian market as a factor limiting the ability to divert shipments at sea to Romanian customers; (iii) the logistical challenges attendant to identifying port docking space and refrigerated container availability if alternative manufacturers with product could even be found, particularly given the limited resources and time available to search for such alternatives instead of maximizing what could be loaded in timely fashion. The record in this regard reflects a commercially reasonable effort by Seller.

[38] However, the inquiry does not end here in searching for commercially reasonable alternatives. Buyer raised the prospect of accepting delivery of the product elsewhere to make subsequent shipment possible. Another American supplier facing the same Romanian ban as Seller shipped to another port. While that particular port may not have been a viable alternative for Seller, the evidence made clear there were ports where exclusivity arrangements would not have precluded such delivery. It was Seller's duty to do so here and it failed to do so, preferring to pocket the profit available in a market experiencing a dramatic rise in prices. In doing so Seller misappropriated a profit that should have been made available to Buyer through an alternative shipment destination. The law does not countenance such a result. Accordingly, Buyer is entitled to damages as a remedy.

[39] Article 74 of the CISG provides the applicable standard for the damages claim asserted by Buyer. Basically, under it Buyer is entitled to lost profits caused by Seller that were foreseeable at the time of entry into the Contracts. The damages requested by Buyer meet the Article 74 standard and are adequately evidenced (See, e.g., Ex. 7). Seller's challenge to the damages sought, apart from a force majeure defense, is largely grounded upon the premise that market loss should not take into account a commercially reasonable phased release of product for sale. As such, Seller seeks to blur receipt of product with release of it into the market. However, there was no credible evidence on which to base that inference or to support such a finding. Seller's position is unpersuasive, and is divorced from commercial reality.

III. Award

A. Damages

[40] Accordingly, damages in the full amount requested of $608,323.00 are awarded.

[41] Pre and post-judgment interest issues relating to such damages shall be addressed in the Final Award per the Scheduling and Procedural Order that shall be made a part of this Interim Award.

B. Cost Shifting

[42] I find that Buyer has prevailed on claims and; in accordance with the terms of the ICDR Rules, is entitled to award of the costs (including reasonable attorneys' fees) that it incurred in connection with the prosecution of its claims in this proceeding. Such award of costs, as well as an allocation of the ICDR's administrative fees and the sole arbitrator's compensation, shall be made in the Final Award upon consideration of further written submissions by the parties pursuant to the Scheduling and Procedural Order that shall be made a part of this Interim Award.

C. Resolution of All Issues

[43] All of the parties' claims, counterclaims and arguments have been considered and, except as expressly granted in this Interim Award, which is in full settlement of all claims and counterclaims submitted to this arbitration, are hereby denied.

SO ORDERED

ARBITRATION LAW IN BRAZIL: PRACTICE AND PROCEDURE
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THE AWARD

TIME LIMIT TO ISSUE THE AWARD

The arbitration agreement should set forth the time limit for the issuance of the award. If it fails to do so, either directly or through reference to an arbitration rule,[1] the Arbitration Law of 1996 prescribes a time limit of six months, counted from the institution of the arbitral tribunal,[2] that is to say, from the date when the sole arbitrator or the last member of the tribunal accepts appointment.[3] If an arbitrator is replaced during the case, the term will be counted from the acceptance of the substitute arbitrator.[4]

The time limit for the issuance of the award is a critical issue, since an award rendered after the deadline agreed upon by the parties or prescribed by applicable law may be set aside.[5] However, the mere passage of such time limit does not automatically render the arbitral award null: the party wishing to enforce the time limit shall notify the

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1 Different arbitration rules adopt distinct approaches to the time limit for issuance of the award. For instance, the ICC Rules fix a term of six months counted from the signing or approval by the International Court of Arbitration of the terms of reference (Art. 30(1) of the ICC Rules (2012)). On the other hand, the ICDR Rules leave the arbitrators with the discretion to set forth the deadline of the award, unless the parties have fixed a time limit, and the LCIA Rules are silent in this respect.

2 Art. 23, *caput*, of the Arbitration Law of 1996.

3 We believe that the provisions of the arbitration rules regarding time limits for rendering the award prevail over the 6-month period contained in Art. 23, *caput*, of the Arbitration Law of 1996, because the aforesaid legal provision expressly states that this term will only apply when there was no covenant between the parties on this matter. When the parties choose a given set of arbitration rules, they incorporate in their arbitration agreement, by reference, all the terms and conditions of such rules, including those on deadlines to issue the award, thereby representing a covenant on this matter.

4 Art. 23, *caput*, of the Arbitration Law of 1996.

5 Art. 32, VII, of the Arbitration Law of 1996.

sole arbitrator or the president of the arbitral tribunal, which will then have 10 days to issue the award.[6] [7]

It is usual, during the drafting of the arbitration agreement, for the parties to choose a very short period for the issuance of the arbitral award, aiming at the quick resolution of future conflicts. Practice shows, however, that having too short a deadline might cause problems, since the parties will probably need reasonable time to prepare their statements and to submit evidence in the course of the arbitration, and the arbitrators will need a certain amount of time to draft their decision. If the parties really wish to have a fast arbitration, they should carefully draft the arbitration agreement so as to leave room for further extensions of the deadline for the arbitral award, especially if a complex dispute arises. This issue has become increasingly important in international arbitrations, and arbitration institutions have been trying to improve their rules to allow for faster processes.[8]

Another practical concern is carefully setting forth the starting date of the term for issuance of the award, to avoid the risk of overly truncating the arbitration period. It is not uncommon, for example, to see clauses providing that the arbitration time limit will run from the request for arbitration. This might not be the most appropriate wording, because the parties may lose significant time in the appointment of arbitrators and the drafting of the terms of reference, and be left with inadequate time for the evidentiary phase and the hearing. In this sense, both the Arbitration Law of 1996 and certain arbitration rules, such as the ICC's, count the time limit for the award from an event after the formation of the tribunal.[9]

[6] Art. 12, II, of the Arbitration Law of 1996.

[7] It is important to point out that the Legislative Bill n. 7108/2014, that intends to change some aspects of the Arbitration Law of 1996, established in article 23, paragraph 2 that "the parties and the arbitrators, in a mutual agreement, may postpone the deadline to the award be rendered". (free translation).

[8] For instance, the ICC Court of International Arbitration created, on 26 May 2005, a task force to study measures for reducing time and costs in complex arbitrations. Other institutions, such as the AAA, have "expedited" procedures for certain types of arbitrations.

[9] In order to avoid problems with this deadline and a possible cause of its annulment, it is very common that the parties set forth in the terms of reference that the period established for the arbitrators issue the award commence after the parties' final arguments.

The arbitral award must be "issued" within the applicable time limit, which means that it shall be written and signed by this deadline.[10] It is not necessary, though, to notify the parties of the award within that time limit, and the notification may be made afterward.

8.1.1 Extension of the Time Limit

The Arbitration Law of 1996 requires that any extension of the time limit to issue the award be agreed upon by all the parties and the arbitral tribunal,[11] unless the parties previously authorized the arbitral tribunal (or, in the case of institutional arbitration, the arbitral institution) to extend such time limit. This may create a practical problem if the arbitration takes longer than the original term (which is not unusual) and one of the parties refuses to agree to an extension.

Doubts might arise when the arbitration clause emphasizes the importance of the observation of the time limit but appoints arbitration rules that allow the extension thereof. Such issue shall be analyzed on a case-by-case basis.

Certain arbitration rules address this issue by authorizing the arbitrators or the arbitration institution to extend the time limit of the arbitration, even against the will of one of the parties, if it is deemed necessary for the proper conduct of the process.[12] We feel this type of provision is effective, since the parties, when adopting the arbitration rules, automatically assigns to the tribunal the power to grant such an extension.

To avoid such a controversy, it is advisable to insert in the arbitration agreement or the terms of reference a provision whereby the parties and the arbitrators expressly agree that the arbitral tribunal or the arbitration institution may grant an extension of the deadline to issue the award.

8.2 FORMAL REQUIREMENTS OF THE AWARD

The arbitral award shall be final, consistent, and possible, decide all the matters submitted but no more than the matters submitted, and comply with the following formal requirements:

[10] *See*, in this sense, CARLOS ALBERTO CARMONA, supra note 12, p. 342 and J. E. CARREIRA ALVIM, supra note 29, p. 357.

[11] Art. 23, sole paragraph. of the Arbitration Law of 1996. As mentioned before, based on the Legislative Bill n. 7108/2014, this rule will be established on article 2, paragraph 2.

[12] *See, inter alia*, Art. 24 (2) of the ICC Rules and Art. 4.7 of the LCIA Rules.

7.19 REPETITION OF EVIDENCE, IN THE CASE OF ARBITRATOR REPLACEMENT

If an arbitrator is replaced in the course of the arbitration (e.g., death or supervening impediment), the new arbitrator may request the repetition of the evidence already introduced, if deemed necessary, according to his or her discretion.[197]

This rule mostly pertains to oral evidence,[198] since the new arbitrator's lateness in joining the proceeding, as a general rule, will not substantially affect the analysis of written evidence.

Considering that the repetition of evidence may disturb and delay the arbitration, not to mention probably increase its expenses, it is only recommended when strictly necessary for the decision-making process. And the evidence to be repeated should be produced in the most efficient manner (for instance, written questions could be posed to the witnesses, instead of holding another hearing).

[197] Art. 22, § 5, of the Arbitration Law of 1996.

[198] Although, as a general rule, there should be written transcripts of the oral evidence, which could avoid the need to produce it again.

CHAPTER 8

THE AWARD

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[4] Art. 23, *caput*, of the Arbitration Law of 1996.

[5] Art. 32, VII, of the Arbitration Law of 1996.

a) be in writing[13];

b) contain a summary of the procedural acts[14];

c) spell out the grounds and reasons upon which the decision was based, addressing all factual and legal questions[15];

d) state the decision on the issues in dispute[16];

e) state the date and place of signing[17]; and

f) be signed by all arbitrators. If one of the arbitrators does not sign the award, the chair of the panel must certify this fact.[18]

If arbitral award does not comply with any of these requirements, it may be annulled by request of any party.[19]

8.2.1 Summary of the Proceeding

The summary of the most relevant procedural acts is a traditional requirement of awards in the Brazilian legal system, although it is not usual in some other jurisdictions, and therefore, it is not prescribed in certain arbitration rules and the UNCITRAL Model Law.

The summary is helpful in identifying the litigated issues and the parties' exact claims. It also shows to the parties that all their arguments and points of evidence were considered in the decision-making process.

The summary should not be too long, but it must refer to the most important allegations and evidence upon which the award is based. For instance, if certain testimony was very relevant to the conclusion reached by the tribunal, the summary should highlight its content. The purpose of the summary, therefore, is to provide the background that led to the decision.

[13] Art. 24, § 1. of the Arbitration Law of 1996.

[14] Art. 26, I. of the Arbitration Law of 1996.

[15] Art. 26, II. of the Arbitration Law of 1996.

[16] Art. 26, III. of the Arbitration Law of 1996.

[17] Art. 26, IV. of the Arbitration Law of 1996.

[18] Art. 26, sole paragraph, of the Arbitration Law of 1996.

[19] Art. 32, III, of the Arbitration Law of 1996.

8.2.2 Reasons for the Decision

The reasoning are a critical requirement of the arbitral award, and are deemed to be a public policy matter under Brazilian law, [20] because this supposedly reduces the probability of biased or arbitrary decisions. Consequently, the arbitrators must be careful to set forth in the award, in a logical and consistent manner, all reasons that led them to their conclusions.

It is strongly advisable that the reasoning, which spell out the grounds for the decision, fully address the claims and allegations raised by the parties, and comment on the relevant items of evidence produced, to demonstrate that these were considered in the decision-making process. No claim or controversial point can be ruled without proper grounding of the decision.

8.2.3 Decision

In the final section of the award, the arbitrators will decide on the claimant's claim (and on the respondent's counterclaim, if any). This section is also known as *dispositif* (*dispositivo*). The decision should be written in a straightforward manner, indicating each claim and stating clearly whether the arbitrators grant or deny it.

The decision section should not explain its reasons, as these were already stated in the grounds section of the award.

For the award to be valid, the decision must resolve all the controversies submitted to arbitration,[21] and cannot rule on an issue beyond the scope of the arbitration agreement.[22]

Another important aspect is that the decision must set forth the final costs and expenses, including the institution's (if any) and arbitrators' fees, and determine which party shall pay them.

[20] *See, e.g.*, ALFREDO DE ARAÚJO LOPES DA COSTA, *Direito Processual Civil Brasileiro*. Rio de Janeiro: Jose Konfino, 1945, v. III, p. 22 (1945) and MOACYR AMARAL SANTOS, *Comentários ao Código de Processo Civil*, Rio de Janeiro: Forense, 1994, v. IV, p. 401.

[21] Art. 32, V, of the Arbitration Law of 1996.

[22] Art. 32, IV, of the Arbitration Law of 1996.

8.2.3.1 Liquidated Awards

In principle, the arbitral award should be liquidated, meaning the award must determine the exact amount that a party has to pay, or it must establish the criteria for this determination.[23]

8.2.3.2 Interest and Indexation for Inflation

In arbitrations governed on the merits by Brazilian law, the amounts a party is ordered to pay, as a general rule, will have to be subject to interest and, if denominated in Brazilian currency, to "monetary correction" (inflation indexing). Nonetheless, sometimes arbitral awards do not address matters as to how to calculate interest and indexation, which may cause problems if court enforcement is necessary.

As such, the arbitrators should be careful to deal with these issues in their decision. If the arbitral award fails to resolve these matters, it is recommended for the interested party to present to the tribunal a request for correction, as well as to keep these topics from being unresolved and subject to discussion in any future lawsuit to enforce the award.

8.2.4 Date and Place of the Award

The date of the award is a relevant element, among other reasons, to verify compliance with the deadline for the arbitration, as well as to establish the moment when the award becomes *res judicata*.[24]

The arbitration award must also declare the place where it was rendered. This is an important requirement, because in the Brazilian legal system, the place of issuance determines the nationality of the award,[25] as well as the consequences thereof, such as: a) the need of exequatur to the award, given by the STJ for foreign arbitral awards, or the possibility of immediate enforcement of national arbitral awards; b) possibility or impossibility of setting aside under Art. 32 of the arbitration law; c) identification of the law which governs the arbitral proceedings (*lex*

[23] For instance, if the tribunal orders the respondent to pay the claimant a given amount of indemnification due to violation of a contractual provision, plus interest at a certain rate, counted from the date of breach, the principal amount is determined in the award and the value of interest is determinable through a simple calculation.

[24] FOUCHARD, GAILLARD and GOLDMAN, supra note 52, p. 771.

[25] Art. 34, sole paragraph, of the Arbitration Law of 1996.

arbitri); d) identification of the national courts which has jurisdiction to recognize or to rule on issues connected to the arbitral proceeding or to set aside the arbitral award.

The importance of stating the place of arbitration is demonstrated by the fact that it is also a mandatory element of the arbitration agreement.[26]

The Arbitration Law of 1996 does not expressly contemplate the issuance of an arbitral award in a place different from that prescribed in the arbitration agreement as a specific ground to set aside or deny exequatur. Nonetheless, it is not unlikely that a Brazilian court would vacate an arbitral award under those circumstances, in view of the gravity of such an irregularity. There is so far no precedent regarding this issue.[27]

In light of the foregoing, the arbitrators should be careful to sign the award in the place designated in the arbitration agreement, in order to avoid any challenge on this ground.

8.2.5 Signature of the Arbitrators

The award must be signed by the arbitrators. Nevertheless, the lack of signature by one or more arbitrators, due to the impossibility or disagreement with the content, does not render the award invalid, provided that the chair of the tribunal certifies this fact in the award.[28] Several sets of international arbitration rules require that the reason for an arbitrator's failure to sign be stated in the award.[29] If the award is not signed by any arbitrator, it will be deemed nonexistent.[30]

8.2.6 Practical Note on Drafting an Award

In view of all the foregoing, here is a practical checklist for writing an award:

[26] Art. 10, IV, of the Arbitration Law of 1996.

[27] There is an exequatur case (SE 7595/FR) in which, according to the arbitration agreement, the award had to be executed in Paris, but it was actually signed in São Paulo. The exequatur was challenged, but it had not been judged by the date of closing of this book.

[28] Art. 26, sole paragraph, of the Arbitration Law of 1996.

[29] *See, inter alia*, Art. 32 (4) of the UNCITRAL Rules, art. 26(1) of the ICDR Rules and Art. 26.4 of the LCIA Rules.

[30] J. E. CARREIRA ALVIM, supra note 29, p. 356.

8.2 ARBITRATION LAW OF BRAZIL: PRACTICE AND PROCEDURE

Summary:

1. Identify parties and counsels (preferable with full address and contact information).
2. Describe the dispute in general and identify the contract under which it arose.
3. Identify the arbitration agreement.
4. Identify the seat of arbitration, the applicable substantive law and procedural rules.
5. Describe the main arguments of the request for arbitration, answer, counterclaim and other relevant manifestations of the parties.
6. Explain the composition of the arbitral tribunal and the dates when the arbitrators were named and confirmed.
7. If there is a term of reference or other similar instrument, summarize its contents.
8. Provide the dates and short descriptions of any procedural orders or interim decisions.
9. List the date and place of the hearings and provide a short description of the main testimony.
10. Summarize the final statements of the parties.

Grounds:

1. Identify the litigated issues.
2. Clearly decide on each litigated issue and present a consistent and complete justification of the grounds on which such decisions were based, including references to the applicable law and the relevant facts and evidence.

Decision:

1. End with a formal adjudication in clear, unambiguous and imperative language, which grants or denies each request in the claim and any counterclaim, and directs the remedies granted.

2. Set forth the final costs and expenses of arbitration, including the arbitrators' fees, and determine which party shall pay them, or in what proportion they will share them.
3. Give the date and place of the award.
4. Obtain the signatures of the arbitrators.
5. If there is a dissenting vote, make a note of it and attach it to the award.

8.2.7 Tied Decisions

Considering that the arbitration tribunal must be composed of an odd number of members,[31] it is rare to have a tied arbitration decision. Furthermore, in the case of a tie, the chair of the arbitral tribunal has the deciding vote.[32] Such a solution is convenient, since the president is usually chosen by the parties or the other arbitrators. Nevertheless, the arbitration rules might provide for another method of decision making in the case of tie. Brazilian law does not prescribe a solution for the very unlikely situation in which there is a tie and the chair does not vote, which means that the method will then depend on the applicable arbitration rules.

8.2.8 Dissenting Arbitrator's Opinion

The arbitration decision does not need to be unanimous. The arbitrator who disagrees with the decision may, if so wishing or the applicable arbitration rules require, present a dissenting opinion in writing, with proper grounds.[33] From a practical standpoint, it is advisable for the dissenting arbitrator to draft a well-grounded opinion, so that the parties can understand his or her position.

Contrary to what occurs in judicial courts in Brazil, where non-unanimous judgments of collegiate decision-making bodies are subject to a special type of motion for rehearing,[34] the dissenting arbitral opinion does not give rise to any specific recourse or ground for challenge.

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[31] Art. 13, § 1, of the Arbitration Law of 1996.

[32] Art. 24, § 1, of the Arbitration Law of 1996.

[33] Art. 24, § 1., of the Arbitration Law of 1996.

[34] *Embargos infringentes*, as per Art. 530 of the Civil Procedure Code.

8.3 PARTIAL ARBITRAL AWARDS.

It used to be controversial under Brazilian law whether it was possible to issue partial awards (that is to say, awards that address prejudicial or preliminary issues without resolving all the litigation).[35]

The issuance of partial awards may be useful for the efficiency of the proceeding in the following circumstances, as pointed out by the arbitral tribunal in ICC Case 4402/1983:

- the issue to be dealt with is clearly separable from the other parts of the litigation;
- the question to be decided is definite, fully exposed by the parties and proved;
- a partial award will help decide on the remaining questions;
- there is urgency in clearing this special question.[36]

A partial award could also helpful in the case of claims, the amount of which has to be determined through complex and time-consuming expertise. In these instances, for the sake of procedural efficiency, the arbitrators could first decide on whether the claim shall be granted, and leave the quantification of the amount due for a later moment.[37]

Nonetheless, certain authors[38] used to argue that partial awards are allowed only when the parties have authorized this kind of award, since the Arbitration Law of 1996 prohibits awards that "do not decide all the litigation submitted to arbitration."[39] As such, a partial award, according to this point of view, could be set aside.

The majority doctrine, however, maintained that this is an inaccurate interpretation of the legal provisions, because what the law proscribes is really an incomplete "final" award, not an interim or interlocutory

[35] IRINEU STRENGER, *Arbitragem Comercial Internacional*. São Paulo: Ltr, 1996, p. 183.

[36] SIGVARD JARVIN, YVES DERRAIN and JEAN-JACQUES ARNALDEZ. Supra note 282, p. 155.

[37] This type of procedure resembles the solution adopted under Brazilian civil procedure, which contemplates an award-setting (*liquidação de sentença*) phase of the proceeding when the judicial decision does not quantify the award, generally in the event this requires further evidence and expert examination (Art. 603 *et seq.* of the Civil Procedure Code).

[38] *See* CARLOS ALBERTO CARMONA, supra note 12, p. 351.

[39] Art. 32, V, of the Arbitration Law of 1996.

decision of a given prejudicial or preliminary issue, which will be necessarily followed by a final award ruling on the remaining issues.[40] According to this view, a partial award is not really an award in the strict sense, which would require a terminative nature, but is rather a decision on an incidental issue.

The reform of the Brazilian Arbitration Law ended this discussion, because it now expressly authorizes partial arbitral awards.[41]

8.4 SETTLEMENT AWARD

If the parties settle their dispute during the arbitration, the arbitral tribunal may, upon the parties' request, issue an award to spell out the settlement.[42]

The parties are not required to ask for a settlement award,[43] and upon reaching a settlement, they may just request the dismissal of the arbitration without judging the merits. The advantage of a settlement award is to grant the parties an instrument with the terms and conditions of their agreement, which will have the same enforceability as a judicial award. Therefore, in the case one of the parties breaches the settlement award, the procedure to enforce it will be much simpler than the one to enforce an ordinary settlement.

In view of Art. 28 of the Arbitration Law of 1996, the settlement award must contain the same elements of an ordinary arbitral award (that is to say, summary, grounds and decision). Nonetheless, a consent award is usually much simpler than an ordinary one, since the arbitrators do not need to be so detailed in giving their grounds.

8.5 SCRUTINY OF THE AWARD BY THE ARBITRATION INSTITUTION

The scrutiny and approval of draft arbitral awards by a higher instance in the arbitration institution is a distinguishing feature of ICC

[40] *See* and ARNOLDO WALD, *A validade da sentença arbitral parcial nas arbitragens submetidas ao regime da CCI,* 17 RDB, pp. 329-341, which also quotes the opinion, in the same sense, of Professor LUIS GASTÃO PAES DE BARROS LEÃES.

[41] Art. 21, § 1st, of the Arbitration Law of 1996, as amended.

[42] Art. 28 of the Arbitration Law of 1996.

[43] Certain institutions call the arbitral settlement award the "award by consent" (*See*, e.g., Art. 26 of the ICC Rules).

arbitrations,[44] which has been replicated by some other arbitration institutions.

Scrutiny of the draft award serves two purposes: to correct possible formal errors and to draw the arbitrators' attention to points of substance that might be challenged.

As to the formal aspects, this scrutiny goes far beyond the correction of typographical errors, since it plays an important role to ensure enforceability. For instance, the arbitration institution may spot that a mandatory element of the award is missing or that the award is not in line with the tribunal's mandate, such as *infra* or *ultra petita* decisions.

With respect to the substance of the award, scrutiny may identify issues such as confusion, inconsistency, insufficient grounds or contradiction with applicable law.

It should be stressed that scrutiny of the award is in no way akin to a second-level review of a decision. Except for purely clerical or formal mistakes, the arbitration institution will not order modifications to the award, but rather present recommendations to the tribunal, which may or may not accept them. The arbitral tribunal normally has full liberty of decision on the merits of the case, and may disregard the recommendations and points indicated by the arbitration institution with respect to substance.

On the one hand, scrutiny could enhance the quality of the award and increase the likelihood that it will not be set aside or have legal problems in its enforcement. On the other hand, scrutiny may delay issuance of the award and bring additional costs to the arbitration institution, which will be reflected in the fees charged.

8.6 DELIVERY OF THE ARBITRAL AWARD

Upon issuance of the award, a copy must be delivered to the parties.[45] There is no prescribed formality for the delivery of such copy,[46] which may be done, for instance, through couriers or personally, as long as there is clear evidence of the date when the award was delivered. Each arbitration court has its own procedure for the delivery of the copy of the award.

The delivery of the award triggers several relevant limitation periods, such as the term to file a request for clarification to the tribunal and the term to file a lawsuit to set aside the award.

If a request for clarification is granted and the arbitral award is modified accordingly, the amended award must equally be delivered to the parties, and the limitation period to apply for setting it aside will be counted from the second delivery date.

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[44] Art. 27 of the ICC Rules.

[45] Art. 29 of Arbitration Law.

[46] This is not the case with judicial awards, which must be published in the Official Gazette to become effective.

Columbia
Law School

INTERNATIONAL ARBITRATION: COMPARATIVE PERSPECTIVES

University of Sao Paulo Prof. Alejandro M. Garro [1]

August 14-17, 2023 9 am to 11 am

Tuesday, August 15, 2023

Macromex v. Globex: Action to confirm and to set aside the award

Correction, clarification, and interpretation of the award

Res judicata and arbitration

Application to Set Aside: jurisdiction and procedural mechanism

Grounds for setting aside: the approach of the Uncitral Model Law ("UML") and the Federal Arbitration Act ("FAA")

Enforcement and Vacatur. Fact Scenario: Kim Corp vs. Mondal Inc

Who Can Set Aside? Internaational Standard Electric Co. v. Bridas

Consequences of Set Aside: TermoRio SA v. Electranta S.P.

In Re Arbitration of Certain Controversies Between Cromalloy Aeroservices and the Arab Republic of Egype

Parson & Whittemore Overseas Co. Inc. v. RAKTA

[1] Prof. Alejandro M. Garro: garro@law.columbia.edu

1. With costs of the arbitration proceedings and attorney fees, the final award for Macromex came to a total of $876,310.58. When buyer Macromex petitioned the court for confirmation of the award pursuant to § 9 of the FAA, seller Globex cross-petitioned to have the award vacated pursuant to § 10 of the FAA. The U.S. District Court for the Southern District of New York confirmed the arbitration award and denied the cross-petition to vacate. Judge Scheindlin wrote:

B. Vacatur of Award

The confirmation of an arbitration award is a summary proceeding that converts a final arbitration award into a judgment of the court.[24] "Arbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation."[25] "A court is required to confirm the award unless a basis for modification or vacatur exists."[26] The Federal Arbitration Act ("FAA") lists specific instances where an award may be vacated.[27] In addition, the Second Circuit has recognized that a court may vacate an arbitration award that was rendered in "manifest disregard of the law."[28] However, "review for manifest error is severely limited."[29]

Although "its precise boundaries are ill defined . . . its rough contours are well known."[30] To find manifest disregard, the Second Circuit held in *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S* that the court must conduct a three step analysis. *First,* the court must find that the arbitrator ignored a law that was clearly and explicitly applicable to the case.[31] *Second,* the court must find that the law was improperly applied, leading to an erroneous outcome.[32] *Third,* the court must find that the arbitrator acted with the subjective knowledge that she was overlooking or misapplying the law.

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24. See *Yusef Ahmed Algahanim & Sons v. Toys "R" Us,* 126 F.3d 15, 23 (2d Cir.1997) (citing *Florasynth, Inc. v. Pickholz,* 750 F.2d 171, 176 (2d Cir.1984)).

25. *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.,* 103 F.3d 9, 12 (2d Cir.1997) (quotation marks omitted). *Accord Ono Pharm. Co. v. Cortech, Inc.,* No. 03 Civ. 5840, 2003 WL 22481379, at *2 (S.D.N.Y. Nov. 3, 2003).

26. *Insurance Co. of N. Am. v. Ssangyong Eng'g & Const. Co.,* No. 02 Civ. 1484, 2002 WL 377538, at *4 (S.D.N.Y. Mar. 11, 2002).

27. The statutory grounds for vacatur listed in the FAA are: (1) the award was procured by corruption, fraud or undue means; (2) the arbitrators exceeded their powers or "so imperfectly executed [their powers] that a mutual, final, and definite award upon the . . . matter submitted was not made;" (3) the arbitrator was guilty of "misconduct in . . . refusing to hear evidence pertinent and material to the controversy;" (4) the arbitrators exhibited "evident partiality" or "corruption;" or (5) the arbitrators were guilty of "misconduct in refusing to postpone the hearing, upon sufficient cause shown," or guilty of "any other misbehavior" that prejudiced the rights of any party. *Ono,* 2003 WL 22481379, at *2 n. 24; 9 U.S.C. § 10(a). Globex does not argue that any of these provisions apply.

28. *Wallace v. Buttar,* 378 F.3d 182, 189 (2d Cir.2004) (quoting *DiRussa v. Dean Witter Reynolds, Inc.,* 121 F.3d 818, 821 (2d Cir.1997)).

29. *Id.* (quoting *Government of India v. Cargill Inc.,* 867 F.2d 130, 133 (2d Cir.1989)). In *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S,* 333 F.3d 383, 389 (2d Cir.2003), the court noted that "since 1960 we have vacated some part or all of an arbitral award for manifest disregard in . . . four out of at least 48 cases where we applied the standard."

30. *Duferco,* 333 F.3d at 389.

31. *See id.* at 389–90.

32. *See id.*

"A federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law. On the contrary, the award 'should be enforced, despite a court's disagreement with it on the merits, if there is a barely colorable justification for the outcome reached.'"[33] In deciding whether to confirm an arbitration award, the court "should not conduct an independent review of the factual record" to check if facts support the panel's conclusion. Rather, "[t]o the extent that a federal court may look upon the evidentiary record of an arbitration proceeding at all, it may do so only for the purpose of discerning whether a colorable basis exists for the panel's award so as to assure that the award cannot be said to be the result of the panel's manifest disregard of the law."[34]

Macromex Srl, Plaintiff, v. Globex International, Inc., Defendant, U.S. District Court, S.D. New York, No. 08 Civ. 114(SAS), April 16, 2008, 2008 WL 1752530. Footnotes in the original.

In spite of the high bar for vacatur of an arbitral award, Judge Scheindlin went on to discuss Globex's argument that the arbitrator had misinterpreted the UCC when filling the gaps in the CISG. He concluded that case law differed on the interpretation of § 2-614 but that at least some decisions also required the seller "to arrange substituted performance." Hence, "the arbitrator correctly applied section 2-614." Subsequently, the Judge examined at some length whether the arbitrator had miscalculated the damages and, again, concluded that "the arbitrator's calculation of damages was correct."

33. *Wallace,* 378 F.3d at 190 (emphasis in original) (quoting *Banco de Seguros del Estado v. Mutual Marine Office, Inc.,* 344 F .3d 255, 260 (2d Cir.2003)).

Globex appealed, but the U.S. Court of Appeals affirmed the District Court judgment. Circuit Judges Walker, Sotomayor, and Wallace referred *inter alia* to *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 92 (2d Cir. 2008) ("In the context of contract interpretation, we are required to confirm arbitration awards [even if we have] serious reservations about the soundness of the arbitrator's reading of the contract." (internal quotation marks and brackets omitted)); and to *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) ("Manifest disregard of the law . . . clearly means more than error or misunderstanding with respect to the law." (internal quotation marks omitted)); as well as *Wallace*, 378 F.3d at 190 ("Our cases demonstrate that we have used the manifest disregard of law doctrine to vacate arbitral awards only in the most egregious instances of misapplication of legal principles."). (See *Macromex SRL, Petitioner-Appellee, v. Globex International Inc., Respondent-Appellant*, U.S. Court of Appeals, Second Circuit, No. 08-2255-cv. May 26, 2009, 330 Fed. App'x 241.)

Why would the District Court Judge first say that an arbitral award is only reviewable on the merits if there is "manifest disregard of the law" and then proceed to review the award on the merits? Do you see weaknesses in the analysis of the arbitrator that suggest an erroneous decision, one that could at least potentially amount to a "manifest disregard of the law"?

Similar to the District Court, the Court of Appeals talks about "being required to confirm arbitration awards [even if the Court has] serious reservations about the soundness of the arbitrator's reading of the contract" and how even manifest disregard of the law by the arbitrator would only lead to a vacatur "in the most egregious instances of misapplication of legal principles."

On the assumption that the U.S. courts are not seriously suggesting that *any* deviation by an arbitral tribunal in an international commercial arbitration from well-established U.S. court practice can be reason for a review on the merits to see whether vacatur may be merited, was there anything in the arbitral award that would suggest grave injustice being inflicted on an American company? More specifically, were there *any* plausible arguments for Globex to challenge the award, or were the lawyers of Globex just out to make some more money?

If the arbitral award came under the New York Convention, would the reading of the FAA by the District Court (fn. 27 and accompanying text), as affirmed by the Court of Appeals, be in conformity with Article V of the New York Convention? In other words, if the award was rendered outside of the U.S., and thus a "foreign" award, do the U.S. courts have the rights of review they are exercising in the present case?

a

2. The case is interesting not only because it is our first arbitral award and there were court proceedings to prevent its recognition and enforcement. The case also provides a thorough discussion of breach of contract and when a breach is a fundamental breach. More importantly, the case is one of relatively few to provide a differentiated analysis of the Article 79 exemption, the concept of *force majeure*, and how and when the *force majeure* defense can be successfully invoked.[114]

When looking at the positions of Tallon and Chengwei Liu respectively (para. 22), who is right and who is wrong? Why?

