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The Divergence and Convergence of ICSID and Non-ICSID Arbitration

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Abstract

This thesis is an inquiry into the inherent divergence and emerging convergence of ICSID and non-ICSID arbitration. Based on the argument that investor-State arbitration is an intricate interplay of diverse actors with compatible or disparate interests, this study investigates the substantial divergences between ICSID and non-ICSID arbitration by evaluating the jurisdiction of tribunals, the role of institutions, post-awards remedies and the recognition and enforcement of arbitral awards. It also examines the consequential, but discrepant, impact of the divergences on the safeguarding of State sovereignty, the protection of foreign investors' rights, the enhancement of legitimacy of investment arbitration and the endorsement of public interests. It further puts forward fair, efficient, accountable and legitimate ways that would tentatively or constructively improve the entire dispute resolution system in the realm of international investment. In scrutinizing the interplay and interaction between ICSID and non-ICSID arbitration, the thesis argues that the symbiosis of ICSID and non-ICSID arbitration creates and maintains a relatively stable environment where a number of factors serve as engines for promoting directly or indirectly the convergence of ICSID and non-ICSID arbitration.

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature:

Printed name:

Date:

List of Abbreviations

AAA	American Arbitration Association
AC	Appeal Cases
ADR	Alternative Dispute Resolution
AF	Additional Facility
A/RES	Resolution adopted by the General Assembly
ASA	Swiss Arbitration Association
B.C.L.R.3d	British Columbia Law Reports, Third Series
BIT	Bilateral Investment Treaty
BPs	(World) Bank Procedures
CAFTA-DR	Dominican Republic-Central America-United States Free Trade Agreement
CETA	Comprehensive Economic and Trade Agreement
CIArb	Chartered Institute of Arbitrators
CMEA	Council for Mutual Economic Assistance
CRCICA	Cairo Regional Centre for International Commercial Arbitration
D.C. Cir.	United States Court of Appeals for the District of Columbia Circuit
D.D.C.	United States District Court for the District of Columbia
DSB	WTO Dispute Settlement Body
EC	European Community
ECT	Energy Charter Treaty
EU	European Union
European Convention	European Convention on International Commercial Arbitration
EWHC (Comm)	High Court of England and Wales (Commercial Court)
FAA	Federal Arbitration Act
FDI	Foreign Direct Investment
FTA	Free Trade Agreement

FSIA	Foreign Sovereign Immunities Act
IBA	International Bar Association
IBRD	International Bank for Reconstruction and Development
ICAC	International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation
ICC	International Court of Arbitration of International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICDR	International Centre for Dispute Resolution
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IDA	International Development Association
IIA	International Investment Agreement
ILC	International Law Commission
ILM	International Legal Materials
LCIA	London Court of International Arbitration
LMAA	London Maritime Arbitrators' Association
LSA	Local Standard Annulment
NAFTA	North American Free Trade Agreement
MAI	Multilateral Agreement on Investment
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PTIA	Preferential Trade and Investment Agreement
QB	Queen's Bench
RBW	Judge Reggie B. Walton

RIAA	Reports of International Arbitral Awards
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
S.D.N.Y	United States District Court for the Southern District of New York
TBT	Agreement on Technical Barriers to Trade
TPP	Trans-Pacific Partnership
TRIMs	Agreement on Trade-Related Investment Measures
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNTS	United Nations Treaty Series
U.S.C.	United States Code
U.S. S.Ct.	United States Supreme Court
WTO	World Trade Organization
2d/5th/9th Cir.	United States Court of Appeals for the Second/Fifth/Ninth Circuit

Introduction

1 Research Question

In order to minimize risks related to policy and institutional determinants of capital-importing States, a network of international instruments, which comprise bilateral investment treaties (hereinafter 'BIT'), free trade agreements (hereinafter 'FTA') and other investment treaties, provides foreign investors with essential protections. These instruments not only constrain host States' incentive to expropriate or nationalize through an explicit commitment that expropriation or nationalization would be accompanied by a payment of prompt, adequate and effective compensation, and further make such commitment more credible and realistic by coercively subjecting host States to international investment arbitration. As compared to the traditional recourse to diplomatic protection or national courts, international investment arbitration is depoliticized and external, and seems to be more independent and neutral. Among arbitration, national courts, international courts or tribunals and diplomatic protection, international investment arbitration has been a major method for the settlement of investment disputes between foreign investors and host States at the present time.¹

While the World Trade Organization (hereinafter 'WTO') Dispute Settlement Body (DSB) continues to respect the traditional State-State dispute resolution method, the mechanism in the international investment regime has undergone a fundamental change in which foreign investors are conferred a benefit on the use of a relatively depoliticized method, namely investor-State arbitration. The development of investor-State arbitration results greatly from the creation of the International Centre for Settlement of Investment Disputes (hereinafter 'ICSID') and a significant number of investment treaties that contain extraordinarily broad dispute settlement clauses referring to ICSID arbitration. In addition to ICSID arbitration, a number of arbitration institutions and *ad hoc* tribunals also play an increasing important role in resolving international investment disputes.

As different arbitral fora provide disparate levels of procedural protections and substantive benefits, the choice of an appropriate forum is highly essential, and can have considerable

¹ Following 62 cases initiated in 2102 which constitutes the highest number of known treaty-based investor-State arbitration ever filed in one year, at least 57 new cases are commenced in 2013. See UNCTAD, 'Latest Developments in Investor-State Dispute Settlement', IIA Issues Note, N 1, 2013, 2; IIA Issues Note, N 1, 2014, 2.

consequences. In particular, notwithstanding the commonly accepted designation of ‘investor-State arbitration’,² international investment arbitration is by no means merely tackling the complicated relationships between foreign investors and host States; rather, participants who can claim their legitimate interests in investment arbitration and who might influence an investment arbitration case are far more than claimants and respondent States. International investment arbitration is an intricate interplay of diverse actors, which can be likened to an epic voyage to justice that is, by and large, initiated by the protagonists - investors and States (and their legal counsels), carried by arbitration institutions or secretariats, steered by arbitral tribunals, assisted and inspected by national courts and participated in by third-parties, experts and even home States and international organisations (see Figure I). The significance of making a choice among different fora is similar to that concerning the selection of a forwarding agent, a freight agent and a shipping agent for a sailing adventure, but reflects much more far-reaching implications of political, economic and social interests. In fact, the divergences of different fora have the potential to make a considerable impact on prospective legitimate interests of various participants in investment disputes cases, especially those related directly to damages and compensation.

² In contemporary arbitration theory, ‘international investment arbitration’ is conceptualized as recourse to international tribunals of last resort, which refers to a variety of arbitration genres, including ‘State-State arbitration’ and mere ‘investment treaty-based arbitration’. The terminology of ‘international investment arbitration’ in this thesis, however, indicates *sensu stricto* ‘investor-State arbitration’, regardless of its (treaty or contract) jurisdictional basis.

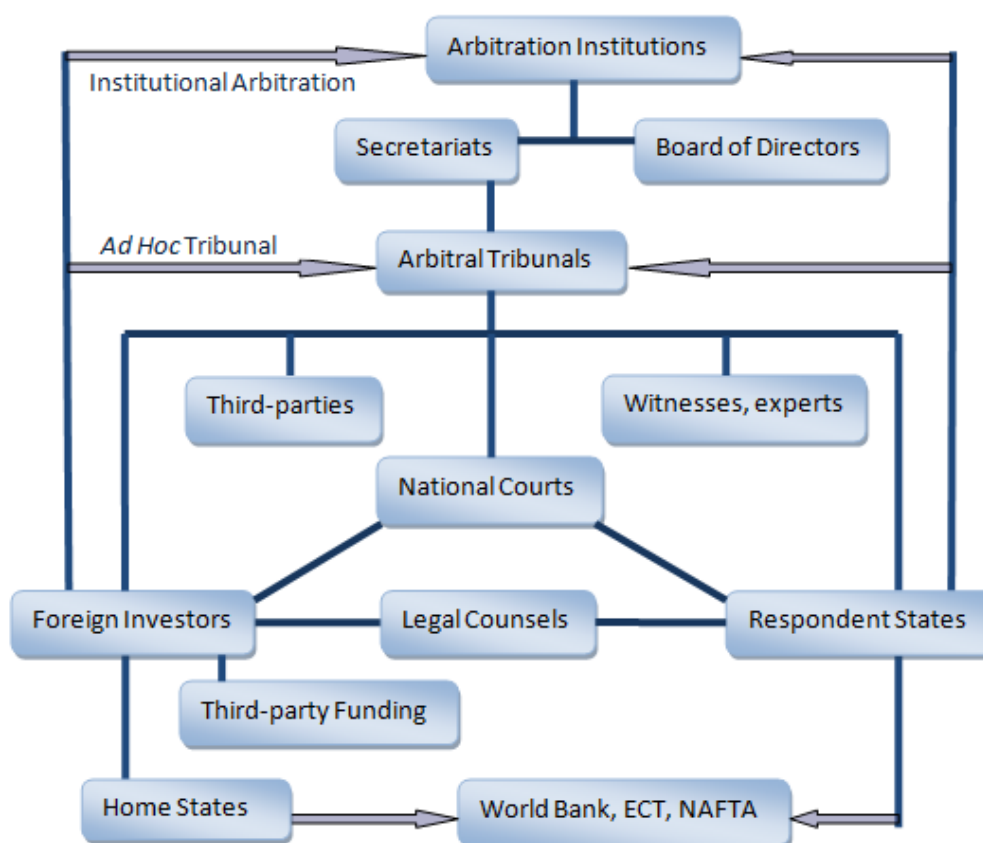


Figure I: Participants in Investor-State Arbitration

In view of the consequential but different impacts resulting from arbitral proceedings under a variety of arbitration rules, essential scrutiny of the specific divergences of different arbitral fora and an inspection of their relation, interplay and interaction on the basis of the criteria that have been acknowledged in constructing a fair, efficient and legitimate dispute resolution system become not only crucial, but also necessary to adapt arbitration rules to a rapidly changing world. This thesis attempts to examine whether different genres of international investment arbitration intrinsically implicate stark divergences of characteristic traits in essence and whether such discrepancies matter in real practice. An inquiry into the divergence of distinct arbitration genres cannot but be based on scrutiny of the characteristic traits of each genre, an examination of their practical advantages and drawbacks in specific contexts, and an analysis of potential areas of concern that stem from a range of arbitration rules. To this end, international investment dispute resolution methods can conveniently be classified into two genres, namely ICSID and non-ICSID arbitration. These two genres appear to be optimal classifications, categorically emblemized not only in terms of their utilization in arbitration industry, but also in terms

of their approaches to delivering justice in a different way that brings in a disparate degree of fairness, efficiency, accountability and legitimacy. While ICSID arbitration apparently refers to *sui generis* arbitration under the aegis of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter 'ICSID Convention'), non-ICSID arbitration commonly comprises arbitration under the auspices of the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter 'UNCITRAL'), the Arbitration Rules of the Stockholm Chamber of Commerce (hereinafter 'SCC'), the Arbitration Rule of International Chamber of Commerce (hereinafter 'ICC') and the Arbitration Rule of London Court of International Arbitration (hereinafter 'LCIA').

The ICSID Additional Facility Rules, consisting of a principal set of rules governing the additional facility proceedings and three schedules, were created to facilitate the use of the extensive Secretariat's services.³ Nonetheless, arbitration under the Additional Facility Rules sets it apart from ICSID arbitration in numerous ways, despite its procedural similarities to ICSID arbitration, in particular those related to the ICSID Secretariat's administrative support. It is conspicuous that disputing parties eligible for proceedings under the Additional Facility Rules are distinctive, and the subject matters qualified for the proceedings are more comprehensive since the Rules are applicable to the settlement of disputes arising indirectly out of an investment on condition that the underlying transaction is not an ordinary commercial transaction.⁴ Furthermore, the additional facility proceedings are not governed by the ICSID Convention, though certain provisions of the ICSID Administrative and Financial Regulations apply *mutatis mutandis* in the proceedings.⁵ Unlike the ICSID Convention, the Additional Facility Rules do not supersede national law at the arbitral *situs* and other potential treaties in respect of post-award remedies and the recognition and enforcement of arbitral awards. Consequently, it

³ Aron Broches, 'The 'Additional Facility' of the International Centre for Settlement of Investment Disputes - (ICSID)' (1979) IV YB Com Arb 373, 379.

⁴ Introduction and art 2(b) of the ICSID Additional Facility Rules. It is worth noting that the Rules are not designed as a means to avoid the application of the ICSID Convention where access to the ICSID jurisdiction is available. ICSID practice also demonstrates that there is no difficulty with regard to the classification of disputes arising from investment because it is unlikely that a transaction will not meet the Convention's requirement due to the general acceptance of an extraordinarily broad notion of 'investment' (see Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary* (CUP, 2009) 142).

⁵ Art 5 of the ICSID Additional Facility Rules.

would not be irrational for ICSID additional facility arbitration to fall more suitably within the ambit of non-ICSID arbitration.

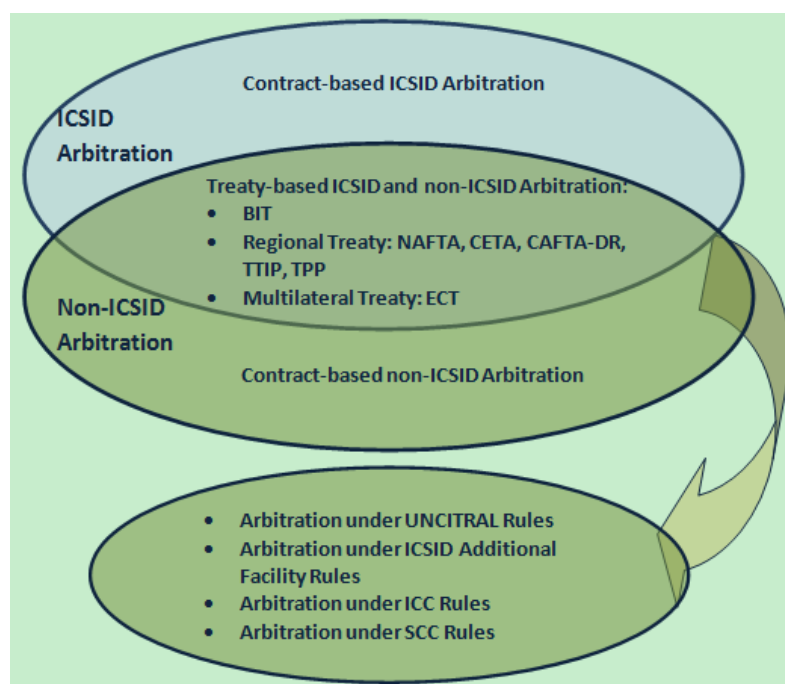


Figure II: Classification of International Investment Arbitration

2 The Divergence of ICSID and Non-ICSID Arbitration

The term ‘divergence’ refers to the state, condition, quality or degree of being unlike or dissimilar. However, the divergence of ICSID and non-ICSID arbitration in this thesis will not include a variety of distinctions between ICSID and non-ICSID arbitration; rather, it looks into the differences that are significant and substantive. ICSID and non-ICSID arbitration, when viewed from a macro perspective, have two main divergences of a general nature. First, ICSID arbitration remains a public characteristic to some degree. The concept of arbitration as a consensual means of resolving investment disputes was a part of the landscape of public international law at the time the ICSID Convention was concluded.⁶ As a multi-faceted dispute settlement mechanism, ICSID is situated at the

⁶ Campbell McLachlan, ‘Investment Treaty Arbitration: The Legal Framework’ in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International, 2009) 99-100.

intersection of laws, politics and economics,⁷ and the intersection typically implicates issues of international magnitude that have essential impacts on public interests. Conversely, non-ICSID arbitration is perceived, on the whole, intrinsically to possess a private characteristic. It is acknowledged that the UNCITRAL Rules were originally designed for use in *ad hoc* international commercial arbitration which normally deals with international trade disputes,⁸ and that SCC, ICC, LCIA and other mainstream arbitration has principally been crafted to apply to international commercial disputes between private businessmen. The impact of the private characteristic of non-ICSID arbitration, which seems to be more perceptible in cases of non-ICSID institutional arbitration, is that many developing countries believe that ICC or other non-ICSID arbitration gives undue weight to the preferences and interests of capital-exporting countries.⁹ Second, as to the legal framework, the conclusion of the ICSID Convention was regarded as a breakthrough that actually provided a secure and self-contained system of resolving investment disputes, thoroughly autonomous and explicitly independent of any legal system at the national level. Though it would possibly no longer be an exaggeration to say that international commercial arbitration has become its own legal system,¹⁰ a self-contained system of non-ICSID arbitration is far from taking initial shape. The effectiveness of non-ICSID arbitration rests, in principle, on a patchwork of international and national laws.¹¹

⁷ 'Laws' refers to applicable procedural and substantive rules of the ICSID Convention and Rules, and arbitral tribunals' implementation of rules; 'politics' indicates that ICSID arbitration relates to a broader framework of the Developed World/Third World relations; and 'economics' focuses on the World Bank lending and surveillance, and World Bank's administration of dispute settlement institution. See Iboronke T. Odumosu, 'The Antinomies of the (Continued) Relevance of ICSID to the Third World' (2007) 8 San Diego Intl L J 345, 350.

⁸ Gary B. Born, *International Commercial Arbitration* (Kluwer Law International, 2009) 152.

⁹ Malcolm D. Rowat, 'Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA' (1992) 3 Harv Intl L J 103, 107.

¹⁰ Recently an increasing degree of convergence around common principles has emerged, and such convergence particularly occurs through the promulgation of the UNCITRAL Model Law which has in turn driven the revision and reform of national arbitration statutes and rules of arbitration institutions. In practice, the Supreme Court of Canada had observed that arbitration was part of no State's judicial system, while the French Cour de Cassation accepted that international arbitral awards were international judicial decisions. See Campbell McLachlan, 'Investment Treaty Arbitration: The Legal Framework' 102.

¹¹ There were three competing visions, philosophies, or more accurately, mental representations of international arbitration which structured the way in which scholars and practitioners observed international arbitration. Unlike the other two representations, namely, (i) international arbitration which was relegated to a component of a single national legal order, and (ii) international arbitration which was anchored in a plurality of national legal orders, the third representation where international arbitration was regarded as an autonomous legal order contemplated that the juridicity of arbitration was rooted in a distinct, transnational legal order, but not in a national legal system of the country of the seat or the place of enforcement. Instead of considering each State individually, the third representation concentrated on the body of States that were

The divergences of a general nature between ICSID and non-ICSID arbitration give rise to significant distinctions between ICSID and non-ICSID arbitration in a wide range of procedural and substantive respects. Specific distinctions of ICSID and non-ICSID arbitration, which may be a source of ‘procedural confusion or inefficiency’ particularly on the part of States,¹² can be elucidated in manifold of practical aspects. However, a number of distinctions are less essential in evaluating ICSID and non-ICSID arbitration. In the first place, some differences, such as the process, time limitations and remedies during the course of the constitution of a tribunal, are simply the procedural dissimilarities that entail less significant implication. In the second place, some divergences, though fundamental in themselves, are of impractical consequence in assessing ICSID and non-ICSID arbitration. For instance, the independence of the arbitrator and the duty of disclosure are found in the UNCITRAL and many non-ICSID arbitration rules, whereas the ICSID Convention does not provide any indication of the kind of relations that should be disclosed by an arbitrator to satisfy the parties of his independence. Admittedly, the rules governing the independence of arbitrator, together with the practice of non-ICSID institutions presiding over their application, are crucial in ensuring the integrity and neutrality of arbitral proceedings. Nevertheless, the absence of relevant rules in the ICSID Convention does not detract from the ICSID’s reputation in providing independent, accountable and fair dispute settlement since in practice the Chairman of the Administrative Council and the Secretariat will take the matter seriously if any disputing party were to challenge the impartiality and independence of an arbitrator.¹³

In general, the jurisdiction, the arbitral proceedings (eg, transparency, provisional measures, role of domestic courts and arbitral costs), the challenge of arbitral awards and the

prepared to recognize and enforce arbitral awards collectively in a global context, thereby removing arbitrators from the notion that they were legitimized by a particular State to the normative activity of the community of States. The three theories determined different extent to which mandatory laws, principles and other rules of the *situs* would be applied in arbitral proceedings. See Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers, 2010) 35-37.

¹² Antonio R. Parra, ‘Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment’ (1997) 12(2) ICSID Rev-Foreign Investment LJ 287, 359.

¹³ For instance, in November 2013 the Chairman of the Administrative Council disqualified the investor’ appointed arbitrator, Mr Jose Maria Alonso, in *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*. See ICSID Case No ARB 12/20, Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal, 12 November 2013.

recognition and enforcement of arbitral awards are the major divergences standing out compared with others since they represent and express significant departures that would have enormous potential impacts on legitimate, but conflicting, interest demands. In order to advance the thesis that ICSID and non-ICSID arbitration possess substantial divergences which have, more or less, a bearing on the final outcome of cases submitted to investor-State arbitration based on different arbitration rules, these areas of divergence will be addressed in this thesis.

Chapter I concentrates on the divergence of tribunals' jurisdiction. It is always a given that consent to the jurisdiction of ICSID or non-ICSID arbitral tribunal constitutes a derogation from a State' sovereignty in that the jurisdiction of an international investment case lies, in a traditional sense, with the State where the investment in question is located.¹⁴ Accordingly, State's consent to international arbitration amounts precisely to a transfer of its judicial sovereignty. As consent to jurisdiction of ICSID or non-ICSID arbitration constitutes a different degree of derogation of State sovereignty, international arbitral tribunal' jurisdiction, which is backed up by the indispensable State's consent, is thus a delicate matter and an essential factor to measure the extent of sovereign rights that have been conceded by State to ICSID or non-ICSID arbitral tribunal. In the meantime, in what ways and to what extent would a State transfer sovereignty would affect, by and large, investors' right to obtain the benefit of investor-State arbitration in view of the fact that diverse jurisdictional requirements in ICSID and non-ICSID arbitration indubitably influence the scope of investors' investment which would be appropriately protected.

Chapter II looks into the divergence of the role of institutions. It is obvious that disparate administrative powers and functions in ICSID and non-ICSID arbitration will result in distinctive integrity and efficiency of the investment dispute settlement facilities.¹⁵ Aside

¹⁴ For example, Latin America countries that insisted on the Calvo doctrine maintained that recognition of the international law concept would contradict the fundamental concept of territorial sovereignty. Therefore, host States had exclusive jurisdiction over disputes arising out of investment. See James C. Baker & Lois J. Yoder, 'ICSID and the Calvo Clause a Hindrance to Foreign Direct Investment in LDCs' (1989-1990) 5 Ohio St J on Disp Resol 75.

¹⁵ For example, duties fulfilled by secretariats may, on occasion, be attacked on account of the abuse of authority. Lalive published a paper that contained a number of comments that were critical of the Secretariat of the ICC Court as a whole. One of the criticisms was that the Secretariat had taken it upon itself to issue a directive in 1995, which exemplified an increasing and worrisome tendency of the Secretariat to 'increase its power'. However, the Secretary General of the ICC Court defended the Court by asserting that the paper was considered to be founded on an erroneous premise because the directive, which was a reflection of the

from administrative powers and functions, arbitration institutions also undertake a variety of duties, varying in terms of their rules. Particularly, the ICSID distinguishes itself from other arbitration institutions, given that one of the ICSID's objectives is to foster increased flows of transnational investment. The ICSID undertakes enormous duties that a non-ICSID arbitration institution may be incapable of assuming, but such duties would have profound impacts on the coherent investor-State arbitral jurisprudence and the future development of an investment dispute settlement mechanism.

Chapter III scrutinizes the divergence of post-award remedies. The finality of international arbitral awards can, in consideration of the delivery of a final binding resolution as the most fundamental task of arbitration, be in juxtaposition to efficiency and economy which are generally appreciated as the foremost virtues of international arbitration.¹⁶ Though the precise nature of *res judicata* effect¹⁷ in investor-State arbitration still remains a controversial issue,¹⁸ the finality of investor-State arbitral awards has been historically honoured by both States and investors.¹⁹ However, as a result of the ambiguousness in part as well as human fallibility ranging from typographical errors to *non sequitur* analysis, the presumptive finality of arbitral awards might be challenged by a number of instruments under both international conventions and national laws, which typically refer to post-award remedies available for parties who receive an unfavourable outcome to challenge the finality of arbitral awards. Post-award remedies, though obtainable in both ICSID and non-ICSID arbitration, demonstrate one of the most distinguishing features between ICSID and

collective views of the Court and not the whims of its Secretariat, was entirely consistent with the ICC Arbitration Rules. See Eric A. Schwartz, 'On the Subject of "Administrative Secretaries": A Reply by Mr. Eric Schwartz, Secretary General of the ICC Court' (1996) 14(1) ASA Bulletin 32.

¹⁶ Christoph Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope' (2011) 10 L & Prac of Intl Cts & Tribunals 211, 211.

¹⁷ In view of the fact that the rules of preclusion in international arbitration have been, to an enormous extent, developed as a matter of national law, international arbitral awards in main legal jurisdictions are accorded the same preclusive effects that national court judgments obtain under the national law framework. However, common and civil law legal systems adopt divergent rules of preclusion, and the differences are complex and vary from one jurisdiction to another. While major common law jurisdictions accept two basic concepts of preclusion, namely, claim preclusion and issue preclusion, civil law jurisdiction merely recognizes claim preclusion. See Gary B. Born, *International Arbitration: Cases and Materials*, 1048-52.

¹⁸ In other words, it is ambiguous as to what preclusive effects are mandated by art 53(1) of the ICSID Convention and art 3 of the New York Convention.

¹⁹ The historical importance to States of the finality of investor-State awards can be indicated in the development of the investor-State arbitration process, in particular in *travaux préparatoires* and the final text of the ICSID Convention and UNCITRAL Model Law, and the negotiation of MAI by OECD (see Jason Clapham, 'Finality of Investor-State Arbitral Awards: Has the Tide Turned and is there a Need for Reform?' (2009) 26(3) J Intl Arb 437, 440-45).

non-ICSID arbitration. In the light of the alleged risky ICSID annulment which lacks finality, certainty and predictability,²⁰ some commentators even advocate a greater use of non-ICSID arbitration with judicial review by national courts.²¹ Hence, scrutiny of the divergence of post-award remedies between ICSID and non-ICSID arbitration is of practical consequence.

Chapter IV elucidates the divergence of recognition and enforcement of arbitral awards. The recognition and enforcement of international arbitral awards are of vital significance since the effectiveness of international arbitration depends, mainly and ultimately, on the degree of finality of awards and the presumptive obligation of enforcement. In fact, despite the fact that the majority of international arbitral awards have been, in general, voluntarily complied with, award creditors might have to seek the recognition and enforcement of awards in some cases where award debtors refuse to execute the awards against them. In investor-State arbitration, the *travaux préparatoires* of the ICSID Convention indicated that the enforcement of ICSID awards against States was somehow an academic question due to the solemn international obligation to comply with awards undertaken in advance by States when ratifying the Convention,²² but the Convention still attempted to provide both States and investors with a simplified and effective method of obtaining enforcement. The Convention ensures enormously rigorous finality and optimal preconditions for the presumptive obligation in a manner that is sufficient to distinguish ICSID arbitration from

²⁰ As to ICSID arbitration, scepticism concerning the annulment had been expressed by Feldman who maintained that it was more important for the ICSID to be efficacious that awards be final rather than correct since parties valued informality, expeditiousness and economy (see Mark B. Feldman, 'The Annulment Proceedings and the Finality of ICSID Arbitral Awards' (1987) 2(1) ICSID Rev-Foreign Investment LJ 85, 87). By contrast, some scholars asserted that given the importance of many of the disputes and the occasional errors of arbitrators, the amount of review in annulment proceedings seemed to be desirable (see David D. Caron, 'Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal' (1992) 7(1) ICSID Rev-Foreign Investment LJ 21, 51). More fundamentally, while the interests in finality implied that several arbitrary limits for control systems should be established, the interest in justice required a fair decision be guaranteed no matter what the cost or how long it took (see W. Michael Reisman, 'The Breakdown of the Control Mechanism in ICSID Arbitration (1989) 1989 Duke LJ 739, 744-45). In general, ICSID annulment was a preferred solution in balancing these two control mechanism policies (see Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 903).

²¹ See, eg, Bernard Hanotiau & Olivier Caprasse, 'The Review of Arbitral Awards by Domestic Courts: Introductory Report' in Emmanuel Gaillard (ed), *The Review of International Arbitral Awards* (Juris, 2010) 18-19.

²² ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Vol II-1, 304.

non-ICSID arbitration.²³ Recently, post-award remedies and the enforcement of non-ICSID arbitral awards have been thrust into the limelight as Russia may seek annulment of the Hague Arbitration Court's ruling on the *Yukos* case and avoid enforcing the highest-value arbitral award of all time.²⁴

3 The Convergence of ICSID and Non-ICSID Arbitration

It is unequivocal that the divergence of ICSID and non-ICSID arbitration is conspicuous and even radical in a number of aspects. However, the relationship between ICSID and non-ICSID arbitration does not simply correspond with disparity and singularity. Chapter V argues that as new phenomena emerge and several non-ICSID arbitration rules have been amended or are in the works to address more fundamental issues of investor-State arbitration, there is currently a new-fangled and more subtle way of looking at the relationship of ICSID and non-ICSID arbitration. More specifically, a trend of convergence of ICSID and non-ICSID arbitration begins, to some extent, to emerge within the framework of investment arbitration in a contemporary perspective. Nonetheless, investment arbitral jurisprudence has not developed a general principle for evaluating the convergence of ICSID and non-ICSID arbitration. In this thesis, the convergence is conceptualized as two processes converging ICSID and non-ICSID arbitration, namely the substantive resemblance between ICSID and non-ICSID arbitration and the relationship, interplay and interaction between ICSID and non-ICSID arbitration. The convergence of ICSID and non-ICSID arbitration is not simply a consequence of competition or rivalry; in essence, it is consequentially an evolution towards fairer and more efficient dispute resolution.

4 The Implications of the Divergence of ICSID and Non-ICSID Arbitration

4.1 States: A Perspective of Transfer of State Sovereignty

The divergences of ICSID and non-ICSID arbitration have theoretical and practical implications for contemporary international investment law. In particular, the divergences

²³ Lucy Reed, Jan Paulsson, Nigel Blackaby, *Guide to ICSID Arbitration* (Kluwer International Law, 2011) 179.

²⁴ ITAR-TASS news, The Hague Court's Ruling on Yukos Final but Russia May Seek Annulment <<http://en.itar-tass.com/economy/742631>> accessed 1 August 2014.

pragmatically play critical parts in pursuit of a successful settlement of an investment dispute, and of more primary but less tangible interests underlying the individual dispute such as government's regulatory right for protection of public welfare, health and safety, labour rights and the environment.

The roles that States play in investor-State arbitration are not just as claimants, respondents or non-disputing parties as *amicus curiae* in specific cases; instead, they can be multiple and tremendously complex, and would profoundly affect the international investment regime on the whole.²⁵ In particular, treaty negotiation is a primary role from a macro perspective, since State sovereignty would be a focal point in the negotiation process and the extent of sovereign rights transferred to international tribunals would substantially affect the framework of investor-State arbitration. International tribunals' discretionary use of adjudicative power on regulatory disputes seems to conflict with 'principles of judicial accountability and independence in democratic societies' and infringe the integrity of a legal system by contracting out the judicial functions in public law.²⁶ Nonetheless, most legal systems in the modern world have accepted that State sovereignty is not inalienable and some sovereign functions can be transferred to supranational or international entities.²⁷ In the investor-State arbitration context, State sovereignty can be, whether through investment concessions or treaties, transferred or surrendered²⁸ by States to international tribunals. In fact, when verifying consent to investor-State arbitration jurisdiction, States automatically transfer part of their judicial sovereignty in favour of investment protection; in other words, international tribunals remove, *de facto*, a substantial component of national courts' jurisdiction.²⁹ As more cases have proved that investor-State arbitration is not simply about seeking compensation for the damage but rather the challenge of

²⁵ For example, first, States act as legislators to create statutory frameworks for international arbitration, especially when it comes to their functions to legitimate and support non-ICSID arbitration and further promote arbitration venues. Second, States as contracting parties negotiate and ratify international or regional arbitration conventions and multilateral or bilateral investment treaties, which are of the utmost importance in shaping the formulation of international investment law and in setting up the foundation of investor-State arbitration. In addition, certain functions of States are undertaken by national courts, including, *inter alia*, issuing arbitration injunction, implementing awards and controlling non-ICSID awards.

²⁶ Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP, 2007) 4.

²⁷ Guglielmo Verdirame, 'A Normative Theory of Sovereignty Transfers' (2013) 49(2) *Stanford J Intl L* 371.

²⁸ The diction of 'transfer' emphasizes that sovereignty is positively interchanged by States, while the term 'surrender' implies a voluntary but passive attitude towards the loss of some sovereign rights.

²⁹ Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart Publishing, 2009) 125-26.

sovereign rights,³⁰ it can be contended that the element of transferring State sovereignty is the linchpin of the whole investment arbitration mechanism.

Intriguingly, the extent of the sovereignty that States have to transfer to ICSID or non-ICSID arbitration is different. States have to transfer, by and large, more sovereign rights in ICSID arbitration in the light of four concerns. First, consent to ICSID arbitration jurisdiction would prevent disputing parties from seeking relief from national courts in the course of the arbitral proceedings. Second, the place where ICSID arbitral proceedings take place is irrelevant to the validity of awards. Third, national courts charged with the enforcement of ICSID arbitral awards have no power to review awards for procedural irregularities or substantive correctness. Fourth, respondent States in ICSID arbitration may be confronted with a threat of impliedly waiving its sovereign immunity.³¹ The divergence concerning the extent of alienable State sovereignty in ICSID and non-ICSID arbitration has potentially great implications not only because of the exclusion of any other remedy and any national court's scrutiny of ICSID award since such sovereign rights have been transferred to ICSID arbitration, but also owing to the considerable impact of decisions rendered by international arbitral tribunals. In exercising their authority conferred by States and investors over investment disputes, international tribunals increasingly function as a mechanism of global governance, impacting on domestic administrative, legislative and judicial decision-making and policy-making.³² Apparently, the more sovereign rights are transferred, the more significant impacts would be imposed on general foreign investors, host States and civil society.

³⁰ For example, in July 2014 Newmont Nusa Tenggara and its majority Dutch shareholder Nusa Tenggara Partnership BV filed an ICSID arbitration request against the Indonesian government over its mineral-export ban policy, seeking interim and injunctive relief to resume exports. See *Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. Republic of Indonesia*, ICSID Case No ARB/14/15.

³¹ The Court of Appeals for the Second Circuit held in *Blue Ridge Invs., L.L.C. v. Republic of Argentina* that Argentina had waived its foreign sovereign immunity pursuant to the implied waiver exception under art 1605(a)(1) of the Foreign Sovereign Immunities Act by becoming a party to the ICSID Convention, and the arbitral award exception under 1605(a)(6) of the Act by submitting the dispute to the ICSID tribunal. See Docket No 12-4139-cv, 2d Cir. 2013.

³² Benedict Kingsbury and Stephan W. Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference*, 5-14. See also Stephan W. Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking' (2011) 12(5) German L J 1083, 1084-86.

In view of the controversy surrounding the effect of investor-State arbitration contained in BITs on Foreign Direct Investment (FDI) inflows,³³ it has become more essential for developing countries to revalue BITs and investment arbitration and further consider to what extent they decide to transfer State sovereignty. As developing countries concede sovereignty only in the belief that they would benefit from the global capital market since the resulting investment inflows will promote economic development, there is a possibility that they abandon ICSID or non-ICSID arbitration and resume their regulatory rights if such promise could not be achieved. Bolivia, Ecuador and Venezuela have respectively denounced the ICSID Convention,³⁴ triggering their withdrawal from the investor-State dispute resolution mechanism under the auspices of the Centre.³⁵ Bolivia, the first State to

³³ Yackee found only inconsistent evidence that BITs might succeed in attracting additional FDI, and emphasized that the effectiveness of BITs in performing such role depended on the particulars of dispute settlement mechanism in BITs (see Jason Webb Yackee, 'Sacrificing Sovereignty: Bilateral Investment Treaties, International Arbitration, and the Quest for Capital', USC Centre in Law, Economics and Organization Research Paper No C06-15, 8). Berger's study, however, revealed that investor-State arbitration would not increase FDI between developed countries and it might incur serious economic and political costs (see Axel Berger, 'The Transatlantic Free Trade Agreement - The Dispute over Dispute Settlement', The Current Column, 4 March 2014). Generally, simply containing investor-State arbitration in BITs is insufficient in particular considering that the impact of investor-State arbitration on the development of host States' economies and institutions is still debatable (see OECD, 'Government Perspectives on Investor-State Dispute Settlement: A Progress Report', Freedom of Investment Roundtable, 14 December 2012, 12-13).

³⁴ The World Bank received written notices of denunciation from the Republic of Bolivia on 2 May 2007, from the Republic of Ecuador on 6 July 2009 and from the República Bolivariana de Venezuela on 24 January 2012. In accordance with art 71 of the ICSID Convention, the denunciation took effect six months after receipt of the notice.