3. Finally, the award goes into some detail about the question of what a party to an IBT has to do in order to try to overcome an impediment that potentially falls under Article 79. The arbitrator reminds us that "the aim of the CISG is to give preference to the performance remedies" (para. 28), that is, the primary remedies, over secondary remedies (damages).

In this context, once again, the question of a gap in the CISG arises and how it can be resolved. Can you summarize in one sentence the arbitrator's conclusions in paragraph 26? Does paragraph 27 provide the answer?

4. Do you believe the arbitrator ultimately "got it right"? Consider the summary in paragraph 38 *in fine*.

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114. See also Christoph Brunner: *Force Majeure Under General Contract Principles—Exemption for Non-Performance in International Arbitration*, Wolters Kluwer 2008.

EXPERIENCING INTERNATIONAL ARBITRATION

RESOLVING CROSS-BORDER DISPUTES

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WEST ACADEMIC PUBLISHING

Enforcement and Vacatur

Fact Scenario

Kim Corp., a microprocessor manufacturer incorporated in Mexico, and Mondal Inc., a Canadian company that retails enterprise-level servers, entered into a contract by which Kim Corp. was to provide 100,000 ZX7 microprocessors to Mondal Inc. each month for a year. The first few months went well, but Mondal Inc. began receiving complaints from customers that its servers were crashing at unusually high rates due to overheating. After an internal review, Mondal Inc. identified Kim Corp.'s microprocessors as the basis for the defect. Kim Corp. has challenged this finding since learning of it.

Incensed at the costs resulting from issuing refunds over the alleged defect, Mondal Inc.'s CEO (formerly the mayor of Toronto) began criticizing Kim Corp. in various popular online fora on a variety of matters, including issues largely unrelated to the contractual disagreement. One such accusation was that Kim Corp's "sweatshop" facilities in Mexico were notorious for driving their low wage employees to sickness, injury or worse. Mondal Inc.'s CEO has not offered any details.

The contract in question has a dispute resolution clause providing for ICC arbitration (2012 rules) in Hong Kong, to be governed by Hong Kong law. Hong Kong has enacted UNCITRAL Model Law as amended.

In a majority decision, the tribunal awarded Mondal Inc. US$10 million in damages, with Professor Carson dissenting. Further, in response to a counterclaim, the tribunal unanimously awarded Kim Corp. US$3 million for its reputational damages. Yet notwithstanding the above, the arbitration did not exactly proceed in a conventional manner.

First, once Mondal Inc. and Kim Corp. had appointed their arbitrators, Mr. Kozey and Professor Carson, respectively, the arbitrators were instructed by the parties to select a chair. At this time, however, Kim Corp. requested that the tribunal delay the appointment since it was changing its counsel, and wanted its new counsel to be in place for the selection of the chair. The tribunal disregarded the request and selected the chair, the estimable Professor Dr. Ames. Mondal

Inc. did not object to Kim Corp.'s request for additional time, and the tribunal provided no reason for declining it, written or oral.

Second, during the hearings, the tribunal accepted telephonic testimony from Mondal Inc.'s principal fact witness, Mr. Belu-John. Mr. Belu-John, calling from his vacation home in the Bahamas ended up being disconnected into his testimony towards the end of his direct but before Kim Corp.'s counsel could cross. He was unreachable by phone thereafter because of severe inclement weather (although he is doing well now, having escaped just in time to his chalet in Chamonix). Mondal Inc. offered to extend the hearing by a day to permit cross, and Kim Corp. agreed, but the tribunal declined, citing regrettable scheduling conflicts in other matters. The majority relied on Mr. Belu-John's testimony in its claim determinations.

Third, in her dissent, Professor Carson identified that the tribunal understood Hong Kong law but opted not to apply it. According to Professor Carson, the tribunal accepted the written statement of a party appointed expert (and leading international expert of microprocessor overheating), Dr. Baker, but then refused to let Dr. Baker testify notwithstanding the request of Kim Corp that he do so, citing Dr. Baker's excessive costs. The tribunal does not appear to have relied on Dr. Baker's statement in its award. Both Kim Corp. and Mondal Inc. contain significant assets in the United States. Mondal Inc. seeks to recognize and enforce its award in the United States Southern District of New York (SDNY).

Kim Corp. challenges the recognition of the award, relying on the facts above. In determining how to proceed, Kim Corp's counsel must first decide whether to challenge the entire award, including its counterclaim award for US$3M, or seek to uphold the counterclaim award while challenging just the claim award for US$10M.

Readings

A. The Framework for the Enforcement of Arbitral Awards

The New York Convention establishes the essential framework for the enforcement of foreign arbitral awards.[1] As one court explained, "[t]he basic understanding of the New York Convention is that '[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with

[1] There are 160 states that are parties to the New York Convention. There are other conventions such as the Panama Convention, the Montevideo Convention, and the Moscow Convention which may relate to the enforcement of arbitral awards as well.

the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the . . . articles [of the Convention].' Under the Convention, 'the critical element is the place of the award: if that place is in the territory of a party to the Convention, all other Convention states are required to recognize and enforce the award, regardless of the citizenship or domicile of the parties to the arbitration.' "[2]

The New York Convention further provides the exclusive grounds for the challenge to the enforcement of arbitral awards. The Federal Arbitration Act sets the grounds for challenge to arbitral awards made in the United States, and Chapter 2 of Title 9 of the United States Code implements the New York Convention with respect to foreign awards. Both the FAA and New York Convention are excerpted below.

In reading the relevant provisions of both the New York Convention and the Federal Arbitration Act, consider whether there is any area in which the grounds for challenges to enforcement differ. What do you think is the reason for the difference, if there is one?

New York Convention

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

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

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

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

2 *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007) (citations omitted).

that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

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

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

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

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

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

Federal Arbitration Act

Section 10. Same; vacation; grounds; rehearing

a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:

1) Where the award was procured by corruption, fraud, or undue means.

2) Where there was evident partiality or corruption in the arbitrators, or either of them.

3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

b) The United States district court for the district wherein an award was made that was issued pursuant to section 590 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 582 of title 5.

Scope of Review of Arbitral Awards

The scope of review of arbitral awards set in the Federal Arbitration Act and the New York Convention are considered to be exclusive. The U.S. Supreme Court recently decided that the scope of review of arbitral awards could not be broadened by agreement. In reading *Hall Street Associates*, consider whether you agree with the reasons given by the Court as to why the grounds for challenge cannot be broadened by agreement. Consider that the basis for arbitration is the consent of the parties—should the parties not be able to contract for a broader control mechanism to their arbitral dispute resolution provisions?

Who Can Set Aside?

Before addressing the consequences of set aside, it is useful to explore which court(s) have the authority to set aside an award. Is it clear from the text of the Convention? The Following case addresses the issue.

International Standard Electric Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Comercial

745 F. Supp. 172 (S.D.N.Y. 1990) (footnotes omitted).

[In the late 1970s International Standard Electric Corporation (ISEC) controlled more than half of Argentine telecommunications through its wholly-owned subsidiary Compania Standard Electric Argentina S.A. (CSEA). In March 1979, CSEA entered into an agreement with Bridas under which Bridas purchased 25% participation CSEA. The agreement contained a clause for ICC arbitration and provided New York law would govern the agreement. Bridas commenced arbitration in April 1985 against ISEC—the parent-company of CSEA. The arbitration was seated in Mexico City, Mexico. The arbitral tribunal's award in favor of Bridas was issued to the parties in January 1990. ISEC filed a petition in U.S. district court seeking, *inter alia*, to vacate the award.]

CONBOY, J.

[. . .]

ANALYSIS

We will first address the question of whether, under the binding terms of the New York Convention, we lack subject matter jurisdiction to vacate a foreign arbitral award. The situs of the Award in this case was Mexico City, a location chosen by the ICC Court of Arbitration pursuant to rules of procedure explicitly agreed to by the parties. Since the parties here are an American Company and an Argentine Company, it is not difficult to understand why the Mexican capital was selected as the place to conduct the arbitration.

Bridas argues that, under the New York Convention, only the courts of the place of arbitration, in this case the Courts of Mexico, have jurisdiction to vacate or set aside an arbitral award. ISEC argues that under the Convention both the courts of the place of arbitration and the courts of the place whose substantive law has been applied, in this case the courts of the United States, have jurisdiction to vacate or set aside an arbitral award.

Under Article V(1)(e) of the Convention, "an application for the setting aside or suspension of the award" can be made only to the courts or the "competent authority of the country in which, *or under the law of which*, that award was made." (Emphasis added). ISEC argues that "the competent authority of the country . . . under the law of which [the] award was made," refers to the country the substantive law of which, as opposed to the procedural law of which, was applied by the arbitrators. Hence, ISEC insists that since the arbitrators applied substantive New York law, we have jurisdiction to vacate the award.

[. . .]

Bridas has cited a case decided by our colleague Judge Keenan, *American Construction Machinery & Equipment Corp. v. Mechanised Construction of Pakistan Ltd., 659 F. Supp. 426* (S.D.N.Y.), *aff'd, 828 F.2d 117 (2d. Cir. 1987), cert. denied, 484 U.S. 1064, 98 L. Ed. 2d 988, 108 S. Ct. 1024 (1988),* as authority against the ISEC position. This case involved a dispute between a Cayman Islands Company and a Pakistani company, arguably controlled by Pakistani substantive law and arbitrated in Geneva. Judge Keenan was asked to decline enforcement of the award on the ground that a challenge to it was pending in the courts of Pakistan. He ruled that "the law under which this award was made was Swiss law because the award was rendered in Geneva pursuant to Geneva *procedural* law" *659 F. Supp. at 429* (emphasis added). This analysis was expressly affirmed in the Court of Appeals, and the Supreme Court declined to review it.

[. . .]

We conclude that the phrase in the Convention "[the country] under the laws of which that award was made" undoubtedly referenced the complex thicket of the *procedural* law of arbitration obtaining in the numerous and diverse jurisdictions of the dozens of nations in attendance at the time the Convention was being debated. Even today, over three decades after these debates were conducted, there are broad variations in the international community on how arbitrations are to be conducted and under what customs, rules, statutes or court decisions, that is, under what "competent authority." Indeed, some signatory nations have highly specialized arbitration procedures, as is the case with the United States, while many others have nothing beyond generalized civil practice to govern arbitration. *See* Lowenfeld, *The Two-Way Mirror: International Arbitration as Comparative Procedure*, 7 Mich. Y.B. Int'l Legal Studies 163, 166–70 (1985), *reprinted in* 2 Craig, Park and Paulssou, *International Chamber of Commerce Arbitration*, App. VII at 187 (1986).

This view is confirmed by Professor Van den Berg to the effect that the language in dispute reflects the delegates' practical insight that parties to an international arbitration might prefer to equalize travel distance and costs to witnesses by selecting as a situs forum A, midpoint between two cities or two continents, and submit themselves to a different procedural law by selecting the arbitration procedure of forum B.

> The "competent authority" as mentioned in Article V(1)(e) for entertaining the action of setting aside the award is virtually always the court of the country in which the award was made. The phrase "or under the law of which" the award was made refers to the theoretical case that on the basis of an agreement of the parties *the award is governed by an arbitration law which is different from the arbitration law of the country in which the award was made.*

A. Van den Berg, *The New York Arbitration Convention of 1958* 350 (Kluwer 1981) (emphasis added). [. . .]

It is clear, we believe, that any suggestion that a Court has jurisdiction to set aside a foreign award based upon the use of its domestic, substantive law in the foreign arbitration defies the logic both of the Convention debates and of the final text, and ignores the nature of the international arbitral system. This is demonstrated overwhelmingly by review of cases in foreign jurisdictions that have considered the question before us.

Decisions of foreign courts deciding cases under the Convention uniformly support the view that the clause in question means procedural and not substantive (i.e., in most cases contract) law. [. . .]

Finally, we should observe that the core of petitioner's argument, that a generalized supervisory interest of a state in the application of its domestic substantive law (in most arbitrations the law of contract) in a foreign proceeding, is wholly out of step with the universal concept of arbitration in all nations. The whole point of arbitration is that the merits of the dispute will *not* be reviewed in the courts, wherever they be located. Indeed, this principle is so deeply imbedded in American, and specifically, federal jurisprudence, that no further elaboration of the case law is necessary. That this was the animating principle of the Convention, that the Courts should review arbitrations for procedural regularity but resist inquiry into the substantive merits of awards, is clear from the notes on this subject by the Secretary-General of the United Nations. *See* Bermann Aff., *supra*, at 32–33.

Consequences of Set Aside

In reading the cases below, consider why the court did or did not enforce the arbitral award on the basis of the set aside. Do you think the decisions below are consistent? Why? What factors differ between the cases? Are these factors salient in your opinion?

Finally, in reading the decisions, you will find references made to public policy. Bear these references in mind when reading the cases dealing with the public policy exception to enforcement in its own right discussed further below. After reading the cases discussed in the next section, consider: did the procedural posture of these cases affect the public policy analysis?

TermoRio S.A. E.S.P. v. Electranta S.P.

487 F.3d 928 (D.C. Cir. 2007).

EDWARDS, J.

Appellant TermoRio S.A. E.S.P. ("TermoRio") and appellee Electrificadora del Atlantico S.A. E.S.P. ("Electranta"), a state-owned public utility, entered into a Power Purchase Agreement ("Agreement") pursuant to which TermoRio agreed to generate energy and Electranta agreed to buy it. When appellee allegedly failed to meet its obligations under the Agreement, the parties submitted their dispute to an arbitration Tribunal in Colombia in accordance with their Agreement. The Tribunal issued an award in excess of $60 million dollars in favor of TermoRio. Shortly after the Tribunal issued its award, Electranta filed an "extraordinary writ" in a Colombia court seeking to overturn the award. In due course, the Consejo de Estado ("Council of State"),

Colombia's highest administrative court, nullified the arbitration award on the ground that the arbitration clause contained in the parties' Agreement violated Colombian law.

Following the judgment by the Consejo de Estado, TermoRio and co-appellant LeaseCo Group, LLC ("LeaseCo"), an investor in TermoRio, filed suit in the District Court against Electranta and the Republic of Colombia seeking enforcement of the Tribunal's arbitration award. Appellants contended that enforcement of the award is required under the Federal Arbitration Act, *9 U.S.C. § 201* ("FAA"), which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, *reprinted in 9 U.S.C. § 201* (historical and statutory notes) ("New York Convention"). The District Court dismissed LeaseCo as a party for want of standing, dismissed appellants' enforcement action for failure to state a claim upon which relief could be granted, and, in the alternative, dismissed appellants' action on the ground of *forum non conveniens. TermoRio S.A. E.S.P. v. Electrificadora del Atlantico S.A. E.S.P., 421 F. Supp. 2d 87 (D.D.C. 2006).*

We affirm the judgment of the District Court. The arbitration award was made in Colombia and the Consejo de Estado was a competent authority in that country to set aside the award as contrary to the law of Colombia. *See* New York Convention art. V(1)(e) ("Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked . . . if that party furnishes . . . proof that: . . . [t]he award . . . has been set aside . . . by a competent authority of the country in which, or under the law of which, that award was made."). Because there is nothing in the record here indicating that the proceedings before the Consejo de Estado were tainted or that the judgment of that court is other than authentic, the District Court was, as it held, obliged to respect it. *See Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd., 191 F.3d 194 (2d Cir. 1999).* Accordingly, we hold that, because the arbitration award was lawfully nullified by the country in which the award was made, appellants have no cause of action in the United States to seek enforcement of the award under the FAA or the New York Convention.

[. . .]

C. *The Validity of a Foreign Judgment Vacating an Arbitration Award*

[. . .]

The Convention provides a carefully crafted framework for the enforcement of international arbitral awards. Under the Convention, "[o]nly a

court in a country with primary jurisdiction over an arbitral award may annul that award." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 287 (5th Cir. 2004)* ("*Karaha Bodas II*"). As the Second Circuit has noted:

> the Convention mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought. The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief. *See* Convention art. V(1)(e). However, the Convention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.

Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir. 1997).

In this case, appellees point out that, because the arbitration award was made by a Colombian Tribunal convened in that country, pursuant to an agreement between Colombian companies to buy and sell electrical power in that country, Colombia is the nation with primary jurisdiction over this dispute. Appellees argue further that, under the clear terms of the Convention, appellants' action to enforce the arbitration award fails to state a cause of action. On this latter point, appellees point to Article V(1)(e) of the Convention, which provides that

> [r]ecognition and enforcement of [an] award may be refused, at the request of the party against whom it is invoked, . . . if that party furnishes . . . proof that: . . . [t]he award . . . has been set aside . . . by a competent authority of the country in which, or under the law of which, that award was made.

New York Convention art. V(1)(e). Pursuant to this provision of the Convention, a secondary Contracting State normally may not enforce an arbitration award that has been lawfully set aside by a "competent authority" in the primary Contracting State. Because the Consejo de Estado is undisputedly a "competent authority" in Colombia (the primary State), and because there is nothing in the record here indicating that the proceedings before the Consejo de Estado were tainted or that the judgment of that court is other than authentic, appellees contend that appellants have no cause of action under the FAA or the

New York Convention to enforce the award in a Contracting State outside of Colombia. On the record at hand, we agree.

In reaching this conclusion, we generally subscribe to the reasoning of the Second Circuit in *Baker Marine, 191 F.3d 194*. In that case, Baker Marine, a barge company, executed a services contract with Danos, a shipping concern. The contract contained a clause requiring the parties to arbitrate disputes or controversies arising under their agreement. Following such a dispute, the parties "submitted to arbitration before panels of arbitrators in Lagos, Nigeria." *Id. at 195*. The panels awarded Baker Marine nearly $ 3 million in damages, but the award was subsequently set aside by a Nigerian court. Baker Marine then sought enforcement of the award in the United States District Court for the Northern District of New York. The trial court refused to recognize the award, citing Article V(1)(e) of the New York Convention, as well as principles of comity. On appeal, Baker Marine argued that the trial court erred in refusing to enforce the award, because it had been set aside by the Nigerian court on grounds that would have been invalid under U.S. law if presented in an American court. The appellate court rejected this argument and affirmed the trial court's decision not to recognize the award, noting that the parties "contracted in Nigeria that their disputes would be arbitrated under the laws of Nigeria." *Id. at 197*. The court also remarked on the undesirable consequences that would likely follow from adoption of Baker Marine's argument:

> [A]s a practical matter, mechanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments. If a party whose arbitration award has been vacated at the site of the award can automatically obtain enforcement of the awards under the domestic laws of other nations, a losing party will have every reason to pursue its adversary "with enforcement actions from country to country until a court is found, if any, which grants the enforcement."

Id. at 197 n.2 (quoting ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 355 (1981)). The same principles and concerns govern here, where appellants seek to enforce an arbitration award that has been vacated by Colombia's Consejo de Estado. For us to endorse what appellants seek would seriously undermine a principal precept of the New York Convention: an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully "set aside" by a competent authority in

the State in which the award was made. This principle controls the disposition of this case.

D. *Considerations of "Public Policy"*

Appellants argue that courts in the United States "have discretion under the Convention to enforce an award despite annulment in another country," *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas, 335 F.3d 357, 369 (5th Cir. 2003)*, because Article V(1)(e) merely says that "[r]ecognition and enforcement *may* be refused" if the award has been set aside by a competent authority in the primary state, New York Convention art. V(1)(e) (emphasis added). More particularly, appellants contend that "a state is not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interests." Appellants' Br. at 22 (quoting *Laker Airways Ltd. v. Sabena, Belgian World Airlines, 235 U.S. App. D.C. 207, 731 F.2d 909, 931 (D.C. Cir. 1984)).* Appellants' characterizations of the applicable law are understated and thus misguided.

Appellants concede that *Baker Marine* is not incorrect in its holding that "it is insufficient to enforce an award solely because a foreign court's grounds for nullifying the award would not be recognized under domestic United States law." Appellants' Br. at 24. Rather, appellants allege that the District Court should have exercised its discretion to enforce the arbitration award in this case, because, *inter alia*, "the Council of State's decision was contrary to both domestic Colombian and international law; recognition of that decision would frustrate clearly expressed international and United States policy; and the process leading to the nullification decision demonstrated the Colombian government's determination to deny Plaintiffs fair process." *Id.*

[. . .]

Furthermore, appellants are simply mistaken in suggesting that the Convention policy in favor of enforcement of arbitration awards effectively swallows the command of Article V(1)(e). A judgment whether to recognize or enforce an award that has not been set aside in the State in which it was made is quite different from a judgment whether to disregard the action of a court of competent authority in another State. "The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief." *Yusuf Ahmed Alghanim & Sons, 126 F.3d at 23; see also Karaha Bodas II, 364 F.3d at 287–88.* This means that a primary State necessarily may set aside an

award on grounds that are not consistent with the laws and policies of a secondary Contracting State. The Convention does not endorse a regime in which secondary States (in determining whether to enforce an award) routinely second-guess the judgment of a court in a primary State, when the court in the primary State has lawfully acted pursuant to "competent authority" to "set aside" an arbitration award made in its country. Appellants go much too far in suggesting that a court in a secondary State is free as it sees fit to ignore the judgment of a court of competent authority in a primary State vacating an arbitration award. It takes much more than a mere assertion that the judgment of the primary State "offends the public policy" of the secondary State to overcome a defense raised under Article V(1)(e).

The decision in *Baker Marine* notes that the "[r]ecognition of the [foreign court's] judgment in [that] case d[id] not conflict with United States public policy," *191 F.3d at 197 n.3*, thus at least implicitly endorsing a "public policy" gloss on Article V(1)(e). However, the decision does not say that a court in the United States has unfettered discretion to impose its own considerations of public policy in reviewing the judgment of a court in a primary State vacating an arbitration award based upon the foreign court's construction of the law of the primary State. Rather, as appellees argue, *Baker Marine* is consistent with the view that, "[w]hen a competent foreign court has nullified a foreign arbitration award, United States courts should not go behind that decision absent extraordinary circumstances not present in this case." Appellees' Br. at 12.

In applying Article V(1)(e) of the New York Convention, we must be very careful in weighing notions of "public policy" in determining whether to credit the judgment of a court in the primary State vacating an arbitration award. The test of public policy cannot be simply whether the courts of a secondary State would set aside an arbitration award if the award had been made and enforcement had been sought within its jurisdiction. As noted above, the Convention contemplates that different Contracting States may have different grounds for setting aside arbitration awards. Therefore, it is unsurprising that the courts have carefully limited the occasions when a foreign judgment is ignored on grounds of public policy.

[. . .]

Accepting that there is a narrow public policy gloss on Article V(1)(e) of the Convention and that a foreign judgment is unenforceable as against public policy to the extent that it is "repugnant to fundamental notions of what is decent and just in the United States," *Taban, 662 F.2d at 864* (internal quotation marks omitted), appellants' claims still fail. Appellants have neither alleged nor

provided any evidence to suggest that the parties' proceedings before Colombia's Consejo de Estado or the judgment of that court violated any basic notions of justice to which we subscribe.

Appellants contend that the Consejo de Estado's ruling conflicts with Colombia's obligation under the New York Convention, but that bare allegation surely provides no basis for us to ignore Article V(1)(e) on grounds of public policy. [. . .]

The District Court correctly observed that "[t]his matter is a peculiarly Colombian affair," concerning, as it does, "a dispute involving Colombian parties over a contract to perform services in Colombia which led to a Colombian arbitration decision and Colombian litigation." *TermoRio, 421 F. Supp. 2d at 101, 103.* To this, we would add that the parties also agreed to be bound by Colombian law. The Consejo de Estado, Colombia's highest administrative court, is the final expositor of Colombian law, and we are in no position to pronounce the decision of that court wrong.

[. . .]

In Re Arbitration of Certain Controversies Between Chromalloy Aeroservices and the Arab Republic of Egypt

939 F. Supp. 907 (D.D.C. 1996) (footnotes omitted).

[In June 1988 Egypt and Chromalloy (CAS) executed a contract whereby CAS was to provide parts and services for Egyptian Air Force helicopters. In December 1991 Egypt notified CAS that Egypt was terminating the contract. CAS rejected the cancellation and commenced arbitration against Egypt. The arbitral tribunal issued an award in favor of CAS in August 1994. Thereafter, in October 1994 CAS filed in U.S. district court seeking enforcement of the award while Egypt petitioned the Egyptian courts to nullify the award in November 1994 which it ultimately did in December 1995. In the excerpt below the U.S. district court addresses whether it should refuse to enforce the award based on the set aside by the Egyptian courts or whether it should nevertheless enforce the award.]

GREEN, J.

[. . .]

C. The Decision of Egypt's Court of Appeal

1. The Contract

"The arbitration agreement is a contract and the court will not rewrite it for the parties." *Williams v. E.F. Hutton & Co., Inc., 753 F.2d 117, 119, 243 U.S. App. D.C. 299* (D.C. Cir. 1985) (*citing Davis v. Chevy Chase Financial Ltd., 215 U.S. App. D.C. 117, 667 F.2d 160, 167 (D.C. Cir. 1981)*). The Court "begin[s] with the 'cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other.' " *United States v. Insurance Co. of North America, 317 U.S. App. D.C. 459, 83 F.3d 1507, 1511 (D.C. Cir. 1996)* (*quoting Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 131 L. Ed. 2d 76, 115 S. Ct. 1212, 1219 (1995)*). Article XII of the contract requires that the parties arbitrate all disputes that arise between them under the contract. Appendix E, which defines the terms of any arbitration, forms an integral part of the contract. The contract is unitary. Appendix E to the contract defines the "Applicable Law Court of Arbitration." The clause reads, in relevant part:

> It is . . . understood that both parties have irrevocably agreed to apply Egypt (sic) Laws and to choose Cairo as seat of the court of arbitration.
>
> * * * *
>
> The decision of the said court shall be final and binding and cannot be made subject to any appeal or other recourse.

(Appendix E ("Appendix") to the Contract.)

This Court may not assume that the parties intended these two sentences to contradict one another, and must preserve the meaning of both if possible. *Insurance Co., 317 U.S. App. D.C. 459, 83 F.3d 1507, 1511 (D.C. Cir. 1996)*. Egypt argues that the first quoted sentence supersedes the second, and allows an appeal to an Egyptian court. Such an interpretation, however, would vitiate the second sentence, and would ignore the plain language on the face of the contract. The Court concludes that the first sentence defines choice of law and choice of forum for the hearings of the arbitral panel. The Court further concludes that the second quoted sentence indicates the clear intent of the parties that any arbitration of a dispute arising under the contract is not to be appealed to any court. This interpretation, unlike that offered by Egypt, preserves the meaning

of both sentences in a manner that is consistent with the plain language of the contract. The position of the latter sentence as the seventh and final paragraph, just before the signatures, lends credence to the view that this sentence is the final word on the arbitration question. In other words, the parties agreed to apply Egyptian Law to the arbitration, but, more important, they agreed that the arbitration ends with the decision of the arbitral panel.

2. The Decision of the Egyptian Court of Appeal

The Court has already found that the arbitral award is proper as a matter of U.S. law, and that the arbitration agreement between Egypt and CAS precluded an appeal in Egyptian courts. The Egyptian court has acted, however, and Egypt asks this Court to grant *res judicata* effect to that action.

The "requirements for enforcement of a foreign judgment . . . are that there be 'due citation' [*i.e.*, proper service of process] and that the original claim not violate U.S. public policy." *Tahan v. Hodgson, 213 U.S. App. D.C. 306, 662 F.2d 862, 864 (D.C. Cir. 1981) (citing Hilton v. Guyot, 159 U.S. 113, 202, 40 L. Ed. 95, 16 S. Ct. 139 (1895)).* The Court uses the term 'public policy' advisedly, with a full understanding that, "Judges have no license to impose their own brand of justice in determining applicable public policy." *Northwest Airlines Inc. v. Airline Pilots Association, Int'l, 257 U.S. App. D.C. 181, 808 F.2d 76, 78 (D.C. Cir. 1987).* Correctly understood, "Public policy emanates [only] from clear statutory or case law, 'not from general considerations of supposed public interest.' " *Id. (quoting U.S. Postal Workers Union v. United States Postal Service, 252 U.S. App. D.C. 169, 789 F.2d 1 (D.C. Cir. 1986)).*

The U.S. public policy in favor of final and binding arbitration of commercial disputes is unmistakable, and supported by treaty, by statute, and by case law. The Federal Arbitration Act "and the implementation of the Convention in the same year by amendment of the Federal Arbitration Act," demonstrate that there is an "emphatic federal policy in favor of arbitral dispute resolution," particularly "in the field of international commerce." [. . .] A decision by this Court to recognize the decision of the Egyptian court would violate this clear U.S. public policy.

3. International Comity

"No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum." *Laker Airways Ltd. v. Sabena, Belgian World Airlines, 235 U.S. App. D.C. 207, 731 F.2d 909, 937 (D.C. Cir. 1984).* "Comity *never* obligates a national forum to ignore 'the rights of its own citizens or of other persons who are under the protection of its

laws.' " *731 F.2d at 942* (emphasis added) (quoting *Hilton v. Guyot, 159 U.S. 113, 164, 40 L. Ed. 95, 16 S. Ct. 139 (1895)*. Egypt alleges that, "Comity is the chief doctrine of international law *requiring* U.S. courts to respect the decisions of competent foreign tribunals." However, comity does not and may not have the preclusive effect upon U.S. law that Egypt wishes this Court to create for it.

[. . .]

4. Choice of Law

Egypt argues that by choosing Egyptian law, and by choosing Cairo as the sight [sic] of the arbitration, CAS has for all time signed away its rights under the Convention and U.S. law. This argument is specious. When CAS agreed to the choice of law and choice of forum provisions, it waived its right to sue Egypt for breach of contract in the courts of the United States in favor of final and binding arbitration of such a dispute under the Convention. Having prevailed in the chosen forum, under the chosen law, CAS comes to this Court seeking recognition and enforcement of the award. The Convention was created for just this purpose. It is untenable to argue that by choosing arbitration under the Convention, CAS has waived rights specifically guaranteed by that same Convention.

[. . .]

IV. Conclusion

The Court concludes that the award of the arbitral panel is valid as a matter of U.S. law. The Court further concludes that it need not grant *res judicata* effect to the decision of the Egyptian Court of Appeal at Cairo. Accordingly, the Court **GRANTS** Chromalloy Aeroservices' Petition to Recognize and Enforce the Arbitral Award, and **DENIES** Egypt's Motion to Dismiss that Petition. An appropriate order is attached.

G. Public Policy

One of the most contested bases for the non-enforcement of international arbitral awards is the public policy exception to enforcement. The New York Convention provides:

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

One of the leading questions in this regard is whether the public policy in question is the domestic public policy of the enforcing State, or some form of international public policy. This distinction lies at the heart of a current debate

in international arbitration circles on the importance of the local anchor of arbitrations both in the jurisdiction in which they are seated and the jurisdictions in which they are enforced. With few exceptions, a consensus has formed that the public policy intended by the New York Convention is an "international public policy". Yet, in reading the decisions below, consider whether the public policy invoked in the decisions is truly international, or if it remains rooted in the legal systems in which the enforcing court is seated regardless of statements to the contrary on the face of the court decisions themselves.

Parson & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie du Papier

508 F.2d 969 (2d Cir. 1974) (footnotes omitted).

[In November 1962, Parsons & Whittemore Overseas (Overseas) entered into a contract with Societe General De L'Industrie du Papier (RAKTA) to construct and operate a paperboard mill in Egypt. The contract contained an arbitration clause and a force majeure clause excusing delay in performance from causes beyond Overseas' control. In June 1967, as a result of the Arab-Israeli Six Day War, Egypt broke diplomatic ties with the United States and ordered all U.S. citizens out of the country. This meant that the majority of Overseas' employees were forced to leave Egypt even though construction of the mill was almost complete. Overseas invoked the force majeure clause in the contract but RAKTA claimed breach. The dispute was submitted to arbitration under ICC rules.

The arbitral tribunal found that Overseas was entitled to claim force majeure only for the period between May 28 to June 20, 1967 and that Overseas had not made a serious effort to obtain special visas that would have allowed its employees to remain in Egypt. Consequently, the tribunal issued an award in favor of RAKTA. Overseas sought declaratory judgment in U.S. district court to prevent a letter of credit issued in favor of RAKTA to cover any "penalties" for breach of contract by Overseas from being used to satisfy any potential award in RAKTA's favor issued by the arbitral tribunal. RAKTA argued that the arbitral award constituted a penalty as contemplated by the letter of credit and sought confirmation and enforcement of the award. The U.S. district court rejected all of Overseas' asserted grounds for refusing recognition and enforcement under the New York Convention. The decision excerpted below is from the appeal to the Second Circuit which affirmed the district court's ruling.]

SMITH, J.

[. . .]

A. *Public Policy*

Article V(2) (b) of the Convention allows the court in which enforcement of a foreign arbitral award is sought to refuse enforcement, on the defendant's motion or *sua sponte*, if "enforcement of the award would be contrary to the public policy of [the forum] country." The legislative history of the provision offers no certain guidelines to its construction. Its precursors in the Geneva Convention and the 1958 Convention's ad hoc committee draft extended the public policy exception to, respectively, awards contrary to "principles of the law" and awards violative of "fundamental principles of the law." In one commentator's view, the Convention's failure to include similar language signifies a narrowing of the defense. Contini, *supra*, 8 Am. J. Comp. L. 283 at 304. On the other hand, another noted authority in the field has seized upon this omission as indicative of an intention to broaden the defense. Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049, 1070–71 (1961).

Perhaps more probative, however, are the inferences to be drawn from the history of the Convention as a whole. The general pro-enforcement bias informing the Convention and explaining its supersession of the Geneva Convention points toward a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention's basic effort to remove preexisting obstacles to enforcement. [. . .] Additionally, considerations of reciprocity—considerations given express recognition in the Convention itself—counsel courts to invoke the public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States.