³⁵ The impact of the denunciation on the ICSID arbitral claims has been a subject of debate for a couple of years, and much of the debate has centred on whether foreign investors would have rights to continue initiating new claims against States that have withdrawn from the ICSID Convention on the basis of States' unilateral prior consent contained in a BIT, a FTA or other investment treaty that remains in force. Professor Gaillard drew a distinction between State's 'unqualified consent' and 'agreement to consent' to ICSID arbitration in BITs, and the underlying terminology used in the arbitration clause dictated whether the clause was an expression of an unqualified consent or an agreement to consent. Eg, art 8 of the UK-Bolivia BIT provided that disputing parties 'may agree to refer the dispute either' to ICSID, ICC or *ad hoc* arbitration, which indicated that a further agreement was required to commence ICSID arbitration. By contrast, art 11 of Germany-Bolivia BIT stated that after both States had become the contracting parties of the ICSID Convention, the dispute 'shall be submitted' to ICSID mediation and arbitration, which unequivocally expressed State's consent to ICSID jurisdiction. Where an unqualified consent existed, investors could rely on such consent to initiate ICSID arbitration against the State even after it had denounced the Convention (see Emmanuel Gaillard, 'The Denunciation of the ICSID Convention' (2007) 237(122) NYLJ, 26 June 2007). Professor Tietje also observed that the most far-reaching understanding of art 72 provided for the possibility of accepting State's consent to ICSID jurisdiction contained in a BIT so long as the BIT remained effective, and then the decisive issue was under what conditions the ICSID arbitration clause in a BIT remained unaffected by the State's denunciation of the Convention. Normally, the conditions were that the consent stipulated in a BIT needed to be unconditional and required no further action on the part of the State

denounce the ICSID Convention, asserted that ICSID arbitration was an infringement of national sovereignty.³⁶ The Foreign Ministry of Venezuela also underlined State sovereignty, reiterating that Venezuela acceded to the ICSID Convention in 1993 ‘by order of a provisional government weak and lacking popular legitimacy, pressured by transnational economic sectors involved in the dismantling of Venezuela’s national sovereignty’.³⁷ Furthermore, as a considerable number of BITs in force contemplate, in addition to ICSID arbitration, alternative arbitration fora such as arbitration under the aegis of ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules or other available rules,³⁸ foreign investors are entitled to bring their claims against Bolivia, Ecuador and Venezuela before non-ICSID arbitral tribunals. In fact, several cases have been commenced against Bolivia in the non-ICSID arbitral proceedings.³⁹ Given that BITs still

(see Christian Tietje, et al, *Once and Forever? The Legal Effects of a Denunciation of ICSID*, Beiträge zum Transnationalen Wirtschaftsrecht, Heft 74, 8-9, 28-30).

Intriguingly, Oscar M. Garibaldi argued that applying the contract analogy to art 72 became an instance of the fallacy of false analogies. He presented observations on the limits of the contract analogy and on the inadequacy of other theories that might tempt commentators who attempted to search for an extra-textual justification for construing the ‘consent’ in art 72 as an ‘agreement to arbitrate’ (see Oscar M. Garibaldi, ‘On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy’ in Christina Binder, et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, 2009) 252-77).

Currently, there is a scarcity of case law concerning the effect of denunciation. Eg, the ICSID tribunal in *Pan American Energy LLC v. Plurinational State of Bolivia* (ICSID Case No ARB/10/8) had refused to throw out the claim filed against Bolivia simply on the ground that the investor initiated arbitration more than two years after Bolivia’s denunciation of the Convention had taken effect. The tribunal might revisit the issue in subsequent arbitral proceedings, thus turning the debate from an academic question into a practical issue. However, the predominant academic observation indicates that no new claim should be permitted to file before an ICSID arbitral tribunal against a State if the State has withdrawn from the ICSID Convention, despite the fact that recourse to ICSID arbitration still retains an option as a dispute resolution forum in the text of the BIT or other applicable treaty that remains in force (Christoph Schreuer, ‘Denunciation of the ICSID Convention and Consent to Arbitration’ in Michael Waibel, et al (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010) 353-68).

³⁶ Fernando Mantilla-Serrano, ‘The Effect of Bolivia’s Withdrawal from the Washington Convention: is a BIT-Based ICSID Jurisdiction Foreclosed’ (2007) 22(8) Mealy’s Intl Arb Rep 21.

³⁷ R. Polanco Lazo, ‘Is There a Life for Latin American Countries After Denouncing the ICSID Convention?’ (2004) 11(1) Transnatl Disp Management 1, 20.

³⁸ For instance, only Germany-Venezuela and Chile-Venezuela BITs provide for ICSID arbitration as the sole valid forum available for investors to resolve investment disputes, and the other 25 BITs concluded by Venezuela in force commonly contain a variety of arbitral venues, in particular the UNCITRAL arbitration.

³⁹ Guaracachi and Rurelec initiated an UNCITRAL arbitration administered by the Permanent Court of Arbitration (hereinafter ‘PCA’) against Bolivia under the U.S.-Bolivia and UK-Bolivia BITs, claiming compensation resulting from the nationalization in 2010 (*Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, UNCITRAL, PCA Case No 2011-17, Award, 31 January 2014). Other arbitral proceedings are still underway, including *South American Silver Limited v. Bolivia* (UNCITRAL arbitration based on the UK-Bolivia BIT) and *Albertis v. The Government of Bolivia* (UNCITRAL/PCA arbitration based on the Spain-Bolivia BIT).

contribute to the coherence, predictability and stability of host States' investment framework⁴⁰ and that the effectiveness of BITs in attracting foreign investment arguably depends in part on the commitment of providing foreign investors with direct access to investor-State arbitration, developing States should pay more attention to the selection between ICSID and non-ICSID arbitration. Bolivia and Venezuela's withdrawal from ICSID arbitration has showed their moderate resistance to sovereign rulings being conceded to international tribunals. Their selection of non-ICSID arbitration in which State sovereignty would be transferred in a less drastic way will have a significant implication for other developing countries, especially those who have been sceptical of the effect of BITs and investor-State arbitration.

Since BITs are reciprocal, developed countries also give up some sovereign rights to conclude BITs that contain investor-State arbitration. Such transfer seems to have been inconsequential over the past decades in that as traditional capital-exporting countries, developed countries focus more on protection of their nationals' overseas investment and thus guaranteed access for their nationals to international investment arbitration is ordinarily in line with their expectation. Be that as it may, developed countries still face risks of being sued by investors from developing countries.⁴¹ In addition, given that developed economies are also traditional FDI recipients⁴² and some of them are members to international or regional treaties that provide for recourse to investor-State arbitration,⁴³ there is also a possibility that developed countries are respondents in investment arbitration cases brought by investors from other developed countries. In 2013, almost half of the new treaty-based investor-State arbitration cases were filed against developed States, most of which were initiated by investors from developed countries.⁴⁴ The unusually high number of cases commenced against developed countries might arouse their concerns about the relinquishment of State sovereignty. For instance, Canada's ratification of the ICSID

⁴⁰ UNCTAD, 'The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries', UNCTAD/DIAE/IA/2009/5, 2009, 25.

⁴¹ For example, *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium*, ICSID Case No ARB/12/29.

⁴² For example, U.S. and EU's combined share of FDI inflows accounted for 50 per cent of global inflows before the financial crisis. As their economic recovery strengthened, direct investment to these regions rose to 30 per cent of global inflows in 2013. See UNCTAD, 'World Investment Report 2014 - Investing in the SDGs: An Action Plan', UNCTAD/WIR/2014, 2014, x.

⁴³ For example, the Energy Charter Treaty (hereinafter 'ECT') and the North American Free Trade Agreement (hereinafter 'NAFTA').

⁴⁴ UNCTAD, 'Latest Developments in Investor-State Dispute Settlement', IIA Issues Note, N 1, 2014, 2-4.

Convention has been criticized for relinquishing more elements of Canada's judicial sovereignty.⁴⁵ In view of the availability of UNCITRAL arbitration under NAFTA prior to Canada's ratification of the ICSID Convention and commentators' argument that joining ICSID will relinquish more State sovereignty, it can be seen that an emphasis has been put upon the disparate extent of sovereignty that may be transferred to ICSID and non-ICSID arbitral tribunals.

Currently, there are five attitudes towards the ICSID membership worthy of attention: (i) States choose to become contracting members to the ICSID Convention; (ii) States joined the ICSID but then withdrew from the Convention; (iii) States, such as Russia and Thailand, have signed but not ratified the Convention; (iv) States, including Poland and India, opt not to be involved in ICSID; (v) non-State entities cannot be signatories to the Convention which is only open to States. For example, as the Treaty of Lisbon confers exclusive competence pertinent to FDI on the European Union (hereinafter 'EU') over its member States, EU as a supranational organization cannot be a party to the ICSID Convention, but UNCITRAL or other non-ICSID arbitration may be an option.⁴⁶ Other instances include Palestine and Taiwan which lack the statehood status. Diverse approaches towards ICSID arbitration have much to do with sovereignty. For States, the transfer or surrender of judicial sovereignty is one of the most essential factors affecting their sovereign choices to join or not to join the ICSID. Ultimately, how far they decide to transfer State sovereignty has far-reaching implications for their economic policies, public welfare and the environment, which are of national importance.⁴⁷ For non-State entities,

⁴⁵ Gus Van Harten, Harper Moves to Give up More Canadian Sovereignty, 12 November 2013, <<http://theyee.ca/Opinion/2013/11/12/Harper-Gives-Up-Sovereignty/>> accessed 26 June 2014.

⁴⁶ The European Parliament considered that UNCITRAL arbitration would not be available to the EU (see European Parliament Resolution on the Future European International Investment Policy, 2010/2203 (INI), 6 April 2011, para 33). The reason given by the European Parliament that the EU was not a member of UNCITRAL was, however, not convincing because the UNCITRAL Arbitration Rules could be used by international organizations (see August Reinisch, 'The EU on the Investment Path - Quo Vadis Europe? The Future of EU BITs and other Investment Agreements' (2014) 2 Santa Clara J Intl L 111, 134).

⁴⁷ Traditionally, challenges to regulations or government's conducts as regards fiscal and monetary policy (eg, tax assessments) or sustainable development (eg, environment protection) ordinarily create risks for general community welfare, and the resolution of such challenges remain the prerogative of national courts which are authorized by State's statutes (William W. Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (OUP, 2012) 697). This is because regulatory powers over foreign investors vest exclusively in States. However, in investor-State arbitration the decisions by legislatures and discretionary conducts of government are entered into the ambit of the authority of reviewing by external arbitral tribunals; thus, investor-State arbitration actually protects foreign investors in the regulatory sphere. As elucidated previously, in exercising their authority, international tribunals function as mechanism of global governance, impacting domestic administrative, legislative, judicial decision-making and policy-making. The more

research aiming to analyse the tension between the potency of ICSID arbitration as a vehicle for exercising certain sovereign authority and States' comprehensive regulatory powers is also conducive to gaining a wider perspective when they deal with non-ICSID arbitration.

4.2 Investors and Counsels: A Perspective of Investment Protection in Extraordinary Times

4.2.1 Investment Protection

The world has been undergoing rapid development and profound changes, which not only introduce unprecedented opportunities but also indubitably bring unexpected challenges that has the potential to cause the global economy to be unstable. The 2007-2008 global financial crisis, the 2010 European sovereign debt crisis and other economic crises make it an extraordinary time for foreign investment, which, in turn, calls for further strengthening protection for investors in the global capital market.⁴⁸ Against this background, foreign investors have to be more prudent in gauging the risks to their investments and respond properly to possible disputes arising out of investments. The latest *Yukos* award⁴⁹ powerfully proves again how important ECT (or international investment treaties in a boarder context) is for foreign investors and how investor-State arbitration functions necessarily as the last resort to seek justice. As to investment dispute resolution, it is discernible that ICSID and non-ICSID arbitration provide different levels of procedural

sovereign rights are transferred to international tribunals, the more significant impacts would be imposed on host States and civil society. This is also one of the reasons why the U.S. Congress has enacted trade legislation that gives an intention to restrict investor-State arbitration in investment treaties (see *ibid*, 699).

⁴⁸ For example, as currency devaluation and fiscal policies adopted by Argentina to stabilize the national economy and restore political confidence imposed direct and heavy costs on foreign participants in Argentina's economy, the 1998-2002 Argentine great depression saw the rise of international investment arbitration. At least 30 financial crisis-related investment treaty claims have been filed against Argentina, the majority of which were initiated under the auspices of the ICSID Convention.

⁴⁹ Recently, Russia was found in three UNCITRAL cases to be in breach of art 13(1) of the ECT for its 'devious and calculated' expropriation and was ordered to pay over an amount of U.S. \$50 billion in damage to Yukos shareholders (which was the largest award ever in the history of arbitration), U.S. \$60 million in fees of legal representation and U.S. \$5.6 million in costs of arbitration (see *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No AA 227, Final Award, 18 July 2014; *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No AA 226, Final Award, 18 July 2014; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No AA 228, Final Award, 18 July 2014).

protection and substantive benefits for investors, and the selection of ICSID or non-ICSID arbitration becomes more crucial in such extraordinary times.

Though in a large number of cases investors' recourse to ICSID arbitration is subject to States' sovereign choice when concluding investment treaties, it is noteworthy that at the present the vast majority of investment treaties provides for both ICSID and non-ICSID arbitration. Ordinarily, it is the investor who has a choice to select the dispute resolution mechanism⁵⁰ since State' prior consent to international arbitration has been expressed in relevant investment treaties. Veeder has observed that over the past few years, it has been 'clear that many claimant investors are deliberately not choosing ICSID arbitration, preferring non-institutional UNCITRAL arbitration' and 'even the SCC and the ICC for investor-State disputes'.⁵¹ This phenomenon leads to the question as to whether non-ICSID arbitration is more conducive to the protection of investors' interests. Investors' selection of ICSID or non-ICSID arbitration is not a philosophical or theoretical question but an intensely practical matter. An inquiry into the underlying motives for foreign investors' choice cannot, but be on the basis of the delineation of characteristic traits of a whole range of investment dispute resolution fora that are potentially accessible, and the evaluation of appropriateness, effectiveness and efficiency of different fora and their leading to justice. Accordingly, a study aimed at bringing out special features of ICSID and non-ICSID arbitration will assist in assessing which forum is more desirable for a particular dispute. It will further shed light on the identification of methods of better understanding various relationships in investor-State arbitration, providing direction for States to strike a balance between investors' rights and State sovereignty, and thereby promoting the viability of international investment arbitration in the long run.

4.2.2 Arbitration Industry

⁵⁰ In most cases international investment arbitration is filed by foreign investors against host States. So far there only one case has been commenced by a State, namely, *Gabon v. Société Serete S.A.* (ICSID Case No ARB/76/1). The case was based on an investment contract and was settled by the disputing parties. There is also one case in which a State initiated a counterclaim. In *Spyridon Roussalis v. Romania* (ICSID Case No ARB/06/1), Romania's counterclaim was admitted by the tribunal on the ground of the umbrella clause in the Romania-Greece BIT.

⁵¹ V. V. Veeder, 'The Investor's Choice of ICSID and Non-ICSID Arbitration Under Bilateral and Multilateral Treaties' in Arthur W. Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2009)* (Martinus Nijhoff Publishers, 2010) 5.

In the contemporary world of commerce, the landscape of international arbitration has been transformed, while still sustaining the enduring element of its intrinsic and long-established significance as a dispute settlement means. More precisely, it has been claimed that international arbitration is evolving into a veritable industry,⁵² and in such lucrative industry international arbitration is, to some extent, deemed a money-making machine.⁵³ As Organisation for Economic Co-operation and Development (hereinafter ‘OECD’) researchers observe, the international arbitration industry is led by entrepreneurial counsels advising potential clients about options for solving investment disputes between investors and States through international arbitration that would not have been considered only a few years ago.⁵⁴ The role of legal counsels in investor-State arbitration is undeniably measurable since investor-State arbitration has grown largely from the integral impulse of counsels to arbitration. In the light of the important role of counsels and their possible misconduct that virtually obstructs the legitimate protection of investment, *lex arbitri*⁵⁵ and counsels’ professional or disciplinary bar rules⁵⁶ have provided legal frameworks for counsels’ activities. However, there is still a possibility that counsels redirect their conducts in ways that are of no consequence for the efficiency of arbitration (eg, challenge of arbitrator or jurisdiction on knowingly unfounded grounds) or even have an overall detrimental impact on the arbitral process (eg, engagement in *ex parte* communications with arbitrators without appropriate appointments and knowingly making false statements). Furthermore, the different approaches taken by international tribunals in dealing with a challenge to counsel⁵⁷ may cause, exacerbate and prolong the conflicts of divergent interests in investment cases. Normally, investors’ choice between ICSID and non-ICSID

⁵² Nicolas C. Ulmer, ‘The Cost Conundrum’ (2010) 26(2) *Arb Intl* 221, 224 .

⁵³ Pia Eberhardt and Cecilia Olivet, *Profiting from Injustice* (Corporate Europe Observatory and the Transnational Institute, 2012) 15.

⁵⁴ David Gaukrodger and Kathryn Gordon, ‘Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community’, OECD Working Papers on International Investment, 2012/03, 7.

⁵⁵ For example, the most notable and original aspect of the 2014 LCIA Arbitration Rules is perhaps the Annex A. The Annex, entitled ‘General Guidelines for the Parties’ Legal Representatives’, is intended to promote the good and equal conduct of legal representatives.

⁵⁶ For example, The International Bar Association (hereinafter ‘IBA’)’s Guidelines on Party Representation were inspired by the principle that party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings. See the Preamble of the IBA Guidelines.

⁵⁷ The challenge to counsels has occurred in two ICSID cases: *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No ARB/05/24, Order Concerning the Participation of a Counsel, 6 May 2008, paras 26-28; *The Rompetrol Group N.V. v. Romania*, ICSID Case No ARB/06/3, Decision on the Participation of a Counsel, 14 January 2010, paras 16-22.

arbitration is reliant mainly on counsels' opinion, and therefore counsels' role in fostering investment protection in extraordinary times has to be taken into account when critically evaluating ICSID and non-ICSID arbitration.

4.3 Institutions: Competition and Legitimacy Crisis

4.3.1 Competing for Market Share of Disputes

The combination of international investment treaties, the ICSID Convention and investment treaty arbitration case law as a whole contributes, to a great extent, to the progress of investor-State dispute settlement mechanism. Considering that such progress leads to far greater certainty for foreign investors in dealing with investment with host States, which in turn incentivizes growth in international commerce,⁵⁸ It can be seen that investor-State arbitration cases will be increasingly initiated under the aegis of the ICSID Convention. Hence, it is widely acknowledged that ICSID arbitration is becoming a dominant vehicle for resolving international investment claims.

In addition to ICSID arbitration, the current use of *ad hoc* arbitration under the UNCITRAL Arbitration Rules in the context of investor-State arbitration has shown that the Rules are as viable as they work effectively in international commercial arbitration. Apart from UNCITRAL cases in which one of the disputing parties has no access to ICSID arbitration, there are a number of BITs that provide exclusively for UNCITRAL arbitration.⁵⁹ It appears that it would be easier in UNICTRAL arbitration to achieve a balance between the interests of third-parties and the public on the one hand, and the interests of disputing parties to have efficient dispute resolution by virtue of flexible

⁵⁸ Canada, for instance, has already been a favourable venue for international investors due to a large quantity of natural resources, but it will be more attractive since the accessibility of ICSID arbitration reduces foreign investors' risks and thus increases investors' confidence in investing in Canada.

⁵⁹ For example, art 8 of the Netherlands-Czech and Slovak BIT. See *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL; *Eastern Sugar B.V.(Netherlands) v. The Czech Republic*, SCC Case No 088/2004 (the case was administered by SCC and the 1976 UNCITRAL Rule was applied); *Invesmart v. Czech Republic*, UNCITRAL; *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL/PCA.

Under the UK-Argentina BIT, disputing parties might agree on ICSID or UNCITRAL arbitration, but failing such agreement after three months the parties shall be bound to bring their claims before UNCITRAL tribunals. See *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, Decision of Jurisdiction, 3 August 2006.

interpretations of the rules on the tribunals' power on the other.⁶⁰ More importantly, the UNCITRAL Secretariat has taken steps to keep the Rules up to date with challenges, making the Rules more suitable for solving investment disputes and, accordingly, remaining the Rules as an attractive alternative to ICSID arbitration.

The role of the SCC in investor-State arbitration has been either to manage investment cases under the SCC Arbitration Rules and the Rules for Expedited Arbitrations, or for the SCC to provide administrative services for cases (such as acting as appointing authority) under other arbitration rules. It is noteworthy that SCC arbitration is one of three options enumerated by the ECT for the settlement of disputes between investors and States, alongside with ICSID and UNCITRAL arbitration. At present, the SCC is the second most frequently chosen institution in resolving international investment disputes.⁶¹ The ICC, LCIA and other mainstream arbitration are rarely mentioned as an option in investment treaties, probably due to the stereotyping by the treaty drafters that these genres of non-ICSID arbitration are perceived as traditional commercial dispute resolution methods.⁶² Be that as it may, the ICC also deals with a number of contract-based⁶³ and treaty-based⁶⁴ investor-State arbitration cases. The ICC Arbitration Rules (2012) contain several provisions that are intended to facilitate and further the participation of States and State entities in ICC arbitration,⁶⁵ which may be able to encourage disputing parties to opt for

⁶⁰ Norbert Horn, 'Current Use of the UNCITRAL Arbitration Rules in the Context of Investment Arbitration' (2008) 24(4) *Arb Intl* 587.

⁶¹ As of October 2012, 121 known investment treaties incorporate a dispute resolution clause referring to arbitration under the SCC Rules or stipulating SCC as appointing authority. As the SCC Rules provide for procedures fully in line with efficient arbitration practices, since 1993 the SCC has seen close to 50 investment arbitration cases. See Nils Eliasson, 'Stockholm as a Forum for Investment Arbitration' in Ulf Franke, *et al* (eds), *International Arbitration in Sweden: A Practitioner's Guide* (Kluwer Law International, 2013) 25; Annette Magnusson, 'The SCC Experience of Investment Arbitration Under UNCITRAL Rules, Euro-Arab Investor-State Dispute Settlement: Recent Developments and Future Perspectives', Cairo, October 2012, 3.

⁶² Alexandra Diehl, *The Core Standard of International Investment Protection* (Kluwer Law International, 2012) 217.

⁶³ There are at least six published ICC cases. Eg, *Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. Maharashtra Power Development Corporation Limited, Maharashtra State Electricity Board and the State of Maharashtra*, ICC Case No 12913/MS (Dabhol Power Project), Final Award, 27 April 2005.

⁶⁴ For example, *East Cement for Investment Company v. Poland*, ICC Arbitration Case No 16509/JHN (based on Jordan-Poland BIT), Partial Award, 26 August 2011; *Kaliningrad Region v. Lithuania*, ICC (based on Lithuania-Russian Federation BIT), Judgment of the Paris Court of Appeal on application to set aside award, 18 November 2010.

⁶⁵ ICC Arbitration Commission Report on Arbitration Involving States and State Entities under the ICC Rules of Arbitration, ICC Publication 862-0 ENG, 2014, paras 19-23.

the ICC as an alternative institution for investment dispute resolution. In addition, the LCIA, the Cairo Regional Centre for International Commercial Arbitration (hereinafter ‘CRCICA’) and other arbitration institutions handle, on occasion and marginally, investor-State arbitration cases.⁶⁶

In brief, notwithstanding the prevailing position of ICSID arbitration, it has become evident that there will be more competition among different investment fora in the future, in particular considering that most investment treaties do not provide for a hierarchy of fora and thus claimants dispense with a duty to exhaust a particular forum before they can resort to the remaining fora provided in treaties (see Figure III). Besides, as arbitral proceedings conducted under the SCC, ICC, LCIA and other comparable institutional arbitration rules are more confidential, State aiming at establishing a higher degree of confidentiality in resolving contract-based disputes possibly consider opting for non-ICSID arbitration. As the number of UNCITRAL, SCC and other non-ICSID investor-State arbitration cases is expected to continue to experience a steady growth, an assessment of the divergences between ICSID and non-ICSID arbitration and their implication for arbitration institutions is by no means negligible.

⁶⁶ For example, *TS Investment Corp. v. Republic of Armenia*, LCIA (based on U.S.-Armenia BIT), Award, 1 August 2011 (not public).

CRCICA’s investor-State arbitration cases include: the first case filed by a Libyan public company for foreign investment against the Syrian Ministry (Case No112/1998), the second case filed by an Egyptian company against Lebanon (Case No165/2000) and the third case on the basis of Libya-Morocco BIT (Case No 816/2012). See Mohamed Abdel Raouf, ‘UNCITRAL Arbitration Rules and the Settlement of Investment Disputes: the Experience of CRCICA’, Cairo, October 2012.

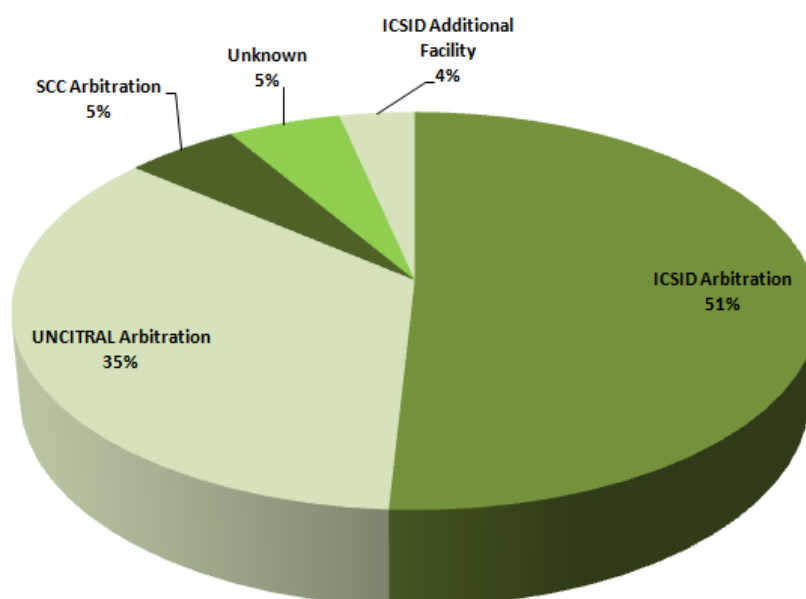


Figure III: Forum/Rules Distribution of New Treaty-based Investor-State Arbitration Cases in 2013

4.4.2 Challenge of Legitimacy

Though international investment law is still in the infancy stage, it has to experience growing pains as investor-State arbitration faces a wide array of challenges of legitimacy,⁶⁷ which is even perceived as a crisis of legitimacy.⁶⁸ Some commentators have questioned whether a backlash against the current foreign investment regime is underway.⁶⁹ Generally, legitimacy is a prerequisite for the existence of international institutions since States can withdraw from an institution if it is deemed to be illegitimate and then a considerable amount of withdrawals would consequently give rise to the loss of the institution's public acceptance. The widespread absence of the perception of legitimacy not only affects the functioning of the institution, but also pushes the institution to the brink of rejection and

⁶⁷ See, eg, Charles T. Kotuby Jr and Luke A. Sobota, 'Practical Suggestions to Promote the Legitimacy and Vitality of International Investment Arbitration' (2013) 28(2) ICSID Rev-Foreign Investment LJ 454; Sergio Puig, 'Recasting ICSID's Legitimacy Debate: Towards a Goal-Based Empirical Agenda' (2013) 36 Fordham Intl LJ 465.

⁶⁸ See, eg, Charles N. Brower, 'A Crisis of Legitimacy' (7 October 2002) NAT'L LJ, B9; Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 Fordham L Rev 1521.

⁶⁹ Michael Waibel, *et al*, 'The Backlash Against Investment Arbitration: Perceptions and Reality' in Michael Waibel, *et al* (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010) xxxvii - li.

failure.⁷⁰ Franck defined legitimacy as ‘a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively’.⁷¹ Following the question ‘why do nations obey rules’, Franck proposed a hypothetical answer to the question, namely, ‘because they perceive the rule and its institutional penumbra to have a high degree of legitimacy’.⁷² In developing the hypothesis, Franck distilled four objective indicators of legitimacy for international rule-making institutions, identified as determinacy, symbolic validation, coherence and adherence.⁷³ Notwithstanding the criticism,⁷⁴ Franck’s legitimacy theory was swiftly applied to explain modern tribunals’ approaches to the international law of expropriation.⁷⁵ The theory provides a framework for assessing the legitimacy of investor-State arbitration as an international system of rules. The application of the theory to investor-State arbitration will assist in identifying the specific ways in which challenges emerging in contemporary investment law may actually deplete the legitimacy of invest-State arbitration and further in examining the differences between ICSID and non-ICSID arbitration in response to the challenges.

Adapting the theory to the context of investor-State arbitration,⁷⁶ above all, as the rule-making of international arbitral tribunals is taken from their decisions by which investment participants can scrutinize the legal rationale and adjust their conducts to conform the standards spelt out by the tribunals, it is critically important that investment arbitral processes be transparent to some extent. In fact, the scarcity of appropriate transparency is one of the main challenges of legitimacy of investor-State arbitration, especially when the

⁷⁰ Charles H. Brower, II, ‘Structure, Legitimacy, and NAFTA’s Investment Chapter’ (2003) 36 Vand J Transnatl L 37, 51.

⁷¹ Thomas M. Franck, *The Power of Legitimacy Among Nations* (OUP, 1990) 24.

⁷² *Ibid*, 25.

⁷³ *Ibid*, 49.

⁷⁴ Alvarez argued that Franck’s legitimacy theory was not based on mathematical proof or certainty but only postulated a hypothesis. The theory had serious shortcomings as an accurate description of reality, a predictor of likely compliance, and a prescription for the rule-maker. See Jose E. Alvarez, ‘Quest for Legitimacy: An Examination of the Power of Legitimacy Among Nations by Thomas M. Franck’ (1991-1992) 4 NYU J Intl L & Pol 199, 228.

⁷⁵ Patrick M. Norton, ‘Law of the Future or a Law of the Past - Modern Tribunals and the International Law of Expropriation’ (1991) 85 Am J Intl L 474, 499-502.

⁷⁶ As to symbolic validation, investor-State arbitration not only appears to be symbolically authoritative but also substantially adjudicates States’ actions that cause damages to investors and, as elucidated above, influences States’ future policies. As compared to ICSID’s relatively short time, the pedigree of non-ICSID arbitration is nobler due to its long history. However, this is quite inconsequential in examining the divergence of ICSID and non-ICSID arbitration.

proceedings involve environmental protection and labour standards.⁷⁷ The differences regarding transparency between ICSID and non-ICSID arbitration relate not only to discrepant degrees of transparency in arbitral proceedings, but also to different competitive strategies adopted by arbitration institutions in response to the challenge of transparency. Diverse responses are primarily determined by the demand of major users of arbitration rules, but they reflect, by and large, the suitability of institutions' roles in investor-State arbitration. Second, coherence is a focal concern in both ICSID and non-ICSID arbitration, but arbitral awards rendered under the ICSID Convention can be published with the consent of the disputing parties, thereby implying a possibility of developing coherent case law on the ICSID arbitration. However, the development of coherent jurisprudence in non-ICSID arbitration seems to be nearly unachievable due to a variety of practical grounds, especially those related to the confidentiality of procedures, unpublished awards and diverse contending applicable laws (such as *lex mercatoria* and mandatory national rules). Third, diverse secondary rules as well as occasionally disparate approaches to adherence in ICSID and non-ICSID arbitration generate different levels of severity in challenging the legitimacy of ICSID and non-ICSID arbitration. In particular, investor-State arbitration has been reproved for failing to ensure the rule of law for the final determination on the basis of independent and impartial adjudicative processes due to its asymmetrical structure of claims and its perceived systemic bias in favour of foreign investors.⁷⁸

A critical evaluation of ICSID and non-ICSID arbitration based on the legitimacy analysis is of enormous importance since, on the whole, much of the so-called backlash against investor-State arbitration has been claimed to be directed against ICSID arbitration⁷⁹ and,

⁷⁷ Rainer Hofmann and Christian J. Tams, 'Introduction: The International Convention on the Settlement of Investment Disputes (ICSID) - Taking Stock after 40 Years' in Rainer Hofmann, Christian J. Tams (eds), *The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock after 40 Years* (Nomos, 2007) 10.

⁷⁸ See Productivity Commission, 'Bilateral and Regional Trade Agreements', Research Report, Canberra, 2010, 273; Susan D. Franck, 'Empirically Evaluating Claims about Investment Treaty Arbitration' (2007-2008) 86 NCL Rev 1; Susan D. Franck, 'Development and Outcomes of Investment Treaty' (2009) 50 Harv Intl LJ 435; Kevin P. Gallagher & Elen Shrestha, 'Investment Treaty Arbitration and Developing Countries: A Re-Appraisal', Global Development and Environment Institute, Working Paper No 11-01, 2011; Thomas Schultz & Cédric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study', King's College London Law School Research Paper No 2014-16; UNCTAD, 'Latest Developments in Investor-State Dispute Settlement', IIA Issues Note, N 1, 2014, 10.

⁷⁹ Stephen Jagusch & Jeffrey Sullivan, 'A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern' in Michael Waibel, *et al* (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality*, 80. The contentions of the legitimacy crisis in investor-State arbitration come mainly from inconsistency, systematic bias in favour of investors, and the reduced scope for host State

accordingly, the perception of less legitimate ICSID arbitration will push certain foreign investors towards non-ICSID arbitration. Although a number of scholars have observed that it is ‘an exaggeration to speak of an acute crisis or a backlash’ against investor-State arbitration despite several shortcomings that have emerged over the years⁸⁰ and some even argue that investor-State arbitration is generally ‘a legitimate mechanism for structuring and stabilizing international investment relations’,⁸¹ the critique of legitimacy of investor-State arbitration and the reforms presented by those commentators shall be seriously considered by arbitration institutions in view of the fact that arbitration institutions’ reaction and response to the challenges of legitimacy would unequivocally influence their public acceptance by States and investors and have the potential to further affect their functioning and viability in the future arbitration community.

4.4 Third-Parties and the Public: A Perspective of Sustainable Development

As public service sectors in host States are more often than not involved in investment disputes, critical public interests are basically relevant and possibly applicable to investor-State arbitration cases. In general, public interests can be moderate factors that tribunals take into account in adjudicating investment cases if they are legitimate and especially related to human rights,⁸² the environment⁸³ and cultural heritage.⁸⁴ Though public interests seem to be peripheral in a particular case, the interplay between investors’ rights and public interests in investor-State arbitration can have a profound impact. In fact, public interests have aroused concern about a balanced approach between the pursuit of purely economic growth objectives and the need for the protection of people and the

regulation. However, given that most non-ICSID arbitral awards are unpublished prior to the implementation of the UNCITRAL’s transparency rules, much of the attack of legitimacy of investor-State arbitration is thus perceivably targeted at ICSID arbitration.

⁸⁰ Christoph Schreuer, ‘The Future of Investment Arbitration’ in Mahnoush H. Arsanjani, *et al* (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers, 2010) 803.

⁸¹ Charles N. Brower and Stephan W. Schil, ‘Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law’ (2008-2009) 9 *Chi J Intl L* 471, 498.

⁸² For example, *Compañía de Aguas del Aconquija, SA (AdA) & Compagnie Générale des Eaux v. Argentina*, ICSID Case No ARB/97/3, Award, 21 November 2000.

⁸³ For example, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No 2009-04, Notice of Arbitration, 26 May 2008.

⁸⁴ For example, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No ARB/84/3, Award of the Tribunal, 20 May 1992, para 190.

environment.⁸⁵ In terms of the divergence of ICSID and non-ICSID arbitration, sustainable development⁸⁶ concerns are remarkable.

In practice, sustainable development issues have been brought before investor-State arbitral tribunals⁸⁷ and make two primary enquiries into the potential protection in ICSID and non-ICSID arbitration. The first enquiry relates to the procedural protection. On the one hand, it is important that arbitral procedures be transparent and allow for public participation in the light of the momentous impact sustainable development can have on the public in investor-State arbitration. Normally, non-governmental organizations represent a broad spectrum of public interests and thus they have cardinal functions to shape the formulation of investment treaties and the development of investment dispute resolution.⁸⁸ On the other hand, third-parties participation involves certain risks, given that the need of disputing parties and the protection of sensitive information serve as the rationale for the *in camera* proceedings. Such ambivalence leads to different approaches to *amicus curiae* in ICSID and non-ICSID arbitration. The ICSID Arbitration Rules were amended in 2006 to grant tribunals more authority to determine whether third-parties can make written submissions as *amicus curiae*.⁸⁹ The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration go further than the ICSID Rules since they not only provide that UNCITRAL tribunals have the discretion to allow third-party

⁸⁵ UNCTAD, 'Investment Policy Framework for Sustainable Development', UNCTAD/WEB/DIAE/PCB/2012/6, 12 June 2012, 8.

⁸⁶ The United Nations (hereinafter 'UN') Millennium Declaration emphasizes the three pillars of sustainable development: (i) economic development, (ii) social development and (iii) environmental protection. See UN General Assembly Resolution A/RES/55/2.

⁸⁷ Chester Brown, 'Bringing Sustainable Development Issues before Investment Treaty Tribunals' in Marie-Claire Cordonier Segger, *et al* (eds), *Sustainable Development in World Investment Law* (Kluwer Law International, 2011) 175-88.

⁸⁸ The first *amicus curiae* submission under the amended ICSID Arbitration Rules was granted in *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* to five non-government organizations (see ICSID Case No ARB/05/22, Procedural Order No 6, 25 April 2007). Four human rights groups were granted permission in providing useful information and accompanying submissions to the tribunal in *Piero Foresti, Laura de Carli and others v. Republic of South Africa* (ICSID Case No ARB (AF)/07/1, Procedural Order, 5 September 2009). This was the first time an ICSID tribunal under the Additional Facility Rules required that key legal filings be disclosed to a set of third-parties. However, not all third-party' applications to participation as *amicus curiae* will be granted. The Spain-U.S. Chamber of Commerce has recently been denied permission to file a written submission in an annulment procedure in *Iberdrola Energía, S.A. v. Republic of Guatemala* (ICSID Case No ARB/09/5, Decision of the *Ad Hoc* Committee on Non-Disputing Party's Application to File a Written Submission, 12 February 2014).