We conclude, therefore, that the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice. *Cf.* 1 *Restatement Second of the Conflict of Laws § 117, comment c*, at 340 (1971); *Loucks v. Standard Oil Co., 224 N.Y. 99, 111, 120 N.E. 198 (1918).*

Under this view of the public policy provision in the Convention, Overseas' public policy defense may easily be dismissed. Overseas argues that various actions by United States officials subsequent to the severance of American-

Egyptian relations—most particularly, AID's withdrawal of financial support for the Overseas-RAKTA contract—required Overseas, as a loyal American citizen, to abandon the project. Enforcement of an award predicated on the feasibility of Overseas' returning to work in defiance of these expressions of national policy would therefore allegedly contravene United States public policy. In equating "national" policy with United States "public" policy, the appellant quite plainly misses the mark. To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of "public policy." Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis. *Cf. Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S. Ct. 2449, 41 L. Ed. 2d 270, 42 U.S.L.W. 4911, 4915–16 n. 15 (1974).*

To deny enforcement of this award largely because of the United States' falling out with Egypt in recent years would mean converting a defense intended to be of narrow scope into a major loophole in the Convention's mechanism for enforcement. We have little hesitation, therefore, in disallowing Overseas' proposed public policy defense.

[. . .]

Columbia
Law School

INTERNATIONAL ARBITRATION: COMPARATIVE PERSPECTIVES

University of Sao Paulo Prof. Alejandro M. Garro [1]

August 14-17, 2023 9 am to 11 am

Wednesday, August 16, 2023

Recognition of foreign arbitral awards and enforcement of awards: New York Convention awards and other awards.

Grounds for denying Recognition and Enforcement of an Arbitration Award

Disputes subject to international arbitration: Subject-matter arbitrabiity and enforcement of arbitral agreements/awards Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985)

Recognition and Enforcement of an Award Annulled at the Seat**:** Chromalloy Aeroservices v. Arab Republic of Egypt

[1] Prof. Alejandro M. Garro: garro@law.columbia.edu

Chromalloy Aeroservices v. Arab Republic of Egypt

939 F. Supp. 907 (D.D.C. 1996)
(Paragraph numbers added, most footnotes omitted.)
JUNE L. GREEN, District Judge

I. Introduction

[1] This matter is before the Court on the Petition of Chromalloy Aeroservices, Inc., ("CAS") to Confirm an Arbitral Award, and a Motion to Dismiss that Petition filed by the Arab Republic of Egypt ("Egypt"), the defendant in the arbitration. This is a case of first impression. The Court GRANTS Chromalloy Aeroservices' Petition to Recognize and Enforce the Arbitral Award, and DENIES Egypt's Motion to Dismiss, because the arbitral award in question is valid, and because Egypt's arguments against enforcement are insufficient to allow this Court to disturb the award.

II. Background

[2] This case involves a military procurement contract between a U.S. corporation, Chromalloy Aeroservices, Inc., and the Air Force of the Arab Republic of Egypt.

[3] On June 16, 1988, Egypt and CAS entered into a contract under which CAS agreed to provide parts, maintenance, and repair for helicopters belonging to the Egyptian Air Force. . . . On December 2, 1991, Egypt terminated the contract by notifying CAS representatives in Egypt. . . . On December 4, 1991, Egypt notified CAS headquarters in Texas of the termination. On December 15, 1991, CAS notified Egypt that it rejected the cancellation of the contract "and commenced arbitration proceedings on the basis of the arbitration clause contained in Article XII and Appendix E of the Contract." Egypt then drew down CAS' letters of guarantee in an amount totaling some $11,475,968.

[4] On February 23, 1992, the parties began appointing arbitrators, and shortly thereafter, commenced a lengthy arbitration. On August 24, 1994, the arbitral panel ordered Egypt to pay to CAS the sums of $272,900 plus 5 percent interest from July 15, 1991, (interest accruing until the date of payment), and $16,940,958 plus 5 percent interest from December 15, 1991, (interest accruing until the date of payment). The panel also ordered CAS to pay to Egypt the sum of 606,920 pounds sterling, plus 5 percent interest from December 15, 1991, (interest accruing until the date of payment).

[5] On October 28, 1994, CAS applied to this Court for enforcement of the award. On November 13, 1994, Egypt filed an appeal with the Egyptian Court of Appeal, seeking nullification of the award. . . . On December 5, 1995, Egypt's Court of Appeal at Cairo issued an order nullifying the award. . . .

[6] Egypt argues that this Court should deny CAS' Petition to Recognize and Enforce the Arbitral Award out of deference to its court. . . . CAS argues that this Court should confirm the award because Egypt "does not present any serious argument that its court's nullification decision is consistent with the New York Convention or United States arbitration law." . . .

III. Discussion

A. Jurisdiction . . .

1. The Standard under the Convention

[10] This Court *must* grant CAS's Petition to Recognize and Enforce the arbitral "award unless it finds one of the grounds for refusal . . . of recognition or enforcement of the award specified in the . . . Convention." 9 U.S.C. § 207. Under the Convention, "Recognition and enforcement of the award *may* be refused" if Egypt furnishes to this Court "proof that . . . [t]he award has . . . been set aside . . . by a competent authority of the country in which, or under the law of which, that award was made." Convention, Article V(1) & V(1) (e) (emphasis added), 9 U.S.C. § 201 note. In the present case, the award was made in Egypt, under the laws of Egypt, and has been nullified by the court designated by Egypt to review arbitral awards. Thus, the Court *may,* at its discretion, decline to enforce the award.[2]

[11] While Article V provides a discretionary standard, Article VII of the Convention *requires* that, "The provisions of the present Convention *shall not* . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law . . . of the count[r]y where such award is sought to be relied upon." 9 U.S.C. § 201 note (emphasis added). In other words, under the Convention, CAS maintains all rights to the enforcement of this Arbitral Award that it would have in the absence of the Convention. Accordingly, the Court finds that, if the Convention did not exist, the Federal Arbitration Act ("FAA") would provide CAS with a legitimate claim to enforcement of this arbitral award. *See* 9 U.S.C. §§ 1–14. Jurisdiction over Egypt in such a suit would be available under 28 U.S.C. §§ 1330 (granting jurisdiction over foreign states "as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity . . . under sections 1605–1607 of this title") and 1605(a) (2) (withholding immunity of foreign states for "an act outside . . . the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States"). *See Weltover,* 504 U.S. at 607 . . . . Venue for the action would lie with this Court under 28 U.S.C. § 1391(f) & (f) (4) (granting venue in civil cases against foreign governments to the United States District Court for the District of Columbia).

2. Examination of the Award under 9 U.S.C. § 10

[12] Under the laws of the United States, arbitration awards are presumed to be binding, and may only be vacated by a court under very limited circumstances:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration
>
> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

---

2. The French language version of the Convention, (which the Court notes is *not* the version codified by Congress), emphasizes the extraordinary nature of a refusal to recognize an award: "Recognition and enforcement of the award *will not be refused* . . . unless. . . ." . . . (emphasis in the original).

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10.[1]

[13] An arbitral award will also be set aside if the award was made in "'manifest disregard' of the law." *First Options of Chicago v. Kaplan,* 514 U.S. 938 [942] . . . (1995). "Manifest disregard of the law may be found if [the] arbitrator[s] understood and correctly stated the law but proceeded to ignore it." *Kanuth v. Prescott, Ball, & Turben, Inc.,* 949 F.2d 1175, 1179 (D.C.Cir.1991).

> Plainly, this non-statutory theory of vacatur cannot empower a District Court to conduct the same de novo review of questions of law that an appellate court exercises over lower court decisions. Indeed, we have in the past held that it is clear that [manifest disregard] means more than error or misunderstanding with respect to the law. *Al-Harbi v. Citibank,* 85 F.3d 680, 683 (D.C.Cir.1996) (internal citations omitted). . . .

[17] In the United States, "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* [above, p. 900] (1985). In Egypt, however, "[I]t is established that arbitration is an exceptional means for resolving disputes, requiring departure from the normal means of litigation before the courts, and the guarantees they afford." (Nullification Decision at 8.) Egypt's complaint that, "[T]he Arbitral Award is null under Arbitration Law, . . . because it is not properly 'grounded' under Egyptian law," reflects this suspicious view of arbitration, and is precisely the type of technical argument that U.S. courts are not to entertain when reviewing an arbitral award. *See Montana Power Company v. Federal Power Commission,* 445 F.2d 739, 755 (D.C.Cir.1970) (*cert. den.* 400 U.S. 1013 . . . (1971)) (holding that, "Arbitrators do not have to give reasons") (*citing United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 598 . . . (1960)).

[18] The Court's analysis thus far has addressed the arbitral award, and, as a matter of U.S. law, the award is proper. *See Sanders v. Washington Metro. Area Transit Auth.,* 819 F.2d 1151, 1157 (D.C.Cir.1987) (holding that, "When the parties have had a full and fair opportunity to present their evidence, the decisions of the arbitrator should be viewed as conclusive as to subsequent proceedings, absent some abuse of discretion by the arbitrator") (*citing* the Restatement (Second) of Judgments § 84(3) (1982), *Greenblatt v. Drexel Burnham Lambert, Inc.,* 763 F.2d 1352 (11th Cir. 1985)). The Court now considers the question of whether the decision of the Egyptian court should be recognized as a valid foreign judgment.

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1. The Court has reviewed the voluminous submissions of the parties and finds no evidence that corruption, fraud, or undue means was used in procuring the award, or that the arbitrators exceeded their powers in any way.

[19] As the Court stated earlier, this is a case of first impression. There are no reported cases in which a court of the United States has faced a situation, under the Convention, in which the court of a foreign nation has nullified an otherwise valid arbitral award. This does not mean, however, that the Court is without guidance in this case. To the contrary, more than twenty years ago, in a case involving the enforcement of an arbitration clause under the FAA, the Supreme Court held that:

> An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause. . . . The invalidation of such an agreement . . . would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a parochial concept that all disputes must be resolved under our laws and in our courts. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 . . . (1974) (*reh. den.*, 419 U.S. 885 . . . (1974)) (citations omitted).

[20] In *Scherk*, the Court forced a U.S. corporation to arbitrate a dispute arising under an international contract containing an arbitration clause. *Id.* 417 U.S. at 518, 94 S. Ct. at 2456–57. In so doing, the Court relied upon the FAA, but took the opportunity to comment upon the purposes of the newly acceded-to Convention:

> The delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements. . . . [W]e think that this country's adoption and ratification of the Convention and the passage of Chapter 2 of the United States Arbitration Act provide strongly persuasive evidence of congressional policy consistent with the decision we reach today. *Id.* at n. 15.

The Court finds this argument equally persuasive in the present case, where Egypt seeks to repudiate its solemn promise to abide by the results of the arbitration.[4] . . .

2. The Decision of the Egyptian Court of Appeal

[23] The Court has already found that the arbitral award is proper as a matter of U.S. law, and that the arbitration agreement between Egypt and CAS precluded an appeal in Egyptian courts. The Egyptian court has acted, however, and Egypt asks this Court to grant *res judicata* effect to that action.

[24] The "requirements for enforcement of a foreign judgment . . . are that there be 'due citation' [*i.e.*, proper service of process] and that the original claim not violate U.S. public policy." *Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C.Cir.1981) (*citing*

4. The fact that this case concerns the enforcement of an arbitral *award*, rather than the enforcement of an agreement to arbitrate, makes no difference, because without the knowledge that judgment will be entered upon an award, the term "binding arbitration" becomes meaningless.

Hilton v. Guyot, [above, p. 834]. The Court uses the term 'public policy' advisedly, with a full understanding that, "[J]udges have no license to impose their own brand of justice in determining applicable public policy." *Northwest Airlines Inc. v. Air Line Pilots Association, Int'l,* 808 F.2d 76, 78 (D.C.Cir.1987). Correctly understood, "[P]ublic policy emanates [only] from clear statutory or case law, 'not from general considerations of supposed public interest.'" *Id.* (*quoting American Postal Workers Union v. United States Postal Service,* 789 F.2d 1 (D.C.Cir.1986)).

[25] The U.S. public policy in favor of final and binding arbitration of commercial disputes is unmistakable, and supported by treaty, by statute, and by case law. The Federal Arbitration Act "and the implementation of the Convention in the same year by amendment of the Federal Arbitration Act," demonstrate that there is an "emphatic federal policy in favor of arbitral dispute resolution," particularly "in the field of international commerce." *Mitsubishi v. Soler Chrysler-Plymouth,* [above, p. 900]; *cf. Revere Copper & Brass Inc., v. Overseas Private Investment Corporation,* 628 F.2d 81, 82 (D.C.Cir.1980) (holding that, "There is a strong public policy behind judicial enforcement of binding arbitration clauses"). A decision by this Court to recognize the decision of the Egyptian court would violate this clear U.S. public policy. . . .

IV. Conclusion

31 The Court concludes that the award of the arbitral panel is valid as a matter of U.S. law. The Court further concludes that it need not grant *res judicata* effect to the decision of the Egyptian Court of Appeal at Cairo. Accordingly, the Court GRANTS Chromalloy Aeroservices' Petition to Recognize and Enforce the Arbitral Award, and DENIES Egypt's Motion to Dismiss that Petition.

For further analysis see, *inter alia,* Claudia Alfons: *Recognition and Enforcement of Annulled Foreign Arbitral Awards: An Analysis of the Legal Framework and its Interpretation in Case Law,* Peter Lang Verlag 2010; Vesna Lazi-Smoljanič: *Enforcing Annulled Arbitral Awards: A Comparison of Approaches in the United States and in the Netherlands,* Zbornik Pravnog Fakulteta Sveucilista u Rijeci 2018, Vol. 39, No. 1, pp. 215–240.

Notes and Questions

1. What are the rules on foreign sovereign immunity in the U.S.? Explain the discussion in paragraph 11 of the decision. In which kind of cases would a foreign state be able to rely on sovereign immunity before a U.S. court and in which kind of cases would it not? Do some research, if necessary.

2. Can you enumerate all cases where a foreign arbitral award would not be recognized and enforced in the U.S.? To what extent are these scenarios giving discretionary powers to U.S. courts? To what extent may a U.S. court have to refuse recognition and enforcement? How do U.S. rules potentially differ from the rules on recognition and enforcement applicable in other countries? Consult paragraphs 13, 17, and 18 when formulating your answers.

3. Judge Green could not find a precedent for the question whether a foreign arbitral award could be recognized and enforced even if it had been annulled at the seat of the tribunal. She did find the *Scherk v. Alberto-Culver* decision, however, which discussed the invalidity of an arbitration clause (paras. 19–20). Do you agree that this is a persuasive precedent? Why? Why not?

4. After the Egyptian court annulled the arbitral award, the defendant requested that the U.S. court grant res judicata effect[297] to the Egyptian court decision (paras. 23 et seq.). In general, when does a court decision have res judicata effect? Is there a difference between purely domestic constellations and cases where the effect is invoked for a foreign court decision? What about res judicata of the earlier arbitral award? Can an arbitral award have res judicata effect? When? On what conditions?

5. In the end, the U.S. court decided to disregard the Egyptian annulment and recognize and enforce the original arbitral award. Can you summarize why the U.S. court came to this decision? Do you think it is a fair and correct decision? In what kind of cases would a U.S. court refuse the recognition and enforcement of a foreign arbitral award that has been annulled at its seat? When in doubt, should U.S. courts err on the side of recognizing or refusing to recognize a foreign arbitral award? Why?

6. Do you think that the fact that the respondent was the government of Egypt played a role in the annulment decision of the Egyptian court? The recognition and enforcement decision of the American court?

7. If the respondent does not pay voluntarily, the recognition and enforcement of the arbitral award in the U.S. is only useful for the claimant if the respondent has assets in the U.S. What kind of assets might a foreign state or government have in the U.S.? Could the claimant, for example, seize the building or the bank accounts of the Egyptian embassy in Washington, D.C.? Do some research into this question, if necessary.

8. Possibly because it could not find sufficient assets of the Egyptian state in the U.S., Chromalloy also pursued recognition and enforcement in France. Like the U.S. court, the French court granted recognition and enforcement in spite of the annulment in Egypt. See *The Arab Republic of Egypt v. Chromalloy Aeroservices Inc.*, Judgment of January 14, 1997, 22 Y.B. Comm. Arb. 691 (CA 1997).

. *Existence of an Arbitrable Dispute*

A dispute is arbitrable if it can be settled by arbitration. If a dispute is not arbitrable, a party to an IBT can call on the courts in spite of an arbitration clause in the agreement and/or any arbitration awards obtained by the other party would not be enforceable. A dispute that is not arbitrable can still be settled by negotiation or mediation, or a party can simply stop pursuing its claims. However, a binding decision against the will of at least one of the parties can only be obtained from the courts.

Although parties are largely free to decide whether they want to arbitrate instead of litigate, there are some restrictions for subject matter or types of dispute that are not arbitrable. An example we have used before is the restriction placed by many countries on arbitration clauses in consumer contracts (
The following case is a good illustration of the approach taken in the U.S. toward arbitrability in B2B transactions.

Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.

473 U.S. 614 (1985)

(Paragraph numbers added, some footnotes omitted.)

Justice BLACKMUN delivered the opinion of the Court (from p. 3348).

[1] The principal question presented by these cases is the arbitrability, pursuant to the Federal Arbitration Act, 9 U.S.C. §1 et seq., and the [New York] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention) . . . , of claims arising under the Sherman Act, 15 U.S.C. §1 et seq., and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction.

I

[2] Petitioner-cross-respondent Mitsubishi Motors Corporation (Mitsubishi) is a Japanese corporation which manufactures automobiles and has its principal place of business in Tokyo, Japan. Mitsubishi is the product of a joint venture between, on the one hand, Chrysler International, S.A. (CISA), a Swiss corporation registered in Geneva and wholly owned by Chrysler Corporation, and, on the other, Mitsubishi Heavy Industries, Inc., a Japanese corporation. The aim of the joint venture was the distribution through Chrysler dealers outside the continental United States of vehicles manufactured by Mitsubishi and bearing Chrysler and Mitsubishi trademarks. Respondent-cross-petitioner Soler Chrysler-Plymouth, Inc. (Soler), is a Puerto Rico corporation with its principal place of business in Pueblo Viejo, Guaynabo, Puerto Rico.

[3] On October 31, 1979, Soler entered into a Distributor Agreement with CISA which provided for the sale by Soler of Mitsubishi-manufactured vehicles within a designated area, including metropolitan San Juan. . . . On the same date, CISA, Soler, and Mitsubishi entered into a Sales Procedure Agreement (Sales Agreement) which, referring to the Distributor Agreement, provided for the direct sale of Mitsubishi products to Soler and governed the terms and conditions of such sales. . . . Paragraph VI of the Sales Agreement, labeled "Arbitration of Certain Matters," provides:

> "All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association."

[4] [Initially, Soler was very successful in selling cars under the agreement in its designated area, which caused Mitsubishi to increase the minimum sales target for Soler. In 1981, the market slowed down and Soler was no longer able to meet its target numbers. Soler requested that Mitsubishi should slow down or cancel some shipments and also asked for permission to sell some cars out of area, including the continental U.S., as well as Latin America. Mitsubishi and CISA refused permission for any out-of-area sales and started withholding deliveries to Soler. To preempt litigation by Soler,] Mitsubishi brought an action against Soler in the United States District Court for the District of Puerto Rico under the Federal Arbitration Act and the Convention. Mitsubishi sought an order, pursuant to 9 U.S.C. §§4 and 201,[3] to compel arbitration in accord with [Para.] VI of the Sales Agreement. . . . Shortly

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3. Section 4 provides in pertinent part: "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall

after filing the complaint, Mitsubishi filed a request for arbitration before the Japan Commercial Arbitration Association.

[6] [In its response before the District Court, Soler counterclaimed against Mitsubishi and CISA. . . .] In the counterclaim premised on the Sherman Act, Soler alleged that Mitsubishi and CISA had conspired to divide markets in restraint of trade. To effectuate the plan, according to Soler, Mitsubishi had refused to permit Soler to resell to buyers in North, Central, or South America vehicles it had obligated itself to purchase from Mitsubishi; had refused to ship ordered vehicles or the parts, such as heaters and defoggers, that would be necessary to permit Soler to make its vehicles suitable for resale outside Puerto Rico; and had coercively attempted to replace Soler and its other Puerto Rico distributors with a wholly owned subsidiary which would serve as the exclusive Mitsubishi distributor in Puerto Rico. . . .

[7] [The District Court ordered Mitsubishi and Soler to arbitrate the contractual elements of the dispute.] With regard to the federal antitrust issues, it recognized that the Courts of Appeals, following *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (CA2 1968), uniformly had held that the rights conferred by the antitrust laws were "of a character inappropriate for enforcement by arbitration." App. to Pet. for Cert. in No. 83-1569, p. B9, quoting *Wilko v. Swan*, 201 F.2d 439, 444 (CA2 1953), rev'd, 346 U.S. 427 . . . (1953). The District Court held, however, that the international character of the Mitsubishi-Soler undertaking required enforcement of the agreement to arbitrate even as to the antitrust claims. It relied on *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515–520 . . . (1974), in which this Court ordered arbitration, pursuant to a provision embodied in an international agreement, of a claim arising under the Securities Exchange Act of 1934 notwithstanding its assumption, arguendo, that *Wilko*, supra, which held nonarbitrable claims arising under the Securities Act of 1933, also would bar arbitration of a 1934 Act claim arising in a domestic context.

[8] The United States Court of Appeals for the First Circuit affirmed in part and reversed in part. 723 F.2d 155 (1983). It first rejected Soler's argument that Puerto

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make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."

Section 201 provides: "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter." Article II of the Convention, in turn, provides:

"1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. . . .

"3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." . . . Title 9 U.S.C. § 203 confers jurisdiction on the district courts of the United States over an action falling under the Convention.

Rico law precluded enforcement of an agreement obligating a local dealer to arbitrate controversies outside Puerto Rico. It also rejected Soler's suggestion that it could not have intended to arbitrate statutory claims not mentioned in the arbitration agreement. Assessing arbitrability "on an allegation-by-allegation basis," id., at 159, the court then read the arbitration clause to encompass virtually all the claims arising under the various statutes, including all those arising under the Sherman Act.[9]

[9] Finally, after endorsing the doctrine of *American Safety*, precluding arbitration of antitrust claims, the Court of Appeals concluded that neither this Court's decision in *Scherk* nor the Convention required abandonment of that doctrine in the face of an international transaction. 723 F.2d, at 164–168. Accordingly, it reversed

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9. As the Court of Appeals saw it, "[t]he question . . . is not whether the arbitration clause mentions antitrust or any other particular cause of action, but whether the factual allegations underlying Soler's counterclaims—and Mitsubishi's bona fide defenses to those counterclaims—are within the scope of the arbitration clause, whatever the legal labels attached to those allegations." 723 F.2d, at 159. Because Soler's counterclaim under the Puerto Rico Dealers' Contracts Act focused on Mitsubishi's alleged failure to comply with the provisions of the Sales Agreement governing delivery of automobiles, and those provisions were found in that portion of Article I of the Agreement subject to arbitration, the Court of Appeals placed this first counterclaim within the arbitration clause. Id., at 159–160.

The court read the Sherman Act counterclaim to raise issues of wrongful termination of Soler's distributorship, wrongful failure to ship ordered parts and vehicles, and wrongful refusal to permit transshipment of stock to the United States and Latin America. Because the existence of just cause for termination turned on Mitsubishi's allegations that Soler had breached the Sales Agreement by, for example, failing to pay for ordered vehicles, the wrongful termination claim implicated at least three provisions within the arbitration clause: Article I-D(1), which rendered a dealer's orders "firm"; Article I-E, which provided for "distress unit penalties" where the dealer prevented timely shipment; and Article I-F, specifying payment obligations and procedures. The court therefore held the arbitration clause to cover this dispute. Because the nonshipment claim implicated Soler's obligation under Article I-F to proffer acceptable credit, the court found this dispute covered as well. And because the transshipment claim prompted Mitsubishi defenses concerning the suitability of vehicles manufactured to Soler's specifications for use in different locales and Soler's inability to provide warranty service to transshipped products, it implicated Soler's obligation under Article IV, another covered provision, to make use of Mitsubishi's trademarks in a manner that would not dilute Mitsubishi's reputation and goodwill or damage its name and reputation. The court therefore found the arbitration agreement also to include this dispute, noting that such trademark concerns "are relevant to the legality of territorially based restricted distribution arrangements of the sort at issue here." 723 F.2d, at 160–161, citing *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 . . . (1977).

The Court of Appeals read the federal Automobile Dealers' Day in Court Act claim to raise issues as to Mitsubishi's good faith in establishing minimum-sales volumes and Mitsubishi's alleged attempt to coerce Soler into accepting replacement by a Mitsubishi subsidiary. It agreed with the District Court's conclusion, in which Mitsubishi acquiesced, that the arbitration clause did not reach the first issue; it found the second, arising from Soler's payment problems, to restate claims already found to be covered. 723 F.2d, at 161.

Finally, the Court of Appeals found the antitrust claims under Puerto Rico law entirely to reiterate claims elsewhere stated; accordingly, it held them arbitrable to the same extent as their counterparts. Ibid.

the judgment of the District Court insofar as it had ordered submission of "Soler's antitrust claims" to arbitration. Affirming the remainder of the judgment, the court directed the District Court to consider in the first instance how the parallel judicial and arbitral proceedings should go forward.[12]

[10] We granted certiorari primarily to consider whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction. 469 U.S. 916 . . . (1984).

II

[11] At the outset, we address the contention raised in Soler's cross-petition that the arbitration clause at issue may not be read to encompass the statutory counterclaims stated in its answer to the complaint. In making this argument, Soler does not question the Court of Appeals' application of ¶ VI of the Sales Agreement to the disputes involved here as a matter of standard contract interpretation. Instead, it argues that as a matter of law a court may not construe an arbitration agreement to encompass claims arising out of statutes designed to protect a class to which the party resisting arbitration belongs "unless [that party] has expressly agreed" to arbitrate those claims, . . . by which Soler presumably means that the arbitration clause must specifically mention the statute giving rise to the claims that a party to the clause seeks to arbitrate. . . . Soler reasons that, because it falls within the class for whose benefit the federal and local antitrust laws and dealers' Acts were passed, but the arbitration clause at issue does not mention these statutes or statutes in general, the clause cannot be read to contemplate arbitration of these statutory claims.

[12] We do not agree, for we find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims. The Act's centerpiece provision makes a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce . . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. The "liberal federal policy favoring arbitration agreements," *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 . . . (1983), manifested by this provision and the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply "creates a body of federal substantive law establishing

12. Following entry of the District Court's judgment, both it and the Court of Appeals denied motions by Soler for a stay pending appeal. The parties accordingly commenced preparation for the arbitration in Japan. Upon remand from the Court of Appeals, however, Soler withdrew the antitrust claims from the arbitration tribunal and sought a stay of arbitration pending the completion of the judicial proceedings on the ground that the antitrust claims permeated the claims that remained before that tribunal. The District Court denied the motion, instead staying its own proceedings pending the arbitration in Japan. The arbitration recommenced, but apparently came to a halt once again in September 1984 upon the filing by Soler of a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 et seq.

and regulating the duty to honor an agreement to arbitrate." Id., at 25, n. 32 . . . .[14] As this Court recently observed, "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered," a concern which "requires that we rigorously enforce agreements to arbitrate." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 . . . (1985).

[13] Accordingly, the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination by applying the "federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hospital*, 460 U.S., at 24 . . . . See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400–404 . . . (1967); *Southland Corp. v. Keating*, 465 U.S. 1, 12 . . . (1984). And that body of law counsels

> "that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hospital*, 460 U.S., at 24–25 . . . .

See, e.g., *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–583 . . . (1960). Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability.

[14] There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights. Some time ago this Court expressed "hope for [the Act's] usefulness both in controversies based on statutes or on standards otherwise created," *Wilko v. Swan*, 346 U.S. 427, 432 . . . (1953) (footnote omitted); see *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 135, n. 15 . . . (1973), and we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution. Just last Term in *Southland Corp.*, supra, where we held that § 2 of the Act declared a national policy applicable equally in state as well as federal courts, we construed an arbitration clause to encompass the disputes at issue without pausing at the source in a state statute of the rights asserted by the parties resisting arbitration. 465 U.S., at 15, and n. 7 . . . .[15] Of course, courts should remain attuned to well-supported claims

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14. The Court previously has explained that the Act was designed to overcome an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law. See *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 219–221, and n. 6 . . . (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510, and n. 4 . . . (1974).

15. The claims whose arbitrability was at issue in *Southland Corp.* arose under the disclosure requirements of the California Franchise Investment Law, Cal.Corp.Code Ann. § 31000 et seq. (West 1977). While the dissent in *Southland Corp.* disputed the applicability of the Act to

that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds "for the revocation of any contract." 9 U.S.C. §2; see *Southland Corp.*, 465 U.S., at 16, n. 11 . . . ; *The Bremen v. Zapata Off-Shore Co.*, [above, p. 763] (1972). But, absent such compelling considerations, the Act itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.

[15] That is not to say that all controversies implicating statutory rights are suitable for arbitration. There is no reason to distort the process of contract interpretation, however, in order to ferret out the inappropriate. Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable. *See Wilko v. Swan*, 346 U.S., at 434–435 . . . ; *Southland Corp.*, 465 U.S., at 16, n. 11 . . . ; *Dean Witter Reynolds Inc.*, 470 U.S., at 224–225 . . . (concurring opinion). For that reason, Soler's concern for statutorily protected classes provides no reason to color the lens through which the arbitration clause is read. By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. See *Wilko v. Swan, supra*. Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate. See *Prima Paint Corp.*, 388 U.S., at 406 . . . .

[16] In sum, the Court of Appeals correctly conducted a two-step inquiry, first determining whether the parties' agreement to arbitrate reached the statutory issues, and then, upon finding it did, considering whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims. We endorse its rejection of Soler's proposed rule of arbitration-clause construction.

III

[17] We now turn to consider whether Soler's antitrust claims are nonarbitrable even though it has agreed to arbitrate them. In holding that they are not, the Court of Appeals followed the decision of the Second Circuit in *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (1968). Notwithstanding the absence of

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proceedings in the state courts, it did not object to the Court's reading of the arbitration clause under examination.

any explicit support for such an exception in either the Sherman Act or the Federal Arbitration Act, the Second Circuit there reasoned that "the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make . . . antitrust claims . . . inappropriate for arbitration." *Id.*, at 827–828. We find it unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions. As in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 . . . (1974), we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

[18] Even before *Scherk*, this Court had recognized the utility of forum-selection clauses in international transactions. In *The Bremen*, supra, an American oil company, seeking to evade a contractual choice of an English forum and, by implication, English law, filed a suit in admiralty in a United States District Court against the German corporation which had contracted to tow its rig to a location in the Adriatic Sea. Notwithstanding the possibility that the English court would enforce provisions in the towage contract exculpating the German party which an American court would refuse to enforce, this Court gave effect to the choice-of-forum clause. It observed:

> "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." 407 U.S., at 9 . . . .

[19] Recognizing that "agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting," *id.*, at 13–14 . . . the decision in *The Bremen* clearly eschewed a provincial solicitude for the jurisdiction of domestic forums.

[20] Identical considerations governed the Court's decision in *Scherk*, which categorized "[a]n agreement to arbitrate before a specified tribunal [as], in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." 417 U.S., at 519 . . . . In *Scherk*, the American company Alberto-Culver purchased several interrelated business enterprises, organized under the laws of Germany and Liechtenstein, as well as the rights held by those enterprises in certain trademarks, from a German citizen who at the time of trial resided in Switzerland. Although the contract of sale contained a clause providing for arbitration before the International Chamber of Commerce in Paris of "any controversy or claim [arising] out of this agreement or the breach thereof," Alberto-Culver subsequently brought suit against Scherk in a Federal District Court

in Illinois, alleging that Scherk had violated § 10(b) of the Securities Exchange Act of 1934 by fraudulently misrepresenting the status of the trademarks as unencumbered. The District Court denied a motion to stay the proceedings before it and enjoined the parties from going forward before the arbitral tribunal in Paris. The Court of Appeals for the Seventh Circuit affirmed, relying on this Court's holding in *Wilko v. Swan*, 346 U.S. 427 . . . (1953), that agreements to arbitrate disputes arising under the Securities Act of 1933 are nonarbitrable. This Court reversed, enforcing the arbitration agreement even while assuming for purposes of the decision that the controversy would be nonarbitrable under the holding of Wilko had it arisen out of a domestic transaction. Again, the Court emphasized:

> "A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. . . .
>
> "A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. . . . [It would] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." 417 U.S., at 516–517. . . .

Accordingly, the Court held Alberto-Culver to its bargain, sending it to the international arbitral tribunal before which it had agreed to seek its remedies.

[21] *The Bremen* and *Scherk* establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions. Here, as in *Scherk*, that presumption is reinforced by the emphatic federal policy in favor of arbitral dispute resolution. And at least since this Nation's accession in 1970 to the Convention, see [1970] 21 U.S.T. 2517, T.I.A.S. 6997, and the implementation of the Convention in the same year by amendment of the Federal Arbitration Act, that federal policy applies with special force in the field of international commerce. . . .

Notes and Questions

1. In effect, the Supreme Courts says, whatever the parties to an IBT have agreed to shall be enforced, even if it concerns an area subject to public policy mandates, such as antitrust legislation. The Court leaves open the question whether it would hold similarly for a domestic business transaction. Why would antitrust considerations (and other public policy) be less important in the context of *international* transactions? Or does the Court see other reasons for giving a higher priority to party autonomy in the case of IBTs?

2. Could this precedent be used to support arbitrability in all cases where the parties have inserted an arbitration clause in their agreement? How about employment contracts? Consumer contracts? Prenuptial agreements about division of assets or even child custody in case of divorce? Why or why not?

3. Who is bound by the approach taken in *Mitsubishi v. Soler*? Who is not? What happens if antitrust concerns are not arbitrable in other countries, for example in Switzerland, where CISA is incorporated? What happens generally when the standards for arbitrability vary from one country to another?

4. The Supreme Court went on to examine the four part test developed by the First Circuit in *American Safety* (from p. 3356):

> First, private parties play a pivotal role in aiding governmental enforcement of the antitrust laws by means of the private action for treble damages. Second, 'the strong possibility that contracts which generate antitrust disputes may be contracts of adhesion militates against automatic forum determination by contract.' Third, antitrust issues, prone to complication, require sophisticated legal and economic analysis, and thus are 'ill-adapted to strengths of the arbitral process, i.e., expedition, minimal requirements of written rationale, simplicity, resort to basic concepts of common sense and simple equity.' Finally, just as 'issues of war and peace are too important to be vested in the generals, . . . decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community—particularly those from a foreign community that has had no experience with or exposure to our law and values.' See *American Safety*, 391 F.2d, at 826–827.

The Supreme Court ultimately disagrees with all four elements of the test and basically says that:

> [t]here is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism. To be sure, the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim. Cf. *Wilko v. Swan*, 346 U.S., at 433–434 . . . .[19] And so long as the

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19. In addition to the clause providing for arbitration before the Japan Commercial Arbitration Association, the Sales Agreement includes a choice-of-law clause which reads: "This Agreement is made in, and will be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein." . . . The United States raises the possibility that the arbitral panel will read this provision not simply to govern interpretation of the contract terms, but wholly to displace American law even where it otherwise would apply. Brief for United States as Amicus Curiae 20. The International Chamber of Commerce opines that it is "[c]onceivabl[e],

> prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.

Isn't it a bit naive, to say it diplomatically, to assume that a foreign arbitral tribunal, in this case composed of three Japanese lawyers, would be able or even interested in enforcing American antitrust law (see note 19)? What do you think of the Supreme Court's idea that American courts would have sufficient opportunity to ensure respect of American public policy when a foreign award comes home for enforcement? Couldn't the parties simply seek enforcement in other countries if they are worried that the award would not be enforceable in the U.S.? Could you make an argument in defense of *American Safety*?

5. One of the important tools for the enforcement of American antitrust law is the ability of an injured party to claim treble damages from the party or parties in violation of U.S. law. However, punitive damages are frowned upon in most other countries and even explicitly prohibited in some.[205] Pursuant to *Mitsubishi v. Soler*,

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although we believe it unlikely, [that] the arbitrators could consider Soler's affirmative claim of anticompetitive conduct by CISA and Mitsubishi to fall within the purview of this choice-of-law provision, with the result that it would be decided under Swiss law rather than the U.S. Sherman Act." Brief for International Chamber of Commerce as Amicus Curiae 25. At oral argument, however, counsel for Mitsubishi conceded that American law applied to the antitrust claims and represented that the claims had been submitted to the arbitration panel in Japan on that basis. . . . The record confirms that before the decision of the Court of Appeals the arbitral panel had taken these claims under submission. . . .

We therefore have no occasion to speculate on this matter at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award. Nor need we consider now the effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinitiate suit in federal court. We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy. . . .

205. On the subject of punitive damages, see Voker Behr, *Myth and Reality of Punitive Damages in Germany*, J. L. & Com. 2005, Vol. 24, pp. 197–224; Jessica J. Berch, *The Need for Enforcement of U.S. Punitive Damages Awards by the European Union*, Minn. J. Int'l L. 2010, Vol. 19, No. 1, pp. 55–106; Ronald A. Brand, *Punitive Damages and the Recognition of Judgments*, Netherlands Int'l L. Rev. 1996, Vol. 43, No. 2, pp. 143–186; Norman T. Braslow, *The Recognition and Enforcement of Common Law Punitive Damages in a Civil Law System: Some Reflections on the Japanese Experience*, Ariz. J. Int'l & Comp. L. 1999, Vol. 16, No. 2, pp. 285–360; Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, Cornell L. Rev. 2002, Vol. 87, No. 3, pp. 743–782; John Y. Gotanda, *Awarding Punitive Damages in International Commercial Arbitrations in the Wake of* Mastrobuono v. Shearson Lehman Hutton Inc., Harv. Int'l L.J. 1997, Vol. 38, No. 1, pp. 59–110; John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, Villanova University Working Paper Series 2006, available at https://digitalcommons.law.villanova.edu/wps/art65/; Scott R. Jablonski, *Translation and Comment: Enforcing U.S. Punitive Damages Awards in Foreign Courts—A Recent Case in the Supreme Court of Spain*, J. L. & Com. 2005, Vol. 24, pp. 225–243; Amy A. Kirby, *Punitive Damages in Contract Actions: The Tension between the United Nations Convention on Contracts for the International Sale of Goods and U.S. Law*, J. L. & Com. 1997, Vol. 16, No. 2, pp. 215–231; A. Mitchell Polinsky & Steven Shavell, *Punitive Damages:*

must we conclude that a party agreeing to arbitration outside of the U.S. effectively gives away its opportunity to claim treble damages if it should be the target or victim of an antitrust violation?

6. If you were to advise Soler in the negotiations of a distributorship agreement with General Motors and Isuzu, what kind of arbitration clause would you want, if any, after the experience with Mitsubishi and Chrysler?

7. The latest word by the U.S. Supreme Court on the arbitrability of alleged violations of federal and state antitrust law was rendered on January 8, 2019, in *Henry Schein v. Archer & White* (139 S. Ct. 524):

> Under the Federal Arbitration Act . . . and this Court's cases, the question of who decides arbitrability is itself a question of contract. The Act allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes. . . .
>
> Even when a contract delegates the arbitrability question to an arbitrator, some federal courts nonetheless will short-circuit the process and decide the arbitrability question themselves if the argument that the arbitration agreement applies to the particular dispute is "wholly groundless." The question presented in this case is whether the "wholly groundless" exception is consistent with the Federal Arbitration Act. We conclude that it is not. The Act does not contain a "wholly groundless" exception, and we are not at liberty to rewrite the statute passed by Congress and signed by the President. When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract. We vacate the contrary judgment of the Court of Appeals. . . .
>
> II
>
> In 1925, Congress passed and President Coolidge signed the Federal Arbitration Act. As relevant here, the Act provides:
>
> "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2.
>
> Under the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. *Rent-A-Center*, 561 U. S., at 67. Applying the Act, we have held that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also "'gateway' questions of 'arbitrability,' such as whether the parties have agreed to

An Economic Analysis, Harv. L. Rev. 1998, Vol. 111, No. 4, pp. 869–962; Francesco Quarta, *Recognition and Enforcement of U.S. Punitive Damages Awards in Continental Europe: The Italian Supreme Court's Veto*, Hastings Int'l & Comp. L. Rev. 2008, Vol. 31, pp. 753–782. See also p. 856, note 157.

arbitrate or whether their agreement covers a particular controversy." *Id.*, at 68–69; . . . .

We must interpret the Act as written, and the Act in turn requires that we interpret the contract as written. When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.

That conclusion follows not only from the text of the Act but also from precedent. We have held that a court may not "rule on the potential merits of the underlying" claim that is assigned by contract to an arbitrator, "even if it appears to the court to be frivolous." *AT&T Technologies, Inc. v. Communications Workers*, 475 U. S. 643, 649–650 (1986). A court has "'no business weighing the merits of the grievance'" because the "'agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.'" *Id.*, at 650 (quoting *Steelworkers v. American Mfg. Co.*, 363 U. S. 564, 568 (1960)). . . .

We express no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator. The Court of Appeals did not decide that issue. Under our cases, courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options*, 514 U. S., at 944 . . . .

8. Can you now formulate a basic rule for arbitrability in disputes resulting from international business transactions?

Columbia Law School

INTERNATIONAL ARBITRATION: COMPARATIVE PERSPECTIVES

University of Sao Paulo Prof. Alejandro M. Garro [1]

August 14-17, 2023 9 am to 11 am

Thursday, August 17, 2023

Arbitration of investment disputes: The investment treaty arbitration phenomenon

Principles common to the protection of foreign investments

Substantive rights of foreign investors: standards of "treatment" (national, most-favored, fair and equitable, etc.); expropriation and compensation standards

Relevance of general public international law

Custom in treaty interpretation and its limitations

The emergence of a common law of foreign investment protections

How to achieve a "balance" between the rights of investors and host States

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FORDHAM SCHOOL OF LAW

INTERNATIONAL BUSINESS TRANSACTIONS (ITGL-0359-001)
Spring 2017- Prof. Josefa Sicard-Mirabal
FOREIGN DIRECT INVESTMENT: PROTECTION

Prof. Alejandro M. Garro

March 20, 2017 Room 4-07 1 pm to 3:50 pm

PROTECTION OF FOREIGN INVESTMENTS UNDER BILATERAL INVESTMENT TREATIES ("BITs") AND INVESTOR-STATE ARBITRATION UNDER ICSID

If the foreign investor is a national of a Contracting State to the Convention for the Settlement of Setplement of Investment Disputes Between States and Nationals of Other States ("ICSID" or "Washington" Convention of 1965), the investor may submit an investment dispute to ICSID arbitration pursuant to the NAFTA treaty any other multilateral investment treaty or one of the many bilateral investment treaties ("BITs").

Please review the main provisions of the ICSID Convention, as well as the core provisions of the 2012 US Model BIT below, so you can compare the core NAFTA provisions protecting property. Also, consider the barriers to enforce such protection if the respondent State were to challenge an arbitral award rendered under the New York Convention (see BG vs. Argentina, below), as opposed to an award rendered under the ICSID Convention (arts. 50-55, ICSID Conv.)

Bilateral Investment Treaties (BITs) are agreements between nations designed to encourage foreign direct investment by protecting investments and providing methods for dispute resolution. They have become increasingly common. The United States is party to many BITs; many BITs also exist to which the U.S. is not a party—for example, between important sources of foreign direct investment such as major European countries and common destinations for foreign investment, such as countries in Latin America and Asia.

BITs generally provide two core sources of protection. First, the host country agrees to protect rights of the investment. These rights typically include fair and equitable treatment, protection by the host nation's police forces, guarantees that investors will be able to transfer assets freely in and out of the host nation, and protections against state expropriations of assets. Second, BITs typically provide that each party to the treaty agrees to arbitration of investment disputes with investors from the other party. The idea is to avoid the barriers to enforcing protections that arise in litigation [illegible].

2012 U.S. MODEL BILATERAL INVESTMENT TREATY

available at
http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf

Article 3: National Treatment

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. * * *

Article 4: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. * * *

Article 5: Minimum Standard of Treatment

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimums standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law. * * *

Article 6: Expropriation and Compensation

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:

(a) for a public purpose;

(b) in a non-discriminatory manner;

(c) on payment of prompt, adequate, and effective compensation; and

(d) in accordance with due process of law and Article 5 * * *.

2. The compensation referred to in paragraph 1(c) shall:

(a) be paid without delay;

(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place * * *;

(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

(d) be fully realizable and freely transferable. * * *

Article 23: Consultation and Negotiation

In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of nonbinding, third-party procedures.

Article 24: Submission of a Claim to Arbitration

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

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

(i) that the respondent has breached

(A) an obligation under Articles 3 through 10,

(B) an investment authorization, or

(C) an investment agreement; and

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

3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

(a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;

(b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;

(c) under the UNCITRAL Arbitration Rules; or

(d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules. * * *

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration * * *

Article 25: Consent of Each Party to Arbitration

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Treaty. * * *

BG GROUP PLC v. REPUBLIC OF ARGENTINA

United States Supreme Court, 2014.
134 S. Ct. 1198.

Justice BREYER delivered the opinion of the Court.

Article 8 of an investment treaty between the United Kingdom and Argentina contains a dispute-resolution provision, applicable to disputes between one of those nations and an investor from the other. See Agreement for the Promotion and Protection of Investments, Art. 8(2), Dec. 11, 1990 (hereinafter Treaty). The provision authorizes either party to submit a dispute "to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made," *i.e.*, a local court. Art. 8(1). And it provides for arbitration

> "(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal . . ., the said tribunal has not given its final decision; [or]
>
> "(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute." Art. 8(2)(a).

* * *

This case concerns the Treaty's arbitration clause, and specifically the local court litigation requirement set forth in Article 8(2)(a). The question before us is whether a court of the United States, in reviewing an arbitration award made under the Treaty, should interpret and apply the local litigation requirement *de novo,* or with the deference that courts ordinarily owe arbitration decisions. That is to say, who—court or arbitrator—bears primary responsibility for interpreting and applying the local litigation requirement to an underlying controversy? In our view, the matter is for the arbitrators, and courts must review their determinations with deference.

I

A

In the early 1990's, the petitioner, BG Group plc, a British firm, belonged to a consortium that bought a majority interest in an Argentine entity called MetroGAS. MetroGAS was a gas distribution company created by Argentine law in 1992, as a result of the government's privatization of its state-owned gas utility. Argentina distributed the utility's assets to new, private companies, one of which was MetroGAS. It awarded MetroGAS a 35-year exclusive license to distribute natural gas in Buenos Aires, and it submitted a controlling interest in the company to international public tender. BG Group's consortium was the successful bidder.

At about the same time, Argentina enacted statutes providing that its regulators would calculate gas "tariffs" in U.S. dollars, and that those tariffs would be set at levels sufficient to assure gas distribution firms, such as MetroGAS, a reasonable return.

In 2001 and 2002, Argentina, faced with an economic crisis, enacted new laws. Those laws changed the basis for calculating gas tariffs from dollars to pesos, at a rate of one peso per dollar. The exchange rate at the time was roughly three pesos to the dollar. The result was that MetroGAS' profits were quickly transformed into losses. BG Group believed that these changes (and several others) violated the Treaty; Argentina believed the contrary.

B

In 2003, BG Group, invoking Article 8 of the Treaty, sought arbitration. The parties appointed arbitrators; they agreed to site the arbitration in Washington, D.C.; and between 2004 and 2006, the arbitrators decided motions, received evidence, and conducted hearings. BG Group essentially claimed that Argentina's new laws and regulatory practices violated provisions in the Treaty forbidding the "expropriation" of investments and requiring that each nation give "fair and equitable treatment" to investors from the other. Argentina denied these claims, while also arguing that the arbitration tribunal lacked "jurisdiction" to hear the dispute. According to Argentina, the arbitrators lacked jurisdiction because: (1) BG Group was not a Treaty-protected "investor"; (2) BG Group's interest in MetroGAS was not a Treaty-protected "investment"; and (3) BG Group initiated arbitration without first litigating its claims in Argentina's courts, despite Article 8's requirement. In Argentina's view, "failure by BG to bring its grievance to Argentine courts for 18 months renders its claims in this arbitration inadmissible."

In late December 2007, the arbitration panel reached a final decision. It began by determining that it had "jurisdiction" to consider the merits of the dispute. In support of that determination, the tribunal concluded that BG Group was an "investor," that its interest in MetroGAS amounted to a Treaty-protected "investment," and that Argentina's own conduct had waived, or excused, BG Group's failure to comply with Article 8's local litigation requirement. The panel pointed out that in 2002, the President of Argentina had issued a decree staying for 180 days the execution of its courts' final judgments (and injunctions) in suits claiming harm as a result of the new economic measures. In addition, Argentina had established a "renegotiation process" for public service contracts, such as its contract with MetroGAS, to alleviate the negative impact of the new economic measures. But Argentina had simultaneously barred from participation in that "process" firms that were litigating against Argentina in court or in arbitration. These measures, while not making litigation in Argentina's courts literally impossible, nonetheless "hindered" recourse "to the domestic judiciary" to the point where the Treaty implicitly excused compliance with the local litigation requirement. Requiring a private party in such circumstances to seek relief in Argentina's courts for 18 months, the panel concluded, would lead to "absurd and unreasonable result[s]."

On the merits, the arbitration panel agreed with Argentina that it had not "expropriate[d]" BG Group's investment, but also found that Argentina had denied BG Group "fair and equitable treatment." It awarded BG Group $185 million in damages.

C

In March 2008, both sides filed petitions for review in the District Court for the District of Columbia. BG Group sought to confirm the award under the New York Convention and the Federal Arbitration Act. Argentina sought to vacate the award in part on the ground that the arbitrators lacked jurisdiction.

The District Court denied Argentina's claims and confirmed the award. But the Court of Appeals for the District of Columbia Circuit reversed. In the appeals court's view, the interpretation and application of Article 8's local litigation requirement was a matter for courts to decide *de novo*, *i.e.*, without deference to the views of the arbitrators. The Court of Appeals then went on to hold that the circumstances did not excuse BG Group's failure to comply with the requirement. Rather, BG Group must "commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration." Because BG Group had not done so, the arbitrators lacked authority to decide the dispute. And the appeals court ordered the award vacated.

BG Group filed a petition for certiorari. Given the importance of the matter for international commercial arbitration, we granted the petition.

II

As we have said, the question before us is who—court or arbitrator—bears primary responsibility for interpreting and applying Article 8's local court litigation provision. Put in terms of standards of judicial review, should a United States court review the arbitrators' interpretation and application of the provision *de novo*, or with the deference that courts ordinarily show arbitral decisions on matters the parties have committed to arbitration? * * *

III

Where ordinary contracts are at issue, it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide. If the contract is silent on the matter of who primarily is to decide "threshold" questions about arbitration, courts determine the parties' intent with the help of presumptions.

On the one hand, courts presume that the parties intend courts, not arbitrators, to decide what we have called disputes about "arbitrability." These include questions such as "whether the parties are bound by a given arbitration clause," or "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); accord, *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299–300 (2010) (disputes over "formation of the parties' arbitration agreement" and "its enforceability or applicability to the dispute" at issue are "matters . . . the court must resolve" (internal quotation marks omitted)).

On the other hand, courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration. See *Howsam*, *supra*, at 86 (courts assume parties "normally expect a forum-based decisionmaker to decide forum-specific *procedural* gateway matters" (emphasis added)). These procedural matters include claims of "waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983). And they include the satisfaction of "prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate." *Howsam*, *supra*, at 85.

The provision before us is of the latter, procedural, variety. The text and structure of the provision make clear that it operates as a procedural condition precedent to arbitration. It says that a dispute "shall be submitted to international arbitration" if "one of the Parties so requests," as long as "a period of eighteen months has elapsed" since the dispute was "submitted" to a local tribunal and the tribunal "has not given its final decision." Art. 8(2). It determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all. Neither does this language or other language in Article 8 give substantive weight to the local court's determinations on the matters at issue between the parties. To the contrary, Article 8 provides that *only* the "arbitration decision shall be final and binding on both Parties." Art. 8(4). The litigation provision is consequently a purely procedural requirement—a claims-processing rule that governs when the arbitration may begin, but not whether it may occur or what its substantive outcome will be on the issues in dispute. * * *

V

Argentina correctly argues that it is nonetheless entitled to court review of the arbitrators' decision to excuse BG Group's noncompliance with the litigation requirement, and to take jurisdiction over the dispute. It asks us to provide that review, and it argues that even if the proper standard is "a [h]ighly [d]eferential" one, it should still prevail. Having the relevant materials before us, we shall provide that review. But we cannot agree with Argentina that the arbitrators "exceeded their powers" in concluding they had jurisdiction.

The arbitration panel made three relevant determinations:

(1) "As a matter of treaty interpretation," the local litigation provision "cannot be construed as an absolute impediment to arbitration,"

(2) Argentina enacted laws that "hindered" "recourse to the domestic judiciary" by those "whose rights were allegedly affected by the emergency measures"; that sought "to prevent any judicial interference with the emergency legislation"; and that "excluded from the renegotiation process" for public service contracts "any licensee seeking judicial redress";

(3) under these circumstances, it would be "absurd and unreasonable" to read Article 8 as requiring an investor to bring its grievance to a domestic court before arbitrating.

The first determination lies well within the arbitrators' interpretive authority. Construing the local litigation provision as an "absolute" requirement would mean Argentina could avoid arbitration by, say, passing a law that closed down its court system indefinitely or that prohibited investors from using its courts. Such an interpretation runs contrary to a basic objective of the investment treaty. Nor does Argentina argue for an absolute interpretation.

As to the second determination, Argentina does not argue that the facts set forth by the arbitrators are incorrect. Thus, we accept them as valid.

The third determination is more controversial. Argentina argues that neither the 180-day suspension of courts' issuances of final judgments nor its refusal to allow litigants (and those in arbitration) to use its contract renegotiation process, taken separately or together, warrants suspending or waiving the local litigation requirement. We would not necessarily characterize these actions as rendering a domestic court-exhaustion requirement "absurd and unreasonable," but at the same time we cannot say that the arbitrators' conclusions are barred by the Treaty. The arbitrators did not " 'stra[y] from interpretation and application of the agreement' " or otherwise " 'effectively dispens[e]' " their " 'own brand of . . . justice.' " *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010) (providing that it is only when an arbitrator engages in such activity that " 'his decision may be unenforceable' " (quoting *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 509 (2001) (*per curiam*))).

Consequently, we conclude that the arbitrators' jurisdictional determinations are lawful. The judgment of the Court of Appeals to the contrary is reversed.

It is so ordered.

[Opinions of Justice Sotomayor, concurring, and of Chief Justice Roberts, joined by Justice Kennedy, dissenting, are omitted].

QUESTIONS AND COMMENTS

1. How would you describe the advantages of obtaining protection of an investment under the customary international law, under NAFTA, and under a BIT?

2. To which extent does NAFTA and a BIT protect against expropriation? What about interferences with the investment short of expropriation?

3. How would you assess what "fair and equitable treatment" ("FET") encompasses? What about what type of compensation you may obtain in case of a violation to the FET clause?

4. Why might arbitration be especially preferable to litigation (in the US, the host country or anywhere else)? What challenges lie ahead after obtaining a judgment or an arbitral award against the State that violated the foreign investor's right to property?

5. BG v. Argentina is an example of an investor seeking protection under a BIT (UK-ARgentina BIT). What is the nature of the dispute? How does the UK help the UK investor? Was this an arbitration under the ICSID Convention or some other rules? What difference does it make, or what would have happened in the absence of a BIT?

6. What are the advantages and disadvantages of entering into a BIT from the host country's perspective?

CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

(done in Washington D.C. 1965)

Article 1

1. There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre).

2. The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.

Article 2

The seat of the Centre shall be at the principal office for the International Bank for Reconstruction and Development (hereinafter called the Bank). The seat may be moved to another place by decision of the Administrative Council adopted by a majority of two-thirds of its members.

***

Article 12

The Panel of Conciliators and the Panel of Arbitrators shall each consist of qualified persons, designated as hereinafter provided, who are willing to serve thereon.

Article 13

1. Each Contracting State may designate to each Panel four persons who may but need not be its nationals.

2. The Chairman may designate ten persons to each Panel: The persons so designated to a Panel shall each have a, different nationality.

Article 14

1. 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 judgement. Competence in the Field of law shall be of particular importance in the case of persons on the Panel or Arbitrators.

2. The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.

Article 15

1. Panel members shall serve for renewable periods of six years.

2. In case of death or resignation of a member of a Panel, the authority which designated the member shall have the right to designate another person to serve for the remainder of that member's term.

3. Panel members shall continue in office until their successors have been designated.

Article 16

1. A person may serve on both Panels.

2. If a person shall have been designated to serve on the same Panel by more than one Contracting State, or by one or more Contracting States and the Chairman, he shall be deemed to have been designated by the authority which First designated him or, if one such authority is the State or which he is a national, by that State.

3. All designations shall be notified to the Secretary-General and shall take effect from the date on which the notification is received.

***

Article 25

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

2. "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

4. Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

Article 26

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

Article 27

1. No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

2. Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

Article 36

1. Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party

2. The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

3. The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

Article 37

1. The Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request pursuant to Article 36.

2. (a) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.

(b) Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties

Article 38

If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

Article 39

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; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.

Article 40

1. Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38.

2. Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.

Article 41

1. The Tribunal shall be the judge of its own competence.

2. Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 42

1. The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

2. The Tribunal may not bring in a Finding of non liquet on the ground of silence or obscurity of the law.

3. The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree.

Article 43

1. Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings;

(a) call upon the parties to produce documents or other evidence, and

(b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.

Article 44

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.

Article 45

1. Failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions.

2. If a party fails to appear or to present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.

Article 46

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

Article 47

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

Article 48

1. The Tribunal shall decide questions by a majority of the votes of all its members.

2. The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.

3. The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.

4. Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

5. The Centre shall not publish the award without the consent of the parties.

Article 49

1. The Secretary-General shall promptly dispatch certified copies of the award to the parties. The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.

2. The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article $2 shall run from the date on which the decision was rendered.

Article 50

1. If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.

2. The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

Article 51

1. Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.

2. The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.

3. The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.

4. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request.

Article 52

1 Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

(a) that the Tribunal was not properly constituted;

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

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

2. The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

3. On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an ad hoc Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

4. The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply mutatis mutandis to proceedings before the Committee.

5. The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

6. If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter.

Article 53

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

2. For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

Article 54

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

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

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

Article 55

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

Article 56

1. After a Commission or a Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged; provided, however, that if a conciliator or an arbitrator should die, become incapacitated, or resign, the resulting vacancy shall be filled in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

2. A member of a Commission or Tribunal shall continue to serve in that capacity notwithstanding that he shall have ceased to be a member of the Panel.

3. If a conciliator or arbitrator appointed by a party shall have resigned without the consent of the Commission or Tribunal of which he was a member, the Chairman shall appoint a person from the appropriate Panel to fill the resulting vacancy.

Article 57

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. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

Article 58

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 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.

Article 59

The charges payable by the parties for the use of the facilities of the Centre shall be determined by the Secretary-General in accordance with the regulations adopted by the Administrative Council.

Article 60

1. Each Commission and each Tribunal shall determine the fees and expenses of its members within limits established from time to time by the Administrative Council and after consultation with the Secretary-General.

2. Nothing in paragraph (1) of this Article shall preclude the parties from agreeing in advance with the Commission or Tribunal concerned upon the fees and expenses of its members.

Article 61

1. In the case of conciliation proceedings the fees and expenses of members of the Commission as well as the charges for the use of the facilities of the Centre, shall be borne equally by the parties. Each party shall bear any other expenses it incurs in connection with the proceedings.

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

Article 62

Conciliation and arbitration proceedings shall be held at the seat of the Centre except as hereinafter provided.

Article 63

Conciliation and arbitration proceedings may be held, if the parties so agree, (a) at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may make arrangements for that purpose; or (b) at any other place approved by the Commission or Tribunal after consultation with the Secretary-General.

Article 64

Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.

Article 65

Any Contracting State may propose amendment of this Convention. The text of a proposed amendment shall be communicated to the Secretary-General not less than 90 days prior to the meeting of the Administrative Council at which such amendment is to be considered and shall forthwith be transmitted by him to all the members of the Administrative Council.

ICSID INSTITUTION RULES

Introductory Note

The ICSID Institution Rules were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(b) of the ICSID Convention.

The ICSID Institution Rules apply from the filing of a Request for arbitration or conciliation under the ICSID Convention to the date of registration or refusal to register. If a Request is registered, the ICSID Arbitration or Conciliation Rules apply to the subsequent procedure. The ICSID Institution Rules do not apply to the initiation of post-Award remedy proceedings, or to proceedings pursuant to the ICSID Additional Facility, the ICSID Fact-Finding Rules or the ICSID Mediation Rules.

Rule 1
The Request

(1) Any Contracting State or any national of a Contracting State wishing to institute proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("Convention") shall file a request for arbitration or conciliation together with the required supporting documents ("Request") with the Secretary-General and pay the lodging fee published in the schedule of fees.

(2) The Request may be filed by one or more requesting parties, or filed jointly by the parties to the dispute.

Rule 2
Contents of the Request

(1) The Request shall:

(a) state whether it relates to an arbitration or conciliation proceeding;

(b) be in English, French or Spanish;

(c) identify each party to the dispute and provide its contact information, including electronic mail address, street address and telephone number;

(d) be signed by each requesting party or its representative and be dated;

(e) attach proof of any representative's authority to act; and

(f) if the requesting party is a juridical person, state that it has obtained all necessary internal authorizations to file the Request and attach the authorizations.

(2) The Request shall include:

(a) a description of the investment and of its ownership and control, a summary of the relevant facts and claims, the request for relief, including an estimate of the amount of any damages sought, and an indication that there is a legal dispute between the parties arising directly out of the investment;

(b) with respect to each party's consent to submit the dispute to arbitration or conciliation under the Convention:

(i) the instrument(s) in which each party's consent is recorded;

(ii) the date of entry into force of the instrument(s) on which consent is based, together with supporting documents demonstrating that date;

(iii) the date of consent, which is the date on which the parties consented in writing to submit the dispute to the Centre, or, if the parties did not consent on the same date, the date on which the last party to consent gave its consent in writing to submit the dispute to the Centre; and

(iv) an indication that the requesting party has complied with any condition for submission of the dispute in the instrument of consent;

(c) if a party is a natural person:

(i) information concerning that person's nationality on both the date of consent and the date of the Request, together with supporting documents demonstrating such nationality; and

(ii) a statement that the person did not have the nationality of the Contracting State party to the dispute either on the date of consent or the date of the Request;

(d) if a party is a juridical person:

(i) information concerning and supporting documents demonstrating that party's nationality on the date of consent; and

(ii) if that party had the nationality of the Contracting State party to the dispute on the date of consent, information concerning and supporting documents demonstrating the agreement of the parties to treat the juridical person as a

national of another Contracting State pursuant to Article 25(2)(b) of the Convention;

(e) if a party is a constituent subdivision or agency of a Contracting State:

(i) the State's designation to the Centre pursuant to Article 25(1) of the Convention; and

(ii) supporting documents demonstrating the State's approval of consent pursuant to Article 25(3) of the Convention, unless the State has notified the Centre that no such approval is required.

Rule 3
Recommended Additional Information

It is recommended that the Request:

(a) contain any procedural proposals or agreements reached by the parties, including with respect to:

(i) the number and method of appointment of arbitrators or conciliators;

(ii) the procedural language(s); and

(iii) the use of expedited arbitration under Chapter XII of the ICSID Arbitration Rules; and

(b) include the names of the persons and entities that own or control a requesting party which is a juridical person.

Rule 4
Filing of the Request and Supporting Documents

(1) The Request shall be filed electronically. The Secretary-General may require the Request to be filed in an alternative format if necessary.

(2) An extract of a document may be filed as a supporting document if the extract is not misleading. The Secretary-General may require a fuller extract or a complete version of the document.

(3) The Secretary-General may require a certified copy of a supporting document.

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(4) Any document in a language other than English, French or Spanish shall be accompanied by a translation into one of those languages. Translation of only the relevant part of a document is sufficient, provided that the Secretary-General may require a fuller or a complete translation of the document.

Rule 5
Receipt of the Request and Routing of Written Communications

The Secretary-General shall:

(a) promptly acknowledge receipt of the Request to the requesting party;

(b) transmit the Request to the other party upon receipt of the lodging fee; and

(c) act as the official channel of written communications between the parties.

Rule 6
Review and Registration of the Request

(1) Upon receipt of the Request and lodging fee, the Secretary-General shall review the Request pursuant to Article 28(3) or 36(3) of the Convention.

(2) The Secretary-General shall promptly notify the parties of the registration of the Request, or the refusal to register the Request and the grounds for refusal.

Rule 7
Notice of Registration

The notice of registration of the Request shall:

(a) record that the Request is registered and indicate the date of registration;

(b) confirm that all correspondence to the parties in connection with the proceeding will be sent to the contact address appearing on the notice, unless different contact information is indicated to the Centre;

(c) invite the parties to inform the Secretary-General of their agreement regarding the number and method of appointment of arbitrators or conciliators, unless such information has already been provided, and to constitute a Tribunal or Commission without delay;

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(d) remind the parties that registration of the Request is without prejudice to the powers and functions of the Tribunal or Commission in regard to jurisdiction of the Centre, competence of the Tribunal or Commission, and the merits; and

(e) remind the parties to make the disclosure required by ICSID Arbitration Rule 14 or ICSID Conciliation Rule 12.

Rule 8
Withdrawal of the Request

At any time before registration, a requesting party may notify the Secretary-General in writing of the withdrawal of the Request or, if there is more than one requesting party, that it is withdrawing from the Request. The Secretary-General shall promptly notify the parties of the withdrawal, unless the Request has not yet been transmitted pursuant to Rule 5(b).

The Arbitration Review of the Americas 2018

Investment Treaty Arbitration in the Americas

David M Orta, Daniel Salinas-Serrano, Brian H Rowe and Kristopher Yue
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30 August 2017

The Americas have experienced a strong uptick in investment treaty arbitration activity over the past year. In 2016, 17 per cent of the 47 new investment arbitration cases registered before the International Centre for Settlement of Investment Disputes (ICSID) under the ICSID Convention and Additional Facility Rules included a South American country as a party, while an additional 6 per cent included Spanish-speaking countries from the Caribbean and Central America.[1] ICSID registered a total of 14 cases, involving Colombia (three), Venezuela (three), Panama (three), Peru (one), Uruguay (one), Mexico (one), Canada (one) and the United States (one).[2] Thirteen per cent of the arbitrators, conciliators and ad hoc committee members appointed in cases registered in 2016 were South American nationals (21 total), 2 per cent were from Central America (three total), and 18 per cent were from North America (28 total).[3] Claimants initiated cases under the UNCITRAL Rules against Bolivia,[4] Colombia,[5] the Dominican Republic,[6] Ecuador,[7] Mexico[8] and Peru.[9] At the opposite end of the arbitration 'life cycle', the past 12 months saw an increasing number of cases involving countries in the Americas come to a close. Between 1 June 2016 and 21 June 2017, Venezuela[10] and Costa Rica[11] each had two ICSID awards rendered against them; ICSID awards were also rendered against Panama,[12] Peru,[13] Uruguay,[14] El Salvador,[15] Argentina[16] and Canada.[17] The region continues to see foreign investment from all over the world, suggesting that it will likely continue to see investment treaty disputes for the foreseeable future.[18]

In the past year, several new international investment treaties involving the Americas have been in negotiations or were signed, but only three were ratified: (i) the Canada-Hong Kong Foreign Investment Promotion and Protection Agreement (FIPA), (ii) the Canada-Mongolia FIPA, and (iii) the United States-Argentina Trade and Investment Framework Agreement (TIFA). Of these three, only the Canadian FIPAs provide for investor-state dispute resolution. The Canada-Hong Kong FIPA provides for UNCITRAL arbitration, and the Canada-Mongolia FIPA provides for ICSID or UNCITRAL arbitration. The United States and Argentina already have a BIT in force (since 1994) that provides for investor-state dispute resolution, so the new TIFA understandably does not have such a provision.