⁸⁹ R 37(2) of the ICSID Arbitration Rules.

submissions⁹⁰ and that hearings shall be public,⁹¹ but also dispense tribunals' duty to request disputing parties' consent for third-parties' participation. Conversely, it appears that potentially interested third-parties are less likely to be aware of pending SCC and ICC arbitral proceedings due to the traditional opacity of procedures, and will therefore probably be unable to make submissions.

The second enquiry concentrates on the substantive protection. It is worth noting that investor-State arbitration is not intrinsically biased towards sustainable development or investment protection, and arbitral tribunals shall be essentially neutral and impartial. However, the rules on treaty interpretation under the Vienna Convention on the Law of Treaties (1969) provide arbitral tribunals with potential to reconcile investment protection and sustainable development concerns.⁹² Without prejudice to their independence, neutrality and impartiality, ICSID arbitral tribunals need to be intensely considerate of one of the indispensable components of sustainable development - economic development.⁹³ Since the preamble of the ICSID Convention provides that 'considering the need for international cooperation for economic development and the role of private international investment therein', the Centre was established to provide facilities for arbitration of investment disputes. Accordingly, one of the foremost purposes of the ICSID Convention is the promotion of private international investment and economic development. ICSID arbitration thus inherently possesses a distinguishing feature to foster economic development through providing legal certainty and further creating a favourable investment

⁹⁰ Arts 4 & 5 of the UNCITRAL Transparency Rules.

⁹¹ *Ibid*, art 6.

⁹² First, art 31(1) & (3)(c) of the Vienna Convention stipulates that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty 'in their context and in the light of its object and purpose', and there shall be taken into account any relevant rules of international law applicable in the relations between parties. Second, though investment treaties primarily aim at investment protection, the object and purpose of most investment treaties are not one-dimensional in view of the fact that the preamble, substantive provisions or annexes of investment treaties frequently refer to 'economic development' or other term which may be understood as long-term or sustainable development. Therefore, the Vienna Convention has the potential to strike a balance between investment protection and sustainable development, and such potential may be used by arbitral tribunals. See Katharina Berner, 'Reconciling Investment Protection and Sustainable Development - A Pledge for an Interpretive U-Turn', IIAs Conference, Berlin, October 2013, 8-14.

⁹³ In a broader and flexible context, the concept of 'economic development', if it were to serve as a yardstick for identification of an eligible investment under the ICSID Convention, should not be restricted to measurable contributions to GDP but should include development of human potential, political and social development and local and global environment protection (see Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 134). In this sense, the concept of 'economic development' is quite similar to 'sustainable development' under the United Nations Millennium Declaration.

climate to stimulate larger investment inflows.⁹⁴ Aside from the micro impact, the economic development consideration is also applied to ICSID tribunals' adjudication, and one notable instance is that pursuant to the so-called 'Salini test', a significant contribution to the economic development of host States is one of five criteria indicative of the existence of a qualified investment under the ICSID Convention.⁹⁵ On the contrary, the concern of economic development is commonly absent in non-ICSID arbitration rules or regulations, and thus arbitrators are not necessarily guardians of the economic development of host States. Instead, it seems that non-ICSID arbitral tribunals are simply charged with a commission to resolve particular disputes *inter partes* without contemplating the wider implication on the economic and even sustainable development.

Balanced approaches to scrutinizing the relationship between sustainable development and investment protection are still insufficiently developed, and it remains arduous to assess whether bringing sustainable development issues before investor-State arbitral tribunals would advance or impair the international investment regime, in particular considering that the antipode of *amicus curiae* is additional time and cost which may be not what disputing parties expect. Be that as it may, the diverse extent to which third-parties can raise sustainable development concerns in ICSID and non-ICSID arbitration, and the possibility of ICSID tribunals taking into account sustainable development issues when adjudicating investment disputes would, of course, have significant implications for the sovereign choice between ICSID and non-ICSID arbitration during investment treaty negotiations.

⁹⁴ As the ICSID tribunal in *Amco Asia Corporation and others v. Republic of Indonesia* stated, to protect investment was to protect the general interest of development and of developing countries. See ICSID Case No ARB/81/1, Award, 20 November 1984, para 249.

⁹⁵ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 31 July 2001, para 52.

Chapter I The Arbitral Jurisdiction of Tribunals

The jurisdictional requirements of international arbitration are ordinarily identified as *ratione personae*, *ratione materiae* and *ratione temporis*. The ICSID Convention has a specific requirement of *ratione personae*, merely accepting disputes 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.⁹⁶ Such specific requirement, however, is insignificant in evaluating ICSID and non-ICSID arbitration because all States in question are contracting States to the Convention and the fact that an investor is indeed a national of another contracting State may be uncontested between disputing parties.⁹⁷ The requirement of *ratione temporis* is applied equally to both ICSID and non-ICSID arbitration. Accordingly, only the requirement of *ratione materiae* will be examined in this chapter. Jurisdictional requirements can be satisfied in traditional non-ICSID arbitration, provided that disputing parties with capacity and powers reach a valid arbitration agreement in which the disputes fall within certain categories and, more importantly, the disputes are *per se* arbitrable in nature. Such criteria should, however, be additionally subject to certain requirements contained in the ICSID Convention and potentially applicable investment treaties when examining whether an investment is eligible for ICSID arbitration. In addition to the external jurisdictional limits, the incompatibility of ICSID arbitration with other dispute resolution methods and ICSID's exclusion of remedies from national courts seem to be less efficient at first sight as compared to the compatibility of non-ICSID arbitration with conciliation and national authorities' support. This notwithstanding, the recent decades have seen an expansion of ICSID jurisdiction by virtue of a diversity of techniques where the subject matter is deployed as a means to expand the ambit of ICSID jurisdiction to such an extent that the interpretation of the terminology of investment is virtually sufficient for ICSID tribunals to exercise their jurisdiction over a wide range of assets and activities. Further, the self-contained system also provides a number of approaches that are conducive to the efficiency and effectiveness of arbitral proceedings at the jurisdictional stage.

⁹⁶ Art 25(1), (2) and (3) of the ICSID Convention.

⁹⁷ Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 163). The ICSID Convention does not set objective requirements of *ratione personae*. In case that incorporation has several possible corporate nationalities, ICSID tribunals have uniformly adopted the test of incorporation or seat rather than control (see *ibid*, 282).

1 Subject Matter Covered by Parties' Consent

1.1 Broad Scope of Subject Matter in Non-ICSID Arbitration

The subject matter that disputing parties are entitled to consent to under the ICSID Convention or non-ICSID arbitration rules can be elucidated in two aspects, namely contract-based and treaty-based investment arbitration. In contract-based investor-State arbitration, the scope of the subject matter qualified in non-ICSID arbitration can be extremely broad mainly in that disputing parties are able to reach an arbitration agreement in which any dispute related to investment (including a dispute that occurred prior to investment or arising indirectly out of the investment) can be practically submitted to non-ICSID arbitral tribunals on the basis of a acknowledged comprehensive interpretation of the notion of 'commerciality'.⁹⁸ Notwithstanding the commercial reservation made by a number of States under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter 'New York Convention'),⁹⁹ national courts are likely to interpret the concept of 'commercial' broadly in real practice.¹⁰⁰ Thus, investors dispense with consideration in advance as to whether their claims fall within the notion of 'commercial' if their case has reached the crucial stage of the enforcement proceeding.

⁹⁸ Non-ICSID arbitration rules ordinarily provide for extraordinarily broad accesses to jurisdiction. An UNCITRAL model clause, eg, covers 'any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof' (see Model Arbitration Clause, annex of art 1 of the UNCITRAL Arbitration Rules), and the diction has been construed to cover all differences and claims arising from a given relationship, regardless of a contractual and tortious or other non-contractual relationship. As the most recent worldwide instrument on arbitration, the UNCITRAL Model Law also defines a broad term of 'commercial' in a footnote, covering matters arising from all relationships of a commercial nature which apparently include investment.

In addition, when the Working Group II worked on the revision of the UNCITRAL Rules, one of the primary goals was to design specific provisions to adapt the Rules to investor-State dispute resolution (See Report of the Working Group on Arbitration and Conciliation on the work of its forty-fifth session, A/CN.9/614, paras 17-19).

⁹⁹ Art I(3) of the New York Convention.

¹⁰⁰ For example, in *United Mexican State v. Metalclad Corp.* (89 B.C.L.R.3d 359) the court stated that the term 'commercial' should be given a wide interpretation so as to cover matters arising from all relations of a commercial nature (see Gary Born, *International Commercial Arbitration*, 271). India used to interpret the term 'commercial' narrowly in some cases (see Julian D. M. Lew, *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) 56). However, in order to keep up with the rise of international commercial arbitration as an effective means of dispute resolution, the Supreme Court in *Comed Chemicals Limited v. C N Ramchand* provided expansive scope to the term 'commercial' (Gautam Bhatia and Venugopal Mahapatra, 'Supreme Court on the 'Commercial' Clause under the Arbitration Act', available at Indiacorplaw blog <<http://indiacorplaw.blogspot.co.uk/2009/01/supreme-court-on-commercial-clause.html>> accessed 15 July 2014).

Consent expressed in concession agreements concluded by investors and States referring to ICSID arbitration, however, is on a conditional basis. Only if the condition precedent is validly fulfilled will ICSID arbitral tribunals have jurisdiction over the disputes. The condition precedent is commonly known as a 'dual test',¹⁰¹ which underpins not only the parties' mutual consent but also the requirements under the ICSID Convention that ICSID jurisdiction just extends to legal disputes arising directly out of an investment.¹⁰² In addition, the scope of ICSID jurisdiction can be further restricted since contracting State can notify the Centre of 'the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre'.¹⁰³ Despite the controversy surrounding the effect of such notification, it is unambiguous that the subject matters in ICSID arbitration are much narrower than those in non-ICSID arbitration. Some observers even assert that ICSID arbitration should be somehow considered 'international commercial arbitration',¹⁰⁴ given that it frequently involves commercial disputes arising

¹⁰¹ Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 117.

¹⁰² Art 25(1) of the ICSID Convention.

¹⁰³ Art 25(4) of the ICSID Convention. China, eg, ratified the Convention with a declaration stating that the Chinese government would only consider submitting to the Centre investment disputes over compensation resulting from expropriation and nationalization (Notifications Concerning Classes of Disputes Considered Suitable or Unsuitable for Submission to the Centre, ICSID/8-D).

The effect of the declaration under art 25(4) is still under debate. Commentators denied the effect based on the following arguments: (i) A reservation was unnecessary because no State accepted the ICSID jurisdiction with the ratification. (ii) Art 25(4) stipulated that a declaration made under art 25(4) and its subsequent notification should not constitute the consent required by art 25(1), which underlined the fact that even if States declared that they accepted ICSID jurisdiction for certain disputes under art 25(4), such a declaration would be without legal effects. By the same token, a contrario (a declaration indicating that a State would not accept ICSID jurisdiction was just as well without legal effects) would be tenable (see Monika C. E. Heymann, 'International Law and the Settlement of Investment Disputes Relating to China' (2008) 11 J Intl Econ L 507, 517-18). Certain aspects of the draft history of the ICSID Convention also figured that a statement excluding certain classes of disputes from consideration would not constitute a reservation to the Convention (See International Bank for Reconstruction and Development, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) 1 ICSID Rep 25, para 31). Therefore, the notification did not amount to a reservation to the Convention, and it was merely for the purposes of information and designed to avoid misunderstandings (Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 343-44).

Based on the arguments, several scholars pointed out that investors could submit all kinds of disputes directly out of investment against China to ICSID (see Stephan W. Schill, 'Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China' (2007) 15 Cardozo J Intl & Comp L 73, fn 65; Monika C. E. Heymann, 'International Law and the Settlement of Investment Disputes Relating to China', 518).

¹⁰⁴ Normally, 'international commercial arbitration' refers to arbitration conducted under the aegis of a number of major arbitration institutions and rule-making bodies such as the UNCITRAL, ICC, SCC and LCIA.

out of international contracts between States and foreign private undertakings,¹⁰⁵ despite the fact that ICSID arbitration as a mechanism designed for settlement of investment-related dispute between investors and States is not subject to the ordinary rules of international arbitration.

The other category focuses on treaty-based investor-State arbitration where consent given by disputing parties has to satisfy the requirements set forth in relevant treaties. The past decades have seen a transition from States' contractual consent to treaty-based consent.¹⁰⁶ Taking ICSID arbitration for example, the era in which ICSID jurisdiction was almost exclusively based on State's consent manifested in contractual agreements has passed.¹⁰⁷ At present, approximately 60 per cent of cases rely on State's consent to ICSID jurisdiction through BITs, and an additional 11 per cent of cases fall under ICSID jurisdiction by virtue of NAFTA.¹⁰⁸ Though consent manifested by parties in both ICSID and non-ICSID arbitration is subject to requirements under applicable investment treaties in the same way, there is a possibility that the subject matter in treaty-based non-ICSID arbitration is wider than that in ICSID arbitration in the event that the notion of 'investment' contained in applicable treaties is not narrower than that under the ICSID Convention.

In a nutshell, it has become evident that the subject matter covered by both contract-based and treaty-based non-ICSID arbitration can be remarkably broader. In terms of efficiency of the settlement of investment disputes, it appears that the extensive ambit of jurisdiction

¹⁰⁵ See Emmanuel Gaillard, *et al* (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, 42. In the meantime the authors also recognized that ICSID arbitration did contain specific features especially as regards questions of jurisdiction and procedure.

¹⁰⁶ It is worth mentioning that the total number of newly negotiated BITs (which are known as 'one size fits all') has declined in recent years, despite some recently signed BITs (such as the Colombia-Turkey BIT that was signed in July 2014). Meanwhile, investment protection is integrated in more comprehensive treaties among a number of States or organizations. Eg, the EU is negotiating the Transatlantic Trade and Investment Partnership (hereinafter 'TTIP') with U.S. and the Comprehensive Economic and Trade Agreement (hereinafter 'CETA') with Canada. These treaties present more balanced approaches to recalibrating rights and obligations of both investors and States in particular at the post-establishment stage (such as gaining better access to public markets).

¹⁰⁷ Undeniably, dispute settlement clause referring to ICSID arbitration could be found in a number of concession agreements during the first few decades of ICSID, but claims arising out of such direct agreement just generated a relative trickle of ICSID cases from 1965 to 1995 (see Timothy G. Nelson, "'History Ain't Changed": Why Investor-State Arbitration Will Survive the "New Revolution"' in Michael Waibel, *et al* (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality*, 566-67, 71).

¹⁰⁸ Kathleen S. McArthur, Pablo A. Ormachea, 'International Investor-State Arbitration: An Empirical Analysis of ICSID Decisions on Jurisdiction' (2009) 28 *Rev Litig* 559, 573.

in non-ICSID arbitration is more favourable, especially when dealing with cases involving a variety of interrelated claims. It is noteworthy that transnational investments in natural resources and large infrastructure projects in developing countries are tremendously complex, and parts of disputes such as financing, banking, insurance, consulting or any industrial or business cooperation might occur prior to the investment or arise indirectly out of the investment. Apparently, it would indubitably save time and cost if all relevant disputes related to the whole transaction could be resolved within a proper, single instrument.

1.2 Expansionary Trend in ICSID Jurisdiction

1.2.1 Expansion in Investment Treaties

In the most recent decades an expansionary trend in ICSID jurisdiction has been gradually identified in which ICSID jurisdiction expands by virtue of a diversity of techniques such as an expansive interpretation of the concept ‘foreign investors’ and a reference to the most-favoured-nation clause or umbrella clause.¹⁰⁹ The subject matter is also being deployed as a means to expand the ambit of ICSID jurisdiction. It is notable that contracting States to investment treaties, more often than not, seek to liberalize investment regulations for the purpose of investment protection and, consequently, conclude in treaties a rather broad and comprehensive definition of ‘investment’. Furthermore, it seems that ICSID tribunals expand, more or less, the scope of jurisdictions in practice, albeit with different approaches to interpreting the notion of ‘investment’ under article 25 of the ICSID Convention.

As compared to early international investment treaties which simplistically adopted either an asset-based definition of ‘investment’ in case of a capital movement-oriented instrument or a generally broad definition in case of a protection-oriented instrument,¹¹⁰ the distinction between the two methods becomes increasingly blurred in the era of investment liberalization. The recent BITs between developed and developing States, which have

¹⁰⁹ M. Sornarajah, ‘A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration’ in Karl P. Sauvant, *et al* (eds), *Appeals Mechanism in International Investment Disputes* (OUP, 2008) 40.

¹¹⁰ UNCTAD, ‘Scope and Definition’, UNCTAD/ITE/IIT/11 (vol II), 1999, 15.

become essential components of the move towards liberalization,¹¹¹ appear to move in the direction of greater investment promotion so as to protect various types of cross-border activities related to investment by virtue of a wide and comprehensive definition of ‘investment’. Such expansionary definition of ‘investment’ in investment treaties can be identified in at least three aspects. First, as to the approach followed in defining investment, textual techniques have been employed to provide an open-ended and all-inclusive definition: (i) the traditional asset-based definition stipulated in BITs almost presents a concept ample enough to cover ‘every kind of asset’ owned or controlled by investors, virtually without limitation. A number of BITs even adopt the wording ‘every kind of economic interest’, which is likely wider.¹¹² (ii) In order to cover emerging types of investment, rather than conceptualizing an investment, a number of treaties take a ‘tautological’ or ‘circular’ method to emphasize the features of investment.¹¹³ (iii) Numerous treaties opt for an open-ended definition by adopting flexible languages such as ‘includes, but it is not limited to’, and ‘includes, in particular, though not exclusively’,¹¹⁴ thereby leaving a considerable degree of discretion in interpreting the diction of investment.

Second, as to the form of investment, the definition of ‘investment’ has been expanded to cover a significantly widespread range of forms that investment could take, including, *inter alia*, (i) indirect investment: at present, indirect investment such as bonds, debentures and long-term notes has been encompassed by the U.S. Model BIT (2012);¹¹⁵ (ii) certain types of contractual claims: several contractual rights (eg, those stemming from service agreements) are also regarded as investment, though the inclusion of contractual rights in the concept of investment seems to enter into the gray area between investment and

¹¹¹ Kenneth J. Vandeveld, ‘Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties’ (1998) 36 Colum J Transnatl L 501, 502-03.

¹¹² UNCTAD, ‘Scope and Definition’, UNCTAD/DIAE/IA/2010/2, 2011, 24.

¹¹³ UNCTAD, ‘Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking’, UNCTAD/ITE/IIT/2006/5, 2007, 10. One example is the definition in U.S.-Panama BIT which provides that investment means ‘every kind of investment, owned or controlled directly or indirectly, including equity, debt, and service and investment contracts, and includes’ (see art 1(d) of the U.S.-Panama BIT (2000)). Although the definition has been revised since 2004, it still focuses on the characteristics of the investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit or the assumption of risk (see art 1 of the U.S. Model BIT (2004), the U.S.-Uruguay BIT (2005), and the U.S.-Rwanda BIT (2008)).

¹¹⁴ For example, art 1 of China-Germany BIT (2003).

¹¹⁵ Art 1 of the U.S. Model BIT(2012).

trade;¹¹⁶ (iii) transactions having economic value: indirectly controlled investments have been covered by numerous BITs,¹¹⁷ by virtue of which transnational corporations are able to manipulate the common corporate devices of intermediate holding companies or special investment holding companies organized under the laws of a third State.¹¹⁸

Third, as to the scope of protection, an increasing number of treaties not only protect actual investment and greenfield investment in the traditional sense, but also cover ‘activities associated with investments’ and ‘pre-existing investment’. As far as activities associated with investments are concerned, the China-Australia BIT stipulates that activities associated with investments include a variety of business operations,¹¹⁹ which practically cover every activity related to investment. Pre-existing investment is protected under the U.S. Model BIT since it provides that a contracting State, State enterprise, or a national or an enterprise of a contracting State that attempts to make an investment can be deemed an ‘investor of a party’.¹²⁰

1.2.2 Expansion in ICSID Arbitration Practice

The *travaux préparatoires* of the ICSID Convention has indicated that in exchange for wide-open jurisdiction over any plausible asset or activity, a definition of ‘investment’ was absent in the Convention and relevant rights had been granted to contracting States to unilaterally tailor the definition of ‘investment’ eligible for protection through notification

¹¹⁶ Given that the distinction between transactions which might be regarded as ‘trade in services’ and those that might be considered as ‘investment in services’ is hardly obvious, there is a danger of extending the investment disputes to contractual claims. The inclusion of contractual claims in the BITs could convert, to a large extent, the government regulatory action affecting the validity of private contracts into an expropriation. It would therefore depart from the principle of exclusion of ordinary commercial transactions from investor-State disputes settlement mechanism. See UNCTAD, ‘Scope and Definition’, 2011, 9-10.

¹¹⁷ It can be achieved through two approaches: the first approach which is adopted in French and Dutch BITs uses a special definition of ‘investor’ or ‘national’ that contains companies controlled by their citizens or by companies organized; the other approach achieves the same result by defining ‘investment’ as ‘every asset that an investor owns or controls, directly or indirectly’. See Barton Legum, ‘Defining Investment and Investor: Who is Entitled to Claim?’ (2006) 22(4) *Arb Intl* 521, 523-24.

¹¹⁸ *Ibid.*

¹¹⁹ According to the China-Australia BIT, activities associated with investments include the ‘organisation, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including industrial and intellectual property rights; and the borrowing of funds, the purchase and issuance of equity shares, and the purchase and sale of foreign exchange’ (see art I.1(f) of the China-Australia BIT (1988)).

¹²⁰ Art 1 of the U.S. Model BIT (2012).

under article 25(4).¹²¹ The lack of attempt made to define the concept ‘investment’ also leaves considerable discretion to ICSID arbitral tribunals. It is entirely possible that a liberal definition is adopted by tribunals so as to open the door of the Centre’s jurisdiction to a wide range of investment.¹²² Though tribunals should be neutral, they can embrace a liberal principle favouring investment protection on the basis of the expansion of investment in relevant investment treaties and the importance of private international investment in the cooperation for economic development which is recognized in the Preamble of the Convention. Most ICSID tribunals, if not all, are *de facto* in favour of broad investment protection in practice.

In the first three decades ICSID jurisdiction was seldom objected to on the ground that a dispute arose indirectly out of investment. *Fedax N.V. v. Republic of Venezuela* was the critical turning point where Venezuela argued that promissory notes held by Fedax N.V. failed to qualify as an ‘investment’ because the transaction did not amount to a direct foreign investment involving ‘a long term transfer of financial resources - capital flow - from one country to another in order to acquire interests in a corporation, a transaction which normally entailed certain risks to the potential investor’.¹²³ After examining the negotiating history of the Convention, the tribunal adopted a broad approach to the interpretation of ‘investment’ and accordingly characterized transnational loans as investments by determining that unlike the rapidly concluded commercial financial facilities, loans involving a certain duration were within the framework for the concept of investment in the light of the origin of the Convention. Furthermore, the parties had already taken the precaution of stating explicitly in the loan contract that the loan was eligible for investment for the purpose of the Convention.¹²⁴

Though the doctrine of *stare decisis* is not applicable in ICSID arbitration, two competing methods pertaining to the interpretation of investment under article 25 have been refined based on ICSID jurisprudence. The liberal intuitive method merely identifies the features

¹²¹ Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 114-17.

¹²² Michael M. Moore, ‘International Arbitration between States and Foreign Investors - The World Bank Convention’ (1965-1966) 18 *Stan L Rev* 1359, 1362.

¹²³ Venezuela further contended that neither would the transaction qualify as a portfolio investment under the Venezuelan laws. As Venezuela observed, investment in an economic context meant ‘the laying out of money or property in business ventures, so that it may produce a revenue or income’. See ICSID Case No ARB/96/3, Decision on Objections to Jurisdiction of 11 July 1997, para 19.

¹²⁴ *Ibid*, paras 22-23.

of investment, but the features are not indispensable in assessing the existence of an investment and might vary on a case-by-case basis. The deductive method endeavours to give investment a true definition prior to its application in a specific case.¹²⁵ The dichotomy is similar to the two basic approaches regarding interpretation of ‘investment’, namely the subjective approach which asserts that the undefined definition of investment in the ICSID Convention permits, to a certain extent, the disputing parties to determine the concept of investment, and the objective approach which maintains that investment has a discernible meaning under the Convention, typically described as the ‘Salini Test’.¹²⁶ In general, even though the parties are of the same mind that their transaction is an eligible investment for an ICSID arbitration case, tribunals can still decline jurisdiction provided that the investment in question fails to satisfy the objective requirements (such as the ‘Salini Test’) set forth in article 25. Admittedly, these criteria explicitly exclude certain types of assets from the investment that is eligible for protection under the Convention. However, it is hardly to reach the outer limits of ICSID jurisdiction, despite the ‘Salini Test’ which has been applied in a number of cases. A review of ICSID case law has demonstrated that rights of all kinds (including loans, contracts for the sale of services, claims to money, claims to performance having an economic value, pre-investment expenditures and legitimate expectations) granted by instruments of all kinds (such as domestic laws, BITs and authorizations) can be virtually regarded as investments in practice.¹²⁷

1.2.3 Gordian Knot in ICSID Arbitration

Considering that capital-exporting States may have doubts about the quality of host States’ domestic institutions in protecting property rights,¹²⁸ international investment treaties

¹²⁵ Emmanuel Gaillard, ‘Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice’ in Christina Binder, *et al* (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, 408-11.

¹²⁶ The so-called ‘Salini test’ has been identified as emblematic jurisdictional requirements under the ICSID Convention, which consists of four elements as indicative of an investment: (i) a contribution in money or other assets, (ii) a certain duration, (iii) a sharing of operational risks, and (iv) a contribution to the host State’s economic development. See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 16 July 2001, paras 52-58.

¹²⁷ Farouk Yala, ‘The Notion of “Investment” in ICSID Case Law: A Drifting Jurisdictional Requirement?’ (2005) 22(2) *J Intl Arb* 105.

¹²⁸ UNCTAD studies had indicated that policy and institutional determinants were especially important in developing countries but they were often characterized by weaker institutions and less consistent policies

routinely place dispute settlement outside host States' domestic systems, and seek to provide adequate protection and security so as to mitigate the damages resulting from the legal and policy system which might lack coherence, predictability and stability. Moreover, investment treaties generally provide for a broad and open-ended definition of 'investment', which covers almost every kind of asset or activity associated with investment to demonstrate how developing countries are committed to the protection of foreign investment. Nonetheless, in the event that States defend as respondents in ICSID arbitration cases, they constantly insist on a restrictive method to interpret the notion of 'investment' under the ICSID Convention since a restrictive method is not only of great consequence to safeguard judicial sovereignty but also an essential way to provide strong defenses. As a consequence, the first Gordian knot arises: States, by and large, adopt an extensive definition of investment in investment treaties aimed at attracting foreign investment, but insist on a restrictive method to interpret the concept of investment in arbitral proceedings.

The second Gordian knot relates to the criteria on which ICSID tribunals rely to interpret the term 'investment'. In view of the facts that treaty-based ICSID arbitration cases balloon as BITs proliferate exponentially and that respondent States are usually unfamiliar with jurisdictional foundations, objections to ICSID jurisdiction are almost routinely raised under BITs.¹²⁹ The modern world of arbitration has recognized the authority of arbitral tribunals to determine their own jurisdiction or competence.¹³⁰ However, in practice no uniform criteria are imposing on the exercise of such authority and, accordingly, tribunals virtually have absolute sole discretion in rendering decisions on jurisdiction. Intriguingly, while respondent States ordinarily insist on a restrictive method, ICSID tribunals typically tend to affirm claimants' argument that an interpretation shall respect the fundamental principles *pacta sunt servanda* and *ut res magis valeat quam pereat*, eventually following a liberal method to expand the scope of investment. The extra-jurisdictional hurdle under the ICSID Convention may leave foreign investors financially exhausted with insufficient

(see UNCTAD, 'The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries', 12-13, 16-17).

¹²⁹ Lucy Reed, *et al*, *Guide to ICSID Arbitration*, 143.

¹³⁰ According to the doctrine of '*compétence-compétence*' or '*Kompetenz-Kompetenz*', any objection with respect to the existence or validity of the arbitration agreement falls within the competence of tribunals (see William W. Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction, The Limits of Language' in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?* (Kluwer International, 2007) 56).

resources to carry on the proceedings regarding the actual merits of the dispute,¹³¹ in particular given that objections to jurisdiction on the ground of unqualified investments frequently result in a bifurcation of the proceedings into a phase on jurisdiction, and if jurisdiction is proved to exist, a separate phase on the merits.¹³² Even if objections to jurisdiction are finally unapproved by ICSID tribunals, their filing by respondent States has caused considerable delay to the proceeding.¹³³

Practitioners have advocated that ICSID should issue a policy statement to reconcile the two competing methods on the interpretation of investment in accordance with article 25, under which ICSID can confirm that the definition of investment under the Convention is indeed broad and if an investment is eligible under a contract or treaty agreed by host State, tribunals shall not be too fastidious; however, as ICSID arbitration is designed for substantial investment disputes, it is not suitable for small monetary disputes involving claims of no more than U.S. \$ 3-5 million.¹³⁴ Some scholars, in stark contrast to those who support the exclusion of small monetary claims, urge ICSID tribunals to protect microinvestment under the Convention so as to promote the reality of the international community moving towards community values.¹³⁵ Such observation is backed up by the *ad hoc* annulment committee in *Malaysian Historical Salvors, SDN, BHD v. Malaysia* which

¹³¹ V. V. Veeder, 'The Investor's Choice of ICSID and Non-ICSID Arbitration Under Bilateral and Multilateral Treaties', 7.

¹³² Arbitral tribunals are able to deal with objections as a preliminary question or join objections to the merits of disputes. The practice of joining preliminary objections to the merits of disputes initiated in 1933 in *case concerning the Administration of the Prince Von Pless* and then in the *Panevezys-Saldutiskis Railway Case*. Since questions of jurisdiction and merits are regularly closely intertwined, nowadays ICSID tribunals frequently join objections to the merits. However, separate decisions on jurisdiction are also rendered by many ICSID tribunals.

¹³³ In some cases years pass between the date of the tribunal's first session and the date of decision on jurisdiction. Eg, the tribunal in *Sempra Energy International v. Argentine Republic* (ICSID Case No ARB/02/16) constituted in May 2003, but the decision on objections to jurisdiction was rendered in May 2005.

¹³⁴ V. V. Veeder, 'The Investor's Choice of ICSID and Non-ICSID Arbitration Under Bilateral and Multilateral Treaties', 8.

¹³⁵ Perry S. Bechky, 'Microinvestment Disputes' (2012) 45 Vand J Transnatl L 1043. In defending investor-State arbitration, ICC UK also underpinned the rights of small investor, arguing that small investor would be denied access to remedy if investor-State arbitration was unavailable. This was because State was forced to weigh the broader political and economic implications of taking a claim against another State if dispute was resolved on State-State level (see Peter Gooderham (Director of ICC UK) 'Small Investors Would be Denied Access to Remedy', Financial Times, Letters, 27 October, 2014).

determined that the ICSID Convention rejected a minimum requirement.¹³⁶ Here, the second Gordian knot arises: given that the ICSID Convention is created to provide a reliable forum to foster international cooperation for economic development and that the Convention does not specifically exclude minor financial claims, a liberal method can be adopted by ICSID tribunals in construing the diction of article 25. However, if this assumption is not implausible, the possibility exists that more trivial disputes will be submitted to ICSID tribunals, plunging the resolution process into the whirlpool of contention of jurisdiction and further deteriorating or destructing the utility of investor-State arbitration.

In general terms, a similar Gordian knot would not occur in non-ICSID arbitration since objections to jurisdiction, though not rare in non-ICSID arbitration, appear to be impractical to bring about a significant delay of arbitral proceedings. As the practice of investor-State arbitration becomes more sophisticated, objections to the jurisdiction of non-ICSID arbitral tribunals may delay or even disrupt arbitral proceedings. It happens when one of the disputing parties abuse national court proceedings to derail arbitral proceedings.¹³⁷ However, this is not a common situation. In practice, challenges to the jurisdiction of non-ICSID arbitral tribunal occur in two forms, namely partial challenges total challenges. A partial challenge, which normally depends on whether part of the claims falls within the scope of an arbitration agreement, is insufficient to amount to a primary attack on the tribunal's jurisdiction. In case of a total challenge, where applicants commonly question whether an arbitration agreement is valid and seek to overturn the basis upon which the tribunal has competency, the doctrine of *compétence-compétence* empowers arbitral tribunals to decide on their own jurisdiction. More importantly, the doctrine of separability affects, to a large extent, the outcome of tribunals' decision. According to the doctrine of separability, any challenge to the main agreement does not affect the validity of the arbitration agreement; in other words, the arbitration agreement shall be treated as an agreement independent of the main agreement, and thus a decision

¹³⁶ The committee held that 'it was not the intent of the drafters of the ICSID Convention to exclude claimants advancing claims of minor financial dimension' (see ICSID Case No ARB/05/10, Decision on the Application for Annulment, 16 April 2009, para 82).

¹³⁷ See *Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority*, ICC Arbitration No10623/AER/ACS, Award regarding the suspension of the proceedings and jurisdiction, 7 December 2001; *Himpurna California Energy Ltd v. Indonesia*, Interim Award (*Ad Hoc* UNCITRAL Proceeding), 16 October 1999, 25 YB Com Arb 109 (2000). These cases will be discussed in section '3.3 The Interference of National Courts'.

rendered by the tribunal that the main agreement is null and void shall not entail *ipso jure* the invalidity of the arbitration agreement.¹³⁸ In non-ICSID arbitration, these doctrines strengthen the jurisdiction of arbitral tribunals and minimize challenges being employed as tactical manoeuvres to delay or derail arbitral proceedings. The doctrines, however, work to little avail in ICSID arbitration in that the decision of objection to ICSID jurisdiction ordinarily depends on the approach applied to construing article 25 of the Convention.

Though it is notable that the Gordian knot has caused, and continues to cause, confusion in ICSID arbitration, it seems quite impractical to cut the Gordian knot as long as the concept of investment under the ICSID Convention remains undefined. However, at the present time two measures might be supportive in reducing, or at least mitigating, the risks and damages that disputing parties would encounter at the jurisdictional stage. First and foremost, if States intend to adopt a more restrictive method in arbitral proceedings, they should consider including in investment treaties a less broad definition of investment. In this regard, a new approach called ‘closed-list’ definition emerges to avoid an excessively wide definition of ‘investment’. Without providing a conceptual stipulation, investment treaties adopting the so-called ‘closed-list’ approach merely consist of an ample, but finite, list of tangible and intangible assets that are eligible for protection under the treaties.¹³⁹ Such an approach reduces risks to an acceptable level, and dispenses with States’ concern whether a relatively narrower notion of investment would lose attraction to foreign investors.

Second, article 25 of the Convention shall not be construed by ICSID tribunals restrictively, nor liberally, but in good faith. It appears that the Gordian knot, to some extent, does not bring ICSID tribunals between Scylla and Charybdis. Instead, the interests of both investors and respondent States can be taken into account jointly and fairly by ICSID tribunals in adjudicating the cases. As stated in *Amco Asia Corporation and others v. Republic of Indonesia*, investors had an interest in submitting disputes to international arbitration, and such interest was matched by the interest of host States because ‘to protect investment is to protect the general interest of development and of developing

¹³⁸ Julian D. M. Lew, *et al*, *Comparative International Commercial Arbitration*, 334-35. The doctrines of *compétence-compétence* and separability have been adopted by a number of institutional rules. Eg, art 23(1) of the UNCITRAL Rules.

¹³⁹ For example, art 1 of Canadian Model BIT (2004).

countries'.¹⁴⁰ Accordingly, jurisdictional instruments should be interpreted neither restrictively nor expansively, but rather objectively and in good faith¹⁴¹ with consequences that both parties might be considered as having reasonably and legitimately envisaged.¹⁴² A potential approach to taking into account the expectation of both investors and State can be to set an outer limit beyond which ICSID tribunals are not granted the power to expand the notion of investment. Given that claimants constantly intend to expand the definition of investment, the evaluation of respondent States' expectation is more essential. When ruling on the outer boundaries of the definition in accordance with article 25(1), ICSID tribunals are suggested to identify whether the subject matter is a type of transaction that host States would like to submit directly to international arbitration, which can be conducted through examining the concept of investment in other treaties or agreements concluded by host States.¹⁴³ Such an approach is more than mere temporary expediency as ICSID arbitral proceedings shall be neither more intensive nor more extensive than necessary to reconcile the interests of investors and States who have an equivalent stake in an orderly, constructive and efficient resolution of jurisdictional contention.

Overall, it has become evident and well-recognized that the current development has demonstrated a liberal trend promoting an expansion of ICSID jurisdiction to cover any kind of asset or activity in some way related to investment. Considering that one of the ICSID' objectives is to create a reliable forum which empowers States to strike a deal with potential sources of foreign capital, and that host States would create a secure legal environment in exchange for foreign investment based on BITs that contain a broad definition of investment,¹⁴⁴ it is not unacceptable that nearly every asset or activity associated with investment can be adjudicated within the competence of ICSID tribunals. The concept of investment in modern arbitration, though not comprehensive as compared to the diction of 'commercial' in non-ICSID arbitration, is sufficient for ICSID tribunals to exercise their jurisdiction over a wide range of assets and activities.

¹⁴⁰ ICSID Case No ARB/81/1, Decision on Jurisdiction, 25 September 1983, para 23.

¹⁴¹ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No ARB/84/3, Decision on Jurisdiction and Dissenting Opinion of 14 April 1988, para 63.

¹⁴² ICSID Case No ARB/81/1, Decision on Jurisdiction, 25 September 1983, para 14.

¹⁴³ Tony Cole, Kumar Vaksha, 'Power-conferring Treaties: The Meaning of "Investment" in the ICSID Convention' (2011) *Leiden J Intl L* 305, 327-29.

¹⁴⁴ Julian Davis Mortenson, 'Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law' (2010) 51 *Harv Intl LJ* 257.

2 Compatibility with Other Dispute Resolution

2.1 The Rule of Exhaustion of Local Remedies

As efficiency, which is represented as one of the perceived doctrinal bases in the central tenet of international arbitration, has been amplified emphatically in the past few years, the growing trend towards investor-State arbitration brings into great importance the relationship or compatibility between arbitration and other dispute resolution. Insofar as jurisdiction is concerned, the distinguishing features of ICSID and non-ICSID arbitration have different effects on the art of striking a balance between State sovereignty and investment protection, wherein the application of the rule of exhaustion of local remedies, the fork-in-the-road clause and conciliation should be given special consideration.

Though investor-State arbitration cases result in part from the surrender of host States' judicial sovereignty for the investment protection purpose, States still retain their intrinsically regulatory rights to restrict the extent of judicial sovereignty that would be transferred to international tribunals. It has been established that imposing conditions on the consent to international arbitration is a general practice endorsed by most States as a sound scheme to safeguard State sovereignty. The conditions ordinarily include the exhaustion of local judicial and administrative remedies prior to the submission of a dispute before international tribunals. Such exhaustion is permitted under the ICSID Convention,¹⁴⁵ and has been recognized by a large number of BITs.¹⁴⁶ What is intriguing about the divergence between ICSID and non-ICSID arbitration is the implied waiver, more precisely, the thoroughly disparate implied waiver rule on exhaustion of local remedies applied respectively in ICSID arbitration under the ICSID Convention and in non-ICSID arbitration under general international law. Traditionally, an application of the rule of exhaustion of local remedies is self-evident and does not rely on a prior agreement. There is no presumption generally that the rule of exhaustion of local remedies will not be applied in an international arbitration case in which an alien is involved, unless such rule is

¹⁴⁵ Art 26 of the ICSID Convention.

¹⁴⁶ For example, German investors having investment in China may submit a dispute for arbitration under the following conditions only: (i) the investor has referred the issue to an administrative review procedure in accordance with Chinese law; (ii) the dispute still remains three months after investors have brought the issue to the review procedure. See art 6 of the Protocol of China-Germany BIT (2003).

expressly waived or reserved.¹⁴⁷ In other words, absence of the rule of exhaustion of local remedies in a treaty does not amount to an implied waiver of the rule and the rule shall be applicable in the absence of an explicit waiver.¹⁴⁸ This principle had been confirmed by the tribunal of the International Court of Justice (hereinafter 'ICJ') in *Case Concerning Elettronica Sicula S.p.A.(United States of America v. Italy)* where the tribunal found itself unable to accept that 'an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so'.¹⁴⁹

Contrary to the principle that a tacit declaration does not constitute a waiver of a rule of international law under customary international law, the ICSID Convention radically changes the traditional concept. According to article 26 of the Convention, the contracting State is deemed to have waived the right to apply the rule of exhaustion of local remedies, provided that the State fails to explicitly require prior exhaustion of local remedies as a pre-condition for obtaining access to ICSID arbitration. The rationale of article 26, as explained in the Report of the Executive Directors of the International Bank for Reconstruction and Development, is a presumption that when a State and an investor mutually consent to submit disputes to ICSID arbitration without reserving the right to resort to any other remedy or requiring the prior exhaustion of any other remedy, the intention of the parties is thereby to have recourse to ICSID arbitration to the exclusion of any other remedy.¹⁵⁰ It is generally submitted that article 26 reverses, *de facto*, the situation under traditional international law.¹⁵¹ However, the ICSID Convention was not intended to modify the traditional principle pertinent to the implied waiver of the rule of exhaustion of local remedies.¹⁵² For this purpose, the second sentence of article 26 explicitly recognizes the right of a State to require exhaustion of local judicial or

¹⁴⁷ Chittharanjan Félix Amerasinghe, *Local Remedies in International Law* (CUP, 2004) 250-51.

¹⁴⁸ The classic treatise *International Law: A Treatise* stated that 'waiver will not be implied from silence on the matter in a general disputes settlement provision in a treaty'. See Robert Jennings, Arthur Watts (eds), *International Law: A Treatise* (9th edn, Longman, 1992) 526, note 16.

¹⁴⁹ ICJ Rep 1989, 42.

¹⁵⁰ ICSID, 'Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States', 18 March 1965, para 32.

¹⁵¹ Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 403.

¹⁵² ICSID, 'Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States', para 32.

administrative remedies prior to bringing the case before an ICSID tribunal, which has been reiterated by the first annulment committee in *Amco Asia Corp. v. Republic of Indonesia*. In this case, Indonesia contended that the ICSID tribunal manifestly exceeded its power by deciding that Amco could bring claims directly to the ICSID tribunal without previously seeking redress before Indonesian courts in conformity with the general international law on the exhaustion of local remedies and, moreover, the tribunal failed to set out any reason for its disregard of this rule.¹⁵³ The *ad hoc* committee declined Indonesia's request, determining that in spite of the absence of reason in the tribunal's award for not requiring Amco to exhaust municipal remedies against the acts of Army and Police personnel, this portion of the award could not be annulled in that by virtue of acceptance of ICSID jurisdiction without reserving under article 26 of the ICSID Convention a right to require exhaustion of local remedies prior to resorting to ICSID tribunals, Indonesia must be deemed to have waived such right.¹⁵⁴ The decision of the *ad hoc* committee indicated unequivocally that an implied declaration gave rise to a waiver of applying the rule of exhaustion of local remedies in ICSID arbitration.

The tacit waiver rule on exhaustion of local remedies distinguishes ICSID from non-ICSID arbitration, and such difference entails a considerable risk in the midst of the forum selection process. It is conceivable that one of the essential objectives of the rule of exhaustion of local remedies is the respect to be accorded to State sovereignty.¹⁵⁵ At the very least, host States can give no consent to international arbitration and do justice in their ways through domestic administrative or judicial procedures. Given that in practice States are more likely to neglect the explicit waiver requirement under article 26 of the ICSID Convention and therefore lose their chances to regulate disputes under domestic judicial or administrative system, the ICSID Convention seems to be a derogation of State sovereignty. In consideration of risk avoidance concerning the explicit requirement of waiver under the ICSID Convention, recent investment jurisprudence has revealed that the local remedy requirement is returning in a number of investment treaties.¹⁵⁶ When

¹⁵³ ICSID Case No ARB/81/1, *Ad Hoc* Committee Decision on the Application for Annulment, 16 May 1986, para 62.

¹⁵⁴ *Ibid.*, paras 63-64.

¹⁵⁵ Malcolm N. Shaw, *International Law* (CUP, 2003) 730.

¹⁵⁶ The local remedy requirement takes at least three forms in investment arbitration: (i) the requirement to use domestic remedies for a certain period of time, (ii) domestic forum selection clauses in contracts, and (iii) resort to domestic courts as a substantive requirement of international standards. See Christoph Schreuer,

conceiving the future EU investment treaties, the Parliament also considers endorsing the enhancement of the role of domestic courts through requiring exhaustion of local remedies.¹⁵⁷

However, since an administrative and judicial system in a host State has, of necessity, an inherent national prejudice to benefit the host State who is one of the disputing parties, or at least the domestic system is perceived to harbour such prejudice, article 26, to some extent, facilitates the access of foreign investors to the international remedies. Besides, in response to such prejudice or perceived prejudice, the so-called fork-in-the-road clause has been incorporated into modern BITs to grant claimants a direct right to exclude all local remedies.¹⁵⁸ The clause is just like a road of no return, conferring the obligation of abiding by the final choice between international arbitration and national remedies upon the disputing parties. More specifically, parties would be confronted with several possible options of fora (such as ICSID arbitration, national arbitration or national courts) due to the various contractual and treaty relations. However, once a party choose one forum, the choice would be final binding and thus all other options lapse for both parties;¹⁵⁹ in other words, in the event that claimants decide to have recourse to ICSID or non-ICSID arbitration, the rule of exhaustion of local remedies cannot be required by host States to be applied in dispute resolution proceedings. As there will be no room for the application of local judicial or administrative remedies, international arbitration becomes, at the stage of jurisdiction, an independent procedure without any interference by national courts or other national authorities. Accordingly, while it is alleged that article 26 of the ICSID Convention may concede State sovereignty, the fork-in-the-road clause derogates sovereignty even further. More importantly, if the implied waiver concedes sovereignty in ICSID arbitration as compared to the explicit waiver rule in non-ICSID arbitration, the fork-in-the-road clause derogates sovereignty in ICSID and non-ICSID arbitration in the same way.

'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4 Law & Prac Intl Cts & Tribunals 1.

¹⁵⁷ August Reinisch, 'The EU on the Investment Path - Quo Vadis Europe? The Future of EU BITs and other Investment Agreements' 135.

¹⁵⁸ A typical example can be seen in art 7 of the China-France BIT (2007).

¹⁵⁹ Andrea Schulz, 'The Future Convention on Exclusive Choice of Court Agreements and Arbitration: Parallel Proceedings and Possible Treaty Conflicts, in Particular with ICSID and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards', Prel Doc No 32, Hague Conference on Private International Law, June 2005, 12.

It is also worth emphasizing that the fork-in-the-road clause does not prevent investors from seeking certain legal action taken in domestic courts at the beginning stage of a dispute settlement procedure, since a highly stringent approach has been adopted in practice to interpret the requirements of triggering the fork-in-the-road clause. As a number of BITs contain provisions that guarantee investors effective remedies under domestic laws, which include redress through domestic courts or administrative tribunals, it would create an unreasonable dilemma for investors if they had to make a choice between the assertion of their rights through domestic means or international arbitration. This is because any utilization of local remedies, though necessary in some cases where provisional measures should be taken promptly, might be regarded as a choice under the fork-in-the-road clause and investors might thereby endure any form of injustice passively on pain of losing the access to international arbitration. Therefore, the exercise of domestic procedural rights as guaranteed in BITs should not be seen as triggering the fork-in-the-road clause.¹⁶⁰

Nevertheless, the stringent approach also causes bewilderment and even counterproductive outcome in practice. It is acknowledged that one of the purposes of the fork-in-the-road clause in BITs is to steer clear of parallel proceedings, namely a situation wherein the same dispute is brought by the same claimant against the same respondent for resolution before different State courts or arbitral tribunals.¹⁶¹ Under customary international law, the inspection as to whether a claim submitted to an international tribunal is the same claim that has been resorted to domestic courts or administrative tribunals relies primarily on the doctrine of *res judicata*, which focuses on *persona* (person), *petitum* (object) and *causa petendi* (grounds).¹⁶² In investment arbitration, the requirements of the same claimant/respondent and the same dispute are commonly construed by ICSID tribunals in a narrow and stringent way that is not sufficient to trigger the fork-in-the-road clause.¹⁶³ As

¹⁶⁰ Christoph Schreuer, 'Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5 J World Investment & Trade 231, 248-49.

¹⁶¹ *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award of 3 September 2001, para 161.

¹⁶² Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens, 1953) 340.

¹⁶³ For example, as far as the same claimant is concerned, the ICSID tribunal in *Enron v. The Argentine Republic* observed that it was TGS (which was invested by Enron) that applied to various Argentine courts, seeking remedies in respect of the tax affecting it; however, the ICSID case was brought by Enron. Therefore, the claimant of actions before Argentine courts was different from that of the ICSID arbitration (see ICSID Case No ARB/01/3, Decision of Jurisdiction, 14 January 2004, paras 95-98).

a consequence, although some claims have been submitted to domestic courts or administrative tribunals, the choice made by investors between domestic means and international arbitration loses the final binding effect and thus international tribunals still have discretionary authority to exercise jurisdiction over the same claims. Hence, there is a possibility that tricky investors enjoy a double benefit from both domestic instruments and international arbitration in that they can first have recourse to domestic instrument, and then turn to international tribunals if the domestic means turns out to be unfavourable or will deliver unfavourable awards against them.

2.2 Complementary Use of Conciliation in Arbitration

Given that non-ICSID arbitration is based on the agreement concluded by the disputing parties, non-ICSID arbitral proceedings can be fixed by the tribunal as well as the parties to meet special needs in a particular case. Such a characteristic makes non-ICSID arbitration entirely compatible with conciliation, which can be recommended or initiated by tribunals upon disputing parties' request at every stage of the arbitral proceedings. The LCIA Rules even encourage disputing parties to agree on the conduct of their arbitral proceedings,¹⁶⁴ and the tribunal can apply the principle deriving from 'amiable composition' to the merits of the dispute.¹⁶⁵ In view of the uncertainty of an adjudicatory result, some disputing parties will turn to a more satisfactory alternative outcome with assistance of neutral conciliators. Conciliation, a less adversarial proceeding with fewer emphases on full proofs, is capable of avoiding unnecessary delay or expense, thereby producing an acceptable, swift and cost-efficient outcome.¹⁶⁶ Furthermore, an amicable settlement reached during arbitral proceedings can be salutary in enhancing the economic value of the parties'

As to the same respondent, ICSID tribunal in *Azurix Corp v. The Argentine Republic* held that the respondent in Argentine courts proceedings was the Province of Buenos Aires, and Argentina (the respondent of the ICSID case) was not a party to any of those proceedings (see ICSID Case No ARB/01/12, Decision on Jurisdiction, 8 December 2003, para 90).

On the part of the same investment dispute, the ICSID tribunals determined that contract-based claims were different from treaty-based claims (see *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003), and national claims under domestic law were different from international claims under international investment treaty (see *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No ARB/99/6, Award of 12 April 2002, para 71).

¹⁶⁴ Art 14.2, 14.3 and 14.4 of the LCIA Rules (2014).

¹⁶⁵ *Ibid*, art 22.4.

¹⁶⁶ Jack J. Coe, Jr, 'Toward a Complementary Use of Conciliation in Investor-State Disputes - A Preliminary Sketch' (2005-2006) 12 UC Davis J Intl L & Poly 7, 16.

business relationship by working on the optimal solution, in particular in cases where the parties engage in ongoing, long-term natural resource investment projects.

On the contrary, conciliation is seldom applied in ICSID arbitral proceedings mainly in the light of two considerations. First, conciliation and arbitration are two competing procedures provided under the ICSID Convention, and disputing parties should make a choice between arbitration and conciliation at the outset of the dispute submitting to the Centre. Conciliation as an independent dispute resolution mechanism, however, is infrequently used¹⁶⁷ because what it can produce is merely a non-binding report,¹⁶⁸ which may be not sufficient to solve an investor-State dispute and further delay a settlement through arbitration. Second, the ICSID Convention contains no provision pertaining to conciliation, though a pre-hearing conference can be held under the ICSID Arbitration Rules to consider the issues in dispute with a view to reaching an amicable settlement.¹⁶⁹ The ICSID Arbitration Rules do not specify the ways in which the amicable settlement would be reached, and therefore conciliation could be one of the options. Nonetheless, the pre-hearing conference procedure is rarely ever used, in particular considering that a pre-hearing conference procedure, which cannot be triggered by ICSID or the arbitral tribunal, requires joint consent expressed by both parties. However, if the parties wish to hold a pre-hearing conference to reach an amicable settlement they would probably have recourse to conciliation at the start of their submission of the dispute.

It is acknowledged that conciliation can provide an effective means of reconciling diverse interests and redressing wrongs in arbitral proceedings,¹⁷⁰ which is also appealing to

¹⁶⁷ Only seven conciliation cases have been registered under the Convention since the Centre was established. See ICSID, 'ICSID Caseload – Statistics', 2014-1, 8.

¹⁶⁸ According to art 30 of the ICSID Conciliation Rule, Conciliation Commissions just draw up a report noting the issues in dispute and recording that the parties had reached an agreement.

¹⁶⁹ At the request of the parties, a pre-hearing conference between the tribunal and the parties, duly represented by their authorized representatives, may be held to consider the issues in dispute with a view to reaching an amicable settlement. See r 21(2) of the ICSID Arbitration Rules.

¹⁷⁰ Stephen M. Schwebel, 'Is Mediation of Foreign Investment Disputes Plausible?' (2007) 22(2) ICSID Rev-Foreign Investment LJ 237; V. V. Veeder, 'The Investor's Choice of ICSID and Non-ICSID Arbitration Under Bilateral and Multilateral Treaties', 10-11; Jack J. Coe, Jr, 'Toward a Complementary Use of Conciliation in Investor-State Disputes - A Preliminary Sketch'; Jeswald W Salacuse, 'Is There A Better Way? Alternative Methods of Treaty-based, Investor-State Dispute Resolution' (2007-2008) 31 Fordham Intl LJ 138.

disputing parties in cases where the ICSID Convention governs arbitral procedure.¹⁷¹ In this regard, the flexibly complementary use of conciliation in non-ICSID arbitration is more desirable or, at least, beneficial to the disputing parties. The drawback of incompatibility with conciliation in ICSID arbitration can be avoided once and for all through the amendment of the ICSID Arbitration Rules. However, there are more subtle but practical and fundamental rationales accounting for the incompatibility. To begin with, an increasing number of BITs have made up for the deficiency of incompatibility with conciliation by providing a waiting period requirement under which any dispute between investors and States shall initially, as far as possible, be settled amicably through consultations and negotiations between the parties to the dispute and only in the case where the dispute cannot be settled within a certain period (such as six months) will the investors bring the dispute to ICSID arbitration.¹⁷² The ICSID tribunal in *Murphy Exploration and Production Company International v. Republic of Ecuador* had made it clear that the waiting-period requirement constituted a fundamental requirement that must be complied with and non-compliance with this compulsory requirement would result in rejection of the tribunal's jurisdiction.¹⁷³ Normally, if the dispute could not be settled amicably within a considerable period up to six months before it was submitted to ICSID tribunal, conciliation as an amicable procedure might not be expected to play a vigorous role in the arbitral proceedings.

Furthermore, it is conspicuous that the complementary use of conciliation in non-ICSID arbitration can be conducted under private and confidential conditions, while ensuring confidentiality in ICSID arbitration would be enormously complex since ICSID arbitration is always associated with diverse interests of non-governmental organizations and other stakeholders.¹⁷⁴ In addition, government officials may be unwilling to reach a confidential dispute settlement for fear of being accused of weakness in defending national interests or even corruption. The requirement and the complexity of approval from multiple

¹⁷¹ By now, up to 16 per cent of arbitral proceedings under the ICSID Convention end with awards in which settlement agreements were embodied at parties' request. See ICSID, 'ICSID Caseload – Statistics', 2014-1, 15.

¹⁷² See, eg, art 9(1), (2) of the China-Spain BIT (2005), art 23 of the U.S. Model BIT (2012).

¹⁷³ ICSID Case No ARB/08/4, Award, 15 December 2010, para 149.

¹⁷⁴ W. Michael Reisman, 'International Investment Arbitration and ADR: Married But Best Living Apart' in UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration II*, 2011, 26.

government agencies in practice also reduce the possibility of entering into a settlement.¹⁷⁵ Apart from pragmatic considerations, a non-binding decision rendered in confidential circumstance, viewed from a more comprehensive perspective, contributes little to the development of the jurisprudence of international investment law.¹⁷⁶ Therefore, despite the potential benefits, the use of conciliation in lieu of arbitration or the complementary use of conciliation in ICSID arbitral proceedings may not be appropriate tactics for developing a more efficient dispute resolution system.

3 The Role of National Courts

3.1 Determination of Arbitral Jurisdiction by National Courts

Though one of the noticeable virtues of investor-State arbitration is the depoliticization and delocalization of dispute settlement mechanisms, non-ICSID arbitration necessarily has a legal seat. The *lex arbitri* of non-ICSID arbitration is normally the law of the seat of arbitration, which has an indication that national courts at the arbitral *situs* inherently possess supervisory powers over the arbitral proceedings. First, although non-ICSID arbitral tribunals have authority to determine their own jurisdiction or competence pursuant to the doctrine of ‘*compétence-compétence*’ or ‘*Kompetenz-Kompetenz*’, their decisions on jurisdiction are subject to a full review by national courts.¹⁷⁷ The *raison d’être* of such complete review is that it would contradict with public policy to bind a party to a decision made by an arbitral tribunal to which he never agreed.¹⁷⁸ On the contrary, there is no available application to national courts for the purpose of a review on a jurisdictional decision in ICSID arbitration since such authority to review is conferred on internal *ad hoc* committees established under the ICSID Convention.¹⁷⁹ In particular, preliminary decisions affirming the jurisdiction of arbitral tribunals are not subject to possible

¹⁷⁵ Barton Legum, ‘The Difficulties of Conciliation in Investment Treaty Cases: A Comment on Professor Jack C. Coe’s ‘Toward a Complementary Use of Conciliation in Investor-State Disputes - A Preliminary Sketch’’ (2006) 21(4) Mealey’s Intl Arb Rep 72, 73.

¹⁷⁶ Jeswald W Salacuse, *Is There A Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 178-79.

¹⁷⁷ For example, s 67(1) of the English Arbitration Act provides that a party to arbitral proceedings may apply to national courts, challenging any award of the arbitral tribunal as to its substantive jurisdiction or requesting for an order to declare an award rendered by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction over the dispute.

¹⁷⁸ Julian D. M. Lew, *et al*, *Comparative International Commercial Arbitration*, 337-38.

¹⁷⁹ Art 48(3) of the ICSID Convention.

annulment proceedings, and consequently disputing parties can only request to annul negative jurisdictional decisions which dispose of the dispute.¹⁸⁰

Second, in addition to the determination of non-ICSID arbitral jurisdiction by arbitral tribunals, national courts may be also asked to determine the jurisdiction of arbitral tribunals. Recourse to national courts on the issue of jurisdiction of arbitral tribunals can take place at three stages, namely before the arbitral proceedings have even begun, during the actual course of the arbitral proceedings or following the making of final awards. Under the New York Convention, national court before which an action is brought in a manner in respect of which the parties have made an arbitration agreement shall refer the parties to arbitration, unless the courts find that the agreement is ‘null and void, inoperative or incapable of being performed’.¹⁸¹

The advantage of the determination of non-ICSID arbitral jurisdiction by national courts at an early stage is perceptible. Disputing parties do not have to spend considerable time and money proceeding with the whole arbitral proceedings which may eventually prove futile in the event that national courts at the post-award stage determine that no basis for the jurisdiction of arbitral tribunals exists and thus decline the competency of arbitral tribunals in adjudicating the disputes. However, there is little settled law on whether national courts called upon to determine the jurisdiction of arbitral tribunals at the pre-award stage should thoroughly review on the merits of the issues, or merely verify the *prima facie* existence of a valid arbitration agreement.¹⁸² Consequently, though the role of national courts in determining the jurisdiction of non-ICSID arbitral tribunals is established, the form and degree of court intervention is far from certain. This leaves open the possibility that disputing parties abuse court proceedings to delay and even obstruct arbitral proceedings.

¹⁸⁰ The terminology that the ICSID Secretariat adopts has indicated whether a decision made by arbitral tribunals can be annulled. The ICSID Secretariat uses ‘decision on jurisdiction’ where the jurisdictional decision is positive, while ‘award on jurisdiction’ will be used if the jurisdictional decision is negative and the case is finally dismissed. Only awards on jurisdiction can be challenged before *ad hoc* committees.

¹⁸¹ Art II(3) of the New York Convention.

¹⁸² The U.S. Supreme Court held in *First Options v. Kaplan* (115 S Ct. 1920 (1995)) that if disputing parties agreed to submit the arbitrability question to arbitration ‘then the court’s standard for reviewing the arbitrator’s decision about the matter should not differ from the standard courts apply when they review any other matter that the parties have agreed to arbitrate’. The court should ‘give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances’ (see *ibid*, 1923-24). In other words, if the parties agreed to submit the arbitrability of their disputes to arbitration, national courts should apply a cautious standard in reviewing the issue; if not, national courts are required to undertake a full *de novo* hearing.

In a broader context, the role of national courts is a main divergence between ICSID and non-ICSID arbitration. In practice, national courts can play a part before the constitution of arbitral tribunal, during arbitral proceedings and after the arbitral adjudication, which relate to essential issues ranging from jurisdiction to annulment and enforcement. In order to limit and avoid overlapping content with other chapters, the role of national courts would not be an independent chapter. Given that a crucial consequence of a choice of ICSID jurisdiction is no room for national courts playing a supporting role, this section will also analyse interim relief (one of the main roles of national courts) that takes place after the jurisdictional stage.

3.2 The Favourable Involvement of National Courts

A request for interim relief (also known as a ‘conservatory measure’ or ‘provisional measure’) addressed by any disputing party to national courts is not considered incompatible with the jurisdiction of arbitration based on the agreement between the parties, nor is it deemed a waiver of that agreement and arbitration jurisdiction.¹⁸³ Conversely, its a-national nature makes ICSID arbitration utterly independent of any legal *situs*, thus depriving disputing parties of rights to seek remedy from national courts. Rather than shedding light on the comprehensive distinctions between non-ICSID and ICSID arbitration with respect to the role of national courts at the stage of jurisdiction, an analysis of the effect of the national courts’ involvement in investor-State arbitration is of more practical consequence. It is undeniable that the involvement of national courts can be favourable to the disputants in some cases where the supporting role of national courts (such as assistance in the taking of evidence, determination of questions of law and provisional measures) is beneficial to the arbitral proceedings.¹⁸⁴ Ordinarily, the support of

¹⁸³ For example, art 26(9) of the UNCITRAL Rules, art 28(2) of the ICC Rules, and art 46(4) of the ICSID Additional Facility.

¹⁸⁴ Taking interim measures for example, for one thing the principle of concurrent jurisdiction under which arbitrators and national courts have joint jurisdiction to take interim relief has been well-established in modern arbitration (eg, art 6 of the UNCITRAL Model Law (2006) contemplates the court or other authority for certain functions of arbitration assistance and supervision and art 17 J focuses on court-ordered interim measures). For another, though art 17 H of the UNCITRAL Model Law has confirmed the recognition and enforcement of interim measures ordered by arbitral tribunals, the role of national courts with supervisory power is still positive since the art 9 stipulates that it is not incompatible with an arbitration agreement for a party to request from national courts interim measures and for national courts to grant such measures.

national courts is obtainable throughout the whole arbitral process in non-ICSID arbitration, without which arbitral proceedings might encounter a number of hurdles.

In the first place, disputing parties in non-ICSID arbitration are entitled to request for interim relief from judicial authorities prior to the constitution of arbitral tribunals, wherein national courts are able to properly fill the gap until arbitral tribunals are constituted. In addition, a number of non-ICSID arbitration rules also create different solutions to resolve questions arising out of requests for interim relief prior to the constitution of tribunals.¹⁸⁵ However, the efforts made by the ICC and the American Arbitration Association (hereinafter 'AAA') virtually seem unsuccessful¹⁸⁶ in that the special optional rules have to be adopted by the disputing parties and in practice the parties generally tend to apply to the

¹⁸⁵ The ICC Rules for a Pre-arbitral Referee Procedure provides for the immediate appointment of a referee who has the power to order any conservatory measures or any measures of restoration that are urgently necessary to prevent either immediate damage or irreparable loss, prior to the arbitral tribunal or national court competent to deal with the case being seized of it (see arts 1, 2 of the ICC Rules for a Pre-arbitral Referee Procedure). It must be clarified that since consent to the ICC Arbitration Rules does not automatically amount to consent to the ICC Rules for a Pre-arbitral Referee Procedure, disputing parties have to make reference to the ICC Pre-Arbitral Referee Procedure in their contracts. By the same token, the ICC Rules for Pre-Arbitral Referee Procedure are not applicable in the treaty-based arbitration, except as States and the investors otherwise agree.

The AAA Commercial Arbitration Rules and Mediation Procedures have also developed similar Optional Rules for Emergency Measures of Protection, providing that a party can request the appointment of a special arbitrator to hear the party's request for interim measure of protection. Since it is optional and not a part of the AAA Rules, both parties have to specify in their arbitration clause that optional rules will be applicable. If the parties choose the AAA International Dispute Resolution Procedures (including Mediation and Arbitration Rules) as the rules of arbitration, the provision that provides emergency measures of protection is incorporated into the AAA International Dispute Resolution Procedures (see art 37 of the AAA International Dispute Resolution Procedures).

The SCC Rules were amended in 2010 to include a new Appendix II 'Emergency Arbitrator' which provides that a party may apply for the appointment of an emergency arbitrator until the case has been referred to an arbitral tribunal. The power of the emergency arbitration includes the order of interim measures. Given that the Appendix is incorporated into the SCC Rules, it is applicable as long as the SCC Rules are adopted by disputing parties. Thus a reference in a BIT or multilateral treaty to SCC Rules requires no further mutual consent to the emergency arbitrator (see Appendix II Emergency Arbitrator, the SCC Arbitration Rules).

The LCIA Rules offer an expedited formation of the arbitral tribunal in case of exceptional urgency, and the urgency associated with interim and conservatory measures usually justifies the expedited formation of the arbitral tribunal. Similar to the SCC Rules, the Rules do not require additional consent to apply the expedited formation of the arbitral tribunal (see art 9A of the LCIA Arbitration Rule (2014)).

¹⁸⁶ The ICC Rules for a Pre-arbitral Referee Procedure was in force in 1990, but it took more than 10 years for them to be applied in two different cases. See Emmanuel Gaillard and Philippe Pinsolle, 'The ICC Pre-Arbitral Referee: First Practical Experiences' (2004) 20(1) *Arb Intl* 13, 14.

judicial authority for speedy and enforceable remedies.¹⁸⁷ In contrast, a request for urgent interim relief from disputing parties prior to the constitution of ICSID arbitral tribunal has to be pending, despite the fact that the request for arbitration has been filed. The Secretary-General will fix time limits for the parties to present observations on the request, which can be considered by the tribunal promptly upon its constitution.¹⁸⁸ As can be seen from Tables I and II, provisional measures requested by disputing parties before and during the arbitral proceedings are ordinarily disposed of with reasonable speed by ICSID tribunals and *ad hoc* committees. It is also necessary to point out that the ICSID Convention and the Arbitration Rules do not prevent parties from requesting any judiciary or other authority to order provisional measures, prior to or after the institution of the proceeding, provided that they have so stipulated in the agreement recording their consent.¹⁸⁹ Nevertheless, since States' consent to ICSID jurisdiction is ordinarily given in investment treaties, it is impractical for the parties to reach an agreement with respect to resort to domestic courts for the protection of their respective rights and interests. Such method thus seems less attractive in view of the long period of time typically taken for an ICSID arbitral tribunal to be constituted,¹⁹⁰ the urgency of interim relief and the unrealistic conclusion of another agreement to request for interim relief to national courts.

In the second place, given the long duration of arbitration procedures,¹⁹¹ interim relief is essential to avoid delay of arbitral proceedings in that it has the effect of compelling the parties to behave in a way that will ensure successful proceedings.¹⁹² On occasion, interim relief would have a considerable influence on the enforcement of the final award. A party

¹⁸⁷ Raymond J. Werbicki, 'Arbitral Interim Measures: Fact or Fiction?' (2003) 57-JAN Disp Resol J 62, 65; Gregoire Marchac, 'Interim Measures in International Commercial Arbitration under the ICC, AAA, LCIA and UNCITRAL Rules' (1999) 10 Am Rev Intl Arb 123, 138.

¹⁸⁸ R 39(5) of the ICSID Arbitration Rules.

¹⁸⁹ *Ibid*, art 39(6).

¹⁹⁰ On average, there will be 3 months from the registration (and 263 days from filing the request) to the constitution of a tribunal. The slowest case took 1,251 days from filing the request for a tribunal to be constituted in *Funnekotter v Zimbabwe*. See Anthony Sinclair, 'ICSID Arbitration: How Long Does It Take?' (2009) 4(5) Global Arb Rev 18, 19.

¹⁹¹ In a large majority of arbitration cases an award is issued around two to three years after the initiation of arbitral procedure (see Christian Bühring-Uhle, *et al*, *Arbitration and Mediation in International Business* (Kluwer Law International, 2006) 86). In ICSID arbitration, on average, 3.6 years will elapse from the date on which the request for ICSID arbitration is filed to the date of final award (see Anthony Sinclair, 'ICSID Arbitration: How Long Does It Take?' 18).

¹⁹² Stephen M. Ferguson, 'Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results' (2003) 12 Currents: Intl Trade LJ 55, 55.

who obtains a favourable award may in the end score a Pyrrhic victory if interim measures are not ordered or are ordered but not enforceable to prevent the losing party from deliberately dissipating and transferring assets or destructing evidence. ICSID tribunals also have the power to recommend any provisional measure upon the request of parties or at its discretion, but at first sight the diction of ‘recommend’ used in article 47 of the Convention and article 39 of the Arbitration Rules appear to lack binding force. The tribunal in *Emilio Agustín Maffezini v. Kingdom of Spain* underpinned the fact that the semantic difference between ‘recommend’ and ‘order’ was more apparent than real, and deemed the word ‘recommend’ to be of equivalent value as the word ‘order’.¹⁹³ Accordingly, the tribunal’s authority to rule on provisional measures was not less binding than that of a final award.¹⁹⁴ However, it seemed that the tribunal in *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* intended to distinguish the different degrees of legal force of provisional measures, whereby measures ordered by tribunals were more binding than those that were merely recommended.¹⁹⁵ As the tribunal observed, the tribunal’s recommendation was based on ‘a recognition of the need to preserve such evidence’¹⁹⁶ and ‘for reasons of case management’¹⁹⁷ rather than ‘any finding’ that Tanzania had or might act aversely in respect of such documents¹⁹⁸ or ‘a final determination’ that any particular documents that were within Tanzania’s possession were subject to disclosure.¹⁹⁹ By comparison, what the tribunal ordered was ‘a specifically identified, narrow category of documents’ that was ‘of obvious potential relevance and materiality to the issues in dispute’.²⁰⁰

Notwithstanding the different understandings of the term ‘recommend’, the binding nature of provisional measures granted by ICSID tribunals is undisputable since the legal authority of ICSID tribunals’ decisions on provisional measures should be construed in such a way that an obligation rather than a simple moral duty is imposed on the parties to comply fully with provisional measures issued by ICSID tribunals. Be that as it may, the

¹⁹³ ICSID Case No ARB/97/7, Decision on Request for Provisional Measures, 28 October 1999, para 9.

¹⁹⁴ Ibid.

¹⁹⁵ ICSID Case No ARB/05/22, Procedural Order No 1, 31 March 2006, paras 88, 98, 106.

¹⁹⁶ Ibid, para 87.

¹⁹⁷ Ibid, para 97.

¹⁹⁸ Ibid, para 87.

¹⁹⁹ Ibid, para 97.

²⁰⁰ Ibid, para 104.

limits of ICSID tribunals' authority are by no means negligible or insignificant. First, a number of provisional measures, such as attachments and injunctions affecting third-parties, cannot be issued by ICSID arbitral tribunals. However, compelling attendance of witnesses and production of trail evidence, which require the assistance of national courts, are indispensable in some cases for the purpose of hearing procedure. Second, ICSID tribunals are not entitled with authority to enforce provisional measures in the event of non-compliance, and national courts normally do not take a part in implementing measures issued by ICSID tribunals. It appears that taking into account disputing parties' non-compliance with provisional measures in the decision on the merits²⁰¹ is a feasible way to improve the compliance, which, at any rate, is less advantageous as compared to national courts' assistance in enforcing provisional measures ordered by non-ICSID tribunals.

All told, consent to ICSID jurisdiction would exclude any remedy from national courts, but the ICSID mechanism lacks essential procedures for dealing properly with a request for interim relief prior to the constitution of a tribunal. Though the way ICSID tribunals issue interim relief is not simply a recommendation, the role of ICSID tribunals is somehow restricted in particular given the narrow ambit of their authority to order interim relief and their intrinsic defect in relation to the implementation of interim relief. The solutions designed in non-ICSID arbitration, in terms of availability, speed and enforceability, are more commendable where national courts are able to play a supporting role in an appropriate manner, providing necessary assistance but not detracting from the effect of arbitration. In practice, as international arbitration has grown expeditiously in recent decades, so have requests from disputing parties seeking interim relief.²⁰² Against the background of increasing requests for interim relief, the virtue of the favourable involvement of national courts in non-ICSID arbitration would rise to prominence in being conceived as a relatively impenetrable bulwark against tricky disputing parties' deliberated disruption or even destruction of arbitral proceedings by intimidating witnesses, destructing evidence or dissipating assets.

²⁰¹ In *AGIP S.p.A. v. People's Republic of the Congo*, the respondent failed to comply with provisional measures and the tribunal took into account such non-compliance in its final award. See ICSID Case No ARB/77/1, Award, 30 November 1979, paras 7-9, 42(c).

²⁰² The survey targeted at international arbitrators conducted by the Global Centre for Dispute Resolution Research demonstrated that 64 respondents identified 50 separate arbitration cases in which interim relief was sought either to restrain or stay an activity, order specific performance, or to provide security for costs. See Raymond J. Werbicki, 'Arbitral Interim Measures: Fact or Fiction?' 64.