The past year also saw the termination of many international investment treaties in the Americas, as a result of Ecuador's termination of all 16 of its BITs that remained in force. By presidential decree on 16 May 2017, Ecuador terminated its BITs with Argentina, Bolivia, Canada, Chile, China, France, Germany, Italy, the Netherlands, Peru, Spain, Sweden, Switzerland, the United Kingdom, the United States and Venezuela. Ecuador's termination of these BITs followed the May 2017 report of a national commission (CAITISA, by its Spanish acronym), finding that the BITs failed to give the promised level of foreign direct investment, were contrary to developmental objectives, and disproportionately favoured investors at significant expense to Ecuador.[19] The 108-page report discussed various international arbitral awards in detail, including the award issued in the *Burlington* case addressed below. The report recommended the termination of all BITs, which Ecuador did on 16 May 2017. Notably, however, many of the terminated BITs have sunset clauses that will allow existing investors to continue to rely on them for years to come with respect to investments made prior to the termination of the applicable BITs.

With these developments as backdrop, this article briefly discusses four legal developments and updates to last year's article that are expected to be important for arbitration practitioners, international investors, and others interested in the investment dispute settlement system.

First, three tribunals issued decisions on counterclaims brought by respondent states. Of these three decisions, *Burlington v Ecuador* was the only one to award damages on a counterclaim; the counterclaim failed on the merits in *Urbaser v Argentina*, and the tribunal in *Rusoro Mining v Venezuela* dismissed the counterclaim for lack of jurisdiction.

Second, as an update to last year's article on time limitations and submissions from non-disputing parties, this year saw another trio of decisions on this topic: *Eli Lilly v Canada*, *Berkowitz v Costa Rica* and *Rusoro Mining v Venezuela*.

Third, in *García v Venezuela*, a Paris court hearing set-aside proceedings rejected Venezuela's jurisdictional objection against dual nationals pursuing claims under the Spain-Venezuela BIT.

Finally, President Trump formally notified the US Congress of his intention to renegotiate the North America Free Trade Agreement (NAFTA). Although officials in his administration have offered few specifics, they have suggested that there may be changes to the investor-state dispute settlement mechanism under Chapter 11 of NAFTA. Any changes to the investment arbitration mechanism under NAFTA may have cascading effects on other BITs and FTAs in Latin America and across the globe. As a result of uncertainties over the direction of US economic policymaking, the United Nations forecasts that, in 2017, foreign direct investment in the region will be adversely affected.[20]

Counterclaims

As the CAITISA report circumspectly recognised, not all of Ecuador's cases have ended in losses for the state.[21] In fact, in the recent *Burlington* case, Ecuador won an award of $41.8 million for counterclaims against an investor.[22] Though this is a significant victory for Ecuador, it does little to assuage the concerns laid out in the CAITISA report, as the same tribunal awarded the investor much larger damages of $379.8 million in the same case.

In *Burlington v Ecuador*, an ICSID tribunal exercised jurisdiction over counterclaims based on the investor's and Ecuador's direct agreement that the arbitration was the appropriate forum for resolution of counterclaims arising out of certain investments. After finding a jurisdictional basis in the parties' direct agreement, the tribunal also found that jurisdiction was proper under Article 46 of the ICSID Convention, which allows for jurisdiction over counterclaims ‘arising directly out of the subject-matter of the dispute', subject to consent and other requirements for ICSID jurisdiction.[23] The tribunal held that Ecuador's counterclaims satisfied the independent requirements for ICSID jurisdiction, and awarded Ecuador approximately $41.8 million for environmental and infrastructure counterclaims.[24] This sum is significant, though a fraction of the approximately $380 million that the tribunal awarded the investor.[25] The tribunal also noted the parallel but still-pending *Perenco* arbitral proceedings for the point that Ecuador should not recover twice for the same counterclaims.[26]

Ecuador was not alone in this regard, as Argentina also won a jurisdictional decision on counterclaims. In *Urbaser v Argentina*, the tribunal found jurisdiction over the state's counterclaims but rejected them on the merits.[27] In finding jurisdiction, the tribunal analysed the broadly worded Argentina-Spain BIT, which provided for ICSID arbitration over ‘disputes arising between a Party and an investor of the other Party in connection with investments'.[28] Argentina argued that the investors had violated the residents' right to water by failing to invest funds or carry out various aspects of the investment. For the tribunal, this was close enough of a relation to the investments and the dispute to satisfy the BIT's jurisdictional scope as well as that of Article 46 of the ICSID Convention. After finding jurisdiction, however, the tribunal rejected Argentina's counterclaims on the merits, finding that although the investor was bound by a negative duty to not ‘engage in activity aimed at destroying [human] rights', there was no basis to hold the investors responsible for Argentina's positive obligations to uphold the residents' right to water.[29]

On the other hand, in *Rusoro Mining v Venezuela*, the tribunal held it had no jurisdiction over Venezuela's counterclaim. Venezuela argued that the investor had inadequate mining practices that damaged the mine and impaired its value.[30]The tribunal looked to the text of the Canada-Venezuela BIT, which restricted the scope of arbitrable disputes to those based on a ‘claim by the investor that a measure taken or not taken by the [host State] is in breach of this Agreement', and allowed only investors to submit disputes to

arbitration.[31] Accordingly, the tribunal dismissed Venezuela's counterclaim for lack of jurisdiction.[32]

These cases show that while counterclaims in investment treaty arbitrations remain rare, successful ones remain even rarer.

Though *Burlington* and *Urbaser*surmounted the significant jurisdictional hurdles that states often face - usually in the form of restrictive BIT text (such as in *Rusoro*) or the lack of investor consent to submit counterclaims to arbitration - both cases resulted in what some may dismiss as pyrrhic victories for the respondent state.

Time limits

In last year's article, we discussed non-disputing parties' interpretations of time limitations in free trade agreements, noting Judge Brower's concern that non-disputing parties 'club together' to support the respondent state's restrictive position.[33] In the cases discussed - *Eli Lilly v Canada*, *Corona Materials v Dominican Republic* and *Mercer International v Canada* - non-disputing parties argued that 'neither a continuing course of conduct nor the occurrence of subsequent acts or omissions can renew or interrupt the three-year limitation period once it has commenced to run.'[34] Time limits remained a live issue in the past year, in the form of the awards in *Eli Lilly v Canada*, *Berkowitz v Costa Rica*and *Rusoro Mining v Venezuela*. And in both *Eli Lilly* and *Berkowitz*, the tribunals considered submissions from non-disputing parties as to the limitation period issue.

In *Eli Lilly*, the claimant alleged breaches of the NAFTA based on the Canadian courts' invalidation of certain patents.[35] The three-year limitation period under NAFTA Articles 1116(2) and 1117(2) had commenced on 12 September 2010; the claimant initiated arbitration on 12 September 2013, within that time frame. Though the final Supreme Court decisions were issued within the limitation period in December 2011 and May 2013, the claimant alleged that the basis of the decisions was the courts' adoption of an arbitrary and discriminatory legal doctrine in the mid-2000s - which, Canada argued, meant that the limitations period should have begun to count in 2010, which in turn would have made claimant's NAFTA action time-barred.[36]

As discussed in last year's article, Mexico and the United States filed non-disputing party submissions, arguing that the three-year limitation period of NAFTA should not be suspended, prolonged, or renewed by a continuing course of conduct. The tribunal noted this position but avoided it altogether, holding instead that the 'Claimant has not advanced a theory of continued breach or otherwise advocated the suspension or extension of the limitation period'.[37] The tribunal appeared to deliberately avoid the legal issue, resting its decision on its factual determination that 'the alleged breach for each investment . . . occurred at a single point in time within the three-year period.'[38] The tribunal did note, citing

the *Mondev* and *Feldman* decisions, that it would consider ‘earlier events that provide the factual background to a timely claim'.[39]

In *Berkowitz*, in contrast to *Eli Lilly*, the tribunal squarely addressed the claimants' allegations of a continuing breach or composite act straddling the commencement of the limitation period.[40] The claimants had invested in beachfront properties that were subject to expropriation orders several years before the limitation period commenced (and before the CAFTA's entry into force). The claimants argued that they did not know about the expropriation orders when they were issued, and that the continued failure of Costa Rica to provide adequate compensation constituted an independently actionable breach. El Salvador and the United States made submissions as non-disputing parties, not explicitly in defence of Costa Rica, but supporting the strict interpretation of the three-year limitation period under CAFTA that formed part of Costa Rica's defence.[41] El Salvador also observed that where a treaty calls for a six-month negotiation period before initiating arbitration, as does CAFTA, this effectively shortens the three-year limitation period to two years and six months, as an investor will not be able to initiate a timely arbitration unless it begins negotiations six months before filing.

The tribunal, in line with the non-disputing parties' submissions and in agreement with Corona Materials and other similar cases, adopted a strict interpretation of the three-year limitation period and held that the majority of the claims fell beyond the limitation period.[42] The tribunal only left open a question the potential survival of claims concerning three properties affected by judgments issued more than a year after the arbitration was initiated.[43] The investors withdrew those claims, however, cementing Costa Rica's victory in the case.[44]

Finally, though based on a BIT and not a free trade agreement, the tribunal in Rusoro Mining v Venezuela applied a three-year time limitation in the same manner.[45] The tribunal noted the similarity of the three-year limitation period in the NAFTA and the Canada-Venezuela BIT, which formed the basis of the parties' consent.[46] The parties agreed that the limitation period commenced on 17 July 2009, three years before the investor filed its request for arbitration.[47] The investor argued that certain measures before 17 July 2009 should be considered because they formed a ‘chain of actions' and were ‘part of a composite breach that crystallized after the time bar became applicable'.[48] The tribunal found that there was not a sufficient connection between the pre- and post-period acts, and, therefore, held that the investor's claims based on those earlier measures were time-barred.[49] The investor prevailed on its expropriation claim for the later acts only.[50]

Though *Eli Lilly* decided this issue in favour of the investor and *Berkowitz* and *Rusoro* decided the issue in favour of the respondent state, all three tribunals were careful to emphasise the factually specific nature of their decisions. Even under a strict interpretation of a limitation period, each case will be assessed on its own facts as to whether post-period measures are truly

independent from pre-period events. Tribunals, however, appear to be growing in agreement, under multilateral and bilateral treaties alike, that time limitations generally cannot be bypassed with allegations of a continuing course of conduct, further limiting the *UPS v Canada* holding that 'continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly.'[51]

Paris court affirms dual nationals can pursue claims under BIT

Practitioners in the arbitration community have watched with interest the set-aside proceedings for the jurisdictional award in the *García v Venezuela* case, where an UNCITRAL tribunal allowed claimants with dual Spanish-Venezuelan nationality to bring claims against Venezuela under the Spain-Venezuela BIT. Dual nationals holding the citizenship of the host state cannot bring investment claims under the ICSID Convention. In particular, Article 25 of the ICSID Convention limits the jurisdiction of ICSID to disputes between a 'Contracting State' and a 'national of another Contracting State', defined as 'any natural person who had the nationality of a Contracting State other than the State Party to the dispute' but excluding 'any person who . . . also had the nationality of the Contracting State party to the dispute'. The claimants in the *García* case, however, brought investment claims not under the ICSID Convention, but under the UNCITRAL Arbitration Rules, which, like the applicable treaty, are silent on dual nationals' standing to bring investment claims.
Both claimants had dual nationality. García Armas was born in Spain and moved to Venezuela in the 1960s. He lost his Spanish nationality in 1972 when he became a Venezuelan national, but re-acquired it in 2004. He possessed both nationalities at the time the contested governmental measures were adopted and the treaty claim was filed. García Gruber is a Venezuelan national by birth and acquired Spanish citizenship in 2003, keeping her Venezuelan nationality at all times.

On 15 December 2014, the arbitral tribunal issued a decision on jurisdiction holding that the Spain-Venezuela BIT did not exclude claims by dual nationals, and accordingly found that it had jurisdiction over the Garcías' claims against Venezuela. The tribunal examined the BIT's language and found that the BIT did not contain express restrictions against dual nationals bringing claims against either contracting state. The tribunal reasoned that the specific provisions of the Spain-Venezuela BIT constituted lex specialis, overriding general rules of customary international law and other implied principles. This decision attracted great interest in the arbitration community, in part because it upheld jurisdiction over the claims of dual nationals against a state of their own nationality.

Although the tribunal was unanimous in the standing of dual nationals to bring claims under the Spanish-Venezuela BIT, the arbitrators split on the question of when a claimant must hold Spanish nationality. Two arbitrators, Professors Eduardo Grebler and Guido Tawil, formed a majority, concluding that it was sufficient for the claimants to hold Spanish nationality (i) on the date of the alleged treaty breaches, and (ii) on the date of the commencement of the arbitration. In a dissenting opinion, arbitrator Rodrigo Oreamuno argued that the nationality requirement must also be satisfied on the date of making the investment in Venezuela.

While the arbitration proceeded to the merits phase, Venezuela applied to set aside the jurisdictional award before courts in Paris, the seat of the arbitration. Venezuela asserted that the tribunal wrongly upheld jurisdiction because customary international law does not allow dual nationals to bring claims against their own state.

On 25 April 2017, the Paris Court of Appeal issued a decision partly upholding Venezuela's challenge. Importantly, however, while the court partially annulled the jurisdictional award, it affirmed the central tenet that dual nationals can bring claims under the Spain-Venezuela BIT against either contracting state.

According to the Paris court, the nationality requirement also must be satisfied at the time when claimants make their investment, agreeing with the dissenting view of Mr Oreamuno. In the court's view, because the majority of the tribunal erred on this point, part of the jurisdictional award had to be annulled. However, the court confirmed the rest of the award, agreeing that the Spain-Venezuela BIT did not expressly bar dual nationals from bringing claims. The court also rejected Venezuela's view that customary international law prohibits nationals from pursuing international claims against their own state.

Dual nationals planning on bringing investment claims against one of their states of nationality will now find strong support in the Paris Court of Appeal's decision. Indeed, there are a number of ongoing arbitrations involving dual nationals, such as *Pugachev v Russian Federation*[52] (UNCITRAL arbitration involving a French-Russian national under the France-Russia BIT) and *Dawood Rawat v Republic of Mauritius*[53] (UNCITRAL arbitration involving a French-Mauritian national under the France-Mauritius BIT). Practitioners, however, should carefully evaluate the limits to a tribunal's jurisdiction ratione temporis in light of the Paris court's view that foreign nationality must be held at the date of the making of the investment.

Renegotiation of the NAFTA

President Donald Trump campaigned on a platform of renegotiating the United States' trade deals, describing the NAFTA in particular as ‘the worst trade deal

ever'. In tune with what he has dubbed his ‘America First' policy, President Trump formally withdrew from the Trans-Pacific Partnership negotiations. Within days of taking power, Trump's White House announced that, ‘[i]f our partners refuse a renegotiation that gives American workers a fair deal, then the President will give notice of the United States' intent to withdraw from NAFTA.'[54]
President Trump has followed through on his campaign promise. On 18 May 2017, the Trump administration formally notified Congress that it plans to renegotiate the NAFTA.[55] The notice triggers a 90-day notice period before trade negotiations may be initiated. Although the notice was light on specifics, it advocated for the ‘modernization' of the NAFTA to address topics including intellectual property rights, regulatory practices, state-owned enterprises and customs procedures.[56] The notice did not make specific mention of the future of investment arbitration under NAFTA, however. The silence regarding arbitration notwithstanding, labour and environmental rights groups have promised to lobby for the elimination of investment arbitration under a new trade agreement.[57]Public Citizen, for example, has derided the investor-state dispute settlement process as a ‘corporate power grab' that creates ‘new rights for multinational corporations to sue the US government in front of a tribunal of three corporate lawyers.'[58]
Under Chapter 11, NAFTA provides a mechanism for investor-state dispute resolution, which some commentators believe led to a proliferation of investments in all three countries.[59] There have been at least 59 investment arbitrations under NAFTA.[60]
Despite his stated positions, President Trump's ‘America First' policy has not been entirely hostile to foreign investors. In March, President Trump approved TransCanada's Keystone XL Pipeline, a project that the Obama Administration had previously rejected. TransCanada had initiated arbitration against the United States under Chapter 11 of NAFTA, arguing that the refusal to grant a presidential permit violated the substantive protections that NAFTA affords investors.[61]However, in light of President Trump's approval order, TransCanada discontinued the NAFTA arbitration on 24 March 2017.[62]
This openness to foreign investors, however, may be merely incidental and not part of a broader, considered plan toward liberal relations with foreign investors. President Trump's broader posture on NAFTA could well have the opposite effect in the investment community, creating uncertainty as to the fate of investor-state disputes under the NAFTA.

The upcoming negotiations of NAFTA are likely to focus on contentious issues such as tariffs, trade barriers, and rules of origin. They could also impact the availability and scope of investor-state arbitration under Chapter 11, however. President Trump, for example, could seek to limit the ability of Canadian or Mexican companies to sue the US government or could seek renegotiation of the substantive protections afforded under NAFTA, though there is no express indication at this time that these proposals are being contemplated. US Trade

Representative Robert Lighthizer has said that the US intends to ‘rebalance', but not remove, investor-state dispute settlement under NAFTA.[63] Meanwhile, Democratic legislators, such as Senator Sherrod Brown[64] and Representative Peter DeFazio,[65] have advocated for the complete removal of the investor-state dispute settlement provision, arguing that it favours multinational corporations and undermines US sovereignty.
As mentioned, President Trump could, and has expressly threatened to, opt for the more radical option of withdrawing from NAFTA if his oft-touted negotiation skills don't yield the deal he wants. Withdrawal from NAFTA is quite straightforward. NAFTA Article 2205 requires only written notice to the other parties, with withdrawal becoming effective six months after the notice.

Withdrawal from NAFTA could have significant consequences for US investors with investment disputes against Mexico or Canada, and vice versa. In addition to doing away with the substantive protections and the dispute resolution mechanism afforded to investors under Chapter 11, withdrawal also would have practical implications for investors who have live disputes against one of the member states. Specifically, withdrawal would create serious time constraints for investors wishing to submit investment disputes to arbitration. NAFTA Article 2205 can be interpreted to suggest that investors could bring new claims only during the six months between the notice of withdrawal and the date it becomes effective. NAFTA Article 1119 further complicates and may shorten investors' rights to submit claims to arbitration, as it includes a notice provision in which investors provide the state written notice of intent to submit a claim to arbitration at least 90 days before the claim is presented. In the same vein, Article 1120 provides for a six-month cooling-off period. Unlike most other investment protection agreements that typically guarantee investment protections for 10 to 15 years after the instrument has been terminated, under ‘sunset clauses', NAFTA does not include any such provision. Thus, once the six-month withdrawal notification period is up, an investor who relied on the dispute settlement provisions and the substantive protections of NAFTA may be left without recourse other than suing the host country in domestic courts, with the usual sovereign immunity and attendant complications arising from suing a sovereign in its own courts.

Investors with already-pending claims, however, should not be concerned about the possibility of the United States' withdrawal, since their claims have already been perfected. It is a well-established principle of international law and treaty interpretation that withdrawal from an international instrument cannot have retroactive effects on pending proceedings. For example, cases initiated against Ecuador continued even after Ecuador's denunciation of the ICSID Convention had taken effect.[66] Likewise, cases brought against Venezuela following its denunciation of the ICSID Convention have also continued.[67]

Notes

1. ICSID Caseload Statistics Issue 2017-1, ICSID at 23 (2017). By comparison, in 2015, 4 per cent of the 52 new investment arbitration cases registered under the ICSID Convention and Additional Facility Rules included a South American country as a party, while 2 per cent included Spanish-speaking countries from the Caribbean and Central America.
2. Id. at 26.
3. Id. at 32-34.
4. *Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia*, UNCITRAL.
5. *Cosigo Resources, Ltd., Cosigo Resources Sucursal Colombia, Tobie Mining and Energy, Inc. v. Republic of Colombia*, UNCITRAL.
6. *Silverton Finance Service Inc. v. Dominican Republic*, UNCITRAL.
7. *Albacora S.A. v. Republic of Ecuador*, UNCITRAL.
8. *Jorge Luis Blanco, Joshua Dean Nelson and Tele Fácil México, S.A. de C.V. v. United Mexican States*, UNCITRAL.
9. *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, UNCITRAL.
10. *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award (April 26, 2017); *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016).
11. *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award (March 7, 2017); *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award (January 18, 2017).
12. *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28, Award (2 June 2016).
13. *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Final Award (9 November 2016).
14. *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, Award (8 July 2016).
15. *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award (14 October 2016).
16. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016).
17. *Eli Lilly and Company v. Canada*, ICSID Case No. UNCT/14/2, Award (16 March 2017).

18. ‘World Investment Report 2017: Investment and the Digital Economy', UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (7 June 2017), pp. 57-58; available at: http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.
19. CAITISA stands for Comisión para la Auditoría Integral Ciudadana de los Tratados de Protección Recíproca de Inversiones y del Sistema de Arbitraje Internacional en Materia de Inversiones.
20. ‘World Investment Report 2017: Investment and the Digital Economy', UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (7 June 2017), p. 63; available at: http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.
21. CAITISA Report, p. 32 (noting five cases in which tribunals rejected jurisdiction or found no treaty violations by Ecuador).
22. *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, 7 February 2017.
23. Id. paras. 60-62.
24. Id. para. 1075.
25. *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017.
26. *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims paras. 1080 86, 7 February 2017.
27. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016.
28. Id. para. 1143.
29. Id. para. 1199, 1210, 1220-21.
30. *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016.
31. Id. paras. 623-27 (citing Canada-Venezuela BIT, Art. XII.1).
32. Id. para. 629.
33. *Mesa Power Group, LLC v. Government of Canada*, Concurring and Dissenting Opinion of Judge Charles N Brower para. 30, 25 March 2016.
34. See, e.g., *Eli Lilly v. Canada*, Submission of Mexico para. 7, 18 March 2016.
35. *Eli Lilly v. Canada*, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017.
36. Id. paras. 5, 170.
37. Id. para. 170 n.159.

38. Id.

39. Id. paras. 172-73.

40. *Spence International Investments, LLC, Berkowitz, et al v. Republic of Costa Rica*, ICSID Case no. UNCT/13/2, Interim Award, 25 October 2016.

41. Id. paras. 153-61.

42. Id. para. 308.1-2.

43. Id. para. 308.3.

44. *Spence International Investments, LLC, Berkowitz, et al v. Republic of Costa Rica*, ICSID Case no. UNCT/13/2, Procedural Order on the Correction of the Interim Award and the Termination of the Proceedings, 30 May 2017.

45. *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016.

46. Id. para. 205.

47. Id. para. 209.

48. Id. para. 221.

49. Id. para. 229-32.

50. Id. para. 904.3.

51. *United Parcel Service v. Canada*, UNCITRAL, Award para. 28, 24 May 2007.

52. *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL.

53. *Dawood Rawat v. Republic of Mauritius*, PCA Case No. 2016-20, UNCITRAL.

54. 'America First Foreign Policy', THE WHITE HOUSE (10 March 2017), available at: www.whitehouse.gov/america-first-foreign-policy.

55. 'Trump Sends Nafta Renegotiation Notice to Congress', THE NEW YORK TIMES (18 May 2017); available at: www.nytimes.com/2017/05/18/us/politics/nafta-renegotiation-trump.html.

56. Office of the US Trade Representative to leaders in Congress (18 May 2017).

57. 'Trump Sends Nafta Renegotiation Notice to Congress', THE NEW YORK TIMES (18 May 2017); available at: www.nytimes.com/2017/05/18/us/politics/nafta-renegotiation-trump.html.

58. ‘North American Free Trade Agreement (NAFTA)', PUBLIC CITIZEN; available at:www.citizen.org/our-work/globalization-and-trade/north-american-free-trade-agreement-nafta.
59. NAFTA Investment Law and Arbitration, xxiv (Todd Weiler ed. 2004).
60. See http://investmentpolicyhub.unctad.org/ISDS/FilterByApplicableIia.
61. TransCanada Corporation & TransCanada Pipelines Limited, Request for Arbitration (24 June 2016), para. 1; available at: www.keystone-xl.com/wp-content/uploads/2016/06/TransCanada-Request-for-Arbitratio-2n.pdf.
62. *TransCanada Corporation and TransCanada PipeLines Limited v. United States of America*, ICSID Case No. ARB/16/21.
63. ‘No cutoff to finish NAFTA talks as U.S. hunts for best deal: Trump's trade czar', THE CANADIAN PRESS (21 June 2017); available at: http://rdnewsnow.com/article/542458/us-not-committed-completing-nafta-talks-end-2017-trumps-trade-czar.
64. Letter from Senator Sherrod Brown to President Donald Trump (1 May 2017).
65. Rep. Peter DeFazio Introduces Resolution Outlining Principles for New Trade Agreement with Mexico and Canada (16 February 2017).
66. *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5; *Corporación Quiport S.A. and others v. Republic of Ecuador*, ICSID Case No. ARB/09/2; *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4; *Repsol YPF Ecuador, S.A. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/10.
67. *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22.

This is an initial draft for comments until 30 June 2022. All comments on this initial draft should be communicated to the UNCITRAL Secretariat with the subject "Comments on Pertinent elements initial draft". Email addresses: corentin.basle@un.org; nikola.kovacikova@un.org

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Possible reform of investor-State dispute settlement (ISDS)

Pertinent elements of selected permanent international courts and tribunals

Note by the Secretariat

Contents

I. Introduction

1. This Note aims to provide background information regarding selected permanent international courts and other dispute settlement bodies. It is structured as a comparative analysis of key issues relevant in the context of further discussions regarding the establishment of a multilateral investment tribunal. It is the intention to update this note on a regular basis as work on this topic would progress. Delegations are invited to provide to the Secretariat further pertinent elements.

2. This Note was prepared with reference to a broad range of published information on the topic,[1] and does not seek to express a view on the possible reform solutions, which is a matter for the Working Group to consider.

II. Pertinent elements of selected permanent international courts and tribunals

A. Background information

3. The Working Group may wish to consider document A/CN.9/WG.III/WP.213 regarding the establishment of a multilateral investment tribunal and related issues. It may also wish to note that the establishment of such a tribunal would require the preparation of a statute for adoption by States and regional economic integration organizations. The statute would be supplemented by rules or regulations addressing more detailed procedural matters. The Working Group may wish to consider that various models could be considered for preparing the statutes as well as rules or regulations, as evidenced by international courts and tribunals, regional courts, and other dispute settlement bodies.

4. As a preliminary remark, it could be noted that international dispute settlement bodies can be very different in nature. More specifically, each body bears specific operational characteristics that are inherently linked with their object, purpose and mode of establishment. Thus, a crucial distinction must be made between dispute settlement bodies that were established under a treaty in order to adjudicate disputes between its members over substantive rules provided in that treaty, and other dispute settlement bodies which do not adjudicate on substantive provisions of one particular treaty among its members. While this Note addresses both types of dispute settlement bodies for the purpose of a mere informative exposé on common operational aspects, the Working Group may wish to note that a multilateral investment tribunal would most probably follow the second approach. Indeed, in light of the current legal framework, a multilateral investment tribunal would adjudicate over the relevant underlying international investment instruments, rather than one sole investment treaty with a unified set of substantive standards and provisions.

[1] This includes: the CIDS Research Paper (referred to as the "CIDS report"), entitled *Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap*, by Gabrielle Kaufmann-Kohler and Michele Potestà, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_research_paper_mauritius.pdf; the OECD Working Papers on International Investment No 2012/3, OECD Investment Division 2012, *Investor-state dispute settlement: A scoping paper for the investment policy community*, by David Gaukrodger et al.; the Policy Options Paper, E15 Initiative, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum 2016, *The Evolving International Investment Law and Policy Regime: Ways Forward*, by Karl Sauvant; *Reshaping the Investor-State Dispute Settlement System, Journeys for the 21st Century*, edited by Jean E. Kalicki and Anna Joubin-Bret, Nijhoff International Investment Law Series, Volume: 4; *Appeals Mechanisms in International Investment Disputes*, edited by Karl Sauvant, Oxford University Press; *Appeal mechanism for ISDS Awards, Interaction with New York and ICSID Conventions, Conference on Mapping the Way Forward for the Reform of ISDS,* Albert Jan van den Berg; *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court, Options regarding the Institutionalization of Investor-State Dispute Settlement*, and *Standalone Appeal Mechanism: Multilateral Investment Appeals Mechanisms*, by Marc Bungenberg and August Reinisch, European Yearbook of International Economic Law; see also bibliographic references published by the Academic Forum, available under "Additional resources" at https://uncitral.un.org/en/library/online_resources/investor-state_dispute and www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/.

5. Particular consideration is given in this Note to the WTO Dispute Settlement Body (the "DSB"), the International Court of Justice (the "ICJ"), the Arab Investment Court (the "AIC"), the International Islamic Court of Justice (the "IICJ"), the ECOWAS Court of Justice, the Intra-Mercosur Dispute Settlement Mechanism (the "IMDSM"), the Caribbean Court of Justice (the "CCJ"), the Court of Justice of the Andean Community, the OHADA Common Court of Justice and Arbitration (the "CCJA") the Iran-United States Claims Tribunal (the "IUSCT") and the United Nations Compensation Commission (the "UNCC"), but other examples that are not specifically covered in the Note may also provide useful precedent and illustration

6. Specifically, this Note develops a number of aspects related to the establishment of international courts and tribunals (**Section B**). It further identifies common and specific features on the functioning and governance of these courts, either in the context of existing institutions or as separate bodies (**Section C**). It further highlights examples of how these courts have articulated their jurisdiction (**Section D**), how they have dealt with issues of representation among adjudicators (**Section E**) as well as specific rules of nomination, selection and appointment (**Section F**), the terms of office and renewal of adjudicators (**Section G**), specific requirements related to their competence and expertise (**Section H**), and other ethical rules applicable to them (**Section I**). This Note further explores aspects of case assignment among international adjudicators (**Section J**), the appeal structures and conditions of appeal of these courts (**Section K**), the law they apply (**Section L**) and the way their decisions are enforced in order to ensure their effectiveness (**Section M**).

B. Establishment

7. With regards to the establishment of a multilateral investment tribunal, the Working Group may wish to consider various options, including whether such tribunal would be created under the auspices of an existing organization, as a dispute settlement mechanism in a multilateral treaty or as a separate and independent body. A standing multilateral body would enjoy legal personality under international and national law, which would allow it to conclude treaties such as a seat agreement establishing the necessary privileges and immunities.[2] The Secretariat was requested to further analyze the different options to assist the Working Group in its deliberations

i. International Courts and Tribunals

8. The Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") was agreed upon in 1994 as a part of the Uruguay Round of Multilateral Trade Negotiations and is included in Annex 2 to the Marrakesh Agreement establishing the World Trade Organization. The DSU provides a forum for WTO Members to resolve disputes arising under WTO agreements (referred in DSU as "covered agreements"). The WTO Dispute Settlement Body was established with a view to administer disputes under the rules and procedures referred to in the DSU, in particular the dispute settlement provisions of the agreements listed in Appendix 1 to the DSU. Pursuant to the DSU, WTO Members must first attempt to settle their dispute through consultations. If consultations among disputing WTO members fail, the dispute is brought before an *ad hoc* dispute panel. The decisions made by the *ad hoc* dispute panel may be subject to appeal before the WTO Appellate Body.[3]

9. The International Court of Justice was established by the UN Charter as the principal judicial organ of the United Nations. The role of the Court is to adjudicate legal disputes submitted to it by States, and issue advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.[4]

ii. Regional Courts

[2] A/CN.9/WG.III/WP.213, para. 68.

[3] WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 15 April 1994) available at: https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf

[4] ICJ Statute, Article 1 available at: https://www.icj-cij.org/en/statute

10. The Arab Investment Court was established under the auspices of the League of Arab States (the "LAS") and is competent to hear investment disputes pursuant to the Arab Investment Agreement (the "AIA"). The Unified Agreement for the Investment of Arab Capital in the Arab States was the first investment treaty to establish a permanent forum for the settlement of investor-State disputes.[5]

11. The Charter of the Organization of Islamic Cooperation (the "OIC") envisaged the creation of the International Islamic Court of Justice as the OIC's principal judicial organ. However, Article 49 of the IICJ Statute stipulates that the Statute shall only come into force upon ratification by two-thirds of OIC Member States. As this threshold has not been met, the IICJ has not been established yet.[6]

12. The principal legal organ of the Economic Community of West African States (the "ECOWAS")[7] is the Community Court of Justice.[8] The Court's mandate is to resolve disputes related to the Community's treaty, protocols, and conventions.