3.3 The Interference of National Courts

Without prejudice to arbitral autonomy, investor-State arbitration indeed interacts, to various degrees, with national jurisdictions for its legitimate foundation, effectiveness or, at least, the implementation of awards. However, national courts' support in non-ICSID arbitration seems to be not as remarkable as might be expected by disputing parties. As regards interim relief, in practice national courts are, more often than not, hesitant to exercise their powers to grant interim relief, in particular where interim relief can also be ordered by arbitral tribunals.²⁰³ Moreover, the involvement of national courts has the potential to generate a tension between national jurisdiction and arbitral jurisdiction, further invoking its potential to bring about interference in arbitral proceedings. It is not uncommon at the present time for an anti-arbitration injunction to be issued by national courts to prevent investors from pursuing remedies before international tribunals, or for a request to be filed to challenge and remove arbitrators. Meanwhile, at times States are prepared to control international arbitral procedures to their advantage, some of whom may be more attracted to adjudication at the national level so as to gain a strategic advantage in arbitration with *situs* in their territory, especially where the executive power is able to pressure the judiciary to favour national interests over those of foreign investors due to the ambiguously established division of powers.²⁰⁴

In investor-State arbitration the potential for national courts to disrupt arbitral proceedings can be considerable. In *Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority*, Ethiopia instantly objected to the jurisdiction of the ICC arbitral tribunal after Salini (an Italian contractor) had recourse to the ICC Court.²⁰⁵ As the ICC Court rejected its challenge of the qualification of all three

²⁰³ For example, the House of Lords in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* ([1993] AC 334) held that there was 'the duty of the court to respect the choice of tribunal which both parties have made, and not to take out of the hands of the arbitrators (or other decision-makers) a power of decision which the parties have entrusted to them alone'. The Hong Kong Court of First Instance in *Leviathan Shipping Co Ltd v Sky Sailing Overseas Co Ltd* ([1998] 4 HKC 347) rejected an application of interim relief because the court's power to intervene in arbitral proceedings should be exercised sparingly, and under s 2GC(6) of the Arbitration Ordinance the arbitral tribunal should be the first resort since the tribunal had been constituted and could have ordered the measures.

²⁰⁴ Giulia Carbone, 'The Interference of the Court of the Seat with International Arbitration' (2012) 2012 J Disp Resol 217, 233.

²⁰⁵ ICC Arbitration No10623/AER/ACS, Award regarding the suspension of the proceedings and jurisdiction, 7 December 2001, para 16.

arbitrators, Ethiopia initiated appeal proceedings before the Addis Ababa Court of Appeal in respect of the ICC Court's decision,²⁰⁶ and further commenced a separate action before the Federal First Instance Court, contending that the arbitral tribunal lacked jurisdiction over the dispute.²⁰⁷ In addition, the Federal First Instance Court issued an injunction, enjoining the claimant from proceeding with the arbitration pending its decision on the tribunal's jurisdiction.²⁰⁸ In *Himpurna California Energy Ltd v. Indonesia*, Himpurna (a Bermudan company owned by a U.S. investor) initiated arbitral proceedings against Indonesia under the UNCITRAL Rules after the Indonesian State company had refused to pay damages stated in another UNCITRAL arbitral award. Himpurna was subsequently served with notice of two law suits in the Jakarta Court: one sought enjoinder of arbitral proceedings, while the other was brought by Indonesia seeking an annulment of the first UNCITRAL award. Since the injunction issued by the Indonesian court enjoining Himpurna from proceeding with arbitration against Indonesia failed to interrupt the arbitral hearings, Indonesia further forced the arbitrator appointed by Indonesia return to Indonesia.²⁰⁹ These two cases have demonstrated that in some instances national courts are liable to delay dispute resolution and undermine the basis of international arbitration even further.

In fact, the abusive interference of national courts (or even States) is a cliché in non-ICSID arbitration and how to reduce or avoid potential interference of national courts has been and remains a particularly thorny issue in international arbitration. A recent ICSID case has made a great contribution to defining the boundaries of the intervention of national courts. In *Saipem S.p.A. v. Bangladesh*, despite the injunction issued by Bangladeshi national courts restraining the Italian investor Saipem from proceeding with arbitration, ICC arbitral tribunal rendered an award in favour of Saipem. However, upon the losing party's application to set aside the ICC award, the Bangladeshi court determined that the award was non-existent such that it could neither be set aside nor enforced. The ICSID tribunal acknowledged that national courts of the State where arbitration took place did have supervisory jurisdiction over the arbitration, but the linchpin of the present case was whether the interference of national courts remained within the limits of their supervisory

²⁰⁶ Ibid, para 75.

²⁰⁷ Ibid, para 77.

²⁰⁸ Ibid, paras 88-89.

²⁰⁹ Interim Award (*Ad Hoc* UNCITRAL Proceeding), 16 October 1999, 25 YB Com Arb 109, 109-11, 191 (2000).

jurisdiction and whether such interference amounted to an expropriation.²¹⁰ At a more practical level, though the tribunal firstly accepted that international arbitration was rooted in the legal system of the State which was the seat of arbitration, it also recognized that arbitral tribunals were entitled with rights to sanction the illegality of the actions of (or the actions attributable to) national courts and State if the supervisory power of national courts at the arbitral *situs* was not exercised in good faith, failing to comply with the rule of law and generally acknowledge principles of international arbitration.²¹¹ Through examining the Bangladeshi national courts' jurisdiction, the 'merit' of the courts' decision to revoke the authority of ICC tribunal and the Supreme Court's decision declaring the ICC award non-existent, the ICSID tribunal confirmed that illegal actions of (or the actions attributable to) Bangladeshi courts gave rise to a claim of expropriation.²¹² Accordingly, the abusive intervention of national courts may not only be identified as delaying tactics for the purpose of impelling arbitration to grind to a halt, but also be regarded as a breach of international investment treaties.

Concluding Observations

Though States transfer automatically and consequentially part of their judicial sovereignty in favour of investment protection when verifying consent to both ICSID and non-ICSID arbitral jurisdiction, it is ordinarily submitted that more sovereign rights have to be transferred to ICSID arbitral tribunals. When negotiating investment treaties, States have to consider in what way and to what degree foreign investors can rely on investor-State arbitration rather than national administrative or juridical authority at the cost of a surrender of sovereignty, in particular taking three propositions into account if they attempt to strike a balance between State sovereignty and foreign investors' interests.

First, what kind of disputes can be brought before international tribunals? In general, the scope of subject matter in ICSID arbitration is perceptibly narrower since whether the subject matter in question is qualified as an investment under the ICSID Convention depends on the outcome of a stringent 'dual test'. However, the recent decades have seen an expansionary trend in ICSID jurisdiction by virtue of a broad and open-ended definition

²¹⁰ ICSID Case No ARB/05/7, Award of 30 June 2009, paras 115-16.

²¹¹ *Ibid*, para 186.

²¹² *Ibid*, paras 120-173.

of ‘investment’ in investment treaties which are the direct evidences of States’ consent to ICSID jurisdiction, and of the liberal method adopted by a large number of ICSID tribunals to interpret the concept of investment under the ICSID Convention, thereby enhancing the competency of ICSID tribunals and jurisdiction. The expansive ICSID jurisdiction has given rise to the Gordian knot which, of course, needs to be cut in practice, but it also reduces the differences of jurisdictional requirements between ICSID and non-ICSID arbitration. Nowadays, even though the diction ‘investment’ in ICSID arbitration is not that broad as compared to the comprehensive concept of ‘commercial’ in non-ICSID arbitration, the current interpretation of the notion of investment is sufficient for ICSID tribunals to exercise their jurisdiction over disputes from a wide range of assets and activities associated with investment.

Second, does the compatibility of investor-State arbitration with other dispute resolution procedures have substantive effects on the balance of safeguarding State sovereignty and protecting foreign investment? The explicit waiver requirement of the application of the rule of exhaustion of local remedies, at first glance, seems to be a derogation of State sovereignty in that in practice States normally neglect the difference concerning the waiver requirement under customary international law and the ICSID Convention, thus losing their chance to safeguard sovereign rights through invoking domestic administrative or judicial procedures. Nonetheless, it is conspicuous that the explicit waiver requirement under the ICSID Convention and the fork-in-the-road clause in BITs, to some extent, facilitate foreign investors’ access to international remedies. As to conciliation, there is a slightly ambivalent attribute towards the complementary use of conciliation in non-ICSID arbitration: while it might be in most investors’ interest, the diverse interests of States and other stakeholders are probably undermined in view of the private and confidential conditions under which conciliation could be conducted.

Third, is the fact that national courts retain supervisory power over non-ICSID arbitration more attractive than the exclusion of any remedy from national courts in ICSID arbitration? It is acknowledged that while national courts are able to facilitate arbitral proceedings especially by determining the jurisdiction of arbitral tribunals at an early stage and providing essential interim relief on the one hand, the interference of national courts with international arbitration can be abusive and extraordinarily disruptive on the other. The roles of national courts constitute two sides of the same coin: the benefit (deference to, and

assistance of, arbitral proceedings) and the detriment (the hegemony and disruption of arbitral proceedings). The self-contained nature of ICSID arbitration, which makes ICSID arbitration a system thoroughly detached from the supervisory power of national courts, appears to be less effective in ordering and enforcing interim relief but more essential in ensuring the integrity of arbitral proceedings. On the whole, insofar as jurisdiction is concerned, despite the fact that non-ICSID arbitration has already provided a relatively efficient and effective resolution, ICSID also endeavours to pursue similar ends in dissimilar ways, acting as a quasi-judicial body on the basis of its *sui generis* system to further the goal of protection of legitimate rights and interests of both sovereign States and foreign investors.

Table I: ICSID Tribunals' Treatment of Request for Provisional Measures

Case	Requesting Party	Date of Request	Date of Tribunal's Decision
<i>Holiday Inns S.A. and others v. Morocco</i> (ICSID Case No ARB/72/1)	Claimant	12 May 1972	2 July 1972
<i>AGIP S.p.A. v. People's Republic of the Congo</i> (ICSID Case No ARB/77/1)	Claimant	21 November 1978 (oral)	18 January 1979
<i>Amco Asia Corporation and others v. Republic of Indonesia</i> (ICSID Case No ARB/81/1)	Respondent	30 September 1983	9 December 1983
<i>Atlantic Triton Company Limited v. People's Revolutionary Republic of Guinea</i> (ICSID Case No ARB/84/1)	Respondent	20 August 1984	18 December 1984
<i>Maritime International Nominees Establishment v. Republic of Guinea</i> (ICSID Case No ARB/84/4)	Respondent	25 June 1985 (oral, against attachment orders concerning claimant's enforcement of an AAA award)	
	Respondent	8 August 1985 (request resubmitted for consideration)	4 December 1985
<i>Vacuum Salt Products Ltd. v. Republic of</i>	Claimant	22 October	3 December

<i>Ghana</i> (ICSID Case No ARB/92/1)		1992	1992
	Claimant	23 March 1993 and 30 April 1993 in reply to respondent's response	14 June 1993
<i>Československa obchodní banka, a.s. v. Slovak Republic</i> (ICSID Case No ARB/97/4)	Claimant	A number of requests made between 6 October 1997 and 5 January 1999	9 September 1998, 5 November 1998 (Procedural Orders No 2 and 3), 11 January 1999 (Procedural Order No 4)
<i>Emilio Agustín Maffezini v. Kingdom of Spain</i> (ICSID Case No ARB/97/7)	Respondent	3 July 1998	28 October 1999
<i>Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited</i> (ICSID Case No ARB/98/8)	Claimant	11 May 1999	19 December 1999
	Respondent	28 June 1999	
<i>Victor Pey Casado and President Allende Foundation v. Republic of Chile</i> (ICSID Case No ARB/98/2)	Respondent	13 September 1999	26 September 2001
<i>Zhinvali Development Ltd. v. Republic of Georgia</i> (ICSID Case No ARB/00/1)	Claimant	17 December 2001	24 January 2002
<i>SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan</i> (ICSID Case No ARB/01/13)	Claimant	7 May 2002	16 October 2002
<i>Azurix Corp. v. Argentine Republic</i>	Claimant	15 June	6 August

(ICSID Case No ARB/01/12)		2003	2003
<i>Tokios Tokelès v. Ukraine</i> (ICSID Case No ARB/02/18)	Claimant	3 June 2003	1 July 2003 (Procedural Order No 1)
<i>Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan</i> (ICSID Case No ARB/03/29)	Claimant	20 July 2004	29 November 2004 (Procedural Order No 1), 14 April 2008 (Procedural Orders No 11 and 12)
<i>Plama Consortium Limited v. Republic of Bulgaria</i> (ICSID Case No ARB/03/24)	Claimant	29 July 2005	6 September 2005
<i>Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania</i> (ICSID Case No ARB/05/22)	Claimant	2 August 2005	31 March 2006 (Procedural Order No 1), 29 September 2006 (Procedural Order No 3)
<i>Saipem S.p.A. v. People's Republic of Bangladesh</i> (ICSID Case No ARB/05/7)	Claimant	14 July 2006	21 March 2007
<i>Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador</i> (ICSID Case No ARB/06/11)	Claimant	18 October 2006	17 August 2007
<i>Phoenix Action Ltd v. Czech Republic</i> (ICSID Case No ARB/06/5)	Claimant	25 January 2007,	6 April 06 2007
<i>Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v. People's</i>	Claimant	10 April 2007	14 April 2007 (Procedural

<i>Republic of Bangladesh</i> (ICSID Case No ARB/06/10)			Order No 1)213
<i>Libananco Holdings Co. Limited v. Republic of Turkey</i> (ICSID Case No ARB/06/8)	Respondent	19 December 2007	23 June 2008
<i>Spyridon Roussalis v. Romania</i> (ICSID Case No ARB/06/1)	Respondent	28 May 2008	22 July 2008
	Respondent	12 May 2009	2 July 2009
<i>Saba Fakes v. Republic of Turkey</i> (ICSID Case No ARB/07/20)	Claimant	20 June 2008	6 October 2008
<i>ABCI Investments Limited v. Republic of Tunisia</i> (ICSID Case No ARB/04/12)	Claimant	8 July 2008	30 September 2008
	Claimant	1 October 2010	17 November 2010
	Claimant	26 December 2013	17 April 2014
<i>Murphy Exploration and Production Company International v. Republic of Ecuador</i> (ICSID Case No ARB/08/4)	Claimant	29 July 2008	Claimant withdrew the request
<i>Railroad Development Corporation v. Republic of Guatemala</i> (ICSID Case No ARB/07/23)	Claimant	21 August 2008	15 October 2008
<i>Repsol YPF Ecuador, S.A. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)</i> (ICSID Case No ARB/08/10)	Claimant	16 February 2009 (renewed request)	17 June 2009
<i>Perenco Ecuador Limited v. Republic of Ecuador</i> (ICSID Case No ARB/08/6)	Claimant	19 February 2009	8 May 2009

²¹³ The order required the Respondent take all steps to ensure that the ICSID proceedings continue without hindrance.

<i>Burlington Resources, Inc. v. Republic of Ecuador</i> (ICSID Case No ARB/08/5)		20 February 2009	29 June 2009
<i>Caratube International Oil Company LLP v. Republic of Kazakhstan</i> (ICSID Case No ARB/08/12)	Claimant	14 April 2009	31 July 2009
<i>Gustav F W Hamester GmbH & Co KG v. Republic of Ghana</i> (ICSID Case No ARB/07/24)	Respondent	17 April 2009	24 June 2009
<i>EVN AG v. Macedonia, former Yugoslav Republic of</i> (ICSID Case No ARB/09/10)	Claimant	4 June 2009	Claimant withdrew the request
<i>Millicom International Operations B.V. and Sentel GSM S.A. v. Republic of Senegal</i> (ICSID Case No ARB/08/20)	Claimant	24 August 2009, 17 August 2010 (for modification of provisional measures)	9 December 2009, 29 October 2010
<i>CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela</i> (ICSID Case No ARB/08/15)	Claimant	1 September 2009	3 March 2010
<i>Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia</i> (ICSID Case No ARB/06/2)	Claimant	15 September 2009	26 February 2010
<i>Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v. Georgia</i> (ICSID Case No ARB/08/19)	Claimant	8 January 2010	25 January 2010
<i>Olyana Holdings LLC v. Republic of Rwanda</i> (ICSID Case No ARB/10/10)	Claimant	14 May 2010	Proceeding discontinued
<i>International Company for Railway</i>	Claimant	16 August	Proceeding

<i>Systems (ICRS) v. Hashemite Kingdom of Jordan</i> (ICSID Case No ARB/09/13)		2010	discontinued
<i>Renée Rose Levy de Levi v. Republic of Peru</i> (ICSID Case No ARB/10/17)	Claimant	9 September 2010	17 June 2011
<i>Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru</i> (ICSID Case No ARB/10/2)	Claimant	22 October 2010	23 February 2011
<i>Ioan Micula, Viorel Micula and others v. Romania</i> (ICSID Case No ARB/05/20)	Claimant	3 November 2010	2 March 2011
	Claimant	4 March 2011	27 May 2011
	Claimant	14 October 2011	27 March 2013
	Claimant	5 March 2013	5 April 2013
<i>Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania</i> (ICSID Case No ARB/10/13)	Claimant	23 December 2010	29 March 2011
<i>Club Hotel Loutraki S.A. and Casinos Austria International Holding GMBH v. Republic of Serbia</i> (ICSID Case No ARB/11/4)	Claimant	23 February 2011	Proceeding discontinued
<i>Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic</i> (ICSID Case No ARB/09/1)	Claimant	12 April 2011	8 June 2011
	Claimant	26 March 2012	3 October 2012
<i>International Quantum Resources Limited, Frontier SPRL and Compagnie Minière de Sakania SPRL v. Democratic Republic of the Congo</i> (ICSID Case No	Claimant	23 May 2011	28 November 2011

ARB/10/21)			
<i>Abaclat and others v. Argentine Republic</i> (ICSID Case No ARB/07/5)	Respondent	21 July 2011	27 June 2012
<i>Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan</i> (ICSID Case No ARB/11/8)	Claimant	9 December 2011	30 January 2012
<i>Hussain Sajwani, Damac Park Avenue for Real Estate Development S.A.E., and Damac Gamsha Bay for Development S.A.E. v. Arab Republic of Egypt</i> (ICSID Case No ARB/11/16)	Claimant	9 March 2012	13 July 2012
<i>Burimi SRL and Eagle Games S.H.A v. Republic of Albania</i> (ICSID Case No ARB/11/18)	Respondent	30 March 2012	3 May 2012
<i>Highbury International AVV and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela</i> (ICSID Case No ARB/11/1)	Claimant	9 April 2012	30 April 2012
<i>Bernhard von Pezold and others v. Republic of Zimbabwe</i> (ICSID Case No ARB/10/15)	Claimant	12 June 2012	13 June 2012
	Claimant	6 March 2013	16 March 2013
	Claimant	5 July 2013	22 July 2013
	Claimant	27 October 2013	Claimant withdrew the request
<i>Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe</i> (ICSID Case No ARB/10/25)	Claimant	12 June 2012	16 March 2013 (Procedural Order No 4), 3 April 03 2013 (Procedural Order No 5),

			22 July 2013 (Procedural Order No 6)
<i>Novera AD, Novera Properties B.V. and Novera Properties N.V. v. Republic of Bulgaria</i> (ICSID Case No ARB/12/16)	Claimant	3 July 2012	Claimant withdrew the request
<i>Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan</i> (ICSID Case No ARB/12/1)	Claimant	23 July 2012	13 December 2012
<i>Garanti Koza LLP v. Turkmenistan</i> (ICSID Case No ARB/11/20)	Claimant	2 November 2012	21 December 2012
<i>Churchill Mining and Planet Mining Pty Ltd, formerly ARB/12/14 v. Republic of Indonesia</i> (ICSID Case No ARB/12/14 and 12/40)	Respondent	22 November 2012	4 March 2013 (Procedural Order No 3)
	Claimant	27 March 2014	8 July 2014 (Procedural Order No 9)
<i>Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan</i> (ICSID Case No ARB/13/1)	Claimant	11 March 2013	16 October 2013
<i>Lao Holdings N.V. v. Lao People's Democratic Republic</i> (ICSID Case No ARB(AF)/12/6)	Claimant	19 April 2013, 28 May 2013 (amended the request)	17 September 2013
<i>OI European Group B.V. v. Bolivarian Republic of Venezuela</i> (ICSID Case No ARB/11/25)	Claimant	5 July 2013	26 November 2013
<i>Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic</i> (ICSID Case No ARB/12/38)	Claimant	24 July 2013	Proceeding discontinued
<i>RSM Production Corporation v. Saint Lucia</i> (ICSID Case No ARB/12/10)	Respondent	6 September	12 December 2013

		2013	
<i>Vigotop Limited v. Hungary</i> (ICSID Case No ARB/11/22)	Claimant	10 November 2013	Award rendered on 1 October 2014 (unpublished)
<i>Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation</i> (ICSID Case No ARB/10/11)	Claimant	23 December 2013	31 January 2014 (Procedural Order No 4), 1 May 2014 (Procedural Order No 6)
<i>EVN AG v. Republic of Bulgaria</i> (ICSID Case No ARB/13/17)	Claimant	28 March 2014	5 May 2014
<i>Enel Green Power S.p.A. v. Republic of El Salvador</i> (ICSID Case No ARB/13/18)	Claimant	15 April 2014	The Tribunal held a hearing on 18 July 2014
<i>MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia</i> (ICSID Case No ARB/13/32)	Respondent	12 May 2014	
<i>Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela</i> (ICSID Case No ARB/12/13)	Claimant	15 May 2014	9 September 2014
<i>Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan</i> (ICSID Case No ARB/13/13)	Claimant	14 July 2014	The Tribunal held a hearing on 8 October 2014
<i>PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea</i> (ICSID Case No ARB/13/33)	Claimant	14 July 2014	

<i>Tullow Uganda Operations Pty Ltd and Tullow Uganda Limited v. Republic of Uganda</i> (ICSID Case No ARB/13/25)	Claimant	1 August 2014	
<i>EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic</i> (ICSID Case No ARB/14/14)	Respondent	11 September 2014	
<i>Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Mr. Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan</i> (ICSID Case No ARB/13/38)	Claimant	15 September 2014	The Tribunal held a hearing on 2 October 2014

Table II: Treatment of Request for Provisional Measures in Other ICSID Proceedings

Case	Requesting Party	Date of Request	Proceeding	Date of Tribunal's Decision
<i>ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan</i> (ICSID Case No ARB/08/2)	Applicant	21 September 2010	Interpretation Proceeding	7 March 2011
<i>Ron Fuchs v. Georgia</i> (ICSID Case No ARB/07/15)	Applicant	30 September 2011	Revision Proceeding	
<i>SGS Société Générale de Surveillance S.A. v. Republic of Paraguay</i> (ICSID Case No ARB/07/29)	Applicant	17 January 2013	Annulment Proceeding	
<i>Ioan Micula, Viorel Micula and others v. Romania</i> (ICSID Case No ARB/05/20)	Applicant	10 June 2014	Annulment Proceeding	

Chapter II The Role of Institutions in Administering and Promoting Investment Arbitration

Unlike the highly bureaucratic WTO system, which stays close to bureaucratic and formalized rational legitimacy, the dispute settlement system in the form of international investment arbitration with a simple but stable bureau rests principally on the charisma of arbitrators and strong tradition.²¹⁴ Indeed, the bureaucracy of ICSID, for instance, simply consists of an Administrative Council and a Secretariat, and only the latter performs the function of the administration of dispute settlement facilities. However, the role that an arbitration institution²¹⁵ takes in investment arbitration can be, to the greatest extent possible, essential and fundamental.

It is noteworthy that aside from administrative powers and functions that aim to ensure the continued integrity and efficiency of the arbitration facilities, arbitration institutions can undertake a range of duties that would have consequential influences on the entire international investment arbitration. As one of the ICSID's objectives is to promote increased flows of transnational investment, it is recognized that the ICSID undertakes some duties to foster, *inter alia*, the coherent development of ICSID jurisprudence and to further provide intellectual leadership on international law related to transnational investment and arbitration (both ICSID and non-ICSID arbitration). By comparison, as a legal body specializing in commercial law, the main mandate that UNCITRAL carries out is to modernize and harmonize international trade law.²¹⁶ As *ad hoc* arbitration where no administering facility is readily available, the UNCITRAL Secretariat is virtually not

²¹⁴ José Augusto Fontoura Costa, 'Comparing WTO Panelists and ICSID Arbitrators: the Creation of International Legal Fields', *Oñati Socio-Legal Series*, v1, n4 (2011).

²¹⁵ An arbitration institution is established to resolve disputes, irrespective of the locations of disputing parties or the systems of law. An arbitration institution intervenes and takes on the role of administering and supervising arbitral proceedings, while individual disputes are determined by arbitral tribunals. Though each arbitration institution has its own special characteristics, there are some common features. First, an arbitration institution has its own form of administration to assist in the arbitration process. The level of administration of an institution is one of essential factors affecting disputing parties' choice of forum. Eg, the ICC is greatly administered with the terms of reference, fixing of times for the making of awards and scrutiny procedures, while the LCIA limits its administration to dealing with issues related to arbitrators after the appointment of arbitrator (see Julian D. M. Lew, *et al*, *Comparative International Commercial Arbitration*, 36). Second, an arbitration institution has its own set of pre-established arbitration rules to govern arbitral proceedings. ICSID, ICC, SCC, LCIA and PCA are the common institutions for the resolution of international investment arbitration.

²¹⁶ UNCITRAL, 'A Guide to UNCITRAL: Basic Facts About the United Nations Commission on International Trade Law', 2013, 1-2.

involved in administering arbitration cases governed by the UNCITRAL Rules.²¹⁷ Similarly, as the world's business organization, ICC generally brings together all sectors of international business and acts to further the development of an open world economy.²¹⁸ Considering that most, if not all, non-ICSID institutions do not concentrate on the law of foreign investment (though some of their works are related to investment arbitration), the unique position of the ICSID determines its characteristic role in investor-State dispute settlement mechanism, and the distinctive role of the ICSID Secretariat will rise to prominence not only on the basis of its strengths as primary bureau of the Centre reflecting the needs and wants of contracting States and investors, but also in the light of its far-reaching impact on the development of foreign investment law. Among various distinctions between ICSID and non-ICSID arbitration in regard to the role of institutions, substantive administrative functions, arbitral costs and consistency are the most intrinsically discriminative features.

1 The Independence of Institutions

1.1 The Importance of the Independence of Institutions

It is basically an acknowledgement that an independent and impartial institution, under whose immediate administration arbitral tribunals are constituted to adjudicate investment disputes, is routinely an indispensable expectation of both investors and States. Needless to say, the *raison d'être* of investment arbitration, from a historical perspective, is to provide for neutral fora that let disputing parties off the hook on exterior political, administrative and judicial interference. The independence of international institutions (especially those that act as judicial and quasi-judicial bodies) entails the capacity of institutions to be buffered or insulated from direct external influence and pressure, thus operating neutrally

²¹⁷ The PCA is the only institution mentioned in the UNCITRAL Arbitration Rules. The rules stipulate that if disputing parties fail to agree on the choice of an appointing authority, any party may request the Secretary-General of the PCA to designate an appointing authority for arbitrator selections and challenge (see art 6 of the UNCITRAL Arbitration Rules). Though there is no administrative support from the UNCITRAL Secretariat for *ad hoc* arbitration under the UNCITRAL Rules, UNCITRAL arbitration does not necessarily deprive parties of the benefits from other institution. The PCA has played a unique role among international institutions to administrate an increasing number of investor-State arbitration cases under the UNCITRAL Rules.

²¹⁸ Preamble and art 1(2) of the Constitution of the International Chamber of Commerce (2012).

in resolving disputes.²¹⁹ In the event that an arbitration institution is not perceived as an independent body, it would be simply tenable to criticize the credibility of tribunals constituted under the auspices of the institution to resolve or reconcile the conflicts of diverse interests. In the light of this concern, ICSID's present 'independence' as an arbitration institution is inadequate due mainly to its perceptible link to the World Bank. In contrast, except *ad hoc* arbitration under the UNCITRAL Rules, non-ICSID arbitration is ordinarily conducted under the aegis of an independent commercial arbitration institution, thereby effectively avoiding institutions' inappropriate or illegitimate interference in arbitral proceedings.

1.2 The Independence in ICSID Arbitration

Given that the initiative for the ICSID came from the World Bank and the Centre was established accordingly with 'close administrative ties to the World Bank',²²⁰ it seems that ICSID's connection with the World Bank is somehow unbreakable or, at least, close at the present time. Realizing the increasing importance of international institutions retaining autonomy and independence, ICSID has taken moderate steps to incorporate more independence into its structure.²²¹ However, as one part of the World Bank Group, ICSID still remains, to a certain extent, not only structurally but also financially dependent upon the World Bank.²²² In addition, the World Bank regularly puts forward its views concerning the values, the interpretation and the role of investment arbitration.²²³ All these factors have necessarily affected and continue to affect the independence of ICSID, and may further exert influences on the constitution of ICSID arbitral tribunals, arbitral proceedings and decision-making process. In particular, promoting private foreign

²¹⁹ Kenneth W. Abbott, Duncan Snidal, 'Why States Act through Formal International Organizations' (1998) 42 J Conflict Resol 3, 19, 22.

²²⁰ Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 8.

²²¹ One of the most striking reforms is that the General Counsel of the World Bank is no longer elected to perform functions of the Secretary-General of ICSID since 2008.

²²² In regard to structure, the President of the World Bank shall *ex officio* chair the Administrative Council, and the ICSID Secretary-General is elected by the Administrative Council on the nomination of the Chairman. As to finance, contracting States of the ICSID Convention who are members of the World Bank shall bear the expenditure of the Centre in proportion to their respective subscriptions to the capital stock of the World Bank, provided that the charges for the use of ICSID facilities are insufficient to cover the expenditure of the Centre. See arts 5, 10 & 17 of the ICSID Convention.

²²³ Howard Mann, *et al*, 'Comments on ICSID Discussion Paper, "Possible Improvements of the Framework for ICSID Arbitration"' in Karl P. Sauvant (ed), *Appeals Mechanism in International Investment Disputes*, 370.

investment is one of the objectives of the International Bank for Reconstruction and Development, and the Bank's support for investment projects in practice is normally to provide borrowing countries with financing for a broad range of investment activities, especially for large infrastructure projects necessary to reduce poverty. In the event that an investment dispute in which the World Bank was implicated was brought before an ICSID tribunal, though the Bank not as a named claimant or respondent, there could arguably be a possibility that the arbitration outcome would be influenced by external power. In fact, States had expressed concerns about the connection between ICSID and the World Bank.²²⁴

The connection between ICSID and the World Bank might be justifiable at the outset of the establishment of the Centre in that the World Bank was an appropriate and competent intergovernmental organization to promote international cooperation and further create facilities for international arbitration in the mid-twentieth century. Nonetheless, it appears that the connection is not in itself a necessary hallmark of ICSID arbitration in the contemporary world. There could be unavoidable practical impediments if ICSID's financial connection with the World Bank were broken, but it could be even worse for an arbitration institution to be administratively and financially associated with, or attached to, and therefore dependent on, another organization that can be a stakeholder in arbitration cases. Accordingly, it is advisable to change the ICSID's scarcity of stark independence, particularly in view of the impact of the inadequate independence on the ICSID's future credibility and ability to achieve valuable ends. In addition to the formal split of positions filled by the General Counsel of the World Bank and the Secretary-General of ICSID, some practitioners have proposed that ICSID could follow the trends for non-ICSID arbitration institutions to open offices in areas other than Western capitals,²²⁵ and further to consider moving the arbitral seat from Washington, DC to the Hague (akin to the ICJ and the PCA) and subsequently being funded independently of the World Bank and by the UN or other bodies.²²⁶ These proposals aim to retain, to the largest extent, the independence of

²²⁴ The Centre was originally to have an administrative link to the World Bank, but the administrative connection was discarded due to the protest of many States. See Gita Gopal, 'International Centre for Settlement of Investment Disputes' (1982) 14 Case W Res J Intl L 591, 599.

²²⁵ For example, the PCA's Mauritius office and the AAA (ICDR)'s Bahrain office.

²²⁶ V. V. Veeder, *The Investor's Choice of ICSID and Non-ICSID Arbitration Under Bilateral and Multilateral Treaties*, 9.

ICSID as an arbitration institution which has to be trusted by disputing parties in seeking neutrality and impartiality, and it seems that they are not unfeasible in practice.

1.3 The Independence in Non-ICSID Arbitration

There has been much more emphasis placed on the importance of the independence of non-ICSID arbitration institutions and, a focus on the separation of institutions' administrative function and dispute settlement function. ICC has set an example by establishing the International Court of Arbitration which, as an autonomous body, carries out its function in complete independence from the ICC and its organs, and members of the Court are independent from the ICC National Committees and Groups.²²⁷ The Singapore International Arbitration Centre (hereinafter 'SIAC') goes the way of the ICC in its current Arbitration Rules (2013) under which the newly established Court of Arbitration takes over substantive legal functions²²⁸ from SIAC's Board of Directors, which will be merely responsible for corporate and business development matters.²²⁹ Ordinarily, the disengagement of the dispute settlement function and other functions is conducive to steering clear of conflicts of interests or at least the appearance of such conflicts, which should be one of the foremost considerations of arbitration institutions when designing their future institutional structure since the independence as a question of substance is not only one of primary virtues of institutions that adjudicate investment disputes, but also the essence for its further accountability and credibility.

2 Secretariat's Substantive Case-related Functions

2.1 Screening Power

As the Secretariat is normally the main bureau that deals directly with arbitration cases, it is conspicuous that its substantive case-related functions can have a considerable, even decisive on occasion, influence on the dispute settlement. One of the substantive case-

²²⁷ Art 1 of the ICC Arbitration Rules, Appendix I, Statutes of the International Court of Arbitration.

²²⁸ The substantive legal functions include case administration, jurisdictional challenges, appointment of arbitration, challenges to arbitration, and emergency interim. See arts 6, 13, 25 the SIAC Arbitration Rules, and art 2 of Schedule 1, Emergency Arbitrator.

²²⁹ However, no separate statute is being concluded to govern the functions and proceedings of the SIAC Court as its ICC counterpart does.

related administrative functions of the ICSID Secretariat, which can be a difference between ICSID and non-ICSID arbitration, is the screening power of the ICSID Secretary-General. In accordance with a unique prerogative conferred by the ICSID Convention, the Secretary-General may refuse to register a request for arbitration upon finding, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre.²³⁰ In fact, the screening power is also an administrative function in a number of non-ICSID arbitration institutions. The ICC Court, for instance, shall decide whether and to what extent the arbitration shall proceed if the Secretary General²³¹ refers the effect of an arbitration agreement to the Court. More specifically, the Court is entitled to determine that the arbitration cannot proceed in respect of some or all of them if it is not *prima facie* satisfied that an arbitration agreement under the Rules may exist.²³² Likewise, the SCC Board of Directors may dismiss a case on the condition that the claimant fails to comply with a request for further details,²³³ and shall dismiss a case, in whole or in part, if the SCC manifestly lacks jurisdiction over the dispute.²³⁴ Nevertheless, it is the ICC Court or the Board of Directors (rather than the Secretariat) that is conferred on the screening power in non-ICSID institutional arbitration, which may not be adaptively efficient as compared to the Secretariat performing the screening power. Apart from the distinctive bureaux, there are also several significant disparities between ICSID and non-ICSID arbitration regarding the screening power during the commencement of arbitral proceedings.

In the first place, the ICSID Secretary-General exercises the screening power solely on the basis of the information contained in the request, which has an indication that contrary to main non-ICSID arbitration institutions, the ICSID Secretariat makes a decision without seeking any comments or arguments from the respondent.²³⁵ For one thing, all information that the ICSID Secretary-General has to review, which is supported by the documentation

²³⁰ Art 36(3) of the ICSID Convention.

²³¹ In order to avoid confusion, it is worth mentioning that while the ICSID Convention adopts the diction ‘Secretary-General’, the ICC Rules use the term ‘Secretary General’.

²³² Art 6(4) of the ICC Arbitration Rules (2012).

²³³ Art 6 of the SCC Arbitration Rules (2010).

²³⁴ *Ibid.*, art 10(i).

²³⁵ Intriguingly, unlike the role of the ICSID Secretary-General in ICSID arbitration, the Secretary-General in ICSID additional facility proceedings may, either at the parties’ request or on his own initiative, hold discussions with the parties or invite the parties to a meeting with the officials of the Secretariat. See art 4(5) of the ICSID Additional Facility Rules.

specified in the ICSID Institution Rules,²³⁶ comes exclusively from the requesting party. In practice, in the event that there is any doubt as to whether the request explicitly fails to comply with the jurisdictional requirements set out in article 25(1) of the Convention or whether the request is otherwise incomplete, the Secretariat most likely just contacts the requesting party to correct or further supplement the request.²³⁷ For another, the Secretariat is required to transmit a copy of the request for arbitration and of the accompanying documentation to the respondent,²³⁸ but would not take the respondent's observations into account when making a decision.

In the second place, the screening power of the Secretariat in non-ICSID arbitration is more discretionary. When being opted as the governing rules for investor-State dispute cases, it appears that the Rules of ICC and SCC are ambiguous as to how to exercise the screening power since the grounds for dismissing a request for arbitration in the Rules of ICC and SCC are quite general and place particular emphasis on the resolution of international commercial disputes. The ICC Rules focus on the *prima facie* evidence that an arbitration agreement may exist, and the SCC Rules are silent on the criteria of exercising screening power. While the ICSID Secretariat in additional facility proceedings has plenary discretionary authority on the approval of a request,²³⁹ the provisions governing and limiting the ICSID Secretary-General's screening power are explicit under the ICSID Convention and the Institution Rules. In general, the request for arbitration must be registered unless it manifestly fails to satisfy the jurisdictional requirements under article 25(1) of the Convention which provides that the Centre merely deals with legal disputes arising directly out of an investment between a contracting State and investors of another contracting State. The Institution Rules set forth more specific requirements, including the content of the request, optional information and the form of documentation. Based on the negative formulation of the Convention and the detailed requirements under

²³⁶ R 2 of the ICSID Institution Rules.

²³⁷ Lucy Reed, *et al*, *Guide to ICSID Arbitration*, 127.

²³⁸ R 5(2) of the ICSID Institution Rules.

²³⁹ Under art 4 of Schedule C, Arbitration (Additional Facility) Rules, the ICSID Secretary-General shall register the request as soon as he has satisfied himself that the request conforms in form and substance to art 3 regarding the consents of request. According to art 4(2) of the Additional Facility Rules, the Secretary-General has power to approve an alleged agreement to arbitration only if the requirements are met, which indicates that the Secretary-General has power to verify the existence of consent to arbitration. Thus, art 4(2) of the Additional Facility Rules allows, *de facto*, a conceivable inference of purely discretionary rejection. See Sergio Puig, Chester Brown, 'The Secretary-General's Power to Refuse to Register a Request for Arbitration under the ICSID Convention' (2012) 27(1) ICSID Rev-Foreign Investment LJ 172, 187-88.

the Institution Rules, it can be maintained that the screening power of the ICSID Secretariat is more restrictive and rigid.

Last but not least, the effect of the decision made by virtue of the screening power can be disparate in non-ICSID and ICSID arbitration. Under the ICC Rules, after the ICC Court has made a decision that the arbitration cannot proceed in respect of some or all of them, disputing parties retain the right to seek remedies from any national court having jurisdiction to determine whether or not, and in respect of which of them, there is a binding arbitration agreement.²⁴⁰ In practice, if national courts overturned a decision of the ICC Court in which a request for arbitration was denied on the basis of a manifest lack of an arbitration agreement, the ICC is thereafter required to register the request.²⁴¹ In contrast, the ICSID Secretariat's decision on the request for arbitration is final and binding. In the case where the applicant is allowed to register a case, even though the registrability of the case is challenged by the respondent, the Secretariat would still notify the parties of the registration. In the meantime, the notice of registration shall remind disputing parties that the registration is without prejudice to the powers and functions of the arbitral tribunal in regard to jurisdiction, competence and merits.²⁴² The Secretariat's refusal to register a request for arbitration, however, would preclude access to the Centre's facility. No recourse against the decision of refusal to register is available, though the decision has no *res judicata* effect. Both requesting party and respondent are entitled to make preliminary objections to the Secretariat's decision, regardless of acceptance or refusal of the request,²⁴³ but the objections would not affect the validity of the decision.

Although the Secretariat's screening power can be a feature that distinguishes ICSID arbitration from non-ICSID arbitration, it should be noted that the ICSID Secretariat's

²⁴⁰ Art 6(6) of the ICC Arbitration Rules.

²⁴¹ For example, the ICC Court once disallowed a case to proceed to arbitration on the basis of art 6(2) of the ICC Rules, but the decision was then challenged and overturned by the courts of New York. Subsequently, the ICC allowed the arbitration to proceed. Such recourse, however, is not universal and would not have been available in some jurisdictions such as France and Switzerland. See Matthias Scherer and Jaime Gallego, 'Arbitral Institutions under Scrutiny' (2011) 29(4) ASA Bulletin 940, 941.

²⁴² R 7(e) of the ICSID Institution Rules.

²⁴³ Preliminary objections can be filed by any party not later than 30 days after the constitution of the tribunal, and in any event before the first session of the tribunal. Under this circumstance, the parties will be given the opportunity to present their observations on the preliminary objection, and if the tribunal determines that the dispute or any ancillary claim is not within the jurisdiction of the Centre, or that the claims are manifestly without legal merit, it shall render an award to that effect. See r 41(5), (6) of the ICSID Arbitration Rules.

screening power is, as a matter of fact, limited in nature. The power of Secretariat originated (or one might say was ‘invented’²⁴⁴) to avoid the embarrassment to a respondent (especially a State) that had not consented to submitting disputes to the Centre and a possibility that the machinery of the Centre would be set in motion in cases where jurisdiction was obviously lacking.²⁴⁵ Through precluding frivolous proceedings against States that lack legal foundation, the ICSID Secretariat’s screening power contributes to a safeguard against the waste of time, effort and money, and further assists in ensuring the *bona fide* use of the Centre’s facility.²⁴⁶ Against this background, article 36(3) was adopted with a negative formulation so as not to encroach on the prerogative of tribunals to exercise their jurisdictional authority,²⁴⁷ and such stipulation has an indication that a request must be registered unless the Secretariat is convinced that the dispute is manifestly outside the ambit of the jurisdiction of the Centre. Furthermore, the Secretariat’ screening power is limited to the issue of the jurisdiction rather than the merits of the disputes, which is different from the authority of ICSID tribunals by which tribunals in preliminary objection proceedings can dismiss summarily claims that are manifestly without legal merit.²⁴⁸

The ICSID Secretariat’s screening power, limited as it is, is nevertheless of significant administrative importance. The role of gatekeeper that the ICSID Secretariat serves essentially sets up a jurisdictional threshold to efficiently filter utterly unworthy disputes that manifestly fail to comply with the requirements set out in article 25(1) of the Convention from the disputes that are, substantially or potentially, meritorious. Given the crucial consequence that is generated by the Secretariat’s screening power, a number of observers have suggested that the screening power must be exercised with caution,²⁴⁹ and some even argue that it becomes more difficult to persuade the Secretariat to register a request for arbitration than it is to persuade a tribunal to exercise jurisdiction over a

²⁴⁴ Antonio R. Parra, ‘The Institution of ICSID Arbitration Proceedings’ (2003) 20(2) *News from ICSID* 12, 13.

²⁴⁵ ICSID, ‘Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States’, para 20.

²⁴⁶ Antonio R. Parra, ‘The Screening Power of the ICSID Secretary-General’ (1985) 2(2) *News from ICSID* 10.

²⁴⁷ When finalizing the text of the ICSID Convention, the Legal Committee defined the screening power in negative terms which would ‘better convey the intention of giving the Secretary-General power only for a formal screening’. See Antonio R. Parra, *The History of ICSID* (OUP, 2012) 84.

²⁴⁸ R 41(5) of the ICSID Arbitration Rules.

²⁴⁹ For example, Georges R. Delaume, ‘ICSID Arbitration Proceedings’ (1986) 4 *Intl Tax & Bus L* 218, 220.

claim.²⁵⁰ However, it seems that the scepticism about the difficulty to persuade the Secretariat to register a request is inconsistent with the ICSID practice for the reasons that registration would probably be refused, based on the case law, merely in exceptional circumstances where the investment is a simply commercial transaction which apparently falls outside the jurisdiction of the Centre, and that only 13 requests to register have been refused by the Secretariat as compared to the abundant registered cases.²⁵¹ In any event, it is tenable to assert that the ICSID Secretariat's unique prerogative largely distinguishes ICSID arbitration from UNCITRAL arbitration and non-ICSID institutional arbitration.

2.2 Appointing Authority

As arbitral process would be delayed or even frustrated if disputing parties fail to make an appointment of arbitrator or cannot reach an agreement, appointments made by a default appointing authority are accordingly crucial and necessary for the constitution of a tribunal. The appointing authority scheme is one of characteristic features of institutional arbitration as compared to *ad hoc* arbitration since the pre-established institutional rules provide, by and large, a list or database of potential arbitrators to choose from, and further entrust the bureau of institution with the authority to assist in appointing eligible arbitrators. Through promoting the constitution of arbitral tribunals, the involvement of institutions indubitably ensures that an arbitration case begins in a well-organized and timely manner, thereby enabling greater efficiency in arbitral proceedings. Conversely, in the light of unavailable administrative bureaucracy, disputing parties in *ad hoc* arbitration have, in principle, to be responsible for the appointment of arbitrators on their own, and an appointing authority must be designated if the appointment by the parties turns out to be impossible while national arbitration law is not applicable. In UNCITRAL arbitration, any party can request the Secretary-General of the PCA to designate the appointing authority.²⁵²

The role of the ICSID Secretariat in the appointment process can not only be a stark divergence between ICSID and *ad hoc* arbitration, but also a remarkable feature that distinguishes ICSID arbitration from non-ICSID institutional arbitration. Non-ICSID

²⁵⁰ Stephen D. Sutton, 'Emilio Augustin Maffezini v. Kingdom of Spain and the ICSID Secretary-General's Screening Power' (2005) 21(1) Arb Intl 113, 126.

²⁵¹ Martina Polasek, 'The Threshold for Registration of a Request for Arbitration Under the ICSID Convention' (2011) 5 Disp Resol Intl 177, 188.

²⁵² Art 6(2) of the UNCITRAL Arbitration Rules.

institutional arbitration rules normally do not confer the appointing authority on the Secretariat since such authority commonly falls within the functions of other bureaux of the institution such as the ICC Court²⁵³ and the SCC Board of Directors.²⁵⁴ In addition, the appointing authority in non-ICSID arbitration (especially in the newer institutions) has been questioned for weakening, to some extent, the relationship of trust which disputing parties and arbitrators are supposed to share, and probably entailing a more laborious process for constituting a tribunal which might not achieve the effect (such as securing the appointment and guaranteeing smooth procedures) that the parties expect from national courts as judges are appointed in court trial.²⁵⁵

In fact, the ICSID Convention does not entrust appointing authority to the ICSID Secretariat; instead, the Chairman of the Administrative Council serves the function to appoint an arbitrator at the request of any party if a tribunal cannot be constituted in due course.²⁵⁶ However, several instruments have designated the ICSID Secretary-General as the appointing authority of arbitrators in *ad hoc* proceedings. An annex to the High Ross Treaty made by Canada and U.S. in 1984, for instance, provided for the settlement of disputes by *ad hoc* arbitration where the ICSID Secretary-General served as the appointing authority of last resort.²⁵⁷ Towards the end of the 1980s, UNCITRAL arbitration clauses referring to the ICSID Secretary-General as appointing authority are increasingly seen particularly in NAFTA dispute resolution clauses under which the ICSID Secretary-General is designated to appoint the presiding arbitrator from the agreed roster of arbitrators in the event that disputing parties are unable to agree on a presiding arbitrator.²⁵⁸ In practice, as between the Chairman and the Secretary-General, the Centre generally encourages parties to choose the latter as the appointing authority since such choice is more straightforward as the Chairman ordinarily only performs the function on the advice of the Secretary-General.²⁵⁹

²⁵³ Art 12(8) of ICC Arbitration Rules.

²⁵⁴ Art 13(2), (3) & (4) of the SCC Arbitration Rules.

²⁵⁵ Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, 540-41.

²⁵⁶ Art 38 of the ICSID Convention.

²⁵⁷ Treaty between Canada and the United States of America Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend d'Oreille River (High Ross Treaty), 2 April 1984, Annex, sec.10.

²⁵⁸ Art 1124(3) of NAFTA.

²⁵⁹ Antonio R. Parra, *The History of ICSID*, 152.

The ICSID Secretary-General serving as the appointing authority of arbitrator is not merely a nuance between ICSID and non-ICSID arbitration regarding trivial administrative mission, but a substantive case-related function which stands out as the characteristic trait of ICSID arbitration as distinguished from non-ICSID arbitration mainly in the light of two concerns. First, an appointment made by an arbitration institution is of significant consequence since it (or at least the perception of such appointment) is more neutral, in particular considering that party-appointed arbitrators possibly tend to depart from their mandate that requires them to be and to remain independent and impartial.²⁶⁰ Second, the appointment process can essentially be complicated in view of the fact that in practice the Secretary-General has to take into account a variety of conflict-of-interests issues such as the politics of an arbitrator,²⁶¹ the repeat appointment of arbitrator by the same party or counsel²⁶² and even the racial biases in the appointment of an arbitrator.²⁶³ Therefore, the deliberation of the Secretary-General would indubitably have a considerable influence on the arbitral integrity since arbitral integrity rests, in large part, on the independence and impartiality of arbitrators.

3 The Cost Conundrum

3.1 High Arbitral Costs

²⁶⁰ Two distinguished arbitrators, Jan Paulsson and Albert Jan van den Berg, levelled the criticism that party-appointed arbitrators were untrustworthy, and Paulsson even called for the elimination of party-appointed arbitrators (see Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25 ICSID Rev-Foreign Investment LJ 339; Albert Jan van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in Mahnouch H. Arsanjani, *et al* (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, 821). However, Paulsson's and van den Berg's critiques had been questioned in that the right of disputing parties to choose arbitrators and the ability of arbitrators to express a dissenting opinion were significant elements of the legitimacy of international dispute resolution (see Charles N. Brower & Charles B. Rosenberg, 'The Death of the Two-Headed Nightingale: Why the Paulsson - van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded' (2013) 29(1) Arb Intl, 7).

²⁶¹ Catherine A. Rogers, 'The Politics of International Investment Arbitrators' (2013) 12 Santa Clara J Intl L 223.

²⁶² Maria Rivera-Lupu and Beverly Timmins, 'Repeat Appointment of Arbitrators by the Same Party or Counsel: A Brief Survey of Institutional Approaches and Decisions' (2012) 2012(15) Spain Arb Rev 103.

²⁶³ Umar A. Oseni and Hunud Abia Kadouf, 'The Discrimination Conundrum in the Appointment of Arbitrators in International Arbitration' (2012) 29 J Intl Arb 519; Sam Luttrell, 'Bias challenges in investor-State arbitration: Lessons from international commercial arbitration' in Chester Brown, Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP, 2011) 445-82.

The extraordinary development in both number and size of investor-State arbitration has been accompanied by debates in academia and practice on the remarkably increasing arbitral costs. The costs occurred in investor-State arbitration fall into two categories. The first category contains administrative fees of the institution and fees and expenses of the tribunal. An empirical study showed that the average costs of a tribunal in an ICSID arbitration case were 10 per cent lower than in an UNCITRAL case,²⁶⁴ mainly due to the ICSID's cap on arbitrator's fees.²⁶⁵ As compared to the second category, which commonly comprises fees and expenses of legal representation, hearing, experts and witnesses, it is discernible that administrative expenses and arbitrators' fees are much less expensive. Accordingly, arbitral costs in this thesis only refer to fees and expenses incurred by disputing parties to present and defend their claims. The costs issues in investment arbitration can be elucidated in two aspects when it comes to the divergences as to the role of institution in ICSID and non-ICSID arbitration, ie, high arbitral costs and the apportionment of arbitral costs.

The UNCTAD report indicated that costs involved in investor-State arbitration had skyrocketed in recent years, and legal fees amounted to an average of 60 per cent of the total costs of the case.²⁶⁶ More specifically, an empirical analysis suggested that arbitral costs represented more than 10 per cent of an average award, namely over U.S. \$1.2 million.²⁶⁷ It can be conceivable that high arbitral costs and time expenditure so far can be ascribed, in part, to the complexity of a substantial number of claims submitted to arbitral tribunals. To begin with, it is conspicuous that too much emphasis has been placed upon the battles on all manner of procedural issues wherein challenges against jurisdiction and the tribunal's authority, though legitimate for the appropriate defense in some cases, are typically employed as tactical manoeuvres.²⁶⁸ Furthermore, complex investment disputes result from far more non-legal factors in the contemporary business world in which there is

²⁶⁴ Matthew Hodgson, 'Counting the costs of Investment Treaty Arbitration', *Global Arb Rev* 24 March 2014.

²⁶⁵ ICSID caps arbitrator's fees at U.S. \$3,000 per day (see ICSID Schedule of Fees, 2013, para 3). However, ICSID charges a U.S. \$25,000 non-refundable lodging fee for institution of arbitral proceedings and an annual U.S. \$32,000 administrative fee, which are absent in *ad hoc* arbitration (ibid, paras 1&5).

²⁶⁶ UNCTAD, 'Investor-State Disputes: Prevention and Alternatives to Arbitration', 2010, 16-17.

²⁶⁷ Susan D. Franck, 'Rationalizing Costs in Investment Treaty Arbitration' (2011) 88 *Wash U L Rev* 769, 777.

²⁶⁸ Klaus Sachs, 'Time and Money Cost Control and Effective Case Management' in Loukas A. Mistelis & Julian D. M. Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International, 2006) 113.

a possibility that political, economic and cultural influences triumph over the rule of law in arbitral processes,²⁶⁹ in particular in investor-State arbitration where politics, economics or sociology has the potential to take a part. Arbitral costs in investor-State arbitration, which have been depicted as ‘the sting in the tail’,²⁷⁰ are of no less importance to the stakeholders, and in a broader context, to the investor-State arbitration mechanism as a whole.

Though a research has revealed that ICSID proceedings entail lower costs than UNCITRAL arbitration,²⁷¹ high costs are not dissimilar in ICSID and non-ICSID arbitration. However, unlike ICSID arbitration, many non-ICSID arbitration institutions gradually attach high importance to the increasing arbitral costs due to the competition in the arbitration industry. As compared to ICSID which was specially created to solve investment disputes and is thus considered the most suitable and common mechanism for the resolution of investment disputes, non-ICSID arbitration is merely an alternative for resolution of investment disputes since it is initially designed for settlement of international commercial claims. In order to keep or increase their market share of investment disputes, a number of globalization-driven initiatives taken by major non-ICSID arbitration bureaucracies or proposed by practitioners are in the works or have already been carried out, aiming to resolve investment disputes in a more economical way. By contrast, the ICSID Convention and Rules, though not wholly silent on the matter, simply provide slightly general provisions on arbitral costs which seem insufficient to assist in controlling arbitral costs, let alone reducing the costs.

As Veeder observed, arbitral costs were an essential factor that had a significant impact on investor’s choice of ICSID and non-ICSID arbitration.²⁷² Indeed, arbitral costs create diverse incentives regarding the choice of investor-State arbitration as a dispute resolution method. Insofar as input-output analysis is concerned, since claimants tend to weigh the risks and value of investor-State arbitration prior to commencing arbitral proceedings, the

²⁶⁹ According to Rosendahl’s observation, the political, economic and cultural factors have more or less influences on arbitral process, and the influences take place not only in emerging market countries, but also in developed countries. See Roger W. Rosendahl, ‘Political, Economic and Cultural Obstacles to Effective Arbitration of Foreign Investment Disputes’ in Norbert Horn and Stefan Michael Kröll (eds), *Arbitrating Foreign Investment Disputes* (Kluwer Law International, 2004) 33-49.

²⁷⁰ Klaus Reichert and James Hope, ‘Costs - The Sting in the Tail’ (2006) 1(2) *Global Arb Rev* 30, 30.

²⁷¹ Stephen Jagusch and Jeffrey Sullivan, ‘A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern’, 107.

²⁷² V. V. Veeder, ‘The Investor’s Choice of ICSID and Non-ICSID Arbitration Under Bilateral and Multilateral Treaties’, 11.

large amount of arbitral costs is apparently one of indispensable factors that claimants have to take into account when considering bringing claims before international arbitral tribunals, in particular those who make small investments and thus have to face a number of extra challenges that may possibly put them at a disadvantage against sovereign States. Therefore, claimants need to estimate distinct arbitral costs and related risks in ICSID and non-ICSID arbitration (eg, the apportionment of arbitral costs after the merits of the cases have been decided) and manage their expectation in terms of their financial means.

Furthermore, arbitral costs are notably onerous for developing countries in some cases in the light of their relatively scarce budget and financial resources.²⁷³ There is a possibility that regulatory chill eventually result from the high arbitral costs; in other words, high arbitral costs incurred by respondent States, in turn, influence the course of States' investment policy development. In addition to the payment of money, arbitral costs paid by respondent States can take different forms, and every form has, more or less, an impact on the sensitive issues within the framework of host State's investment policy. Particularly, the form of political costs is relevant to the value of transferring State sovereignty, while the form of social costs is related to unrest or other social consideration such as sustainable development of the host State.²⁷⁴ As compared to the pecuniary payment, such impact of political or social costs can be more far-reaching.²⁷⁵ Hence, how to deploy different ICSID and non-ICSID arbitration rules to control and reduce arbitral costs should become a priority for States before they vindicate the legitimacy of the actions they took to regulate foreign investment.

²⁷³ For example, in October 2013, Argentina finally altered its long time anti-enforcement stance and approved an agreement to settle U.S. \$677 million owed to five foreign investors that won rulings over respectively four ICSID arbitration cases and one UNCITRAL arbitration case. The settlement was to take the form of sovereign bonds as Argentina looked for the World Bank to approve U.S. \$3 billion in loans (See Paula Hodges, *et al*, Argentina Settles Five Outstanding Investment Treaty Arbitration Claims in Historic Break with Its Anti-enforcement Stance, 14 October 2013, <<http://www.lexology.com/library/detail.aspx?g=5546cffa-46d3-4421-a47d-e86817aee4e5>> accessed 27 August 2014). Based on the amount of compensation, it would be not difficult to estimate how much was spent on the nation to defend the cases.

²⁷⁴ Susan D. Franck, 'Rationalizing Costs in Investment Treaty Arbitration', 777.

²⁷⁵ An empirical study has identified that becoming a respondent before ICSID tribunal, regardless of the case status (pending, unresolved, win, loss or perception of loss), would have a detrimental impact on State's investment environment reputation. See Todd Allee and Clint Peinhardt, 'Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment' (2011) 65(3) Intl Organization 401, 429.

3.2 Major Initiatives in Response to High Arbitral Costs

3.2.1 Advance Arrangement on Arbitral Costs

It is a common practice in both institutional and *ad hoc* arbitral proceedings that an advance on costs, which is intended to cover fees and expenses of arbitrators and administrative fees in case of institutional proceedings, shall be payable by disputing parties at the outset of arbitral proceedings.²⁷⁶ By analogy, an advance arrangement on the fees and expenses of disputing parties' counsels and other expenses incurred by the parties can be a potential solution in controlling arbitral costs. Even though reaching an agreement on arbitral costs prior to or at the outset of the arbitral proceedings is impractical in arbitration practice,²⁷⁷ a similar proposal under which disputing parties impose a cap on the total arbitral costs seems to be, to some extent, feasible and promising. Cost capping dates back to the Arbitration Act (1996) in England, Wales and Northern Ireland which entrusts power to limit recoverable costs to arbitral tribunals.²⁷⁸ The London Maritime Arbitrators' Association has applied the stipulation to the settlement of intermediate claims.²⁷⁹

Cost capping imposed on both parties, however, may encounter a number of hurdles in the context of international investment arbitration. First, there is a possibility that a dissonance between disputing parties would substantially influence the arbitral process and the outcome since the party who is fiscally constrained in accordance with the cost cap may deliberately be swamped by his counterpart who operates beyond the ambit of the cost cap. Second, a rigid cost cap at an early stage can lead to guerrilla tactics. For one thing, a respondent who foresees his failure urges to work out an extraordinarily costly fee cap,

²⁷⁶ For example, the SCC published in 2013 a brief describing the criteria taken into account by the SCC Board when determining the advance on costs in cases where the amount in dispute exceeded €100 million and provided criteria considered by the SCC in determining the advance on costs in three investment cases registered during 2010-2012. See Celeste Salinas Quero, 'Briefly on Advance on Costs under the SCC Rules', 1 July 2013.

²⁷⁷ The empirical reality of how often parties agree to costs in advance is uncertain, and an agreement may be a rare phenomenon. See Micha Bühler, 'Awarding Costs in International Commercial Arbitration: an Overview' (2004) 22 ASA Bull 249, 253.

²⁷⁸ More specifically, the Act provides that (i) unless otherwise agreed by the parties, the tribunal may direct that the recoverable costs of the arbitration, or of any part of the arbitral proceedings, shall be limited to a specified amount; (ii) any direction may be made or varied at any stage, but this must be done sufficiently in advance of the incurring of costs to which it relates, or the taking of any steps in the proceedings which may be affected by it, for the limit to be taken into account. See s 65 of the Arbitration Act (1996).

²⁷⁹ Art 15(b), (c), (d) of the LMAA Intermediate Claims Procedure (2012).

which will discourage the claimant from proceeding with the arbitration case. For another, a party with a weaker case has an incentive to propose a rather rigorous self-serving cap in the guise of efficiency norms.²⁸⁰ It appears that guerrilla tactics particularly tend to be more easily employed in arbitration involving States where States can facilitate these tactics in their exercise of sovereign powers.²⁸¹

Be that as it may be, it would be beneficial and desirable to fix the total sum of fees disputing parties believe should be reasonably and acceptably spent on the conduct of arbitral proceedings, and that such cost capping can be, as advocated by a number of practitioners, achieved with the assistance of the Secretariat and the tribunal. For instance, Veeder has designed a process for ICSID arbitration where there are three draft arbitral budgets, namely the claimant' budget, the respondent' budget and the budget drafted by the ICSID Secretariat and the tribunal concerning administrative fees and fees and expenses of the tribunal. Based on these private draft budgets, which are edited to remove all confidential, sensitive or legally privileged items and shall be placed on the table at the first session of arbitration, disputing parties and the tribunal will discuss an overall draft budget for the entire arbitral proceedings.²⁸² The ICSID Secretariat is the main bureau that is of necessary assistance with the process, especially in further jointly monitoring legal costs throughout the whole arbitral procedure.²⁸³ Considering that an accurate assessment of the total costs figure may not be unproblematic to make at an early stage of arbitral proceedings, an alternative approach is to utilize a percentage cap which ensures that arbitral costs incurred by disputing parties are not excessively large as compared to the claimed amount of compensation in issue.

3.1.2 Control of Costs in Arbitral Proceedings

The non-ICSID arbitration community has launched a number of initiatives aiming to control and reduce arbitral costs, thereby retaining arbitration as a speedy, cost-effective and adaptable method of international dispute resolution. Given that legal costs and

²⁸⁰ Jeff Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) 1213.

²⁸¹ Günther J. Horvath & Stephan Wilske (eds), *Guerrilla Tactics in International Arbitration* (Kluwer Law International, 2013) 19.

²⁸² V. V. Veeder, *The Investor's Choice of ICSID and Non-ICSID Arbitration Under Bilateral and Multilateral Treaties*, 12-13.

²⁸³ *Ibid*, 14.

witness and expert costs amount to 82 per cent of total cost in ICC arbitration on average, the ICC has set up the Task Force on Reducing Time and Cost in Arbitration which issued a special Report on Techniques for Controlling Time and Costs in Arbitration in 2007 and an updated version to reflect the modifications made in the 2012 ICC Rules. Based on the observation that costs in arbitration are ordinarily caused by ‘unnecessarily long and complicated proceedings with unfocused requests for disclosure of documents and unnecessary witness and expert evidence’, the Report provides a range of techniques that could be adopted by arbitral tribunals, parties and their counsels to avoid expensive, slow and frustrating proceedings, thus cogently demonstrating the ICC’s endeavour to institutionalize its commitment to facilitating tribunals and parties in devising tailor-made procedures suitable and efficient for their case.²⁸⁴

Another salient non-ICSID institutional innovation is the expedited procedures provided in the Swiss Rules of International Arbitration (2012) under which arbitration cases are referred to a sole arbitrator, disputing parties have only one exchange of responsive pleadings and a single hearing (unless the parties agree that the case is to be decided on the basis of documentary evidence only), and awards shall be rendered within six months from transmission of the file to the arbitrators.²⁸⁵ The expedited procedures have been remarkably successful in limiting delay and cutting arbitral costs as almost 40 per cent of cases have undergone an expedited procedure since the procedures were introduced in Swiss Rules.²⁸⁶ In addition, in 2011 the Swiss Arbitration Association (hereinafter ‘ASA’) launched the Swiss Initiative for Transparency in Arbitration Costs in which the ASA proposed the formation of an International Working Group for Transparency in Arbitration Costs, jointly led by the ASA and the Chartered Institute of Arbitrators (hereinafter ‘CI Arb’), with the core aims of reaching a common understanding of the concept of ‘arbitration costs’, determining the causes of arbitration costs and examining potential ways to control arbitration costs and improve cost-efficiency through collecting reliable

²⁸⁴ The Report lists a number of techniques to reduce long duration and high costs, including (i) use of fast-track procedures when possible, (ii) use of case management conference to identify potential issues and agree on procedures tailored to a specific case, (iii) experts appointed either by tribunals or jointly by disputing parties instead of experts appointed by each party, (iv) minimization of the length and number of hearings, use of telephone and video conferencing for procedural hearing and avoidance of post-hearing when possible. See Report of the ICC Commission on Arbitration and ADR on Techniques for Controlling Time and Costs in Arbitration, 2nd edn, 2012.

²⁸⁵ Arts 42.1(b), (c), (d) & 42.2(b) of the Rules of International Arbitration (2012).

²⁸⁶ Rainer Füeg, Urs Weber-Stecher, ‘Introduction: Swiss Chambers of Commerce’ in *The European, Middle Eastern and African Arbitration Review*, 2014.

data and presenting such data in a relatively transparent form while preserving the necessary confidentiality of individual case.²⁸⁷

However, it is worth noting that whether non-ICSID arbitral institutional initiatives actually work to reduce costs in international arbitration practice is far from certain. The vast majority of measures suggested by the ICC Report on Techniques for Controlling Time and Costs in Arbitration, for instance, require particular conditions such as disputing parties' agreement and proactive arbitrators, which are, however, normally difficult to meet during the arbitral procedures. Moreover, a number of provisions intended to cut costs have the potential to give rise to unintended consequences and further create a basis for further costly battles.²⁸⁸ Notwithstanding the possible obstruction, non-ICSID arbitral institutional initiatives have demonstrated the importance of controlling and cutting arbitral costs and set a positive example for the ICSID in directing disputing parties and tribunals to take steps to promote cost-efficiency.

3.1.3 Third-party Funding

Third-party funding is an increasingly used financing method in non-ICSID arbitration whereby a third-party who has no interest in the substances of the arbitration procedures bears all costs incurred by a disputing party, probably including administration costs, fees and expenses of arbitrators, the party's cost or even the costs of the opponent where the case is lost, against a portion of the proceeds collected from the losing party where the case is won.²⁸⁹ So far, there is little clarity on the regulation of third-party funding, given that third-party funding is a relatively new solution for facilitating the access of expensive international commercial arbitration and that commercial funders regularly operate in anonymity in a small market. Nonetheless, currently non-ICSID arbitration institutions

²⁸⁷ Elliott Geisinger and Nathalie Voser (eds), *International Arbitration in Switzerland: A Handbook for Practitioners* (2nd edn, Kluwer Law International, 2013) 194.

²⁸⁸ For example, the extensive consolidation and third-party joinder procedure envisioned by art 4 and the broad 'set-off' jurisdiction provision of art 21(5) of the Swiss Rules have proved difficult to be applied and these provisions can even aggravate complex multi-jurisdictional disputes. See Nicolas C. Ulmer, 'The Cost Conundrum' 228-31.

²⁸⁹ Lisa Bench Nieuwveld and Victoria Shannon (eds), *Third-Party Funding in International Arbitration* (Kluwer Law International, 2012) 3-9.

have given third-party funding moderate attention,²⁹⁰ and scholars have probed into the propositions as to whether third-party funding should be introduced into investor-State arbitration and to what extent third-party funding should be regulated in the international investment regime.²⁹¹ The ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration has formed a special Investment Arbitration Working Group, which includes the ICSID Secretary-General looking into essential issues specific to investment arbitration in depth.²⁹²

Despite its advantages, third-party funding would have a detrimental influence on the conduct of arbitral proceedings. Arbitration institutions have to examine the tensions caused by third-party funding agreements, namely the tension between the efficiency and viability of the investor-State arbitration (given that such agreements, commonly signed between investors in need and funders, are within the ambit of business secrets and thus seem to be irreconcilable with the need for transparency in investor-State arbitration), and the tension between the *inter partes* effect of third-party funding agreements and the arbitral tribunals' mandate which is restricted within the adjudication of investment disputes since the agreements disconnect from the main investment disputes. These tensions are also the reasons why ICSID tribunals and *ad hoc* committees have refrained from taking into account the relevance of a third-party funding agreement when determining the apportionment of cost.²⁹³

In addition, it is intriguing that unlike the traditional notion of 'third-party funding' in the context of non-ICSID arbitration, funders in investor-State arbitration may invest in disputes for public interest purposes. There are at least two reported cases in which not-for-profit entities pursued charitable or strategic goals in ICSID arbitral proceedings.²⁹⁴ As it

²⁹⁰ For example, the ICC Institute of World Business Law published in late 2013 the Dossier X: *Third-party Funding in International Arbitration*.

²⁹¹ See, eg, Willem H. Van Boom, *Third-Party Financing in International Investment Arbitration*, 2011. The research was partially financed by the OECD Secretariat and available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027114> accessed 3 September 2014.

²⁹² William W. Park, Catherine A. Rogers, 'Third-Party Funding in International Arbitration: The ICCA-Queen Mary Task Force' (2015) *Austrian YB on Intl Arb*, Forthcoming, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2507461> accessed 12 October 2014.

²⁹³ Eric De Brabandere & Julia Lepeltak, 'Third Party Funding in International Investment Arbitration', Grotius Centre Working Paper No 2012/1.

²⁹⁴ The claim in *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe* (ICSID Case No ARB/05/6) was partially funded by the Open Society Initiative for Southern Africa, and the claim in

would be impractical to capture all forms adopted by various funders in this financing market in a single regulation of third-party funding at the international level, it appears more advisable that arbitral institutions provide a general guideline for arbitral tribunals in handling recurring issues with respect to third-party funding.

3.2 Apportionment of Arbitral Costs

In determining costs in international arbitration, tribunals have two principal approaches to follow, namely the English rule of ‘costs follow the event’ (or ‘loser pays’) and the traditional American rule that calls for disputing parties to share arbitral costs equally, with each party bearing its own legal fees. As one of the pivotal matters, there are divergences in treatment of arbitral costs under a variety of ICSID and non-ICSID arbitration rules.²⁹⁵ Under the ICSID Arbitration Rules, though ICSID tribunals can assess costs and proportionate allocation at any stage of the proceedings, final awards must contain any decision regarding costs.²⁹⁶ The ICSID Convention confers on arbitral tribunals general discretion to assess the expenses incurred by disputing parties in connection with the arbitral proceedings, and decide how and by whom the expenses shall be paid.²⁹⁷ However, the Convention, the Arbitration Rules and the Administrative and Financial Regulations are silent as to how to allocate arbitral costs between disputing parties. The ICC, SCC and LCIA somehow have similar approaches, merely providing tribunals with limited guidance on allocating costs.²⁹⁸ By comparison, more specific guidance on the apportionment of

Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (ICSID Case No ARB/10/7) was partially funded by the Campaign for Tobacco-Free Kids and the Bloomberg Foundation (see Philippe Pinsolle, ‘Comment on Third-Party Funding and Nationality Issues in Investment Arbitration’ in Karl P. Sauvant (ed), *Yearbook on International Investment Law & Policy 2010-2011* (OUP, 2012) 641).

²⁹⁵ In both ICSID and non-ICSID arbitration if disputing parties predetermine or agree on the allocation of costs and fees at any stage of proceedings, these agreements are customarily upheld by tribunals. Such agreement, as elucidated previously, is rare in practice.

²⁹⁶ R 47(1)(j) of the ICSID Arbitration Rules.

²⁹⁷ Art 61(2) of the ICSID Convention.

²⁹⁸ These rules ordinarily provide that arbitral tribunals may take into account such circumstances as they consider relevant, including the parties’ relative success and failure in the award and the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner. See art 37(4), (5) of the ICC Arbitration Rules, arts 43(4), (5) & 44 of the SCC Arbitration Rules, art 28.3 of the LCIA Arbitration Rule (2014). However, third-party funding should not impact tribunals’ decision on security for costs unless third-party funding, as proved by respondents, is being used abusively (see William Kirtley and Koralie Wietrzykowski, ‘Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?’ (2013) 30(1) *J Intl Arb* 17).

costs of legal representation and assistance of the successful party is contained in the UNCITRAL Arbitration Rules (1976) under which tribunals are entitled, with guided discretion on how to apportion arbitral costs, to adopt a ‘loser pays’ approach while taking into account the circumstances of the case.²⁹⁹ The 2013 version of the Rules explicitly stipulates that the costs of the arbitration shall, in principle, be borne by the unsuccessful party, and tribunals can apportion costs as they determine that apportionment is reasonable, taking into account the circumstances of the case.³⁰⁰ Though the Rules provide tribunals with substantial flexibility in apportioning costs, it is also evident that the formulation of the Rules underscores an unequivocal preference for application of the ‘loser pays’ approach.³⁰¹

As to the apportionment of arbitral costs in investor-State arbitration, two issues are worthy of further detailed analysis. The first normative question is whether clarity of the allocation of arbitral costs is more desirable. It is conspicuous that diverse approaches to cost allocation create different incentives to initiate arbitral proceedings. As the starting point for apportionment of arbitral costs in UNCITRAL arbitration is the adage that ‘costs follow the event’, such a clear approach to denoting how tribunals can and should exercise their discretion would unambiguously diminish the unpredictability of tribunals’ awards on costs, thereby reducing disputing parties’ risks and increasing the efficiency of the arbitral proceedings. The broad discretion conferred on ICSID tribunals, however, would be less advantageous for potential disputing parties to assess their risks, and has a further detrimental effect on the utility and viability of the dispute resolution method, considering that the practice of ICSID tribunals in apportioning costs has been claimed ‘neither clear nor uniform’³⁰² and has been condemned by scholars who have urged the ICISD to adopt a uniform approach to awarding costs and fees by amending its Rules so as to provide for a permissive presumption for allocating costs and fees.³⁰³

²⁹⁹ Art 38(e) of the UNCITRAL Arbitration Rules (1976).

³⁰⁰ Art 42(1) of the UNCITRAL Arbitration Rules (2013).

³⁰¹ David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd Edn, OUP, 2013) 866.

³⁰² Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 1229. A more detailed and empirical study on allocation of arbitral costs in ICSID arbitration sees Thomas H. Webster, ‘Efficiency in Investment Arbitration: Recent Decisions on Preliminary and Costs Issues’ (2009) 25(4) *Arb Intl* 469.

³⁰³ John Y Gotanda, ‘Consistently Inconsistent: The Need for Predictability in Awarding Costs and Fees in Investment Treaty Arbitrations’ (2013) 28(2) *ICSID Rev-Foreign Investment LJ* 420.