13. Regarding the Intra-MERCOSUR Dispute Settlement Mechanism (the "IMDSM"), the Protocol of Olivos ("PO") put in place the Tribunal Permanente de Revisión ("TPR"), which seeks to resolve disputes concerning the interpretation, application and infringement of MERCOSUR law, which comprises the Treaty of Asunción (the treaty by which MERCOSUR was established), its protocols and the agreements concluded, as well as the disputes arising in connection with decisions, resolutions and directives adopted by MERCOSUR bodies having decision-making competence. In December 2010 the Parlasur (the parliamentary assembly of MERCOSUR) expressed its support for the establishment of a Court of Justice for MERCOSUR. After a year of assessment and parliamentary approval, the draft protocol was submitted to the Consejo del Mercado Común ("CMC" - the supreme political body of MERCOSUR) on 14 December 2010 for its consideration and final approval. All MERCOSUR State Parties[9] are parties to the TPR. The TPR was established in order to solve disputes arising between States parties concerning the interpretation and application of, or non-compliance with, the Treaty of Asuncion (the treaty establishing MERCOSUR), the protocols and agreements within the framework of the Treaty of Asuncion, decisions of the Common Market Council,[10] Resolutions of the Market Group and the Join Guidelines Committee of Commerce of MERCOSUR.[11]

14. The Caribbean Court of Justice was established under the Agreement Establishing the Caribbean Court of Justice (2001). The Court has a dual function as it serves as a jurisdictional organ of the Caribbean Community ("CARICOM") as the court of last instance in a number of CARICOM member States that accepted its jurisdiction. Currently twelve CARICOM members are Contracting Parties to the Agreement.[12]

15. The Andean Community Court of Justice was established by the Treaty creating the Court of Justice of the Andean Community (1979) as the jurisdictional organ of the Andean Community. The Andean Community is an international organization established by the Agreement of Cartagena that aims to promote comprehensive economic and social development in the Andean region. All four members of the Andean Community are State Parties to the Court.[13]

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[5] See: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2394/download

[6] Charter of the Organization of Islamic Cooperation, Article 14 available at: https://www.oic-oci.org/upload/documents/charter/en/oic_charter_2018_en.pdf

[7] ECOWAS comprises of 15 West African countries: Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo

[8] The ECOWAS Community Court of Justice was established under Article 15(1) of the ECOWAS Revised Treaty; Article 2 Protocol A/P.l/7/91

[9] Namely Argentina, Brazil, Paraguay, and Uruguay.

[10] The Common Market Group is the executive organ of MERCOSUR. It consists of five members and five alternates that are appointed by the Member States. See: https://www.mercosur.int/quienes-somos/organigrama-mercosur/

[11] Protocol of Olivos, Article 1.1 available at: http://www.sice.oas.org/trade/mrcsr/olivos/polivostext_s.asp

[12] Namely Antigua and Barbuda, Barbados, Dominica, Grenada, Guyana, Belize, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago.

[13] Namely Colombia, Ecuador, Peru and Bolivia.

16. The CCJA was created by the Treaty establishing the Organization for the Harmonization of Business Law in Africa ("OHADA").[14] The CCJA was established with a dual function: (i) acting as a supranational court of last resort for OHADA Member States in unified commercial law matters, and (ii) administering OHADA arbitration proceedings. There are currently 17 OHADA Member States.

iii. Other Dispute Settlement Bodies

17. The Iran-United States Claims Tribunal[15] was set up by an inter-governmental agreement as an international arbitral tribunal to decide on claims arising out of US nationals against Iran and claims of Iranian nationals against the US.[16] It was established by an Agreement (the Algiers Declarations) of 19 January 1981.

18. The United Nations Compensation Commission (the "UNCC") was established in 1991 as a subsidiary organ of the UN Security Council pursuant to Article 18 of the Security Council Resolution 687 (1991). The Commission is expected to conclude its mandate in early 2022.

C. Functioning and governance

19. In the context of the Working Group discussions, it was noted that several aspects of governance of a multilateral investment tribunal would require further consideration. Effective governance provides consistency and predictability of decision making and increases transparency and accountability. The Working Group may therefore wish to consider a number of features related to the governance structure that are generally found in international courts and tribunals.

i. International Courts and Tribunals

20. For instance, the DSB is composed of government representatives of all WTO Members. The DSB has the authority to establish panels, adopt panel and Appellate Body reports, monitor the implementation of rulings and recommendations, and authorize the suspension of obligations under the covered agreements. Panels are in charge of adjudicating disputes between WTO Member States in the first instance. They are established on an ad hoc basis for each dispute. They are usually composed of three, and exceptionally five, experts. The Appellate Body is a standing body of seven members which hears appeals from reports issued by panels. The Appellate Body can uphold, modify or reverse the legal findings and conclusions of a panel. The Appellate Body reports are then adopted by the DSB by consensus. As such, the DSB is thus responsible for overseeing the entire dispute settlement process. It meets as often as necessary, has its own Chairperson and takes decisions by consensus.[17] With respect to operational aspects of its work, the DSB's Rules of Procedure for Meetings provide that the Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council shall apply,[18] subject to a few special rules on the Chairperson.

21. The ICJ is composed of fifteen permanent judges with a President and a Vice-President. The President and Vice-President are elected by the members of the Court. The President presides at all meetings of the Court, directs its work, and supervises its administration, with the assistance of a Budgetary and Administrative Committee and

[14] OHADA currently comprises 17 Member States: Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Cote d'Ivoire, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, RDC, Senegal, Chad, Togo.

[15] The Iran-United States Claims Tribunal came into existence as one of the measures to resolve the crisis between the Islamic Republic of Iran and the United States of America arising out of the November 1979 hostage crisis at the United States Embassy in Tehran and the subsequent freezing of Iranian assets by the United States. The Government of the Democratic and Popular Republic of Algeria served as intermediary in the search for a mutually acceptable solution and recorded commitments from both countries in two Declarations made on 19 January 1981: the (1) "General Declaration"; and (2) "Claims Settlement Declaration" (collectively the "Algiers Declarations").

[16] Claims Settlement Declaration, Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 January 1981, Article 2(1) available at: https://iusct.com/fa/wp-content/uploads/2018/10/2-Claims-Settlement-Declaration.pdf

[17] WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Articles 1-8.

[18] Rules of Procedure for Meetings of the Dispute Settlement Body adopted by the DSB on 10 February and 25 April 1995 (WT/DSB/9), Article 1.

various other committees, all composed of members of the Court. The Registry is the permanent administrative secretariat of the Court.[19] Every year the ICJ submits a report on its activities to the United Nations General Assembly, which considers it in accordance with Article 15, para. 2 of the UN Charter. The court is funded from the regular budget of the UN, which is included in annual budget resolutions subject to approval by the UN General Assembly.

ii. Regional Courts

22. The General Assembly of the AIC comprises at least five judges and several reserve members and be chaired by the President of the Court.[20] The Council appoints the Chairman of the AIC from amongst the members of the Court.[21]

23. The IICJ is composed of a group of seven judges, each elected for a four-year term. The Court is administered by a President and a Vice-President who are elected by the members. [22]

24. The ECOWAS Court of Justice is comprised of five judges, including the President and the Vice-President. The President and the Vice-President are responsible for the strategic orientation of the Court. The President issues summons to the parties to appear before the court, determine the roll of the Court and preside over its sittings. All operational expenses of the Court are charged to the budget of the Executive Secretariat of the Community. The Community also appoints and provide the Court with the necessary officers and officials to enable it carry out its functions.[23]

25. The MERCOSUR TPR consists of four arbitrators and alternate arbitrator who are appointed by the MERCOSUR State Parties.[24] These arbitrators are nationals of MERCOSUR State parties. The TPR has a permanent Secretariat which fulfils administrative functions and serves as the Registrar of the Tribunal.[25] The Rules of Procedure are approved by the Council of the Common Market.

26. The CCJ consists of one President and a maximum of nine judges.[26] The Regional Judicial and Legal Services Commission ("Commission") is the governing body of the CCJ and is composed of the President and several legal experts from CARICOM members. It appoints the judges of the CCJ other than the President.[27] The President shall be appointed or removed by the qualified majority vote of three-quarters of the Contracting Parties on the recommendation of the Commission.[28] The Court has a Registrar, which serves as Secretary of the Commission and as the Chief administrative officer.[29]

27. The Court of Justice of the Andean Community is composed of four judges, including a President. All members are nationals of the Member States.[30] Each judge has two alternates. At the request of the Court, and by a unanimous vote, the Commission of the Cartagena Agreement is authorized to change the number of judges. The Court appoints its Secretary and the essential staff required to fulfil its duties. The Secretary assists in organizational and administrative matters and functions as Registrar.[31] Each year, the Commission approves the Court's annual budget.

[19] ICJ Statute, Article 3.
[20] AIC Statute, Article 6(1).
[21] Unified Agreement for the Investment of Arab Capital in the Arab States, Article 28 (2) available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2394/download
[22] IICJ Statute, Article 3(a).
[23] Protocol A/P.l/7/91 on the Community Court of Justice, Articles 14(1), 29(3) and 30 available at: http://www.courtecowas.org/wp-content/uploads/2018/11/Protocol_AP1791_ENG.pdf
[24] Protocol of Olivos, Article 18, Additional Protocol, Article 1.
[25] Protocol of Olivos Rules, Article 35(1) & 35(2).
[26] Agreement Establishing the Caribbean Court of Justice (2001), Article IV.
[27] Ibid., Article V.1 and V.3.
[28] Ibid., Article IV. 6.
[29] Ibid., Article XXVII.
[30] Treaty Creating the Court of Justice of the Cartagena Agreement, Articles 6, 9 and 16.
[31] Statute of the Court of Justice of the Andean Community, Article 14 and Article 17-19 available at: https://www.tribunalandino.org.ec/transparencia/normatividad/EstatutoTJCA.pdf

28. The CCJA is the sole judicial body of OHADA and is integrated into a regional system that comprises two political bodies – the Conference of Heads of States and the Council of Ministers, an executive body – the Secretariat, and a specialized judicial academy – the Regional Higher School for the Judiciary. The CCJA was originally established with seven judges and is now composed of thirteen judges due to increased workload. It has a President and two Vice-Presidents. Judges are elected by the OHADA Council of Ministers, from a list issued by the Member States. The Court's Registrar is appointed by the President of the Court.[32]

iii. Other Dispute Settlement Bodies

29. The Iran-United States Claims Tribunal is composed of nine members (or larger multiples of three as Iran and the U.S. may agree). One third of the arbitrators are appointed by Iran and ones third by the U.S. The government-appointed arbitrators select by mutual agreement the remaining third of the members and appoint among the remaining third the President of the Tribunal.[33] Where the government-appointed arbitrators are unable to agree, the remaining third is selected by the appointing authority as foreseen in the UNCITRAL Arbitration Rules (1976).[34] Each government designate an Agent at the seat of the Tribunal to represent it before the Tribunal. The expenses of the Tribunal are shared equally by the two governments. The Secretary-General of the Tribunal transmits financial statements to the Full Tribunal and to the Agents. After the termination of the work of the Tribunal, and after a final audit, the Secretary-General renders an accounting to the two Governments of the deposits received and returns any unexpended balance to the two Governments.[35]

30. The UNCC functions under the authority of the Governing Council, which itself reports to the UN Security Council. that the Governing Council is composed of the current members of the UN Security Council at any given time,[36] and reports periodically on behalf of the Commission to the UN Security Council.[37]As a result, the UNCC has a three-tier structure: (i) the Governing Council presided by a President and two Vice-Presidents; (ii) the Commissioners presided by a Chairperson; and (iii) the Secretariat led by an Executive Secretary. The Executive Secretary transmits to the Governing Council the nominations for Commissioners proposed by the UN Secretary-General. The Commissioners are experts appointed by the Governing Council for the verification and evaluation of claims.[38] The Executive Secretary and the staff of the Secretariat provide administrative, technical and legal support to the Commissioners.[39] The Executive Secretary makes periodic reports to the Governing Council concerning the claims received. They are promptly circulated to the Government of Iraq as well as to all Governments and international organizations that have submitted the claims.[40] The Commissioners when performing their functions possess the status of experts on mission within the meaning of Article VI of the Convention on the Privileges and Immunities of the UN.[41] The Convention applies also to the Commission Secretariat. The Fund out of which the compensation for the damages is paid was established pursuant to Article 18 of the Security Council Resolution 687 (1991) and is operated in accordance with the UN Financial

[32] OHADA Treaty, Articles 31-39.
[33] Claims Settlement Declaration, Article 3(1).
[34] UNCITRAL Arbitration Rules (1976), Article 6 available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf
[35] Tribunal Rules of Procedure, 3 May 1983, Article 41(4) and (5) available at: https://iusct.com/wp-content/uploads/2018/10/5-TRIBUNAL-RULES-OF-PROCEDURE.pdf
[36] Report of the Secretary-General pursuant to paragraph 19 of the Security Council Resolution 687 (1991), paras. 4 and 5 available at: https://uncc.ch/sites/default/files/attachments/S-22559%20%5B1991%5D_0.pdf
[37] Ibid., para. 10.
[38] Decision taken by the Governing Council of the United Nations Compensation Commission at the 27th meeting, Sixth session held on 26 June 1992, S/AC.26/1992/10 (1992), Article 18 available at: https://uncc.ch/sites/default/files/attachments/S-AC.26-DEC%2010%20%5B1992%5D.pdf
[39] Ibid., Article 34(1).
[40] Ibid., Article 16.
[41] Ibid., Article 26.

Regulations and Rules. The Working Group may wish to note that the expenses of the Commission are also borne by the Fund.

D. Jurisdiction

31. Jurisdictional aspects will likely play an important role in the Working Group discussions related to the establishment of a multilateral investment court. In that light, it may be informative for the Working Group to note how international and regional courts and tribunals as well as other dispute settlement bodies articulate their jurisdiction in accordance with their object, purpose and underlying founding instrument.

i. International Courts and Tribunals

32. Pursuant to Article 1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the DSB has jurisdiction over disputes arising not only from the Agreement Establishing the World Trade Organization, but also from a number of multilateral trade agreements and plurilateral trade agreements that are listed in Appendix 1 to the DSU.[42] This particularity means that potential grounds for dispute before the DSB are to be found within these agreements, rather than in the DSU itself. In other words, the legal basis for bringing a dispute before the DSB as well as the type of dispute can differ, depending on the relevant provisions of each covered agreement. Things are different with regard to the WTO Appellate Body, as this standing body hears appeals from reports issued by panels in disputes directly brought by WTO Members. The Appellate Body issues in turn reports that can uphold, modify or reverse the legal findings and conclusions of a panel.

33. The jurisdiction of the ICJ covers all cases which State parties refer to it and all matters specially provided for in the UN Charter or in treaties and conventions in force. State parties to the ICJ Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement the jurisdiction of the ICJ in all legal disputes concerning:

(i) The interpretation of a treaty;

(ii) Any question of international law;

(iii) The existence of any fact which would constitute a breach of an international obligation; and

(iv) The nature or extent of the reparation to be made for the breach of an international obligation.[43]

ii. Regional Courts

34. The Arab Investment Court is intended to have broad jurisdiction over State-to-State and Investor-State disputes that relate to or arise from the application of the provisions of the AIA. More specifically, it is competent to hear such disputes arising either between (i) any State Party and another State Party, or between a State Party and a public entity of the other Parties, or between two public entities of more than one State Party; (ii) a State party, public institution or organization of a Party and an Arab investor, and (iii) a State, a public entity or an Arab investor and the State agencies providing investment guarantees in accordance with the Arab Investment Agreement. The disputing parties can alternatively choose to submit their AIA-related dispute to the national courts of the host State, in which case a fork-in-the-road rule applies or choose an alternative mode of dispute resolution through conciliation, mediation or arbitration. If the parties' chosen alternative method to resolve the dispute fails or if the arbitral tribunal fails to render its award in the prescribed time limits, the parties can then refer the dispute to the AIC.[44] In addition, subject to agreement by the disputing parties, the AIC is competent to hear disputes arising from any other Arab

[42] Namely, the Multilateral Agreements on Trade in Goods; the General Agreement on Trade in Services; the Agreement on Trade-Related Aspects of Intellectual Property Rights; the Understanding on Rules and Procedures Governing the Settlement of Disputes; the Agreement on Trade in Civil Aircraft; the Agreement on Government Procurement; the International Dairy Agreement, and the International Bovine Meat Agreement.

[43] ICJ Statute, Article 36.

[44] AIA, Articles 21-27.

investment agreement which stipulates that disputes shall be referred to international arbitration or an "international court".[45] The AIC can further hear disputes referred to it directly by the LAS Economic and Social Council.[46]

35. The IICJ's jurisdiction encompasses[47]:

(i) Cases referred to the IICJ by OIC Member States;

(ii) Cases referring to the IICJ in any treaties or conventions in force;

(iii) Interpretation of a bilateral or multilateral treaty;

(iv) Any question of international law;

(v) The existence of any fact which, if established, would constitute breach of an international obligation; and

(vi) The nature or extent of reparation to be made for breach of an international obligation.

36. The ECOWAS Court of Justice is competent to adjudicate on any dispute relating to:

(i) The interpretation and application of the ECOWAS Revised Treaty; the ECOWAS Conventions, Protocols and regulations, directives, decisions, and other subsidiary legal instruments adopted by ECOWAS;

(ii) The legality of regulations, directives, decisions, and other subsidiary legal instruments adopted by ECOWAS;

(iii) Failures of Member States to honor their obligations under the ECOWAS Revised Treaty and ECOWAS Conventions, Protocols, regulations, directives, or decisions;

(iv) ECOWAS and its officials; and

(v) Actions for damages against ECOWAS institutions or ECOWAS officials for any action or omission in the exercise of official functions[48].

37. The MERCOSUR TPR is an inter-State dispute resolution body that is open solely to State parties. It can hear disputes in first instance and at appellate level, and also renders advisory opinions. In first instance, parties can resort to the TPR only after a preliminary negotiations phase (fifteen days unless the parties agree otherwise) has been concluded without success.[49] After that, parties can decide either to refer the dispute to diplomatic mediation within the MERCOSUR Group, submit the dispute to *ad hoc* arbitration, or submit the dispute directly to the TPR. If they opt for the TPR, a fork-in-the-road rule applies,[50] and the decision rendered is deemed to be final, i.e., cannot be subject to appeal. At the appellate level, the TPR reviews awards issued by the *ad hoc* arbitration tribunal established under Chapter VII of the PO, when parties had opted for such forum. Its review only covers questions of law and other issues of interpretation of the arbitral award. In addition, the TPR can hear disputes under the Procedure for Exceptional Cases of Urgency, a special procedure intended to solve exceptional cases of emergency that may cause irreparable property damages to State parties. Outside contentious matters, the TPR can also issue non-binding advisory opinions by joint request from the MERCOSUR State Parties, MERCOSUR Executive bodies and Supreme Court of Justices of State Parties,[51] or from national tribunals of the MERCOSUR State parties.[52]

[45] AIA, Article 30.
[46] AIC Statute, Article 21; Agreement to Facilitate and Develop Trade Among Arab Countries, Article 13.
[47] IICJ Statute, Article 25.
[48] The Community Court of Justice, Supplementary Protocol, Article 3 Amending Article 9(1) of the Protocol.
[49] Protocol of Olivos ("PO"), Chapter IV.
[50] PO, Article 1.2; Protocol of Olivos Rules, Article 1; Protocol of Olivos Procedural Rules, Article 2.
[51] PO, Article 3 and Protocol of Olivos Rules, Article 2.
[52] MERCOSUR/CMC/DEC.37/03, Articles 3 and 7.

38. The CCJ is a hybrid institution, that acts both as a municipal court of last resort [53] and as an international court that hears disputes with respect to the interpretation and application of the Treaty of Chaguaramas (the "CARICOM Treaty"). As an international court, the CCJ can hear and deliver judgment on (i) disputes arising between Contracting Parties to the Agreement or between CARICOM and Contracting Parties; (ii) referrals from national courts of the CARICOM Members that are parties to the Agreement, or (iii) applications by certain nationals of the Contracting Parties with a special leave from the Court. [54] In addition, the international court can deliver advisory opinions concerning the interpretation and application of the CARICOM Treaty, upon request of State parties or the Caribbean Community.

39. The Andean Court of Justice is competent to hear claims arising from State Parties, Andean Community organs, other institutions of the Andean System of Integration and in some circumstances private parties (natural and legal entities). In particular, private parties, can resort to the Court either through actions of non-compliance of a State party with the Community norms (also available to Community organs and State parties), or through actions of nullity against decisions taken by the organs of the Andean Community (also available to State parties), if they can bring evidence that their rights have been affected by the said measures or actions. [55] In addition, the Court has jurisdiction to hear claims of omission or inactivity against the Commission of the Andean Community or the General Secretariat, [56] and can arbitrate disputes concerning the application or interpretation of contracts or other agreements among institutions of the Andean System of Integration or between these institutions and third parties. [57] Further, the Court can make preliminary rulings on the interpretation of Community norms, on the request from national courts.

40. The CCJA acts both as a court of last resort for OHADA Member States and as an administering institution for OHADA arbitration. As a court of last resort, the CCJA has jurisdiction to hear claims related to the interpretation or application of OHADA treaty law, including OHADA uniform acts and regulations, in the field of unified commercial law. It can only decide on the law and does not decide on the specific facts of a case. In this respect, the Court can also issue advisory opinions by request of domestic courts, Member States or the Council of Ministers. [58] When acting as an administering institution for OHADA arbitration, the Court is competent to issue administrative decisions, such as the removal or replacement of arbitrators. [59] Since the 2017 arbitration law reform, the CCJA is also competent to issue administrative decisions in investor-State arbitration. The CCJA is further competent to hear disputes in annulment and enforcement proceedings. [60]

iii. Other Dispute Settlement Bodies

41. The example of the Iran-United States Claims Tribunal is also relevant. The IUSCT functions as an international arbitral body with limited jurisdiction, which covers (i) claims arising out of debts, contracts, expropriations, or other measures affecting property rights, brought either by US nationals (both natural and juridical persons) against Iran, or by Iranian nationals (both natural and juridical persons)

[53] The Court's specific appellate jurisdiction in such circumstances differs depending on the Contracting Party's domestic law (Article XXV of the Agreement Establishing the Caribbean Court of Justice).

[54] Agreement Establishing the Caribbean Court of Justice (2001), Article XII; CARICOM Treaty, Article 211. In accordance with Article XXIV of this Agreement, nationals from one of the Contracting Parties can bring a claim before the CCJ only if the following four cumulative criteria are met: (a) The CCJ has established in a particular case that the CARICOM Treaty directly confers rights to individuals of a Contracting Party; (b) The individuals have proven that their rights conferred by the CARICOM Treaty have been prejudiced; (c) The Contracting Party that is entitled to espouse a claim has denied or omitted to do so or has expressly agreed that an individual should present a claim; and (d) The CCJ has found that in the interest of justice an individual should be allowed to bring a claim.

[55] Treaty Creating the Court of Justice of the Cartagena Agreement, Articles 17-22, and Articles 23-31, respectively.

[56] Ibid., Articles 32-37.

[57] Ibid., Articles 38-39 and 44.

[58] OHADA Treaty, Article 14 (2008 amendment); CCJA Rules of Procedure, Articles 53-58.

[59] CCJA Arbitration Rules (2017), Article 4.

[60] CCJA Arbitration Rules (2017), Articles 29-30.

against the United States; (ii) disputes between Iran and the U.S. concerning the interpretation or performance of the Algiers Declarations, and (iii) "official claims" between Iran and the United States arising out of contractual arrangements between them and relating to the purchase and sale of goods and services.[61] While the IUSCT can only hear claims filed with the tribunal by 19 January 1982, disputes between the two Governments concerning the interpretation of the Algiers Declarations are not subject to any time limit. The IUSCT rules of procedure are based on the 1976 UNCITRAL Arbitration Rules,[62] and its decisions have been considered by certain national courts as "arbitral awards" enforceable under the New York Convention.[63]

42. The UNCC is competent to hear claims for direct losses and damage suffered as a direct result of Iraq's invasion and occupation of Kuwait from 1990-1991.[64] As such, it is considered to be a claims commission rather than an international court or tribunal, hence its original features. For instance, claims before the UNCC are brought directly by private parties (both individuals and corporations). In addition, the jurisdiction of the UNCC covers a large range of damages for which compensation can be sought. This includes compensation claims for death, injury, loss of or damage to property, commercial loss, and environmental damage.

E. Representation

43. A question to consider in the design of the composition of a multilateral investment tribunal is the number of adjudicators and, in this respect, whether States would wish to establish "full representation" or "selective representation" bodies. When it considered this question, the Working Group indicated that full representation might be difficult to achieve, in particular in light of the cost implications and connection between the number of adjudicators and the caseload (A/CN.9/1004/Add.1, para. 115). Key elements in this respect are to ensure broad geographical representation as well as a balanced representation of genders, levels of development and legal systems, and to ensure that the agreement establishing the tribunal would allow the number of tribunal members to evolve over time, following any variation in the number of participating States, as well as in caseload.

i. International Courts and Tribunals

44. The founding instruments of international courts and tribunals usually provide that the composition of their judges must reflect a balance of different profiles and represent the main global legal systems. For instance, several existing statutes of international courts refer to "equitable geographical representation" or "distribution" for the selection of adjudicators.[65]

45. In particular, the DSU indicates that WTO Panels shall be composed of well-qualified governmental and/or non-governmental individuals. Panels usually include three panelists, unless the disputing parties agree to have five panelists. The selection of panelists must respect a certain number of parameters. These include, for instance, ensuring the independence of the members, a sufficiently diverse background, and a wide spectrum of experience. Members whose governments are parties to the dispute or third parties[66] shall not serve on a panel concerned with that dispute unless the parties to the dispute agree otherwise. The Appellate Body is for its part composed of seven members, three of whom serve on any one case and are persons of recognized authority, with demonstrated expertise in law, international trade, and the subject matter of the covered agreements. They

[61] Claims Settlement Declaration, Article 2.

[62] Article III (1) of the Claims Settlement Declaration states that the Tribunal "shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extend modified by the parties or by the Tribunal".

[63] See below, para. 102.

[64] Security Council Resolution 687, Articles 16-19.

[65] See, for example, Rome Statute of the International Criminal Court (ICC), 1 July 2002, Article 36(8)(a); See also Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Article 17(3), third sentence.

[66] Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB.

shall be broadly representative of membership in the WTO. Members of the Appellate Body must not be unaffiliated with any government.[67]

46. The ICJ Statute indicates in a similar manner that its judges, in addition to possessing the required qualifications, shall represent the main forms of civilization and the principal legal systems of the world.[68]

ii. Regional Courts

47. Regional courts have also adopted selective representation. For instance, the AIC Statute provides that the five judges and reserve members of the Court must be of a different nationality.[69] A similar rule applies to the seven IICJ judges whose election, including that of the President and Vice-President, and judges, must be made in light of geographical and linguistic distribution requirements among Member States.[70] The CCJ also has selective representation, consisting of a maximum of 9 judges.[71]

48. Another example of selective representation is the ECOWAS Court of Justice. The court used to be composed of seven judges drawn from the judiciary academia and legal practitioners. The number was subsequently reduced from seven to five judges, with each judge having to be a national of a different ECOWAS Member State.[72]

49. In the Intra-MERCOSUR Dispute Settlement Mechanisms, where the State Parties can choose between two types of proceedings – *ad hoc* arbitration and TPR – both proceedings ensure full representation among its members of all the Member States involved in the dispute. In the same vein, in the Court of Justice of the Andean Community each Member State is represented by one judge.[73]

50. The composition of the CCJA also obeys to a number of representation rules. For instance, the OHADA Treaty provides that a third of CCJA judges must be former practicing counsels or academic professors of law with at least fifteen years of experience. Similarly, the Treaty provides that the Court cannot comprise more than one national of the same Member State.[74] As there are now thirteen judges sitting at the CCJA, this means that thirteen out of seventeen OHADA Member States have a national sitting at the CCJA.

iii. Other Dispute Settlement Bodies

51. The Algiers Declarations establishing the Iran-United States Claims Tribunal follow a recognized practice whereby two states, in exercising their diplomatic protection, establish a mixed arbitral tribunal to settle the claims of their nationals against each other. Indeed, at the IUSCT three arbitrators are appointed by Iran, three are appointed by the U.S., and a further three– who must be nationals from third-party countries – are appointed by the previous six arbitrators. The President of the Tribunal is elected among these three non-government-appointed arbitrators.

52. The UNCC Commissioners work in panels of three members, each of whom must be of a different nationality. In addition, the nomination and appointment of Commissioners are made in light of geographical representation, professional qualifications, experience, and integrity.[75]

[67] WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 4(2) and (3), Article 8(2) and (5) Article, Article 17(1) and (3).
[68] ICJ Statute, Article 9.
[69] AIC Statute, Article 2(1)-(2) and Article 3(5).
[70] IICJ Statute, Article 3(a), 3(b) and Article 5(e).
[71] Agreement Establishing the Caribbean Court of Justice (2001), Article IV.
[72] Protocol A/P.1/7/91 on the Community Court of Justice, Article 3(2).
[73] Treaty Creating the Court of Justice of the Cartagena Agreement, Articles 6 and 7.
[74] OHADA Treaty, Article 31.
[75] Decision taken by the Governing Council of the United Nations Compensation Commission S/AC.26/1992/10 (1992) Provisional Rules for Claims Procedure, Articles 19(1) and 28(1) available at: https://uncc.ch/decisions-governing-council

F. Procedure for nomination, selection and appointment

53. At its resumed thirty-eighth session, in January 2020, and at its fortieth session, in February 2021, the Working Group undertook a preliminary consideration of the selection and appointment of ISDS tribunal members, with a focus on their selection and appointment in the context of a standing multilateral mechanism (A/CN.9/1004/Add.1, paras. 95–133; A/CN.9/1050, paras. 17–56). The Working Group considered that, as a matter of principle, the selection and appointment methods of ISDS tribunal members should be such that they contribute to the quality and fairness of the justice rendered as well as to the appearance thereof, and that they guarantee transparency, openness, neutrality, accountability and reflect high ethical standards, while also ensuring appropriate diversity (A/CN.9/964, paras. 91–96). In addition to the qualifications and other requirements, appropriate diversity, such as geographical, gender, and linguistic diversity, as well as equitable representation of the different legal systems and cultures was said to be of essence in the ISDS system.

i. International Courts and Tribunals

54. With respect to the WTO DSB, the Secretariat maintains an indicative list of governmental and non-governmental individuals to serve as panelists. WTO Members may also periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, upon approval by the DSB. Based on this list, the Secretariat proposes nominations for the panel to the parties of the dispute. Parties can only oppose these nominations for compelling reasons.[76] The Appellate Body is composed of seven permanent members who are appointed by the DSB for a four-year term, and each member may be reappointed once.[77] Vacancies are filled as they arise. At the ICJ, candidate judges are nominated by the national groups in the Permanent Court of Arbitration (the "PCA").[78] For those UN Members not represented in the PCA, candidates shall be nominated by ad hoc national groups appointed for this purpose. The Secretary-General addresses a written request to the national groups (both PCA and ad hoc) inviting them to nominate candidates at least three months before the date of election. National groups cannot nominate more than four candidates, not more than two of whom shall be of their own nationality. The UN Secretary-General then subsequently prepares a list of nominated candidates in alphabetical order, from which ICJ judges are elected by absolute majority of votes in both the General Assembly and Security Council.[79]

ii. Regional Courts

55. The AIC judges are elected through secret ballot by the LAS Economic and Social Council at a special council meeting from a list of nominees prepared by the AIC Secretariat. The State Parties present candidates (a main candidate and an alternate) from among its citizens at least one month before the election date. Candidates are elected based on simple majority in the secret ballot.[80]

56. IICJ judges are for their part elected by the OIC Conference of Foreign Ministers at a special session meeting, from list of nominees prepared by the OIC Secretary General. States may present candidates who meet the conditions delineated in Article 4 of the IICJ Statute within a two-month period following written invitation from the OIC Secretary General at least three months prior to the election date. States may nominate a maximum of three candidates, only one of whom may be one of their own nationals. Candidates are elected based on the absolute majority of votes.[81]

57. Judges of the ECOWAS Court of Justice are appointed by the ECOWAS Authority of Heads of State and Government, from a short list of fourteen candidates

[76] WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 8(4) and (6).
[77] Ibid., Article 17(1) and (2).
[78] According to Article 44 of the 1907 Convention for the Pacific Settlement of International Disputes, each contracting party may select a group of up to four persons to be members of the PCA; each group of persons designated in this way constitutes a "national group" for the purpose of the ICJ Statute and the election of its judges.
[79] ICJ Statute, Articles 4 (1), 5(1) and 5(2), 7(1), 10(1).
[80] AIC Statute, Article 3(2)-(4) and Article 8(1).
[81] IICJ Statute, Article 4, Article 5(b)-5(d).

proposed by the ECOWAS Judicial Council. This list is itself based on a larger list prepared in alphabetical order by the ECOWAS Executive Secretary. Nominations are made by the ECOWAS Member States (two nominations maximum per Member State). Candidates are elected by secret ballot, on absolute majority.[82]

58. Regarding the MERCOSUR Dispute Settlement Mechanism, in ad hoc arbitration, each State Party nominates a list of twelve arbitrators that is sent to the MERCOSUR Secretariat.[83] In addition, each State Party provides the MERCOSUR Secretariat with four candidates for an additional list of third arbitrators. One of the four candidates must be a non-MERCOSUR national. Both lists are made publicly available. The process is slightly different for the TPR, which is composed of five arbitrators: each MERCOSUR Party appoints one arbitrator and its deputy; for the fifth arbitrator, each MERCOSUR Party may propose two candidates, and the MERCOSUR Administrative Secretariat selects by unanimity if possible or by lot. However, State Parties can alter the rules for the fifth by mutual agreement[84].