As a uniform approach, or at least improved normative guidance, is worth pursuing since it brings predictability and efficiency in arbitral proceedings, a further question would be which approach is more appropriate for international investment arbitration. Advocates for the American rule ordinarily aver that the English rule is largely a deterrent to investor-State arbitration, making arbitration less appealing to claimants and would-be third-party funders and more risky or outright economically unviable.³⁰⁴ Accordingly, UNCITRAL tribunals in investor-State arbitration shall reject adherence to the rule of ‘costs follow the event’ under article 42(1), which is more suitable for international commercial arbitration, and further require disputing parties to bear their own arbitral costs, save in cases of frivolous or bad faith claims.³⁰⁵ Schill proposes a one-way, pro-plaintiff cost-shifting approach under which respondent States have to bear their own legal costs regardless of the outcome of the adjudication, while claimants may recover their legal costs if they prevail on the merits.³⁰⁶ The justification for one-way cost-shifting relies mainly on three arguments, namely the nature of international investment arbitration as a mechanism for the enforcement of obligations under public international law, the impact of one-way cost-shifting as an incentive to arbitrate on the predictability of and compliance with these obligations, and the protection rationale of investment treaties.³⁰⁷

Nevertheless, the tide, ever so slightly, seems to be turning to an application of the authentic English rule on arbitral costs in investor-State arbitration.³⁰⁸ The assertion that the English rule deters potential claimants in cases where the claims are small relative to the anticipated costs may be tenable, but it is inconsistent with cases in which claimants are confident about their claims because in these cases the English rule serves to incentivize meritorious claims while discouraging frivolous or weak claims.³⁰⁹ Furthermore, from a

³⁰⁴ Baiju S. Vasani & Anastasiya Ugale, ‘Cost Allocation in Investment Arbitration: Back Toward Diversification’, Columbia FDI Perspectives, No100, 29 July 2013.

³⁰⁵ David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 874.

³⁰⁶ Stephan W. Schill, ‘Arbitration Risk and Effective Compliance: Cost-Shifting in Investment Treaty Arbitration’ (2006) 7 J World Investment & Trade 653.

³⁰⁷ *Ibid*, 676-95.

³⁰⁸ For example, *EDF (Servs.) Ltd. v. Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para 329; *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, para 220. An empirical study had shown that the tendency had continued in the period from 2005 to 2009 where the rule of ‘costs follow the event’ was followed in 64 per cent of the awards (see Thomas H. Webster, *Efficiency in Investment Arbitration: Recent Decisions on Preliminary and Costs Issues*, 494).

³⁰⁹ James Nicholson & John Gaffney, ‘Cost Allocation in Investment Arbitration: Forward toward Incentivization, Columbia FDI Perspectives’, No123, 9 June 2014.

public policy perspective, the English rule is conducive to reducing political and economic burdens on respondents States, and such burdens might be one of the consequences of applying the pro-plaintiff cost-shifting approach and the American rule.³¹⁰ More specifically, although the object and purpose of investment treaties are principally the protection of investment, a pro-plaintiff cost-shifting approach appears to be openly and deliberately biased and unbalanced, in particular considering that much-publicized challenge of the legitimacy of investor-State arbitration is directed at the perceived pro-investor systemic bias. The American rule creates financial incentives that foster low-merit, high-value claims but discourage strong, small claims, and may further have a chilling effect on States' legitimate use of sovereign powers.³¹¹ On the whole it has become evident that the English rule is more feasible in striking a balance between investors' rights and States' interests, which seems to account for the emerging trend in favour of the rule of 'costs follow the event' in investment arbitration. In this regard, as ICSID tribunals' broad discretion on apportionment of arbitral costs can become problematic, it is desirable that ICSID provides enhanced clarity on the apportionment of arbitral costs, probably adopting the English rule, thereby promoting a uniform practice and cost-effective dispute resolution.

4 Consistency

4.1 Fostering Consistency in Investment Arbitration

In 2004, the ICSID Secretariat issued a discussion paper which, in addition to increasing the efficiency of arbitral proceedings in various ways, addressed the matter of consistency.³¹² The discussion paper referred several times to the intention to ensure coherence and consistency in case law generated in ICSID arbitrations. In fact, the systematic publication of ICSID awards, including procedural and substantive rulings, is one feasible method to promote consistency since it would obviate, to a large extent,

³¹⁰ David P. Riesenberg, 'Fee Shifting in Investor-State Arbitration: Doctrine and Policy Justifying Application of the English Rule' (2011) 60 Duke LJ 977.

³¹¹ Economists had shown that respondents were most likely to settle suits in which there was little likelihood of success, but would still be cheaper for respondents to settle than to arbitrate (nuisance suits) under the American rule. States might spend budgets to needlessly settle these low-merit nuisance suits and refrain from legitimate use of their powers that could give potential claimants chances to initiate nuisance suits. Therefore, regulators who held liable for their impacts on investors would not regulate to the extent that they should (the regulatory chilling effect). See *ibid*, 1009-10.

³¹² ICSID Secretariat, 'Possible Improvements of the Framework for ICSID Arbitration', 22 October 2004.

numerous recurring problems presented to tribunals and would have further influence on investors' and States' future attitudes towards investment. Accordingly, the original intention of the ICSID Secretariat in fostering consistency of arbitral awards is, by and large, beneficial and desirable, in particular given that legal certainty is one of the primary means of the ICSID to foster economic development and thus consistency of arbitral awards shall contribute to the ICSID's interior certainty.

The ICSID Secretariat serving to foster consistency and promote coherent development of investment arbitration jurisprudence can be a significant feature that distinguishes ICSID arbitration from non-ICSID arbitration. It would be extremely difficult, if not impracticable, to promote consistency in non-ICSID arbitration. Despite the publication of UNCITRAL treaty-based arbitral awards since December 2013, there is no attempt from main non-ICSID arbitration institutions to consider making arbitral awards public. In case of UNCITRAL arbitration, the various applicable laws, such as *lex mercatoria*, mandatory rules of the arbitral *situs* and general principles of law which confer on arbitral tribunals considerable discretion, would be an enormous hurdle in fostering a harmonized case law.

The different roles that ICSID and non-ICSID arbitration institutions play in fostering coherence and consistency in the case law emerging under investment treaties have to do with their strategies for main users in the arbitration industry. The mainstream international investment arbitration community has not perceived inconsistent arbitral awards 'as a fundamental problem', or does it view it 'as an obstacle to the doctrinal reconstruction of substantive or procedural investment law'.³¹³ Accordingly, some non-ICSID arbitration institutions would be reluctant to engage in the promotion of consistency. As Reisman stated, international investment arbitrators were only authorized to act as law-appliers but not law-makers, and they should confine themselves to their case-specific mandate and refrain from departing from it to take account of what arbitrators might conceive to be the 'systemic implications' of their decision. In the meantime, he acknowledged three exceptions, namely thoughtful consideration of previous awards, interpretation of the object and purpose of an investment treaty and 'occasional' supplementary interpretation.³¹⁴ The pursuit of consistency and predictability of investment arbitration

³¹³ Stephan W. Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) 22(3) Eur J Intl L 875, 891.

³¹⁴ W. Michael Reisman, 'Case Specific Mandates' versus 'Systemic Implications': How Should Investment Tribunals Decide? - The Freshfields Arbitration Lecture' (2013) 29(2) Arb Intl 131.

may, in fact, have a detrimental effect in view of the facts that there is a high risk that arbitrators as law-makers do more harms than good in creating law, filling gaps and furthering the rule of law, and that bad rules applied consistently in a predictable way and in a regularized patterns, in turn, give rise to outcomes that contradict the value of investment arbitration.³¹⁵ In addition, the cost of consistency can be extraordinarily high since consistent adjudication in investment arbitration can only be realized by sacrificing accuracy, sincerity and transparency.³¹⁶

In contrast, other commentators observed that decision-makers had an obligation to strive for consistency and predictability and accordingly to follow a consistent line of cases, especially given that international investment law was in its early stages of development and thus required consistency.³¹⁷ Such viewpoint is in accordance with the decision rendered by the tribunal in *Saipem S.p.A. v. The People's Republic of Bangladesh* which postulated two duties on investment arbitral tribunals, namely a duty to 'adopt solutions established in a series of consistent cases' and a duty to 'seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law'.³¹⁸

It is conspicuous that the pursuit of consistency is one of potential ways to promote predictability, thereby allowing investors and States to orient their behaviours in a manner such that more certainty about the outcomes of their behaviours and more equality in the sense of fairness can be guaranteed. In a broader context, as investor-State arbitration is in its infantile stage, it appears that consistency is indispensable for the sake of the development of the rule of law. Substantive and procedural investment rules applied in investor-State arbitration, currently consisting of a massive number of treaties and laws, are fragmented and dynamic, and the application and interpretation of these rules, taking the different decisions rendered on the basis of virtually identical circumstances in which

³¹⁵ Thomas Schultz, 'Against Consistency in Investment Arbitration' in Zachary Douglas, *et al* (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP, 2014) 297-98.

³¹⁶ Irene M. Ten Cate, 'Costs of Consistency: Precedent in Investment Treaty Arbitration' (2012-2013) 51 *Colum J Transnatl L* 418.

³¹⁷ Gabrielle Kaufmann-Kohler, 'Is Consistency a Myth' in Emmanuel Gaillard and Yas Banifatemi (eds), *Precedent in International Arbitration* (Juris Publishing, 2007) 143-45.

³¹⁸ ICSID Case No ARB/05/7, Award, 30 June 2009, para 90.

Argentina took actions to limit the risk and damage from economic crisis for examples,³¹⁹ can be radically discrepant. Inconsistency, which is perceived as a major challenge against the legitimacy of investor-State arbitration, has aroused necessary perceptual awareness towards the essential role of consistency in ensuring the viability of investor-State arbitration. In brief, an appropriate degree of consistency is conducive to the ICSID jurisprudence. Accordingly, the role of ICSID Secretariat in fostering consistency and further promoting coherent development of ICSID jurisprudence can be one of remarkable characteristic traits that should be singled out when compared to non-ICSID arbitration.

4.2 Paths that Lead to Consistency in ICSID Arbitration

4.2.1 Precedents

Though no precedent is binding on ICSID tribunals, ICSID arbitral proceedings and awards can ordinarily be disclosed to the general public, which will unequivocally stimulate a widespread circulation of ICSID's notes, orders and decisions and encourage a degree of reliance on such decisions by subsequent tribunals. Aside from the case law of other international judicial bodies to which ICSID tribunals may make reference,³²⁰ ICSID tribunals are more likely to rely, to various extents in practice, on previous decisions rendered by other ICSID tribunals. The tribunal in *Liberian Eastern Timber Corporation v. The Republic of Liberia* maintained that it was instructive to consider the interpretations established by other ICSID tribunals despite the absence of precedents in ICSID arbitration.³²¹ More fundamentally, the tribunal in *El Paso Energy International Company v. The Argentine Republic* further affirmed the authority from other ICSID tribunals by elucidating that the facts that ICSID arbitration was established *ad hoc*, from case to case and that the Convention and relevant BIT did not establish an obligation of *stare decisis*

³¹⁹ Relying on similar circumstances concerning Argentina's recovery package in response to economic crisis, ICSID tribunals rendered five decisions with contradictory outcomes as to whether Argentina violated treaties obligations. See *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9.

³²⁰ See chapter V: 2.4 The Homogeneity of Dispute Resolution.

³²¹ ICSID Case No ARB/83/2, Award of 31 March 1986 and Rectification of 17 June 1986, 26 ILM 647, 653 (1987).

failed to attack a reasonable assumption that ICSID tribunals would generally take into account the precedents set by other international tribunals, especially considering that in the present case disputing parties had heavily relied on those precedents in their written pleadings and oral arguments.³²²

In general terms, ICSID tribunals reject the concept of legally ‘binding precedent’ in the form of *stare decisis* due to the unchallenged scarcity of a doctrine of precedent under international investment law, but they adhere to decisions issued by ICSID and other tribunals, therefore developing ‘*de facto* case-law’.³²³ As the developing jurisprudence in ICSID arbitration would give rise to increased scrutiny of decisions by tribunals and practitioners, it is advisable that precedents should be relied upon properly and rigorously in particular in the light of two concerns. In the first place, there is no justification for giving previous awards precedential value since there is no hierarchy of international investment arbitral tribunals. Accordingly, the cliché that ICSID tribunals shall retain a sense of autonomy on a case-by-case basis cannot be overemphasized. In the second place, a simple reliance on previous awards without a detailed analysis of the cases by identifying the resemblance has the potential to cause an annulment proceeding on the ground that a decision had failed to state reasons.

4.2.2 Consolidation

Insofar as parallel proceedings are concerned, the consolidation of connected cases, in addition to reducing costs, is a potential method to avoid inconsistent outcomes as the Geneva Colloquium Report has demonstrated that though consolidation was unlikely to decrease ‘inter-fragmentation’ results from related disputes being submitted to different resolution mechanisms, it could prevent or reduce ‘intra-fragmentation’ through joining disputes being adjudicated in the same resolution forum or under the same institutional rules.³²⁴ Consolidation has been incorporated in the ICC Arbitration Rules under which the

³²² ICSID Case No ARB/03/15, Decision on Jurisdiction, 27 April 2006, para 39.

³²³ As Reinisch observed, there were two forms of precedent that led to coherence and predictability, namely, a formal binding precedent (*stare decisis*) in common law jurisdictions and a *de facto* case-law in civil law traditions. See August Reinisch, ‘The Role of Precedent in ICSID Arbitration’ (2008) Austrian Arb YB 495-510.

³²⁴ Gabrielle Kaufmann-Kohler, Laurence Boisson de Chazournes, *et al*, ‘Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?’ (2006) 21(1) ICSID Rev-Foreign Investment LJ 59.

Court has been called upon from time to time to provide possible consolidation of related claims where disputing parties have agreed so, or all claims are made under the same arbitration agreement, or in case of different arbitration agreements the arbitration cases are between the same parties with the same legal relationship.³²⁵ NAFTA has provided a consolidation clause in the context of investment arbitration, conferring upon tribunals discretionary authority in assuming jurisdiction over claims that have a question of law or fact in common after hearing the parties.³²⁶

Consolidation is not covered by the ICSID Convention, but the tribunal in *Cambodia Power Company v. Kingdom of Cambodia* has recognized two core principles governing consolidation in ICSID arbitral proceedings. The uncontroversial starting point is that consolidation of claims depends upon the consent of disputing parties, which normally takes the form of an express provision, whether in a treaty or contract, and can be implied from the circumstances on occasions.³²⁷ The second relevant principle denotes how to identify the precise mechanism by which it has been agreed that claims be coordinated. In particular, tribunals can encourage disputing parties to agree that disputes out of multiple contracts are all to be brought within the ambit of one arbitration agreement in one of the contracts, or that claims under multiple contracts are merged into one arbitration proceeding and determined concurrently by way of one award.³²⁸ When it comes to the role of institutions, the ICSID Secretariat has attempted to foster consistency by having the same arbitrator appointed in various cases.³²⁹ Such practice has potential to harmonize the outcomes of ICSID awards, but there is still a possibility that it is of no avail in avoiding incoherence in some cases.³³⁰ Accordingly, it would be more promising in many ways if appropriate rules which combine consistency and cost-efficiency while maintaining

³²⁵ Art 10 of the ICC Arbitration Rules.

³²⁶ Art 1126(2) of the NAFTA.

³²⁷ ICSID Case No ARB/09/18, Decision on Jurisdiction, 22 March 2011, paras 121-23.

³²⁸ *Ibid*, paras 127-28.

³²⁹ For instance, the decisions on jurisdiction in *Sempra Energy International v. Argentine Republic* (ICSID Case No ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005) and in *Camuzzi International S.A. v. Argentine Republic* (ICSID Case No ARB/03/2, Decision on Objections to Jurisdiction, 11 May 2005) were rendered by the same arbitrators sitting on two different ICSID tribunals, under which the tribunals relied largely on identical reasons and reached the same conclusions in upholding their jurisdiction.

³³⁰ For example, H. E. Judge Francisco Rezek sat on two distinct tribunals in *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No ARB/01/8, Award, 12 May 2005) and *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic* (ICSID Case No ARB/02/1, Decision of Liability, 3 October 2006), but these tribunals diverged on the application of necessity under customary international law on virtually identical facts.

discrete factual and legal basis of each claim by guiding arbitral tribunals in determining consolidation of related cases are set by the ICSID Secretariat.

4.2.3 An Appellate Mechanism/Permanent Court

Based on the assumption that ‘efficiency and economy, as well as coherence and consistency, might best be served by ICSID offering a single appeal mechanism as an alternative to multiple mechanisms’, the ICSID Secretariat had proposed the creation of an ICSID Appeals Facility.³³¹ However, while retaining the efficiency and transparency proposals, the Secretariat abandoned the appeals facility for the reason that it was premature to attempt to establish an appellate mechanism at the current stage, in particular in view of the difficult technical and policy issues raised.³³² Though an appellate mechanism is able to reduce the risk of conflicting decisions, thus developing a coherent jurisprudence and further making ICSID arbitration sustainable and legitimate in the long run, there are still no compelling reasons to move towards an appellate mechanism.³³³ By the same token, a proposal to substitute an international investment court which is perceptibly accountable and capable of delivering consistency for investor-State arbitration, though tenable in some ways,³³⁴ seems to be impractical at the present time.

Concluding Observations

Although the integrity and weight of investor-State arbitration rest largely on the charisma of arbitrators and arbitral tradition, it is also evident that arbitration institutions, which should be structurally and financially dependent, also take essential parts in facilitating arbitral proceedings and fostering the sustainable development of international investment arbitration. The role of institutions takes, by and large, two distinct forms. To begin with, the secretariats, with their unique position at the fulcrum of international arbitration bureaucracy, serve to fulfil substantive case-related functions in the process of promoting arbitration as a suitable mechanism for investor-State dispute resolution. Since there is no

³³¹ ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration, 22 October 2004, 16.

³³² ICSID Secretariat, ‘Suggested Changes to the ICSID Rules and Regulations’, 12 May 2005, 4.

³³³ The creation of an appellate investment structure may be confronted with a number of obstacles, eg, political feasibility and ‘finality’ (time, cost and trust). See Christian J. Tams, ‘Is There A Need for an ICSID Appellate Structure?’ in Rainer Hoffman & Christian J. Tams (eds), *The International Convention for the Settlement of Investment Disputes: Taking Stock After 40 Years* (Nomos, 2007) 223-49.

³³⁴ Gus Van Harten, *Investment Treaty Arbitration and Public Law*, 180-84.

administrative bureau readily available in *ad hoc* arbitration, the role of the Secretariat is a remarkable divergence between ICSID and UNCITRAL arbitration. In addition, as compared to the Secretariat in non-ICSID institutional arbitration, the ICSID Secretariat performs two distinctive functions, namely screening power and appointing authority which are conducive to ensuring the *bona fide* use of the Centre's facility and providing appropriate solutions to problems that are liable to affect arbitral tribunals that are on the verge of being constituted or have already been constituted.

Furthermore, ICSID's intrinsic responsibility in ensuring the viability of international investment arbitration in the long run, through carrying on a wide range of advisory and research activities concentrating on international investment law, significantly distinguishes ICSID from non-ICSID arbitration. On balance, such functions are primarily reflected in two aspects when investigating the divergence between ICSID and non-ICSID arbitration. First, considering that so far investor-State arbitration has consistently been perceived as a high-risk and high-cost option for investors and States, it is advisable that ICSID considers paying more attention to the crucial matter of arbitral costs where a number of non-ICSID arbitration institutions have played vigorous roles in the context of international commercial arbitration. Second, ICSID has the potential to serve a unique function in fostering consistency in investment arbitration and thus promoting the development of ICSID jurisprudence in a coherent, harmonized and equitable manner.

Chapter III Post-award Remedies

It is unequivocal that post-award remedies are one of the most discrepant proceedings in ICSID and non-ICSID arbitration, which could ultimately be the decisive factors in investors' selection between ICSID and non-ICSID arbitration and have momentous implications for the safeguarding of national interests. Prior to embarking on an evaluation of the divergent post-award remedies between ICSID and non-ICSID arbitration, light should be shed on four pre-requisites. First, what kind of remedy is worth exploring? Though a variety of possible remedies are provided under the ICSID Convention and national statutes respectively, a number of remedies that include supplementation, rectification, interpretation and revision³³⁵ normally involve mere incidental, trivial or minor issues that would have slight relevance to the final decision of the claims for compensations and any other kind of relief. These remedies, though important and necessary, are instruments that are too blunt and insignificant by themselves to substantively distinguish ICSID arbitration from non-ICSID arbitration. Therefore, only the annulment mechanism in ICSID arbitration and the vacatur mechanism in non-ICSID arbitration,³³⁶ which are thoroughly radical but limited remedies enabling parties to challenge the finality of awards, will be examined in this chapter.

Second, what type of award can be annulled by *ad hoc* committees or set aside by national courts? Despite the absence of a definition of 'award' under the ICSID Convention, it has been held that an award shall satisfy the requirements of both form and substance as set forth in article 48(2) and (3).³³⁷ However, not all awards can be brought within the purview of annulment. In general, a preliminary decision on jurisdiction incorporated into an award, a decision declining jurisdiction, an order or award noting settlement and discontinuance in accordance with rule 43(2) of the Arbitration Rules and a post-award decision under article

³³⁵ See, eg, arts 49(2), 50 & 51 of the ICSID Convention, s 11 of the Federal Arbitration Act and art 56 of the Chinese Arbitration Act (1994).

³³⁶ In addition to 'vacate', other dictions such as 'annul', 'set aside', 'revoke' or 'nullify' may be adopted by different national arbitration statutes; eg, the Code of Civil Procedure of Netherlands adopts the terms 'reversal and revocation' (see Dutch Arbitration Act, Code of Civil Procedure - Book Four: Arbitration, effective 1 December 1986, s five). In this chapter the dictions of 'set aside' (verb) and 'vacatur' (noun) will be adopted in accordance with the common usage in international commercial arbitration.

³³⁷ R 47 of the ICSID Arbitration Rule sets out the requirements in more detail.

49(2) of the Convention are types of awards for the purpose of annulment.³³⁸ The question in non-ICSID arbitration is more complicated where two issues need to be further analysed. In the first place, what type of award rendered by international tribunals is considered to pertain to a domestic award and thus can be set aside by national courts? While the nationality of an international arbitral award rests ordinarily in national statutes since each State can determine which award shall be considered domestic, the criterion of the seat of arbitration dominates in practice.³³⁹ Accordingly, it is the competent authority at the seat of arbitration that has the power to set aside an international arbitral award. In the second place, what type of award might be set aside by national courts at the arbitral *situs*? Though non-ICSID arbitral tribunals can render an interim, interlocutory, partial or final award,³⁴⁰ disputing parties typically request for a final award to be set aside. In addition to a final award, a partial award may, in theory, be set aside, provided that it is considered to be final and requested accompanying with a final award.³⁴¹ The distinctions between the type of award that can be annulled in ICSID and non-ICSID arbitration, in some ways, have the potential to affect the parties' choice. For instance, claimants in ICSID arbitration will not encounter annulment proceedings initiated by respondents against an interim award in case the tribunal has upheld jurisdiction in a separate decision, while claimants in

³³⁸ A partial award may be subject to annulment if it deals with a clearly defined portion of the dispute. However, a request for annulment of a preliminary decision affirming jurisdiction and paving the way for a subsequent award, procedural order, a decision on provisional measures under art 47 of the Convention or an order under r 43(1) is entirely unfounded under the ICSID Convention. See Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 921-26; Gaëtan Verhoosel, 'Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID' in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference*, 290-91.

³³⁹ Autonomy of disputing parties in determining the seat of arbitration is theoretically possible but seems to be both unnecessary and unhelpful (see Nigel Blackaby, *et al*, *Redfern and Hunter on International Arbitration*, 591). Meanwhile, as an exception, the jurisdiction of annulment is also vested in the court of the State under the law of which the award is made (see Alexander J. Bělohávek, 'Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth' (2013) 31(2) *ASA Bulletin* 262, 280). However, since it is the national law governing the challenge of non-ICSID awards, national courts of a State may even set aside an award rendered outside the territory of the State (see Koji Takahashi, 'Jurisdiction to Set Aside a Foreign Arbitral Award, In Particular an Award Based on an Illegal Contract: A Reflection on the Indian Supreme Court's Decision in *Venture Global Engineering*' (2008) 19 *Am Rev Intl Arb* 173).

³⁴⁰ See, eg, art 32(1) of the UNCITRAL Arbitration Rules (1976) and art 2(v) of ICC Arbitration Rules (interlocutory award is not included in the text). It is worth mentioning that art 34(1) of 2010 revision of the UNCITRAL Arbitration Rules does not classify the type of award and merely provides that the tribunal may make separate awards on different issues at different times. The revision might take account into the lack of uniform criteria related to the definition and the classification of arbitral awards in practice.

³⁴¹ Tibor Várady, *et al*, *International Commercial Arbitration: A Transnational Perspective* (4th edn, West, 2009) 742.

non-ICSID arbitration expose themselves to the risk of an instant proceeding setting aside the decision.

Third, which competent authority is entitled to annul an ICSID award or set aside a non-ICSID award? The autonomous nature of the ICSID system entails delocalized arbitration where annulment proceedings are conducted by *ad hoc* committees established pursuant to article 52 of the ICSID Convention. The annulment in ICSID arbitration is a challenge against awards through utterly internal review procedures within the centralized ICSID system, precluding any scrutiny by any national authority. The challenge of non-ICSID awards, however, is under the framework established generally by national law,³⁴² or treaty in some instances.³⁴³ The UNCITRAL Model Law, though not binding but having influenced legislation in an increasing number of States,³⁴⁴ expressly recognizes an application for setting aside an award before the courts of the place of arbitration as the exclusive recourse against award;³⁴⁵ in other words, only the courts at the arbitral *situs* have the power to vacate awards. Furthermore, given that most non-ICSID investor-State arbitral awards are recognized and enforced by virtue of mechanisms provided by the New York Convention, and that the recognition and enforcement may be rejected under the New York Convention if the award has been set aside by a competent court of the State in which, or under the law of which, it was made,³⁴⁶ the courts of the State that supplies arbitral law under which the award is made can be also entitled to set aside an award under the New York Convention.³⁴⁷

³⁴² It is intriguing that following International Institute for Conflict Prevention & Resolution and Judicial Arbitration and Mediation Services, the American Arbitration Association (AAA) adopts the Optional Appellate Arbitration Rules, effective on 1 November 2013, which create an appeal to an appellate arbitral panel empowered specifically to review ‘an error of law that is material and prejudicial; or determinations of fact that are clearly erroneous’. Considering that the AAA Rules are seldom applied in published investor-State arbitration case, this non-judicial appeal procedure will not be discussed.

³⁴³ For example, art 1136(3)(b) of NAFTA provides that a disputing party may commence a proceeding before national courts to revise, set aside or annul a final award in arbitration under the UNCITRAL Rules or ICSID Additional Facility Rules.

³⁴⁴ For a current list of legislation based on the UNCITRAL Model Law see <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>.

³⁴⁵ Arts 1(2) & 34 of the UNCITRAL Model Law.

³⁴⁶ Art V(1)(e) of the New York Convention.

³⁴⁷ Although the New York Convention specifically contemplates the possibility that an award could be rendered in one State but under the arbitral law of another State, this situation may be so rare as to be a ‘dead letter’ (see Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Arbitration International, 1981) 28). Accordingly, though in a few instances international arbitral awards have been set aside by courts other than those of the seat of arbitration (see

Fourth, can the right to annul or set aside arbitral awards be waived *ex ante*? In ICSID arbitration, advance waiver seems possible at first glance in that disputing parties are free to modify arbitral procedures through agreement in accordance with article 44 of the Convention and hence there is a possibility that the parties modify or even exclude the annulment right. Nonetheless, considering that article 52, which is directed at the requirement of basic procedural fairness that is inherent in any judicial process, should be seen as serving a public order function by protecting the integrity and legitimacy of ICSID arbitration, annulment cannot be deemed a procedural technicality and thus is not at the parties' disposal.³⁴⁸ On the contrary, waiver as a general principle of estoppel or *venire contra factum proprium* is commonly accepted by national laws, some of which even contain statutory provisions on the waiver of right to challenge awards.³⁴⁹ Legislation containing advance waiver attaches importance to the finality of awards, but such legislation is rarely applied in practice since numerous claimants initiate dispute resolution proceedings based on investment treaties and consequently it would be difficult for disputing parties to agree on an agreement containing a waiver *ex ante*. Be that as it may, the advance waiver has been used in investor-State arbitration and the effect of the waiver has been upheld by national courts.³⁵⁰

1 Risks of Challenge

1.1 Uncertainty in Challenging Proceedings

Michael McIlwrath & John Savage, *International Arbitration and Mediation: A Practical Guide* (Kluwer Law International, 2010) 333), it is not common in practice for the courts of the State under the law of which the award was made to set aside the award.

³⁴⁸ Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 919-20.

³⁴⁹ Daniel M. Kolkey, 'Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations' (1988) 22 Intl L 693, 703; Julian D. M. Lew, *et al*, *Comparative International Commercial Arbitration*, 684-86. In fact, after the 2011 Decree which reformed the French Code of Civil Procedure, more national laws have allowed the possibility of waiving setting aside proceedings. See Daniella Strik, 'Growing Number of Countries Allowing Exclusion Agreements with Respect to Annulment Warrants Greater Scrutiny of Arbitration Clauses', Kluwer Arbitration Blog, 11 January 2012.

³⁵⁰ In Switzerland, disputing parties without any connection to Switzerland are allowed to waive the right to challenge the award (see art 192 of the Swiss Private International Law Act). The Swiss Federal Tribunal affirmed in *France Telecom v. Lebanon* that the right to challenge the award on the ground of the UNCITRAL tribunal's lack of jurisdiction was unambiguously waived by the parties, thus the jurisdictional objection ought to be declined (see Matthias Scherer, *et al*, 'Domestic Review of Investment Treaty Arbitrations: The Swiss Experience' (2009) 27(2) ASA Bulletin 256, 273-74).

As compared to the self-contained and centralized system that provides *ad hoc* committees with powers to annul ICSID arbitral awards on the basis of a rather limited number of specific grounds, the vacatur of non-ICSID arbitral awards will be reviewed by national courts at the arbitral *situs* where standards applicable to set aside awards vary from jurisdiction to jurisdiction. Such relatively decentralized framework indubitably indicates different standards of review in non-ICSID arbitration; and, more importantly, the disparity found in national statutes as regards the various standards of review entail, *prima facie*, a remarkable degree of uncertainty. Certain ‘problem jurisdictions’ even demonstrate a tendency to set aside arbitral awards for unforeseeable reasons, in particular in the case where the home State is involved as a party.³⁵¹ Admittedly, the area of uncertainty in investor-State arbitration remains large,³⁵² some of which, taking annulment for example, are inherent in international arbitration so long as post-award remedies are necessary for disputing parties to pursue justice. Therefore, the debate on post-award remedies in ICSID and non-ICSID arbitration is not directed to the utter avoidance of uncertainty but rather to the scrutiny of the degree of uncertainty in different fora that reflects the risks of challenging arbitral awards. Arguably, unlike the more consistent ICSID system that relies merely on one set of rules, a multi-layered system of review provided in a variety of national statutes with respect to the vacatur in non-ICSID arbitration gives rise to a greater degree of uncertainty,³⁵³ which probably diminishes the appeal to disputing parties of choosing non-ICSID arbitration since the risks of challenge resulting from the uncertainty are, as a matter of fact, incongruent with the expectation of prospective claimants. This intriguing assumption will be examined in both theoretical and empirical ways, namely the uncertainty and the ratio of annulment or vacatur application.

1.1.1 Reducing Uncertainty in Non-ICSID Arbitration

The uncertainty in setting aside non-ICSID arbitral awards is somehow unavoidable in view of the varying standards of review that may be applicable. Nonetheless, a number of factors to which uncertainty is attributable can be predicted *ex ante*, and thus the uncertainty in non-ICSID arbitration can be and is being mitigated through a range of paths.

³⁵¹ Juan Fernández-Armesto, ‘Different Systems for the Annulment of Investment Awards’ (2011) 26(1) ICSID Rev-Foreign Investment LJ 128, 130.

³⁵² Andrés Rigo Sureda, *Investment Treaty Arbitration: Judging under Uncertainty* (CUP, 2012) 10.

³⁵³ R. Doak Bishop & Silvia M. Marchili, *Annulment under the ICSID Convention* (OUP, 2012) 261.

First, disputing parties' choice of a neutral and arbitration-friendly place as a primary manifestation of their efforts to ensure equality is very common in practice.³⁵⁴ Among ten published non-ICSID investor-State arbitration cases initiated in the period from 2010 to 2013 (as of the date when the seat of arbitration confirmed), disputing parties' preferences for the arbitral *situs* are always directed at cities in North America and Europe where arbitration-friendly jurisdictions and consistent law enforcement are commonly provided. The selection of a seat from these jurisdictions is not only conducive to adjudicating investment disputes in a more practical and convenient way, but also guarantees the certainty in post-award remedies due to their sound legal systems that seldom contain any peculiar ground for setting aside arbitral awards.

Table III: The Seat of Published Non-ICSID Arbitration Cases

Case	Arbitral <i>Situs</i>	Rules	Document Confirming the Seat
<i>British Caribbean Bank Limited v. The Government of Belize</i>	The Hague, the Netherlands	UNCITRAL	Procedural Order No 1, 6 September 2010
<i>Apotex Inc. v. The Government of the United States of America</i>	New York, U.S.	NAFTA/UNCITRAL	Procedural Order No 1, 16 December 2010
<i>Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia</i>	The Hague, the Netherlands	UNCITRAL	Terms of Appointment and Procedural Order No 1, 9 December 2011
<i>Saint Marys VCNA, LLC v. Government of Canada</i>	Toronto, Canada	NAFTA/UNCITRAL	Procedural Order No 1, 10 September 2012

³⁵⁴ According to the 2010 International Arbitration Survey, London, Geneva, Paris, Tokyo, Singapore, and New York are the preferred seats of arbitration, and all these jurisdictions, in general terms, are neutral to disputing parties and arbitration-friendly. See Paul Friedland & Loukas Mistelis, 2010 International Arbitration Survey: Choices in International Arbitration, 19.

<i>Philip Morris Asia Limited v. The Commonwealth of Australia</i>	Singapore	UNCITRAL	Procedural Order No 3 (Regarding the Place of Arbitration), 26 October 2012
<i>Detroit International Bridge Company v. Government of Canada</i>	Washington DC, U.S.	UNCITRAL	Procedural Order No 3, 27 March 2013
<i>Mesa Power Group, LLC v. Government of Canada</i>	Miami, U.S.	NAFTA/UNCITRAL	Procedural Order No 3, 28 March 2013
<i>Ruby Roz Agricol and Kaseem Omar v. Kazakhstan</i>	London, United Kingdom	UNCITRAL	Award on Jurisdiction, 1 August 2013 ³⁵⁵
<i>The Renco Group, Inc. v. The Republic of Peru</i>	Paris, France	UNCITRAL	Procedural Order No 1, 22 August 2013
<i>Windstream Energy LLC v. Government of Canada</i>	Toronto, Canada	NAFTA/UNCITRAL	Procedural Order No 1, 16 September 2013

Second, notwithstanding the noticeable divergences, it can be asserted that a convergence of national arbitration statutes emerges, given that a similar approach limiting the review of setting aside arbitral awards to the grounds that generally parallel those set out in article V of the New York Convention in the context of non-recognition and non-enforcement of foreign arbitral awards has been adopted in a number of national arbitration regimes. The adoption of such similar approach can be attributed, in part, to the multilateral convention³⁵⁶ and the UNCITRAL Model Law.³⁵⁷ Obviously, the convergence of national legislation can mitigate, to some degree, the uncertainty in non-ICSID arbitration.

³⁵⁵ The document confirming the seat of arbitration is unpublished, but it can be concluded from the award on jurisdiction that the parties agreed to London as the seat of the arbitration on 4 May 2011.

³⁵⁶ For example, the European Convention on International Commercial Arbitration is the only multilateral convention that provides the specific grounds for setting aside international commercial arbitral award. See art 9(1) of the Convention.

Third, non-ICSID tribunals, in particular those constituted by experienced arbitrators, routinely take their part in proactively managing the risk of challenges of awards when conducting arbitral proceedings. In the event that the seat of arbitration is not agreed upon by disputing parties, tribunals in *ad hoc* proceedings are likely to evaluate an arbitral seat by making reference to the guidance provided under the UNCITRAL Notes on Organizing Arbitral Proceedings,³⁵⁸ and then typically determine a neutral and arbitration-friendly seat so as to steer clear of any *a priori* suspicion related to equal treatment for both parties and any potentially applicable ground for setting aside the awards rendered by them. At times, tribunals even try to avoid any risk of challenges at the expense of promoting efficiency.³⁵⁹ Putting aside the controversy of the decency of such practice, it is undeniable that the practice is supportive in protecting the finality of awards and reducing the uncertainty in non-ICSID arbitration.

1.1.2 Non-uniformity of the Standard in ICSID Arbitration

In view of the fact that specific grounds for annulling awards have been set out explicitly in article 52 of the ICSID Convention, ICSID arbitration shall carry, at first sight, less risk stemming from the uncertainty in annulment proceedings. However, it seems that a substantial lack of certainty in annulment proceedings is also a thorny issue in ICSID arbitration as the standard of review adopted by different *ad hoc* committees is far from uniform. In terms of the standard to what extent *ad hoc* committees have implemented their review authority under article 52 of the Convention, Schreuer classified the ICSID annulment jurisprudence into three generations: the first generation of ICSID annulment decisions, consisting of *Klöckner v. Cameroon I* and *Amco v. Indonesia I*, was widely condemned for re-examining the merits of the decisions since they virtually amounted to appeal proceedings. The concern of substantive review aroused in the first generation was alleviated in the second generation of decisions which included *MINE v Guinea*, *Klöckner v. Cameroon II* and *Amco v. Indonesia II*. The *ad hoc* committees in the third generation of decisions had found their proper balance in *Wena Hotels v. Egypt*, *Vivendi v. Argentina I*

³⁵⁷ In fact, the grounds for setting aside arbitral awards set forth under the UNCITRAL Model Law are taken from article V of the New York Convention which provides grounds for refusing to recognize and enforce arbitral awards.