59. The CCJ does not have any specific selection procedure. However, judges must fulfil certain requirements to be eligible for nomination and appointment. For instance, they must have at least five years of experience as a judge in a court of one of the CARICOM Member States, the Commonwealth or in a State that exercises civil law jurisprudence that is common to Contracting Parties or must have practiced or taught law for fifteen years in any of these jurisdictions. Furthermore, in appointing judges, the Commission must consider the person's high moral character, intellectual and analytical ability, sound judgment, integrity, and understanding of people and society. Additionally, at least three of the judges of the CCJ must possess expertise in international law, including international trade law. The President of the CCJ is appointed or removed by the qualified majority vote of three-quarters of the Contracting Parties upon recommendation of the Commission. Judges are appointed or removed by a majority vote of all the members of the Commission.[85]

60. Regarding the Court of Justice of the Andean Community, each Member State provides a list of three candidates for the selection of the four judges and their alternates. The four judges and their alternates (two per judge) are elected from the lists provided by each Member State and by unanimity of the plenipotentiaries that are accredited for this function. In order to qualify for the office, they must be nationals from Member States, enjoy a high moral consideration and meet the conditions that are required to sit in the highest judicial instances in their respective States or be a jurisconsult with recognized competence. The final list is published on the website of the Tribunal.[86]

61. Judges of the CCJA are elected by the OHADA Council of Ministers, from a list issued by the Member States. The President and the two Vice-Presidents of the CCJA are elected by the Court sitting in plenary session. The election of the Vice-Presidents is conducted under the direction of the President.[87] The Court's Registrar is appointed by the President of the Court.[88]

iii. Other Dispute Settlement Bodies

62. With respect to other dispute settlement bodies, the procedure for nomination, selection and appointment of tribunal members (in the case of the IUSCT) and members to the Governing Council and Commissioners (in the case of the UNCC) has been described above.[89] (see paras. 29-30, 51-52).[90]

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[82] Protocol A/P.1/7/91 on the Community Court of Justice, Article 3(6), Article 3(5) and Article 3(4) and Rules of the Court of Justice of the Economic Community of West African States (ECOWAS) 2002 Article 6(1) and Article 6(3).
[83] Protocol of Olivos, Article 11(1).
[84] Protocol of Olivos, Article 18 modified, Additional Protocol, Article 1.
[85] Agreement Establishing the Caribbean Court of Justice (2001), Article IV. 10-11., Article IV.1 and Article IV.6-7.
[86] Treaty Creating the Court of Justice of the Cartagena Agreement, Articles 6 and 7.
[87] CCJA Rules of Procedure, Article 6.
[88] OHADA Treaty, Articles 31-39.
[89] See above, paras. 29-30, 51-52.
[90] Decision taken by the Governing Council of the United Nations Compensation Commission S/AC.26/1992/10 (1992) Provisional Rules for Claims Procedure, Article 18(1), Article 19(3), and Article 20(1).

G. Terms of office

63. The Working Group considered a number of possible avenues regarding the terms of office and renewal for members of a multilateral investment tribunal. Various elements to be taken into account for the determination of the appropriate term were mentioned, including the duration required to resolve ISDS cases, the workload balance among the adjudicators, the ability to attract high-quality candidates and the accumulation of experience and expertise on the court. As a result, some views suggested that the term of office could range from six to nine years, with staggered replacements to achieve stability in the operation of the standing body and of the jurisprudence (A/CN.9/1050, para. 39; see also document A/CN.9/WG.III/WP.213).

64. As can be inferred from the findings in this Section, the views expressed in the Working Group are generally reflective of the practice of international and regional courts and tribunals as well as other dispute settlement bodies.

i. International Courts and Tribunals

65. The WTO DSB establishes panels in charge of adjudicating disputes between WTO Members in first instance. These panels have no permanent basis, as they are selected on an *ad hoc* basis for each dispute. Panels are usually composed of three (exceptionally five) independent and well-qualified experts, selected by the disputing parties from an indicative list of names maintained by the WTO Secretariat.[91] Importantly, panelists serve as independent individuals and do not represent the interests of any government or organization.[92] By contrast, the seven members of the Appellate Body sit on a permanent basis. They serve for terms of four years and can be reappointed by the DSB for another four years.

66. The fifteen judges of the ICJ serve on a permanent basis for terms of nine years, which can be renewed. Special elections take place in case a judge resigns or dies during the course of his/her term of office. Judges *ad hoc* who might be appointed in a case by a disputing party whose nationality is not already represented in the bench only serve for the duration of the case. The President and Vice-President serve a three-year renewable term.[93]

ii. Regional Courts

67. The majority of the regional courts under consideration envisage the possibility of renewable terms for judges. For instance, the following table summarizes these courts' practice with regard to judges' terms of office:

AIC	Judges and Commissioners elected for 3 years	Renewable for Judges and Commissioners[94]
IICJ	Judges elected for 4 years	Renewable once[95]
TPR	Arbitrators and alternate arbitrators elected for 2 years	Renewable for a maximum of 2 consecutive terms[96]
CCJ	President elected for 7 years, age limit of 72. Judges hold	No renewable term but age limit of 72[97]

[91] DSU, Article 8.
[92] DSU, Article 8.9.
[93] ICJ Statute, Article 13(1), and 21(1).
[94] AIC Statute, Article 2(3) and Article 8(1).
[95] IICJ Statute, Article 3(a).
[96] Protocol of Olivos (2002), Article18 PO (modified)/Article 1 Additional Protocol.
[97] Agreement Establishing the Caribbean Court of Justice (2001), Article IX.

	office until they reach 72.	
Court of Justice of the Andean Community	Judges are elected for 6 years	Renewable once[98]
ECOWAS Court of Justice	Judges are elected for 4 years.	No renewable term
CCJA	Judges are elected for 7 years; President and the two Vice-Presidents are elected for 3½ years	No renewable term[99]

iii. Other Dispute Settlement Bodies

68. UNCC Commissioners are appointed by the Governing Council and sit in panels of three, with nineteen panels in total. They are appointed for fixed terms. Their specifics tasks and terms are determined by the Governing Council.[100] Commissioners shall not represent or advise any party or claimant concerning the preparation or presentation of their claims to the Commission during their service as Commissioner or for two years thereafter.[101] The Governing Council has ten non-permanent members that serve for two-year terms, five of which are replaced every year. The President and the co-Presidents serve two-year terms.

69. Members of the IUSCT are appointed by the U.S. and Iranian Governments to the extent of one-third each, with the remaining third being selected by the six Government-appointed members, who also appoint among the remaining third the President of the tribunal. They normally serve until they retire or resign.

H. Conditions of service

70. As indicated by the Working Group when considering qualifications and requirements to be met by individuals serving as ISDS tribunal members, success of any adjudication process largely depends on the professional competence of adjudicators (A/CN.9/1004/Add.1, paras 96-100). As can be seen below, most courts and tribunals contain in their statutes general or specific requirements regarding necessary qualifications and attributes of adjudicators.

i. International Courts and Tribunals

71. For instance, the qualifications of adjudicators in both the WTO panels and the Appellate Body are carefully defined. Panels are to be composed of well-qualified governmental and/or non-governmental individuals, including persons who have (i) served on or presented a case to a panel; (ii) served as a representative of a Member or contracting party to the General Agreement on Tariffs and Trade (GATT) 1947, as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat; (iii) taught or published on international trade law or policy; or (iv) served as a senior trade policy official of a Member. Appellate Body members must have recognized authority with demonstrated

[98] Treaty Creating the Court of Justice of the Cartagena Agreement, Article 8.
[99] OHADA Treaty, Articles 31 and 37.
[100] Decision taken by the Governing Council of the United Nations Compensation Commission at the 27th meeting, Sixth session held on 26 June 1992, Article 18.
[101] Ibid, Article 21.

expertise in law, international trade, and in the subject matter of the covered agreements in general.[102]

72. ICJ judges must have high moral character and possess the qualifications required in their respective countries for appointment to the highest judicial offices or are jurisconsults of recognized competence in international law.[103]

ii. Regional Courts

73. Requirements for adjudicators occupying the highest judicial positions to have high moral character and recognized competence in international law are included in a number of regional courts' statutes, including the AIC,[104] IICJ,[105] and ECOWAS Court of Justice.[106] Some statutes indicate that judges shall have at least fifteen years of relevant practical experience as a judge, practicing lawyer or law professor.[107] Similarly, the AIC Statute provides that Commissioners shall possess high moral character and distinguished professional competence.[108] Further, the IICJ requires members to be no younger than forty and to be an authority in Sharia law.[109] The ECOWAS Court of Justice requires judges to be aged between forty and sixty,[110] and have at least twenty years of professional experience.[111]

74. The IMDSM provides that arbitrators must be available to serve on a permanent basis.[112] In the same vein, the Andean Court of Justice provides that judges shall not carry out any other professional activity except academic duties and requires them to be fully independent in exercising their functions.[113]

iii. Other Dispute Settlement Bodies

75. UNCC Commissioners' conditions of service have been tailored to meet the specific mandate of the institution. As a result, Commissioners are required to be experts in the fields of finance, law, accounting, insurance, environmental damage assessment, oil, trade, and engineering. In addition, the nomination and appointment of Commissioners is made in light of their professional qualifications, experience, and integrity.[114]

76. The IUSCT does not contain specific rules pertaining to the competence or expertise of its members. Nonetheless, its rules of procedure, based on the 1976 UNCITRAL Arbitration Rules, provide that the appointing authorities shall ensure that arbitrators are independent and impartial.[115]

I. Code of conduct

77. The Working Group considered, at its forty-first session, a draft code of conduct for adjudicators in IIDs prepared jointly by the UNCITRAL and ICSID Secretariats (A/CN.9/WG.III/WP.208 and A/CN.9/WG.III/WP.209). The Working Group may wish to note the brief overview below regarding how various international courts and tribunals regulate the conduct of adjudicators.[116]

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[102] WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 8(1), and Article 17(3).
[103] ICJ Statute, Article 2.
[104] AIC Statute, Article 2(1).
[105] IICJ Statute, Article 4.
[106] Protocol A/P.l/7/91 on the Community Court of Justice, Article 3(1).
[107] See e.g., OHADA Treaty, Article 31. See also AIC Statute, Article 2(3).
[108] AIC Statute, Article 3(1) and 8(1).
[109] IICJ Statute, Article 4.
[110] Protocol A/P.l/7/91 on the Community Court of Justice, Article 3(7).
[111] Available at: www.courtecowas.org
[112] Protocol of Olivos (2002), Article 19.
[113] Treaty Creating the Court of Justice of the Cartagena Agreement, Article 6.
[114] Decision taken by the Governing Council of the United Nations Compensation Commission S/AC.26/1992/10 (1992) Provisional Rules for Claims Procedure, Article 19(1) and 19(2).
[115] 1976 UNCITRAL Arbitration Rules, Article 6.
[116] A compilation of code of conducts of arbitral institutions and courts and tribunal is available at : https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/icsid_code_of_codes_and_ethics_part_1.pdf and https://uncitral.un.org/sites/uncitral.un.org/files/media-

i. International Courts and Tribunals

78. The Rules of Conduct of the WTO DSB provide that each person (e.g., panelists, Appellate Body members, arbitrators) shall (i) be independent and impartial; (ii) avoid direct or indirect conflicts of interest; and (iii) respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism.[117] Similar duties are applicable to ICJ judges, who declare that they shall perform their duties and exercise their powers honorably, faithfully, impartially, and conscientiously.[118]

ii. Regional Courts

79. While some regional courts have adopted an identical language to that of the ICJ in their ethical rules,[119] others have adopted a more extensive approach in regulating the conduct of adjudicators. For instance, the AIC Statute provides that judges and Commissioners must respect the duties and integrity of their office and must in particular abstain from (i) activities that contravene established requirements of office; and (ii) taking part in disputes in which the judge has previously (a) acted as an agent, consultant, lawyer, or expert to one of the parties of the dispute or in relation to a dispute that he/she has previously encountered as a member of a national court, international court, or arbitral tribunal, (b) acted as a mediator or investigator, or (c) to which he/she has opined on in any other capacity with respect to the dispute. The AIC Statute further indicates that it is impermissible for judges to work for a party that was involved in a proceeding in which they have acted, within a period of two years following the end of their term of office. In case of contravention of these rules, the matter shall be submitted to the General Assembly, which takes appropriate action and refers the matter to LAS Economic and Social Council.[120]

80. IICJ judges may not (i) exercise political or administrative function nor perform activities contravening the IICJ's dignity and independence; (ii) act as counsel, agent, advocate, or arbitrator in any case or engage in any other work of a professional nature that may conflict with his/her membership of the Court; nor (iii) participate in any case in which the judge has previously taken part as a member of a national court, international court, commission of enquiry, or in any other capacity. Any doubt regarding the interpretation of these rules shall be settled by decision of the Court.[121]

81. Other regional courts regulate their adjudicators' conduct in a detailed manner using dedicated codes of conduct. For example, the CCJ Judicial Code of Conduct (2020) serves as a guideline containing several principles that the judges of the Court commit to uphold.

82. The OHADA Treaty indicates that CCJA members shall not exercise political or administrative functions and shall seek approval from the Court in order to conduct any other remunerated activity.[122] Further, the CCJA Arbitral Rules provide that arbitrators, in arbitration proceedings administered by the CCJA, shall remain independent and impartial, and act diligently and in a timely manner.[123]

83. The MERCOSUR Code of Conduct for Arbitrators, Experts and Staff contains in Article 2 a list of duties and obligations for arbitrators, experts and staff.[124] It provides that such persons must, *inter alia*: retain their independence and impartiality; exercise their functions with equity and due diligence; avoid conflict of interests of a direct or indirect manner; keep in secrecy information that relates to the actions and deliberations concerning a proceeding, even after the conclusion of the latter; and not

documents/uncitral/en/icsid_code_of_codes_and_ethics_part_1.pdf

[117] WTO, Rules of conduct for the understanding on rules and procedures governing the settlement of disputes, Article II (1).

[118] ICJ Statute, Article 20; Rules of Court, Article 4.

[119] See e.g., the ECOWAS Court of Justice, Protocol A/P.l/7/91 on the Community Court of Justice, Article 5, Rules of Procedure, Article 3.

[120] AIC Statute, Article 12(1), Article 12(2), and Article 12(3).

[121] IICJ Statute, Article 8.

[122] OHADA Treaty, Article 37.

[123] CCJA Arbitral Rules, Article 4.

[124] MERCOSUR/CMC/DEC. N° 31/11 ("Code of Conduct").

use such aforementioned information for personal or third-party benefits. The breach of any of these duties may lead to the investigation and removal of individual by the Common Market Group.[125]

84. The Andean Court also foresees the possibility to remove a judge from the Court in case of misbehavior, actions that are incompatible with the position and violation of the conditions of service. The request for removal must emanate from a Member State.[126] The Commission of the CCJ, has also developed disciplinary rules for judges and has the power to remove judges, except for the President, by a majority vote of all members of the Commission.[127]

iii. Other Dispute Settlement Bodies

85. While the IUSCT does not have any code of conduct, its statute provides that arbitrators shall disclose circumstances that may rise justifiable doubts as to their impartiality and independence. As a result, an arbitrator may be challenged in case there are circumstances giving rise to such justifiable doubts.[128]

86. With respect to the UNCC, Commissioners ought to act in their personal capacities and declare to perform their duties and exercise their position honorably, faithfully, independently, impartially, and conscientiously. They are further subject to a disclosure obligation.[129]

J. Case assignment

87. The Working Group noted that case assignment method should ensure balanced representation, diversity, independence and impartiality, which could include randomized appointments with oversight, appointments by the president of the tribunal, or appointments by some other independent committee (A/CN.9/1050, para. 56; A/CN.9/WG.III/WP.213). Clear pre-defined methods for assignment of cases are aimed at avoiding that disputes are attributed to one or the other tribunal member based on political considerations or outside influence. In that sense, far from being an issue of mere internal judicial organization, case assignment methods are a key factor guaranteeing structural independence. Different models for assigning cases can be found in international courts.

i. International Courts and Tribunals

88. In order to handle particular categories of cases, the ICJ forms one or more chambers composed of three or more judges.[130] It shall also annually form a chamber composed of five judges including the President and Vice-President who may hear and determine cases by summary procedure at the request of the parties with a view to the expeditious dispatch of business.[131]

89. The WTO uses two different methods of assignment for cases adjudicated by the Panels in first instance, or the Appellate Body. Panels are composed of three panelists (or five if the parties so agree) nominated by the Secretariat for each case.[132] At the Appellate Body, each case is decided by three members, assigned by rotation.[133]

ii. Regional Courts

84. Regional courts usually sit in chambers or divisions. The IICJ sits in one or more chambers composed of three or more judges, depending on the particular

[125] MERCOSUR/CMC/DEC. N° 31/11 (“Code of Conduct”), Articles 4-6.
[126] Treaty Creating the Court of Justice of the Cartagena Agreement, Article 10 and Statute, Articles 11 and 12.
[127] Agreement Establishing the Caribbean Court of Justice (2001), Article V.3 (2), Article V.14, Article IV.7.
[128] Iran-United States Claims Tribunal, Tribunal Rules of Procedure, Articles 9 and 10.
[129] Decision taken by the Governing Council of the United Nations Compensation Commission S/AC.26/1992/10 (1992) Provisional Rules for Claims Procedure, Articles 21 and 22.
[130] ICJ Statute, Article 26 (1).
[131] Ibid., Article 29; Rules of Court, Article 15.
[132] WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 8(5-6).
[133] WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 17(1), and Dispute Settlement: Appeals Procedures WT/AB/WP/6 (16 August 2010), Rule 6(2).

categories of cases.[134] In some courts, the President of the court determines case assignment, for example, the CCJ, whereby the President of the Court is free to determine the number of divisions in which the CCJ may seat. Every judge can sit in any division. In cases referring to the interpretation of the treaties, the CCJ must seat with at least three judges or more, but always with an uneven number. [135] With respect to the CCJA, judges sit in plenary session, or in chambers of three or five judges constituted by order of the President of the Court. Chambers are presided by the President or one of the Vice-Presidents of the Court.[136]

iii. Other Dispute Settlement Bodies

85. Both the IUSCT and the UNCC refer to the President and Chairperson respectively concerning the case assignment. In the former, the Composition of Chambers, assignment of cases to Chambers, transfer of cases among Chambers, and relinquishment of certain cases by Chambers is to be delineated in orders issued by the President pursuant to their powers.[137] In the latter, Commissioners should work in panels of three members. The claims are organized and allotted to panels by the Chairperson.[138]

K. Appeals and conditions of appeals

86. At its resumed thirty-eighth session, in January 2020, the Working Group had noted that the various components of an appellate mechanism were interrelated and would need to be considered, whatever form such mechanism might take – ad hoc appeal mechanism, a permanent stand-alone appellate body, or an appeal mechanism as the second tier of a standing court (A/CN.9/1004/Add.1, paras. 16 and 25). It had also indicated that the objectives of avoiding duplication of review proceedings and further fragmentation as well as of finding an appropriate balance between the possible benefits of an appellate mechanism and any potential costs should guide the work (A/CN.9/1004/Add.1, para. 24). At its fortieth session, in February 2021, the Working Group continued its deliberations on the matter and requested the Secretariat to undertake further preparatory work (A/CN.9/1050, para. 113).[139] The findings below are aimed at providing the Working Group with a broad overview of how appeal mechanisms operate in the international and regional judicial system.

i. International Courts and Tribunals

87. The WTO appellate mechanism is the Appellate Body. It hears appeals from panel reports. Only parties to the dispute may appeal a panel report and appeals are limited to issues of law covered in the panel report and legal interpretations of the panel report.[140] Appellate Body reports are adopted by the DSB and accepted by the parties to the dispute. Conversely, the DSB can decide by consensus not to adopt the Appellate Body reports, within thirty days following its circulation to the WTO Members.[141]

88. The ICJ does not permit appeal as its judgments are deemed to be final. However, it admits applications for revision of a judgment when such application is based upon the discovery of a fact that is considered a decisive factor unknown to the Court at the time of the judgment. The application for revision cannot be made later than six months after discovery of the fact and must be made within ten years after the judgment is rendered.[142]

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[134] IICJ Statute, Article 15.
[135] Agreement Establishing the Caribbean Court of Justice (2001), Article IV.3.
[136] CCJA Rules of Procedure, Article 9.
[137] Claims Settlement Declaration, Article 3(1) and Rules of Procedure, Article 5.
[138] Decision taken by the Governing Council of the United Nations Compensation Commission S/AC.26/1992/10 (1992) Provisional Rules for Claims Procedure, Articles 28(1) and Article 29.
[139] Initial draft by the UNCITRAL Secretariat on Appellate Mechanisms and enforcement issues, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_wp_-_appeal_14_december_.pdf.
[140] WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 17(1), Article 17(4) and Article 17(6).
[141] Ibid., Article 17(14).
[142] ICJ Statute, Article 60 and Article 61.

ii. Regional Courts

89. Some regional courts envisage an appellate mechanism. For example, the ECOWAS Court of Justice has an Appeals Division of Registry Department that was created in 2018 in preparation for the establishment of an appellate chamber.[143] The conditions of appeal are to be determined upon the establishment of the Appellate Chamber. In the Andean Community, unless parties agree otherwise, appeals are possible in disputes between individuals that concern the interpretation or application of private contracts governed by Andean Community laws.[144] In the MERCOSUR system, appeal is also permissible. More specifically, the TPR can review awards of the *ad hoc* arbitral tribunals, and its review is then limited on questions of law or legal interpretations developed by the *ad hoc* arbitral tribunal. The TPR can confirm, modify, or revoke the award including the legal basis of these decisions. Awards that were rendered on the basis of *ex aequo et bono* cannot be reviewed. On the other hand, the TPR decisions are final and cannot be appealed.[145]

90. The statutes of the AIC,[146] IICJ[147] and CCJ[148] provide that their judgments are final, and thus cannot be appealed. However, revision mechanisms are available within a certain period. For instance, the AIC Statutes stipulate that the court, either at the request of one of the parties or on its own initiative, may correct errors in judgment, either written or arithmetic.[149] The Court of the Andean Community may amend or expand the judgment either at its own initiative or at the request of one of the parties.[150] The IICJ also allows applications for revision of a judgment when it is based upon the discovery of a fact that is considered a decisive factor unknown to the Court at the time of the judgment.[151] The period available for an application for revision differs among the different regional courts, for instance: the ECOWAS provides for five years;[152] the CCJ provides for an application within six months and at the latest five years from the date of the judgement, while a request for revision in an action for non-compliance must be submitted within 90 days of discovery of the fact and maximum one year after the judgment was delivered.[153] In the OHADA system, the CCJA also provides that its judgments can be revised, interpreted and corrected by application of the disputing parties.[154]

iii. Other Dispute Settlement Bodies

91. According to the Claims Settlement Declaration, the decisions of the Iran-United States Claims Tribunal are “final and binding”.[155] Awards are therefore not appealable. However, the Rules of Procedure provide that parties can request the Tribunal to give an interpretation or correction of the award, or to render an additional award if certain claims have been omitted from the original award.[156]

92. Decisions by the panels of Commissioners at the UNCC are subject to the approval of the Governing Council, which may, at its discretion, return a claim or claims for further review by the Commissioners. Decisions of the Governing Council are however final and not subject to appeal or review.[157]

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[143] Available at: www.courtecowas.org
[144] Protocol of Cochabamba Amending the Treaty Creating the Court of Justice, Article 39.
[145] Protocol of Olivos (2002), Articles 17, 21 and 22.
[146] AIC Statute, Article 23.
[147] IICJ Statute, Article 39.
[148] Agreement Establishing the Caribbean Court of Justice (2001), Article XXV (5) and Article XX (1). To be noted that the CCJ may serve as the Court of last instance for several Caribbean States.
[149] AIC Statute, Article 24.
[150] Decision 184, Bylaws of the Court of Justice of the Cartagena Agreement, Article 59.
[151] ICJ Statute, Article 40.
[152] Protocol A/P.l/7/91 on the Community Court of Justice, Article 25.
[153] Agreement Establishing the Caribbean Court of Justice (2001), Article XX.14-5.
[154] CCJA Rules of Procedure, Article 45 bis; Articles 47-50.
[155] Claims Settlement Declaration, Article 4(1).
[156] Iran-United States Claims Tribunal, Rules of Procedure, Articles 35-37.
[157] Decision taken by the Governing Council of the United Nations Compensation Commission S/AC.26/1992/10 (1992) Provisional Rules for Claims Procedure, Article 40(4) and Provisional Rules for Claims Procedure annexed to Governing

L. Applicable law

93. The Working Group may wish to consider the different approaches of international courts and tribunals, regional courts, and other dispute settlement bodies with respect to applicable law. As noted above, a multilateral investment tribunal would likely not apply a unified set of substantive standards and provisions of one sole investment treaty, but rather different rules depending on the underlying international investment instrument.[158]

i. International Courts and Tribunals

94. The Statute of the ICJ provides that the Court shall apply (i) international conventions establishing rules expressly recognized by contesting States; (ii) international custom as evidence of general practice accepted as law; (iii) the general principles of law recognized by civilized nations; and (iv) judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.[159] In the context of the WTO DSB, each dispute is to be decided based on the covered agreement as interpreted in accordance with the customary rules of interpretation of public international law.[160]

ii. Regional Courts

95. A distinctive feature of the applicable law of the IICJ is Sharia Law which is the main source on which the IICJ bases its judgments, with the guidance of international law, bilateral or multilateral conventions, international practice accepted as law, general principles of law, judgments rendered by international law, and the teachings of the most qualified publicists of various States.[161] In MERCOSUR, the *ad hoc* arbitral tribunals and the TPR shall decide based on the Treaty of Asuncion, the Protocol of Ouro Petro, the protocols and agreements concluded within the framework of the Treaty of Asunción, the decisions of the Common Market Council, the resolutions of the Common Market Group, the Directives of the Trade Commission of MERCOSUR, as well as international law.[162] In cases involving the interpretation of CARICOM treaties, the CCJ shall apply such rules of international law as may be applicable.[163] The Andean Court of Justice on the other hand does not refer to international law expressly. Instead, it refers to specific instruments of the Andean Community.[164] With respect to the CCJA, the Court can only be seized on matters pertaining to the interpretation and application of the OHADA Treaty, uniform acts and regulations.[165]

iii. Other Dispute Settlement Bodies

96. In the framework of the Iran-United States Claims Tribunal, the Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions, and changed circumstances.[166] In the framework of the UNCC, Commissioners shall apply

Council decision 10 (1992), Article 41.

[158] See above, para. 4.

[159] ICJ Statute, Article 38(1).

[160] WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 3(2).

[161] IICJ Statute, Articles 1, Article 27(a), and Article 27(b).

[162] Protocol of Olivos (2002), Articles 1 and 34.

[163] Agreement Establishing the Caribbean Court of Justice (2001), Article XVII (1).

[164] Treaty Creating the Court of Justice of the Cartagena Agreement, Article 1, namely, the Agreement of Cartagena, its protocols and additional instruments as well as the Treaty and its protocols and modifications, decisions of the Andean Council of Ministers for Foreign Affairs and the Commission of the Andean Community, resolutions of the General Secretariat of the Andean Community, agreements on Industrial Complementation and other such texts adopted among the Member States and within the framework of Andean subregional integration.

[165] The ten OHADA uniform acts currently in force include the uniform act on arbitration, the uniform act on mediation, the uniform act on accounting law and financial reporting, the uniform act on the organization of collective procedures for the discharge of liabilities, the uniform act on commercial companies and the economic interest group, the uniform act on security interests, the uniform act on cooperatives, the uniform act on general commercial law, the uniform act on road freight agreements, and the uniform act on simplified debt collection procedures and enforcement proceedings.

[166] Claims Settlement Declaration, Article 5 and Rules of Procedure Article 33(1).

the Security Council Resolution 687 (1991), other relevant Security Council Resolutions, the criteria and pertinent decisions of the Governing Council and other relevant rules of international law where necessary.[167]

M. Enforcement of decisions

97. The Working Group undertook a preliminary consideration of issues related to the enforcement of decisions rendered through a permanent appellate mechanism or a multilateral tribunal. In this context, it was emphasized that enforcement was a key feature of any system of justice and was essential to ensure its effectiveness (A/CN.9/1004/Add.1, para. 62). Accordingly, the Working Group requested the Secretariat to undertake thorough research and further report issues relating to enforcement (A/CN.9/1050, para. 112).[168]

i. International Courts and Tribunals

98. With respect to the ICJ, each UN Member State undertakes to comply with the Court's decisions in any case to which it is a party. If a party fails to comply with such decisions, the other party may have recourse to the Security Council, which may make recommendations or decide upon measures to give effect to the judgment.[169]

99. At the WTO, compliance with DSB recommendations or rulings should be exercised promptly by the WTO Members involved in the dispute. In case a party does not comply with such decisions within a reasonable time, the aggrieved party may seek compensation as well as the suspension of concessions or other obligations.[170] However, if the Member concerned objects the level of suspension or claims that the respective procedures were not followed, the matter shall be referred to arbitration, conducted by the original panel or by an arbitrator appointed by the WTO Director-General.[171]

ii. Regional Courts

100. Most regional courts under study refer to execution or enforcement pursuant to the domestic regulation of the State where enforcement is sought. The ECOWAS rules refer to enforcement through writ of execution, which is submitted to the relevant Member State for execution in accordance with the civil procedure rules of that Member State.[172] The Enforcement Division of Registry Department is responsible for enforcing decisions and coordinating with national authorities. Judgements of the AIC are deemed immediately enforceable in the same manner as a final enforceable judgement delivered by the courts of the Member States.[173] In the case of the Court of Justice of the Andean Community, it is clarified that judgements are enforceable in the Member States without homologation or exequatur.[174] For other courts such as the CCJ, decisions must be treated as a decision of a domestic superior court.[175] In the dispute-settlement framework of MERCOSUR, both awards of the *ad hoc* tribunals (if revision is not timely requested) and awards of the TPR are compulsory for the disputing Member States.[176] If a State Party fails to comply, either fully or partially, with the arbitral award, the State that is benefiting from the award is entitled to execute compensatory measures for the duration of one year starting from the lapse of the enforcement date.[177] With regards to OHADA, judgments of the CCJA are also considered directly enforceable in the territory of any OHADA Member State, as if they were a final judgment of their domestic courts. If a domestic court renders a decision in the

[167] Decision taken by the Governing Council of the United Nations Compensation Commission S/AC.26/1992/10 (1992) Provisional Rules for Claims Procedure, Article 31.
[168] This paper is currently under preparation.
[169] Charter of the United Nations, Article 94(1) and 94(2).
[170] These temporary measures are also sometimes commonly referred to as "trade sanctions" or "retaliation".
[171] WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 21(1), Article 22(1), and Article 22(6).
[172] Supplementary Protocol, Article 6 amending Protocol Article 24(2).
[173] AIC Statute, Article 34(3).
[174] Statute of the Court of Justice of the Cartagena Agreement, Article 91.
[175] Agreement Establishing the Caribbean Court of Justice (2001), Article XXVI(a).
[176] Protocol of Olivos (2002), Article 26.
[177] Protocol of Olivos (2002), Article 31.

same subject-matter that is not consistent with the ruling of the CCJA, the decision cannot be enforced in the territory of OHADA Member States.[178]

iii. Other Dispute Settlement Bodies

101. Awards rendered by the Iran-United States Tribunal are enforceable in the courts of any nation in accordance with that nation's laws.[179] In practice, domestic courts faced with the enforcement of those awards have considered whether the New York Convention may be applicable for enforcement, but those court decisions do not reflect uniform case law on this issue. Some early decisions found that the New York Convention could not be applied to awards of the IUSCT since there was no written submission agreement from the parties to refer their dispute to the IUSCT.[180] However, other domestic courts found that awards of the IUSCT fulfilled the requirements of the New York Convention, namely, that they were final and binding arbitral awards rendered by a permanent arbitral body within the meaning of the New York Convention.[181]

102. With regard to the UNCC, compensation payments that have been approved by the Governing Council are made to the relevant government depending on the order of priority of the claim. The relevant government is then responsible to distribute the compensation to the successful claimants.[182] Governments are to distribute the funds to the claimants within six months of receiving payment from the UNCC; after the period for payment has elapsed, each government must provide a report on the payments and the reasons for non-payment to claimants within three months.[183]

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[178] OHADA Treaty, Article 20.

[179] Claims Settlement Declaration, Article 4(3).

[180] *Mark Dallal v. Bank Mellat*, UK High Court of Justice, Queen's Bench Division (Commercial Court), 26 July 1985.

[181] For instance, Ministry of Defence of the Islamic Republic of Iran v. Gould Inc. and others, United States District Court, Central District of California, Not Indicated, 14 January 1988 [United States]; Gould Inc., Gould Marketing, Inc. v. Hoffman Export Corporation, Gould International, Inc. v. Ministry of Defence of the Islamic Republic of Iran, United States Court of Appeals for the Ninth Circuit, Not Indicated, 23 October 1989 [United States].

[182] Governing Council: Decision 17 (1994) Priority of Payment and Payment Mechanism (Guiding Principles), para. 1; Governing Council: Decision 17 (1994) Priority of Payment and Payment Mechanism (Guiding Principles) and Decision 18 (1994) Distribution of Payments and Transparency, para 1.

[183] Governing Council: Decision 17 (1994) Priority of Payment and Payment Mechanism (Guiding Principles) and Decision 18 (1994) Distribution of Payments and Transparency, paras. 3ff.

2012 U.S. Model Bilateral Investment Treaty

TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF…… CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

The Government of the United States of America and the Government of [Country] (hereinafter the "Parties");

Desiring to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Party in the territory of the other Party;

Recognizing that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards;

Recognizing the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration;

Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights;

Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;

Have agreed as follows:

SECTION A

Article 1: Definitions

For purposes of this Treaty:

"central level of government" means:

(a) for the United States, the federal level of government; and

(b) for [Country], [___].

"Centre" means the International Centre for Settlement of Investment Disputes ("ICSID") established by the ICSID Convention.

"claimant" means an investor of a Party that is a party to an investment dispute with the other Party.

"covered investment" means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter.

"disputing parties" means the claimant and the respondent.

"disputing party" means either the claimant or the respondent.

"enterprise" means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise.

"enterprise of a Party" means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.

"existing" means in effect on the date of entry into force of this Treaty.

"freely usable currency" means "freely usable currency" as determined by the International Monetary Fund under its *Articles of Agreement*.

"GATS" means the *General Agreement on Trade in Services*, contained in Annex 1B to the WTO Agreement.

"government procurement" means the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale, or use in the production or supply of goods or services for commercial sale or resale.

"ICSID Additional Facility Rules" means the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*.

"ICSID Convention" means the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, done at Washington, March 18, 1965.

[**"Inter-American Convention"** means the *Inter-American Convention on International Commercial Arbitration*, done at Panama, January 30, 1975.]

"investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(a) an enterprise;

(b) shares, stock, and other forms of equity participation in an enterprise;

(c) bonds, debentures, other debt instruments, and loans;[1]

(d) futures, options, and other derivatives;

(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

(f) intellectual property rights;

(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;[2, 3] and

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(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

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[1] Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

[2] Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

[3] The term "investment" does not include an order or judgment entered in a judicial or administrative action.

"investment agreement" means a written agreement[4] between a national authority[5] of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:

(a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;

(b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or

(c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government.

"investment authorization"[6] means an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of the other Party.

"investor of a non-Party" means, with respect to a Party, an investor that attempts to make, is making, or has made an investment in the territory of that Party, that is not an investor of either Party.

"investor of a Party" means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.

"measure" includes any law, regulation, procedure, requirement, or practice.

"national" means:

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[4] "Written agreement" refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 30[Governing Law](2). For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.

[5] For purposes of this definition, "national authority" means (a) for the United States, an authority at the central level of government; and (b) for [Country], [ ].

[6] For greater certainty, actions taken by a Party to enforce laws of general application, such as competition laws, are not encompassed within this definition.

(a) for the United States, a natural person who is a national of the United States as defined in Title III of the Immigration and Nationality Act; and

(b) for [Country], [___].

"New York Convention" means the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York, June 10, 1958.

"non-disputing Party" means the Party that is not a party to an investment dispute.

"person" means a natural person or an enterprise.

"person of a Party" means a national or an enterprise of a Party.

"protected information" means confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law.

"regional level of government" means:

(a) for the United States, a state of the United States, the District of Columbia, or Puerto Rico; and

(b) for [Country], [___].

"respondent" means the Party that is a party to an investment dispute.

"Secretary-General" means the Secretary-General of ICSID.

"state enterprise" means an enterprise owned, or controlled through ownership interests, by a Party.

"territory" means:

(a) with respect to the United States,

(i) the customs territory of the United States, which includes the 50 states, the District of Columbia, and Puerto Rico;

(ii) the foreign trade zones located in the United States and Puerto Rico.

(b) with respect to [Country,] [___].

(c) with respect to each Party, the territorial sea and any area beyond the territorial sea of the Party within which, in accordance with customary international law as

reflected in the United Nations Convention on the Law of the Sea, the Party may exercise sovereign rights or jurisdiction.

"TRIPS Agreement" means the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, contained in Annex 1C to the WTO Agreement.[7]

"UNCITRAL Arbitration Rules" means the arbitration rules of the United Nations Commission on International Trade Law.

"WTO Agreement" means the *Marrakesh Agreement Establishing the World Trade Organization*, done on April 15, 1994.

Article 2: Scope and Coverage

1. This Treaty applies to measures adopted or maintained by a Party relating to:

   (a) investors of the other Party;

   (b) covered investments; and

   (c) with respect to Articles 8 [Performance Requirements], 12 [Investment and Environment], and 13 [Investment and Labor], all investments in the territory of the Party.

2. A Party's obligations under Section A shall apply:

   (a) to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party;[8] and

   (b) to the political subdivisions of that Party.

3. For greater certainty, this Treaty does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Treaty.

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[7] For greater certainty, "TRIPS Agreement" includes any waiver in force between the Parties of any provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement.

[8] For greater certainty, government authority that has been delegated includes a legislative grant, and a government order, directive or other action transferring to the state enterprise or other person, or authorizing the exercise by the state enterprise or other person of, governmental authority.

Article 3: National Treatment

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, **in like circumstances**, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments.

Article 4: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, **in like circumstances**, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory**.**

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 5: Minimum Standard of Treatment[9]

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that

[9] Article 5 [Minimum Standard of Treatment] shall be interpreted in accordance with Annex A.

standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.

4. Notwithstanding Article 14 [Non-Conforming Measures](5)(b) [subsidies and grants], each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

5. Notwithstanding paragraph 4, if an investor of a Party, in the situations referred to in paragraph 4, suffers a loss in the territory of the other Party resulting from:

(a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or

(b) destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate, and effective in accordance with Article 6 [Expropriation and Compensation](2) through (4), *mutatis mutandis*.

6. Paragraph 4 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 3 [National Treatment] but for Article 14 [Non-Conforming Measures](5)(b) [subsidies and grants].

Article 6: Expropriation and Compensation[10]

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:

[10] Article 6 [Expropriation] shall be interpreted in accordance with Annexes A and B.

(a) for a public purpose;

(b) in a non-discriminatory manner;

(c) on payment of prompt, adequate, and effective compensation; and

(d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3).

2. The compensation referred to in paragraph 1(c) shall:

(a) be paid without delay;

(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation");

(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

(d) be fully realizable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c) – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus

(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement.

Article 7: Transfers

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:

(a) contributions to capital;

(b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;

(c) interest, royalty payments, management fees, and technical assistance and other fees;

(d) payments made under a contract, including a loan agreement;

(e) payments made pursuant to Article 5 [Minimum Standard of Treatment](4) and (5) and Article 6 [Expropriation and Compensation]; and

(f) payments arising out of a dispute.

2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.

3. Each Party shall permit returns in kind relating to a covered investment to be made as authorized or specified in a written agreement between the Party and a covered investment or an investor of the other Party.

4. Notwithstanding paragraphs 1 through 3, a Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors;

(b) issuing, trading, or dealing in securities, futures, options, or derivatives;

(c) criminal or penal offenses;

(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or

(e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

Article 8: Performance Requirements

1. Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking:[11]

(a) to export a given level or percentage of goods or services;

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

(e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

(f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory;

(g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market; or

(h) (i) to purchase, use, or accord a preference to, in its territory, technology of the Party or of persons of the Party[12]; or

(ii) that prevents the purchase or use of, or the according of a preference to, in its territory, particular technology,

so as to afford protection on the basis of nationality to its own investors or investments or to technology of the Party or of persons of the Party.

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[11] For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a "commitment or undertaking" for the purposes of paragraph 1.

[12] For purposes of this Article, the term "technology of the Party or of persons of the Party" includes technology that is owned by the Party or persons of the Party, and technology for which the Party holds, or persons of the Party hold, an exclusive license.

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any requirement:

(a) to achieve a given level or percentage of domestic content;

(b) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

(c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or

(d) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

3. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

(b) Paragraphs 1(f) and (h) do not apply:

(i) when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or

(ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws.[13]

(c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), (f), and (h), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

[13] The Parties recognize that a patent does not necessarily confer market power.

(i) necessary to secure compliance with laws and regulations that are not inconsistent with this Treaty;

(ii) necessary to protect human, animal, or plant life or health; or

(iii) related to the conservation of living or non-living exhaustible natural resources.

(d) Paragraphs 1(a), (b), and (c), and 2(a) and (b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.

(e) Paragraphs 1(b), (c), (f), (g), and (h), and 2(a) and (b), do not apply to government procurement.

(f) Paragraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

4. For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.

5. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did not impose or require the commitment, undertaking, or requirement.

Article 9: Senior Management and Boards of Directors

1. Neither Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.

2. A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

Article 10: Publication of Laws and Decisions Respecting Investment

1. Each Party shall ensure that its:

(a) laws, regulations, procedures, and administrative rulings of general application; and

(b) adjudicatory decisions

respecting any matter covered by this Treaty are promptly published or otherwise made publicly available.

2. For purposes of this Article, "administrative ruling of general application" means an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within its ambit and that establishes a norm of conduct but does not include:

(a) a determination or ruling made in an administrative or quasi-judicial proceeding that applies to a particular covered investment or investor of the other Party in a specific case; or

(b) a ruling that adjudicates with respect to a particular act or practice.

Article 11: Transparency

1. The Parties agree to consult periodically on ways to improve the transparency practices set out in this Article, Article 10 and Article 29.

2. Publication

To the extent possible, each Party shall:

(a) publish in advance any measure referred to in Article 10(1)(a) that it proposes to adopt; and

(b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.

3. With respect to proposed regulations of general application of its central level of government respecting any matter covered by this Treaty that are published in accordance with paragraph 2(a), each Party:

(a) shall publish the proposed regulations in a single official journal of national circulation and shall encourage their distribution through additional outlets;

(b) should in most cases publish the proposed regulations not less than 60 days before the date public comments are due;

(c) shall include in the publication an explanation of the purpose of and rationale for the proposed regulations; and

(d) shall, at the time it adopts final regulations, address significant, substantive comments received during the comment period and explain substantive revisions that it made to the proposed regulations in its official journal or in a prominent location on a government Internet site.

4. With respect to regulations of general application that are adopted by its central level of government respecting any matter covered by this Treaty, each Party:

(a) shall publish the regulations in a single official journal of national circulation and shall encourage their distribution through additional outlets; and

(b) shall include in the publication an explanation of the purpose of and rationale for the regulations.

5. Provision of Information

(a) On request of the other Party, a Party shall promptly provide information and respond to questions pertaining to any actual or proposed measure that the requesting Party considers might materially affect the operation of this Treaty or otherwise substantially affect its interests under this Treaty.

(b) Any request or information under this paragraph shall be provided to the other Party through the relevant contact points.

(c) Any information provided under this paragraph shall be without prejudice as to whether the measure is consistent with this Treaty.

6. Administrative Proceedings

With a view to administering in a consistent, impartial, and reasonable manner all measures referred to in Article 10(1)(a), each Party shall ensure that in its administrative proceedings applying such measures to particular covered investments or investors of the other Party in specific cases:

(a) wherever possible, covered investments or investors of the other Party that are directly affected by a proceeding are provided reasonable notice, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated, and a general description of any issues in controversy;

(b) such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceeding, and the public interest permit; and

(c) its procedures are in accordance with domestic law.

7. Review and Appeal

(a) Each Party shall establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Treaty. Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.

(b) Each Party shall ensure that, in any such tribunals or procedures, the parties to the proceeding are provided with the right to:

(i) a reasonable opportunity to support or defend their respective positions; and

(ii) a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority.

(c) Each Party shall ensure, subject to appeal or further review as provided in its domestic law, that such decisions shall be implemented by, and shall govern the practice of, the offices or authorities with respect to the administrative action at issue.

8. Standards-Setting

(a) Each Party shall allow persons of the other Party to participate in the development of standards and technical regulations by its central government bodies.[14] Each Party shall allow persons of the other Party to participate in the development of these measures, and the development of conformity assessment procedures by its central government bodies, on terms no less favorable than those it accords to its own persons.

(b) Each Party shall recommend that non-governmental standardizing bodies in its territory allow persons of the other Party to participate in the development of standards by those bodies. Each Party shall recommend that non-governmental standardizing bodies in its territory allow persons of the other Party to participate in the development of these standards, and the development of conformity

[14] A Party may satisfy this obligation by, for example, providing interested persons a reasonable opportunity to provide comments on the measure it proposes to develop and taking those comments into account in the development of the measure.

assessment procedures by those bodies, on terms no less favorable than those they accord to persons of the Party.

(c) Subparagraphs 8(a) and 8(b) do not apply to:

(i) sanitary and phytosanitary measures as defined in Annex A of the World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures; or

(ii) purchasing specifications prepared by a governmental body for its production or consumption requirements.

(d) For purposes of subparagraphs 8(a) and 8(b), "central government body", "standards", "technical regulations" and "conformity assessment procedures" have the meanings assigned to those terms in Annex 1 of the WTO Agreement on Technical Barriers to Trade. Consistent with Annex 1, the three latter terms do not include standards, technical regulations or conformity assessment procedures `for the supply of a service.

Article 12: Investment and Environment

1. The Parties recognize that their respective environmental laws and policies, and multilateral environmental agreements to which they are both party, play an important role in protecting the environment.

2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its environmental laws[15] in a manner that weakens or reduces the protections afforded in those laws, or fail to effectively enforce those laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

3. The Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with paragraph 2 where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.

[15] Paragraph 2 shall not apply where a Party waives or derogates from an environmental law pursuant to a provision in law providing for waivers or derogations.

4. For purposes of this Article, "environmental law" means each Party's statutes or regulations,[16] or provisions thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through the:

(a) prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;

(b) control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto; or

(c) protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas,

in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

5. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

6. A Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavor to reach a mutually satisfactory resolution.

7. The Parties confirm that each Party may, as appropriate, provide opportunities for public participation regarding any matter arising under this Article.

Article 13: Investment and Labor

1. The Parties reaffirm their respective obligations as members of the International Labor Organization ("ILO") and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*.

2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall ensure

[16] For the United States, "statutes or regulations" for the purposes of this Article means an act of the United States Congress or regulations promulgated pursuant to an act of the United States Congress that is enforceable by action of the central level of government.

that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its labor laws where the waiver or derogation would be inconsistent with the labor rights referred to in subparagraphs (a) through (e) of paragraph 3, or fail to effectively enforce its labor laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

3. For purposes of this Article, "labor laws" means each Party's statutes or regulations,[17] or provisions thereof, that are directly related to the following:

(a) freedom of association;

(b) the effective recognition of the right to collective bargaining;

(c) the elimination of all forms of forced or compulsory labor;

(d) the effective abolition of child labor and a prohibition on the worst forms of child labor;

(e) the elimination of discrimination in respect of employment and occupation; and

(f) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

4. A Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavor to reach a mutually satisfactory resolution.

5. The Parties confirm that each Party may, as appropriate, provide opportunities for public participation regarding any matter arising under this Article.

Article 14: Non-Conforming Measures

1. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], and 9 [Senior Management and Boards of Directors] do not apply to:

(a) any existing non-conforming measure that is maintained by a Party at:

[17] For the United States, "statutes or regulations" for purposes of this Article means an act of the United States Congress or regulations promulgated pursuant to an act of the United States Congress that is enforceable by action of the central level of government.

(i) the central level of government, as set out by that Party in its Schedule to Annex I or Annex III,

(ii) a regional level of government, as set out by that Party in its Schedule to Annex I or Annex III, or

(iii) a local level of government;

(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], or 9 [Senior Management and Boards of Directors].

2. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], and 9 [Senior Management and Boards of Directors] do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II.

3. Neither Party may, under any measure adopted after the date of entry into force of this Treaty and covered by its Schedule to Annex II, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Articles 3 [National Treatment] and 4 [Most-Favored-Nation Treatment] do not apply to any measure covered by an exception to, or derogation from, the obligations under Article 3 or 4 of the TRIPS Agreement, as specifically provided in those Articles and in Article 5 of the TRIPS Agreement.

5. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], and 9 [Senior Management and Boards of Directors] do not apply to:

(a) government procurement; or

(b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

Article 15: Special Formalities and Information Requirements

1. Nothing in Article 3 [National Treatment] shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party or that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments pursuant to this Treaty.

2. Notwithstanding Articles 3 [National Treatment] and 4 [Most-Favored-Nation Treatment], a Party may require an investor of the other Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

Article 16: Non-Derogation

This Treaty shall not derogate from any of the following that entitle an investor of a Party or a covered investment to treatment more favorable than that accorded by this Treaty:

1. laws or regulations, administrative practices or procedures, or administrative or adjudicatory decisions of a Party;

2. international legal obligations of a Party; or

3. obligations assumed by a Party, including those contained in an investment authorization or an investment agreement.

Article 17: Denial of Benefits

1. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:

   (a) does not maintain diplomatic relations with the non-Party; or

   (b) adopts or maintains measures with respect to the non-Party or a person of the nonParty that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Treaty were accorded to the enterprise or to its investments.

2. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.

Article 18: Essential Security

Nothing in this Treaty shall be construed:

1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or

2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

Article 19: Disclosure of Information

Nothing in this Treaty shall be construed to require a Party to furnish or allow access to confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 20: Financial Services

1. Notwithstanding any other provision of this Treaty, a Party shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity and stability of the financial system.[18] Where such measures do not conform with the provisions of this Treaty, they shall not be used as a means of avoiding the Party's commitments or obligations under this Treaty.

2. (a) Nothing in this Treaty applies to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a Party's

[18] It is understood that the term "prudential reasons" includes the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions, as well as the maintenance of the safety and financial and operational integrity of payment and clearing systems.

obligations under Article 7 [Transfers] or Article 8 [Performance Requirements].[19]

(b) For purposes of this paragraph, "public entity" means a central bank or monetary authority of a Party.

3. Where a claimant submits a claim to arbitration under Section B [Investor-State Dispute Settlement], and the respondent invokes paragraph 1 or 2 as a defense, the following provisions shall apply:

(a) The respondent shall, within 120 days of the date the claim is submitted to arbitration under Section B, submit in writing to the competent financial authorities[20] of both Parties a request for a joint determination on the issue of whether and to what extent paragraph 1 or 2 is a valid defense to the claim. The respondent shall promptly provide the tribunal, if constituted, a copy of such request. The arbitration may proceed with respect to the claim only as provided in subparagraph (d).

(b) The competent financial authorities of both Parties shall make themselves available for consultations with each other and shall attempt in good faith to make a determination as described in subparagraph (a). Any such determination shall be transmitted promptly to the disputing parties and, if constituted, to the tribunal. The determination shall be binding on the tribunal.

(c) If the competent financial authorities of both Parties, within 120 days of the date by which they have both received the respondent's written request for a joint determination under subparagraph (a), have not made a determination as described in that subparagraph, the tribunal shall decide the issue or issues left unresolved by the competent financial authorities. The provisions of Section B shall apply, except as modified by this subparagraph.

(i) In the appointment of all arbitrators not yet appointed to the tribunal, each disputing party shall take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice. The expertise of particular candidates with respect to the particular sector of financial

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[19] For greater certainty, measures of general application taken in pursuit of monetary and related credit policies or exchange rate policies do not include measures that expressly nullify or amend contractual provisions that specify the currency of denomination or the rate of exchange of currencies.

[20] For purposes of this Article, "competent financial authorities" means, for the United States, the Department of the Treasury for banking and other financial services, and the Office of the United States Trade Representative, in coordination with the Department of Commerce and other agencies, for insurance; and for [Country], [___].

services in which the dispute arises shall be taken into account in the appointment of the presiding arbitrator.

(ii) If, before the respondent submits the request for a joint determination in conformance with subparagraph (a), the presiding arbitrator has been appointed pursuant to Article 27(3), such arbitrator shall be replaced on the request of either disputing party and the tribunal shall be reconstituted consistent with subparagraph (c)(i). If, within 30 days of the date the arbitration proceedings are resumed under subparagraph (d), the disputing parties have not agreed on the appointment of a new presiding arbitrator, the Secretary-General, on the request of a disputing party, shall appoint the presiding arbitrator consistent with subparagraph (c)(i).

(iii) The tribunal shall draw no inference regarding the application of paragraph 1 or 2 from the fact that the competent financial authorities have not made a determination as described in subparagraph (a).

(iv) The non-disputing Party may make oral and written submissions to the tribunal regarding the issue of whether and to what extent paragraph 1 or 2 is a valid defense to the claim. Unless it makes such a submission, the non-disputing Party shall be presumed, for purposes of the arbitration, to take a position on paragraph 1 or 2 not inconsistent with that of the respondent.

(d) The arbitration referred to in subparagraph (a) may proceed with respect to the claim:

(i) 10 days after the date the competent financial authorities' joint determination has been received by both the disputing parties and, if constituted, the tribunal; or

(ii) 10 days after the expiration of the 120-day period provided to the competent financial authorities in subparagraph (c).

(e) On the request of the respondent made within 30 days after the expiration of the 120-day period for a joint determination referred to in subparagraph (c), or, if the tribunal has not been constituted as of the expiration of the 120-day period, within 30 days after the tribunal is constituted, the tribunal shall address and decide the issue or issues left unresolved by the competent financial authorities as referred to in subparagraph (c) prior to deciding the merits of the claim for which paragraph 1 or 2 has been invoked by the respondent as a defense. Failure of the respondent to make such a request is without prejudice to the right of the respondent to invoke paragraph 1 or 2 as a defense at any appropriate phase of the arbitration.

4. Where a dispute arises under Section C and the competent financial authorities of one Party provide written notice to the competent financial authorities of the other Party that the dispute involves financial services, Section C shall apply except as modified by this paragraph and paragraph 5.

   (a) The competent financial authorities of both Parties shall make themselves available for consultations with each other regarding the dispute, and shall have 180 days from the date such notice is received to transmit a report on their consultations to the Parties. A Party may submit the dispute to arbitration under Section C only after the expiration of that 180-day period.

   (b) Either Party may make any such report available to a tribunal constituted under Section C to decide the dispute referred to in this paragraph or a similar dispute, or to a tribunal constituted under Section B to decide a claim arising out of the same events or circumstances that gave rise to the dispute under Section C.

5. Where a Party submits a dispute involving financial services to arbitration under Section C in conformance with paragraph 4, and on the request of either Party within 30 days of the date the dispute is submitted to arbitration, each Party shall, in the appointment of all arbitrators not yet appointed, take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice. The expertise of particular candidates with respect to financial services shall be taken into account in the appointment of the presiding arbitrator.

6. Notwithstanding Article 11(2)-(4) [Transparency – Publication], each Party, to the extent practicable,

   (a) shall publish in advance any regulations of general application relating to financial services that it proposes to adopt and the purpose of the regulation;

   (b) shall provide interested persons and the other Party a reasonable opportunity to comment on such proposed regulations; and

   (c) should at the time it adopts final regulations, address in writing significant substantive comments received from interested persons with respect to the proposed regulations.

7. The terms “financial service” or “financial services” shall have the same meaning as in subparagraph 5(a) of the Annex on Financial Services of the GATS.

8. For greater certainty, nothing in this Treaty shall be construed to prevent the adoption or enforcement by a party of measures relating to investors of the other Party, or covered investments, in financial institutions that are necessary to secure compliance with laws or regulations that are not inconsistent with this Treaty, including those related to the

prevention of deceptive and fraudulent practices or that deal with the effects of a default on financial services contracts, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on investment in financial institutions.

Article 21: Taxation

1. Except as provided in this Article, nothing in Section A shall impose obligations with respect to taxation measures.

2. Article 6 [Expropriation] shall apply to all taxation measures, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Section B only if:

(a) the claimant has first referred to the competent tax authorities[21] of both Parties in writing the issue of whether that taxation measure involves an expropriation; and

(b) within 180 days after the date of such referral, the competent tax authorities of both Parties fail to agree that the taxation measure is not an expropriation.

3. Subject to paragraph 4, Article 8 [Performance Requirements] (2) through (4) shall apply to all taxation measures.

4. Nothing in this Treaty shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Treaty and any such convention, that convention shall prevail to the extent of the inconsistency. In the case of a tax convention between the Parties, the competent authorities under that convention shall have sole responsibility for determining whether any inconsistency exists between this Treaty and that convention.

Article 22: Entry into Force, Duration, and Termination

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[21] For the purposes of this Article, the "competent tax authorities" means:

(a) for the United States, the Assistant Secretary of the Treasury (Tax Policy), Department of the Treasury; and

(b) for [Country], [___].

1. This Treaty shall enter into force thirty days after the date the Parties exchange instruments of ratification. It shall remain in force for a period of ten years and shall continue in force thereafter unless terminated in accordance with paragraph 2.
2. A Party may terminate this Treaty at the end of the initial ten-year period or at any time thereafter by giving one year's written notice to the other Party.

3. For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments.

SECTION B

Article 23: Consultation and Negotiation

In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of nonbinding, third-party procedures.

Article 24: Submission of a Claim to Arbitration

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

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

(i) that the respondent has breached

(A) an obligation under Articles 3 through 10,

(B) an investment authorization, or

(C) an investment agreement;

and

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

(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Articles 3 through 10,

(B) an investment authorization, or

(C) an investment agreement;

and

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

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent"). The notice shall specify:

(a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;

(b) for each claim, the provision of this Treaty, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;

(c) the legal and factual basis for each claim; and

(d) the relief sought and the approximate amount of damages claimed.

3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

(a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;

(b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;

(c) under the UNCITRAL Arbitration Rules; or

(d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

4. A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration ("notice of arbitration"):

(a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;

(b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;

(c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 20 of the UNCITRAL Arbitration Rules, are received by the respondent; or

(d) referred to under any arbitral institution or arbitral rules selected under paragraph 3(d) is received by the respondent.

A claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Treaty.

6. The claimant shall provide with the notice of arbitration:

(a) the name of the arbitrator that the claimant appoints; or

(b) the claimant's written consent for the Secretary-General to appoint that arbitrator.

Article 25: Consent of Each Party to Arbitration

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Treaty.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; [and]

(b) Article II of the New York Convention for an "agreement in writing[."] [;" and

(c) Article I of the Inter-American Convention for an "agreement."]

Article 26: Conditions and Limitations on Consent of Each Party

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 24(1) and knowledge that the claimant (for claims brought under Article 24(1)(a)) or the enterprise (for claims brought under Article 24(1)(b)) has incurred loss or damage.

2. No claim may be submitted to arbitration under this Section unless:

   (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Treaty; and

   (b) the notice of arbitration is accompanied,

      (i) for claims submitted to arbitration under Article 24(1)(a), by the claimant's written waiver, and

      (ii) for claims submitted to arbitration under Article 24(1)(b), by the claimant's and the enterprise's written waivers

   of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 24.

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 24(1)(a)) and the claimant or the enterprise (for claims brought under Article 24(1)(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

Article 27: Selection of Arbitrators

1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

2. The Secretary-General shall serve as appointing authority for an arbitration under this Section.

3. Subject to Article 20(3), if a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

4. For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality:

(a) the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;

(b) a claimant referred to in Article 24(1)(a) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and

(c) a claimant referred to in Article 24(1)(b) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant and the enterprise agree in writing to the appointment of each individual member of the tribunal.

Article 28: Conduct of the Arbitration

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 24(3). If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

2. The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty.

3. The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.

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

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

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

   (c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 20 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

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

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

6. When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

7. A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.

8. A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 24. For purposes of this paragraph, an order includes a recommendation.

9. (a) In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties and to the non-disputing Party. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the expiration of the 60-day comment period.

(b) Subparagraph (a) shall not apply in any arbitration conducted pursuant to this Section for which an appeal has been made available pursuant to paragraph 10.

10. In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 34 should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 29.

Article 29: Transparency of Arbitral Proceedings

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public:

(a) the notice of intent;

(b) the notice of arbitration;

(c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28(2) [Non-Disputing Party submissions] and (3) [*Amicus* Submissions] and Article 33 [Consolidation];

(d) minutes or transcripts of hearings of the tribunal, where available; and

(e) orders, awards, and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 18 [Essential Security Article] or Article 19 [Disclosure of Information Article].

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

(a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);

(b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;

(c) A disputing party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1; and

(d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the

information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information.

5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws.

Article 30: Governing Law

1. Subject to paragraph 3, when a claim is submitted under Article 24(1)(a)(i)(A) or Article 24(1)(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law.

2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 24(1)(a)(i)(B) or (C), or Article 24(1)(b)(i)(B) or (C), the tribunal shall apply:

(a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or

(b) if the rules of law have not been specified or otherwise agreed:

(i) the law of the respondent, including its rules on the conflict of laws;[22] and

(ii) such rules of international law as may be applicable.

3. A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.

Article 31: Interpretation of Annexes

1. Where a respondent asserts as a defense that the measure alleged to be a breach is within the scope of an entry set out in Annex I, II, or III, the tribunal shall, on request of the respondent, request the interpretation of the Parties on the issue. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 90 days of delivery of the request.

2. A joint decision issued under paragraph 1 by the Parties, each acting through its representative designated for purposes of this Article, shall be binding on the tribunal, and any

[22] The "law of the respondent" means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case.

decision or award issued by the tribunal must be consistent with that joint decision. If the Parties fail to issue such a decision within 90 days, the tribunal shall decide the issue.

Article 32: Expert Reports

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

Article 33: Consolidation

1. Where two or more claims have been submitted separately to arbitration under Article 24(1) and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.

2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General and to all the disputing parties sought to be covered by the order and shall specify in the request:

(a) the names and addresses of all the disputing parties sought to be covered by the order;

(b) the nature of the order sought; and

(c) the grounds on which the order is sought.

3. Unless the Secretary-General finds within 30 days after receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

4. Unless all the disputing parties sought to be covered by the order otherwise agree, a tribunal established under this Article shall comprise three arbitrators:

(a) one arbitrator appointed by agreement of the claimants;

(b) one arbitrator appointed by the respondent; and

(c) the presiding arbitrator appointed by the Secretary-General, provided, however, that the presiding arbitrator shall not be a national of either Party.

5. If, within 60 days after the Secretary-General receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General, on the request of any disputing party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed. If the respondent fails to appoint an arbitrator, the Secretary-General shall appoint a national of the disputing Party, and if the claimants fail to appoint an arbitrator, the Secretary-General shall appoint a national of the nondisputing Party.

6. Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 24(1) have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

(a) assume jurisdiction over, and hear and determine together, all or part of the claims;

(b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or

(c) instruct a tribunal previously established under Article 27 [Selection of Arbitrators] to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that

(i) that tribunal, at the request of any claimant not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4(a) and 5; and

(ii) that tribunal shall decide whether any prior hearing shall be repeated.

7. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 24(1) and that has not been named in a request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph 6, and shall specify in the request:

(a) the name and address of the claimant;

(b) the nature of the order sought; and

(c) the grounds on which the order is sought.

The claimant shall deliver a copy of its request to the Secretary-General.

8. A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.

9. A tribunal established under Article 27 [Selection of Arbitrators] shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article 27 [Selection of Arbitrators] be stayed, unless the latter tribunal has already adjourned its proceedings.

Article 34: Awards

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

(a) monetary damages and any applicable interest; and

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

A tribunal may also award costs and attorney's fees in accordance with this Treaty and the applicable arbitration rules.

2. Subject to paragraph 1, where a claim is submitted to arbitration under Article 24(1)(b):

(a) an award of restitution of property shall provide that restitution be made to the enterprise;

(b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and

(c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

3. A tribunal may not award punitive damages.

4. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

5. Subject to paragraph 6 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

6. A disputing party may not seek enforcement of a final award until:

   (a) in the case of a final award made under the ICSID Convention,

      (i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or

      (ii) revision or annulment proceedings have been completed; and

   (b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 24(3)(d),

      (i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or

      (ii) a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.

7. Each Party shall provide for the enforcement of an award in its territory.

8. If the respondent fails to abide by or comply with a final award, on delivery of a request by the non-disputing Party, a tribunal shall be established under Article 37 [State-State Dispute Settlement]. Without prejudice to other remedies available under applicable rules of international law, the requesting Party may seek in such proceedings:

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

   (b) a recommendation that the respondent abide by or comply with the final award.

9. A disputing party may seek enforcement of an arbitration award under the ICSID Convention or the New York Convention [or the Inter-American Convention] regardless of whether proceedings have been taken under paragraph 8.

10. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention [and Article I of the Inter-American Convention].

Article 35: Annexes and Footnotes

The Annexes and footnotes shall form an integral part of this Treaty.

Article 36: Service of Documents

Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex C.

SECTION C

Article 37: State-State Dispute Settlement

1. Subject to paragraph 5, any dispute between the Parties concerning the interpretation or application of this Treaty, that is not resolved through consultations or other diplomatic channels, shall be submitted on the request of either Party to arbitration for a binding decision or award by a tribunal in accordance with applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the UNCITRAL Arbitration Rules shall govern, except as modified by the Parties or this Treaty.

2. Unless the Parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each Party and the third, who shall be the presiding arbitrator, appointed by agreement of the Parties. If a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of either Party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

3. Expenses incurred by the arbitrators, and other costs of the proceedings, shall be paid for equally by the Parties. However, the tribunal may, in its discretion, direct that a higher proportion of the costs be paid by one of the Parties.

4. Articles 28(3) [*Amicus Curiae* Submissions], 29 [Investor-State Transparency], 30(1) and (3) [Governing Law], and 31 [Interpretation of Annexes] shall apply *mutatis mutandis* to arbitrations under this Article.

5. Paragraphs 1 through 4 shall not apply to a matter arising under Article 12 or Article 13.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

DONE in duplicate at [city] this [number] day of [month, year], in the English and [foreign] languages, each text being equally authentic.

FOR THE GOVERNMENT OF UNITED STATES OF AMERICA:	FOR THE GOVERNMENT OF THE [Country]:

Annex A

Customary International Law

The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5 [Minimum Standard of Treatment], the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

Annex B

Expropriation

The Parties confirm their shared understanding that:

1. Article 6 [Expropriation and Compensation](1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

3. Article 6 [Expropriation and Compensation](1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 6 [Expropriation and Compensation](1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-bycase, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

Annex C

Service of Documents on a Party

United States

Notices and other documents shall be served on the United States by delivery to:

Executive Director (L/EX)
Office of the Legal Adviser
Department of State
Washington, D.C. 20520
United States of America

[Country]

Notices and other documents shall be served on [Country] by delivery to:

[insert place of delivery of notices and other documents for [Country]]