³⁵⁸ See UNCITRAL Notes on Organizing Arbitral Proceedings, 2012, 10-11.

³⁵⁹ Michael McIlwrath and John Savage, *International Arbitration and Mediation: A Practical Guide*, 328.

and *CMS v. Argentina*.³⁶⁰ The three generations of ICSID annulment jurisprudence have demonstrated a great deal of inconsistency which would, in turn, affect the finality, certainty and predictability of ICSID arbitration.

Though the third generation of annulment decisions wins praise for navigating between the Scylla of complete fairness and the Charybdis of absolute finality,³⁶¹ the standard of review established in the third generation will not be applied compulsorily to future cases. In fact, a number of annulment proceedings that have been initiated in the past few years might be a watershed that marks the beginning of the fourth generation of ICSID annulment jurisprudence.³⁶² Nevertheless, the features of the fourth generation would be particularly difficult to depict since it is like a mixed bag containing considerably different criteria of review.³⁶³ Accordingly, it can be assumed that the uncertainty resulting from the divergent interpretation and application of the grounds for annulment set forth under article 52 will continue, and the lack of uniformity increases, indubitably, the risk of challenges of ICSID arbitral awards.

1.2 Ratio of Annulment/Vacatur

Since the annulment proceedings are subsequent contents following the award section in the ICSID Convention, it appears to disputing parties who receive unfavourable awards that it is a 'routine step' to attack the awards by virtue of annulment,³⁶⁴ either for strategic and tactical considerations or on account of a genuine sense of fundamental injustice. The inflationary requests result accordingly in an increasing number of annulment decisions. Similarly, more applications for setting aside non-ICSID arbitral awards have been initiated because of a greater number of non-ICSID awards that have been issued in recent

³⁶⁰ Christoph Schreuer, 'Three Generations of ICSID Annulment Proceedings' in Emmanuel Gaillard & Yas Banifatemi (eds), *Annulment of ICSID Awards* (Juris Publishing, 2004) 17-20.

³⁶¹ Pierre Lalive, 'Absolute Finality of Arbitral Awards?' in *Revista Internacional de Arbitragem e Conciliação-Año I-2008*, available at ICCA website <http://www.arbitration-icca.org/media/0/12641359550680/lalive_absolute_finality.pdf> accessed 19 February 2014.

³⁶² Promod Nair, 'Claudia Ludwig, ICSID Annulment Awards: The Fourth Generation?' 5(5) *Global Arb Rev*, 28 October 2010.

³⁶³ For example, the annulment decision in *Mr. Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No ARB/99/7) was condemned for focusing too much on the merit of the case, while the *ad hoc* committee in *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No ARB/01/8) was criticized in part for exceeding its power by issuing unwarranted *obiter dicta*.

³⁶⁴ Christoph Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope', 213.

years. As of 1 November 2014, ICSID *ad hoc* committees have determined 41 annulment requests, while 28 decisions on application to vacate non-ICSID award have been rendered by national courts.³⁶⁵

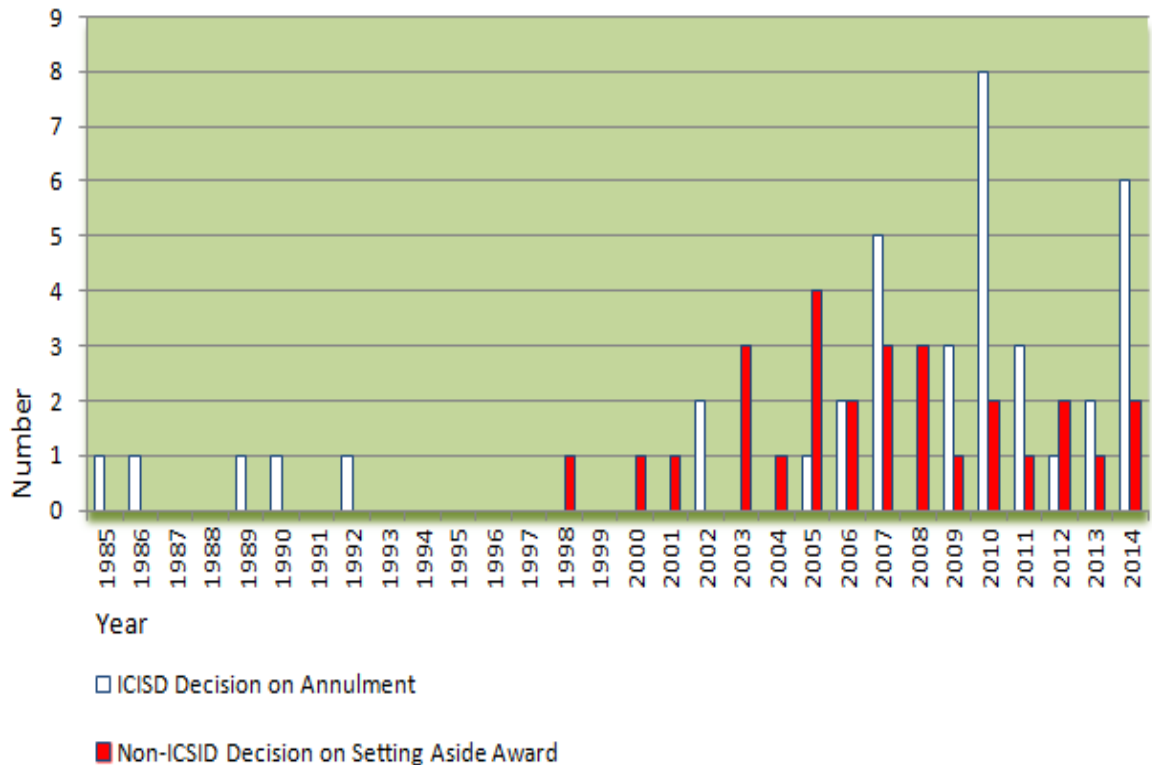


Figure IV: Decision on Annulment or Vacatur Application

As depicted in Figure IV, it would be imprudent to conclude that there is a significant difference between ICSID and non-ICSID arbitration in terms of the total number of decisions on annulment and vacatur.³⁶⁶ However, of the 41 ICSID annulment decisions, up to 32 per cent of decisions were eventually annulled both in full and in part, as compared to a mere 7 per cent of non-ICSID decisions that had been set aside by national courts. As the ratio of ICSID annulment is much higher than in non-ICSID arbitration, it seems that disputing parties have to face more risks of their awards being annulled in ICSID arbitration. Does the data have an implication that the sharpness of the sword in challenging ICSID awards is more brutal against the shield in defending the finality and

³⁶⁵ See Tables IV and V.

³⁶⁶ It is noteworthy that some variables have to be taken into account, such as the fluctuant data of decisions on annulment or vacatur, the lack of transparency in non-ICSID arbitration and the deviation of data (eg, Argentina is one State but initiates many annulment or vacatur proceedings in both ICSID and non-ICSID arbitration).

integrity of ICSID arbitration than that in non-ICSID arbitration? In response to the Philippines' request for the guidelines aiming to ensure fair and effective annulment proceedings, the ICSID Secretariat presented that the ratio of ICSID annulment was not as high as perceived.³⁶⁷ In fact, according to the ICSID 2014 Annual Report, of the 420 cases registered and 189 awards rendered, only 6 awards had led to full annulment and another 7 awards had been annulled partially.³⁶⁸ In other words, the ratio of annulment, in the context of overall ICSID caseload being taken into account, is somewhat low.

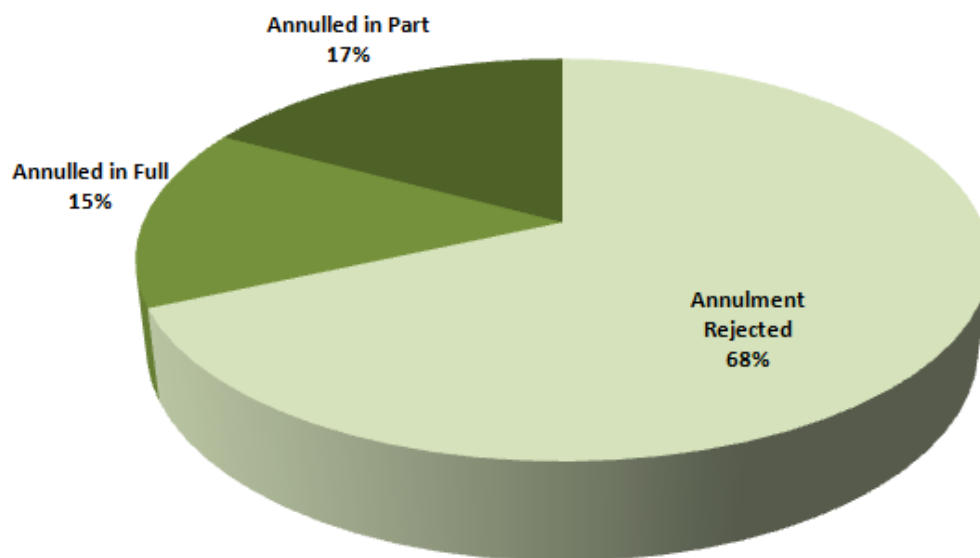


Figure V: Annulment Outcome in ICSID Arbitration

³⁶⁷ ICSID Secretariat, 'Background Paper on Annulment: For the Administrative Council of ICSID' (2012) 27(2) ICSID Rev-Foreign Investment LJ 443, 491.

³⁶⁸ ICSID 2014 Annual Report, 26.

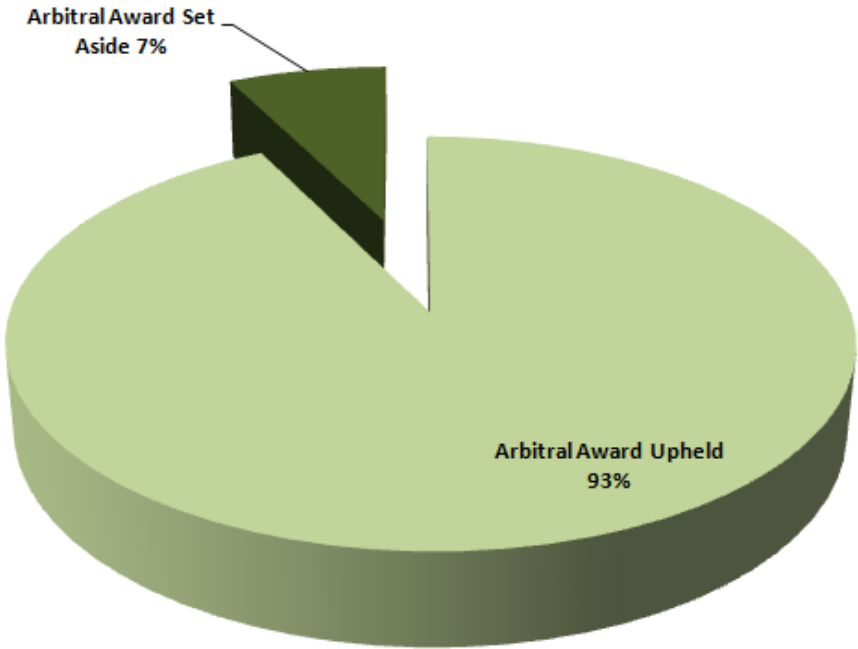


Figure VI: Vacatur Outcome in Non-ICSID Arbitration

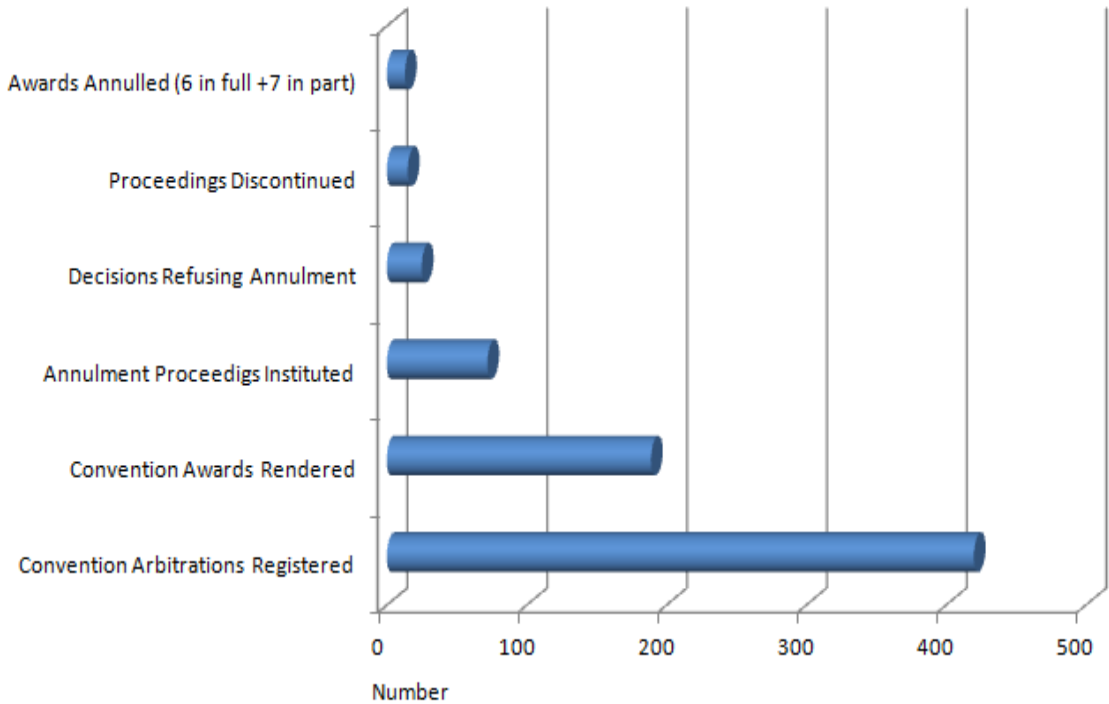


Figure VII: ICSID Caseload and Outcome³⁶⁹

³⁶⁹ Data base on the ICSID 2014 Annual Report which covers the fiscal year from 1 July 2013 to 30 June 2014.

In a nutshell, it would be subtle and insufficient to infer, based on the theoretical analysis and empirical study, that the different post-award remedies approaches provided in ICSID and non-ICSID arbitration are inherited with superiority or inferiority from the perspective of the challenge of the finality of arbitral awards. On the one hand, though the degree of unavoidable uncertainty in non-ICSID arbitration is more perceptible in the light of the varying applicable grounds for setting aside arbitral awards, the uncertainty can be and is actually being mitigated by prospective parties' choice of a neutral and arbitration-friendly seat of arbitration, the convergence of national arbitration statutes and the efforts made by tribunals. This uncertainty does not seem to be particularly conspicuous, on the other hand, given that the non-uniformity of the standard of review adopted by *ad hoc* committees in different generations of ICSID annulment decisions also reveals relatively high uncertainty that ICSID arbitration can generate. In fact, it is the uncertainty surrounding *ad hoc* committees' application of diverse standards of review that opens the door for condemnation of post-award remedies in ICSID arbitration. Furthermore, the number of annulment or vacatur decisions and the ratio of annulment and vacatur are, in general terms, slightly limited to indicate that one approach carries ostensibly more risks than the other. Consequently, uncertainty in annulment and setting aside proceedings is not necessarily directed at disputing parties' assessment and selection of a dispute resolution mechanism. Instead, when it comes to the evaluation of the post-award remedies in ICSID and non-ICSID arbitration, analyses on the differences as to how the grounds for annulment and vacatur are applied and the effect of annulment and vacatur are of more consequence.

2 Grounds for Annulment/Vacatur

2.1 Grounds Provided under the ICSID Convention

2.1.1 Manifest Excess of Powers

Considering that the improper constitution of a tribunal and the corruption of an arbitrator, though important as practical arbitration issues, are seldom used as a ground for annulment in practice,³⁷⁰ these two grounds will not be discussed in this chapter. In addition, though a

³⁷⁰ Questions related to the constitution of tribunal can be solved, before and during the arbitral proceedings, by parties' challenge of the qualification of arbitrators and by the Secretariat's scrutiny. Corruption has aroused particular concerns, but arbitrators appointed in investor-State arbitration are ordinarily independent and impartial, thus allegation of corruption has not been made in ICSID annulment proceedings. See Tamar

serious departure from a fundamental rule of procedure is a frequent ground for annulment,³⁷¹ there is also a similar ground for setting aside awards in non-ICSID arbitration, namely the breach of due process. Notwithstanding their distinctions, these two procedural grounds cover, in essence, the same issue³⁷² and thus cannot reveal substantive divergences that would make considerable influences on the parties' evaluation of a dispute resolution mechanism. Therefore, this part focuses on the other two grounds listed in article 52 of the ICSID Convention.

The most common ground on which *ad hoc* committees rely to annul ICSID arbitral awards is that the tribunal in question had manifestly exceeded its powers (see Figure VIII). The manifest excess of powers under the ICSID Convention has a counterpart under the UNCITRAL Model Law.³⁷³ However, the ground of excess of mandate in non-ICSID arbitration contemplates, in general, two situations in which arbitral tribunals fail to decide all claims submitted to them, resulting in a decision *infra petita*, and where tribunals deal with claims not falling within the terms of the agreement to arbitrate or containing matters beyond the scope of the submission to arbitration, thereby ruling *ultra petita*.³⁷⁴ By comparison, the ground of manifest excess of powers in ICSID arbitration distinguishes itself in at least three aspects.

Meshel, 'The Use and Misuse of the Corruption Defence in International Investment Arbitration' (2013) 30(3) *J Intl Arb* 267; Loukas Mistelis, 'Legal Issues Arising out of Disputes Involving Fraud, Bribery, Corruption and other Illegality Issues' in Emmanuel Gaillard & Domenico di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, 2008) 573.

³⁷¹ Not all departures of rules of procedures can be grounds for annulment. The seriousness of the departure requires that it be more than 'minimal standards of procedure to be respected as a matter of international law', and that it 'deprive[s] the party of the benefit or protection' which would 'have made a difference in the final result'; additionally, a departure is fundamental only if it 'affects the fairness of the proceedings'. See *CDC Group v. Seychelles*, ICSID Case No ARB/02/14, Decision of the *ad hoc* Committee on the Application for Annulment, 29 June 2005, para 49; *Wena Hotels Limited v. Egypt*, ICSID Case No ARB/98/4, Decision on Application for Annulment issued on 5 February 2002, para 57; Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (OUP, 2008) 283.

³⁷² Juan Fernández-Armesto, *Different Systems for the Annulment of Investment Awards*, 138.

³⁷³ Art 34(2)(a)(iii) of the UNCITRAL Model Law.

³⁷⁴ For example, the Court d'Appel de Paris stated that an arbitral tribunal exceeded its mission by awarding a party damages that exceeded the amount of the claimed damages. See Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, 938-41.

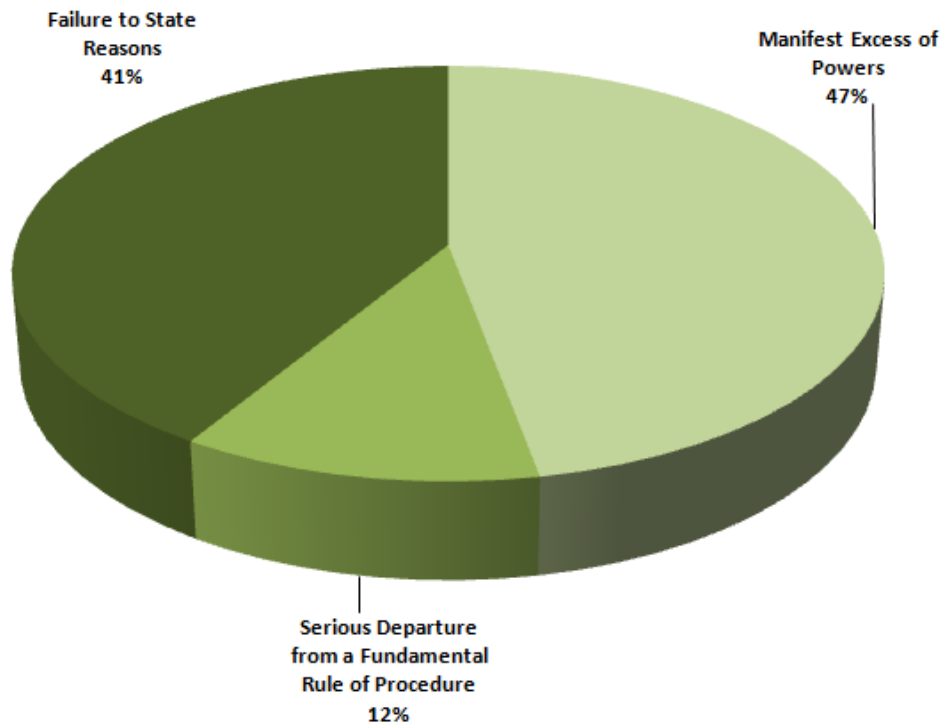


Figure VIII: Annulment Grounds in ICSID Concluded Proceedings³⁷⁵

The first aspect relates to the standard of review. If an allegation of manifest excess of powers is argued as a ground for setting aside a non-ICSID award, a *de novo* review of the arbitral tribunal's jurisdictional determination will be conducted by national courts in some main arbitration jurisdictions, in which the test of courts is 'was the tribunal right or wrong in asserting or refusing to assert jurisdiction under the treaty or contract as it did' rather than 'was the tribunal entitled to reach the decision that it did'.³⁷⁶ The ICSID committees, however, take at least three different standards of review in practice: (i) according to the first methodological approach, the term 'manifest' only relates to the cognitive process that makes it 'self-evident', 'obvious' or 'apparent';³⁷⁷ (ii) as a qualitative matter, 'manifest'

³⁷⁵ 8 awards were annulled on the ground of manifest excess of powers, 7 were on the ground of failure to state reasons, and 2 were on the ground of a serious departure from a fundamental rule of procedure.

³⁷⁶ The approach of a *de novo* review is adopted in England, Canada, Sweden and Switzerland. See Gaëtan Verhoosel, *Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID*, 296-97.

³⁷⁷ The ICSID committees in *Wena Hotels Limited v. Egypt*, *CDC Group v. Seychelles* and *Repsol v. Petroecuador* applied this approach. See ICSID Case No ARB/98/4, Decision on Application for Annulment, 5 February 2002, para 25; ICSID Case No ARB/02/14, Decision of the *ad hoc* Committee on the Application for Annulment, 29 June 2005, para 41; ICSID Case No ARB/01/10, Decision on the Application for Annulment, 8 Jan, 2007, para 36.

concerns the extent of the excess rather than its clarity;³⁷⁸ in other words, the excess should make a difference to the result;³⁷⁹ (iii) the third standard reconciles the two foregoing approaches, requiring an excess to be both obvious and substantively serious based on a two-step method or a *prima facie* test.³⁸⁰ Accordingly, as compared to one main approach in non-ICSID arbitration, an ICSID award will be reviewed depending on which standard is adopted by the *ad hoc* committee.

The second aspect concentrates on the lack of jurisdiction. A tribunal's lack of jurisdiction, regardless of a total or partial lack in accordance with article 25 of the ICSID Convention, comes necessarily within the scope of the manifest excess of powers³⁸¹ since a tribunal is not conferred the power to make a decision on the merits of a claim that is not covered by parties' consent and fails to meet the requirement set forth in the Convention. Currently, the lack of jurisdiction has been recognized as the most apparent example of a manifest excess of powers. On the contrary, in a treaty-based investment arbitration context, all disputes related to investment, including pure commercial disputes, are subject matters that can be resolved by tribunals under non-ICSID arbitration rules. Most, if not all, non-ICSID arbitration rules neither provide a notion of 'investment', nor limit themselves to settlement of mere investment disputes. Therefore, the lack of jurisdiction over investment disputes or disputes related to investment seems to be an unusual phenomenon in non-ICSID arbitration.

The third aspect concerns the failure to apply the proper law. In view of its general obligation to apply the proper law to the dispute under article 42(1) of the ICSID Convention, a tribunal's failure to do so amounts to a manifest excess of powers.³⁸² Failure to apply the proper law can also constitute an excess of powers under national arbitration

³⁷⁸ It was stated in *Soufraki v. United Arab Emirates*, ICSID Case No ARB/02/7, Decision on the Application for the Annulment of the Award, 5 June 2007, para 38.

³⁷⁹ This approach was taken by the committee in *Vivendi v. Argentina*. See ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2002, paras 104-12.

³⁸⁰ The committee in *Soufraki v. United Arab Emirates* created this approach. See ICSID Case No ARB/02/7, Decision on the Application for the Annulment of the Award, 5 June 2007, para 40.

³⁸¹ *Klöckner v. Cameroon*, ICSID Case No ARB/81/2, Decision on Annulment of 3 May 1985, para 4.

³⁸² The *ad hoc* committee in *CDC Group plc. v. Seychelles* stated that failure to apply the law specified by the parties was an excess of powers; essentially, a tribunal's legitimate exercise of power was tied to the consent of the parties, and so the tribunal exceeded its powers where it acted in contravention of that consent. See ICSID Case No ARB/02/14), Decision of the *ad hoc* Committee on the Application for Annulment, 29 June 2005, para 40.

statutes. The distinction of failure to apply the proper law in ICSID and non-ICSID arbitration is that the inquiry by *ad hoc* committees into tribunals' application of the proper law is, on occasion, more stringent and rigorous than that by national courts. Such distinction can be indicated by a comparison of the decisions in *MTD Equity v. Chile* (ICSID arbitration) and *CME v. Czech* (UNCITRAL arbitration) where the ICSID *ad hoc* committee scrutinized whether the tribunal had not applied the governing law to the questions which were necessary for its determination,³⁸³ while the Svea Court of Appeal, conversely, refused to examine whether the tribunal had applied the governing law to the right questions but just verified whether any of the laws listed in the 1991 Netherlands-Czech and Slovak BIT (including laws that parties agreed on to be applicable and laws that the tribunal decided as *amiable compositeur* or *ex aequo et bono* with parties' explicit permission) had been applied to any of the relevant questions.³⁸⁴ In fact, based on the rigid inquiry, an ICSID award faces the risk of annulment on the ground of failure to apply the proper law under a number of circumstances when a tribunal: (i) fails to apply the proper law; (ii) applies a different law other than that agreed by the parties;³⁸⁵ (iii) makes errors that are so gross or egregious as substantially to amount to non-application;³⁸⁶ and (iv) decides *ex aequo et bono* without an authorization by the parties.³⁸⁷

³⁸³ ICSID Case No ARB/01/7, Decision on the Application for Annulment, 21 March 2007, para 72.

³⁸⁴ As the Svea Court of Appeal stated, the Court did not believe that the various sections in the arbitral award were to be reviewed in order to ascertain which of the sources of law listed in art 8.6 of the Treaty had been applied by the arbitral tribunal. In the Court's opinion, when assessing whether the arbitrators had exceeded their mandate, it was sufficient to clarify whether the arbitral tribunal applied any of the sources of law listed in the choice of law clause or whether the tribunal had not based its decision on any law at all but, rather, judged in accordance with general reasonableness. See Svea Court of Appeal, *The Czech Republic v. CME Czech Republic B.V.*, Challenge of Arbitral Award, 15 May 2003, 42 ILM 919, 965 (2003).

³⁸⁵ *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No ARB/84/4, Decision on Annulment of 22 December 1989, para 5.03.

³⁸⁶ *Soufraki v. United Arab Emirates*, ICSID Case No ARB/02/7, Decision on the Application for the Annulment of the Award, 5 June 2007, para 86.

A careful distinction must be made between 'gross or egregious misinterpretation or misapplication of the proper law' and 'erroneous application of the law' because a mere error in the application of the proper law, even though it leads to incorrect result, does not constitute a ground for annulment. See *Amco v. Indonesia*, ICSID Case No ARB/81/1, *Ad hoc* Committee Decision on the Application for Annulment of 16 May 1986, para 23.

³⁸⁷ As an exception from the rules of applicable law, tribunals may decide on the basis of equity in accordance with art 42(3), but such power of tribunals is restricted to cases where explicit permission by the parties is given. A decision *ex aequo et bono* without parties' permission accounts to an excess of powers for failure to apply the governing law. See *Klöckner v. Cameroon*, ICSID Case No ARB/81/2, Decision on Annulment of 3 May 1985, para 59.

2.1.2 Failure to State Reasons

The other ground for annulment provided under the ICSID Convention that applicants frequently contend is the argument that the award has failed to state the reasons on which it is based.³⁸⁸ Failure to state reasons seems not to be, of necessity, a scarce ground for setting aside non-ICSID awards since major non-ICSID arbitration rules normally contain an obligation of tribunals to state reasons which is, however, subject to parties' otherwise statement.³⁸⁹ Be that as it may, the UNCITRAL Model Law does not include the failure to state reasons as a ground for setting aside awards.³⁹⁰ This might be partially relevant to the longstanding amiable composition and *ex aequo et bono* in non-ICSID arbitration, which either confer authorities on tribunals to determine the case at hand on the basis of what they consider to be fair and equitable or provide that arbitrators act as amiable compositeurs. In practice, the failure to state reasons in a decision rendered by the French Cour de Cassation was not in itself contrary to the French understanding of international public policy.³⁹¹ In Italy, the Court of Appeal of Florence rejected the contention of the defendant that the lack of reasons in the arbitral award violated the Italian public order since a violation should be determined on the basis of the decision rather than the reasoning of the award.³⁹² The Court further recalled that the reasoning was not required for an award under Anglo-Saxon and U.S. law.³⁹³ In general, national courts in many jurisdictions, taking Belgium, Canada, England, Switzerland and U.S. as examples, would reject a request for setting aside an arbitral award on the ground of failure to state reasons, or take a particularly restrictive approach.³⁹⁴ In fact, applicants seldom rely on the ground of failure to state reasons when seeking the setting aside of awards in non-ICSD treaty-based arbitration.

³⁸⁸ The basis of this ground rests in art 48(3) of the ICSID Convention, which provides that an award shall state the reasons upon which it is based.

³⁸⁹ For example, art 34(3) of the UNCITRAL Rules, art 31(2) of the ICC Arbitration Rules and art 36(1) of the SCC Rules.

³⁹⁰ Art 34(2)(iii) of the UNCITRAL Model Law.

³⁹¹ Yas Banifatemi, 'Defending Investment Treaty Awards: Is There an ICSID Advantage?' in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference*, 322.

³⁹² Italy No 29, *Bobbie Brooks Inc. v. Lanificio Walter Banci s.a.s.*, Corte Di Appello Di Firenze, 8 October 1977, IV YB Com Arb 289, 291 (1979).

³⁹³ Ibid.

³⁹⁴ Gaëtan Verhoosel, 'Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID', 302.

Failure to state reasons, however, is invoked in nearly every application for annulment, and it is, as shown in Figure VIII, a common ground on which *ad hoc* committees rely to annul arbitral awards, despite the facts that *ad hoc* committees routinely remain cautious in applying this ground to the annulment and that they would not annul an award tainted by a lack of reason supporting the tribunal's conclusion so long as the reason can be reconstructed or explained by the committee itself.³⁹⁵ This is because, unlike the other grounds provided under the ICSID Convention, limiting terms such as 'properly', 'manifestly', 'serious' and 'fundamental' are absent in this ground. As a consequence, the criteria of interpretation of 'a statement of reasons' are highly subjective. At least three different levels of review can be identified in ICSID annulment practice. First, several *ad hoc* committees restrict their powers to the investigation of the absence of reasons (for a particular aspect of the award). For example, the *ad hoc* committee in *Klöckner I* upheld the claimant's request by determining that the tribunal had imposed an obligation of result upon the claimant but it was not possible to discern how and why the tribunal had reached such decision.³⁹⁶ Under the standard, the power of the committee under article 52 is to scrutinize whether there is a failure to state any reason rather than a failure to state correct or convincing reasons.³⁹⁷ It is also noteworthy that though the requirement for addressing every question³⁹⁸ is not explicitly enumerated in article 52, *ad hoc* committees accept the possibility of failure to address every question being considered as a ground of failure to state reasons. To be precise, failure to deal with a question does not *ipso facto* amount to a failure to state reasons, but it does on condition that it is not the cases of inadvertent omissions of a technical character which can be remedied by supplementation pursuant to article 49(2).³⁹⁹

Second, a number of *ad hoc* committees extend their understanding of stated reasons to consistent reasons; in other words, contradiction of reasons constitutes a failure to state reasons since two genuinely contradictory reasons cancel each other out.⁴⁰⁰ The award in

³⁹⁵ *Wena Hotels Limited v. Egypt*, ICSID Case No ARB/98/4, Decision on Application for Annulment, 5 February 2002, para 83.

³⁹⁶ *Klöckner v. Cameroon*, ICSID Case No ARB/81/2, Decision on Annulment of 3 May 1985, para 141.

³⁹⁷ *Vivendi v. Argentina*, ICSID Case No ARB/97/3, Decision on Annulment of 3 July 2002, para 64.

³⁹⁸ Under art 48(3) of the ICSID Convention, an award shall not only state reasons but also deal with every question submitted to the tribunal.

³⁹⁹ Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 1013-14.

⁴⁰⁰ *Klöckner v. Cameroon*, ICSID Case No ARB/81/2, Decision on Annulment of 3 May 1985, para 116.

Amco I, for instance, included a load in calculating the ‘investment’ the investor had made, but it had previously recognized that load funds were excluding from the ‘investment’. Therefore, the *ad hoc* committee determined that the tribunal had contradicted itself and failed to state reasons for its method of calculation.⁴⁰¹ According to this approach, what an *ad hoc* committee should look at is the coherence of the reasons;⁴⁰² in particular, an *ad hoc* committee is supposed to examine whether reasons follow a logical sequence in which the tribunal’s final conclusions are expected to infer in a manner consistent with the premises.

Third, the inquiry of *ad hoc* committees is occasionally extended into a determination of the adequacy or persuasiveness of reasons. This approach is taken by the *ad hoc* committee in *Klöckner I*, which had developed a standard that reasons should be ‘sufficiently relevant’ or ‘reasonably sustainable and capable of providing a basis for the decision’.⁴⁰³ The terms ‘inadequate’ and ‘insufficient’ employed by *ad hoc* committees in determining whether a tribunal’s reasoning is without some substance are somewhat elusive and subjective, which entail a high risk of awards being annulled. Accordingly, the emphasis on the quality and correctness rather than the existence and pertinence of the reasons under this approach has been widely criticized for wrongly basing annulment on excess of powers.⁴⁰⁴

2.2 Substantive Grounds

2.2.1 Review on the Merits

The term ‘manifestly’, ‘serious’ and ‘fundamental’ adopted in the ICSID Convention are theoretically subjective, and it appears that several grounds⁴⁰⁵ even permit, *de facto*, a certain degree of review of the merits on a few questions such as the tribunals’ determination of jurisdiction and application of the proper law.⁴⁰⁶ However, article 52 restricts such review on the merits to the situation in which an excess of powers is manifest

⁴⁰¹ *Amco v. Indonesia*, ICSID Case No ARB/81/1, *Ad hoc* Committee Decision on the Application for Annulment of 16 May 1986, para 97.

⁴⁰² *CDC Group v. Seychelles*, ICSID Case No ARB/02/14, Decision of the *ad hoc* Committee on the Application for Annulment, 29 June 2005, para 70.

⁴⁰³ *Klöckner v. Cameroon*, ICSID Case No ARB/81/2, Decision on Annulment of 3 May 1985, paras 119-20.

⁴⁰⁴ *CDC Group v. Seychelles*, ICSID Case No ARB/02/14, Decision of the *ad hoc* Committee on the Application for Annulment, 29 June 2005, para 66.

⁴⁰⁵ For example, the ground of manifest excess of power.

⁴⁰⁶ Yas Banifatemi, ‘Defending Investment Treaty Awards: Is There an ICSID Advantage?’, 324-25.

and *ad hoc* committees should have a self-restraint attitude towards such review.⁴⁰⁷ Despite the ICSID Convention's *travaux préparatoires* which did not offer a justification for an expansive interpretation of article 52(1),⁴⁰⁸ extensive interpretation of the grounds for annulment, at least in the cases of failure to apply the proper law and serious departure from a fundamental rule of procedure, is not rare in practice since hyperactive *ad hoc* committees typically have a wide perception of their functions.⁴⁰⁹ Based on the extensive approach, a number of *ad hoc* committees engage in greater substantive review of awards than that permitted under the ICSID Convention. The first generation of annulment decisions actually reviewed arbitral awards in a manner approaching appeal, and such unauthorized appellate review was resurrected in the 'second viral phase'⁴¹⁰ of annulment decisions in *Enron v. Argentine*,⁴¹¹ *Sempra v. Argentine*⁴¹² and *Fraport v. Philippines*⁴¹³ where the *ad hoc* committees seemed unable to defy the temptation of excessive annulment. Some commentators even inquire into whether the contemporary annulment of ICSID arbitral awards is back to the first generation.⁴¹⁴

The recent annulment decisions have not only revealed jurisprudence suffused with inconsistency, but also indicated that *ad hoc* committees readily tend to exceed their competence. Accordingly, scholars have presented the argument that ICSID annulment mechanism has to adjust itself to the growing judicialization of ICSID arbitral tribunals, and thus the establishment of a mechanism with official powers of substantive review is needed.⁴¹⁵ Nevertheless, such proposal seems less attractive since the matter directs not only to the objective of the ICSID annulment proceedings but also to the legitimacy of the ICSID arbitration. In the first place, the innovative annulment proceedings created under

⁴⁰⁷ Ibid

⁴⁰⁸ Paul Friedland and Paul Brumpton, 'Rabid Redux: The Second Wave of abusive ICSID Annulments' (2012) 27(4) Am U Intl L Rev 727, 731-34.

⁴⁰⁹ On occasion, *ad hoc* committees even *ex officio* searched for additional reasons for annulment that had not been raised by the applicants. See Christoph Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope', 215-25.

⁴¹⁰ Paul Friedland and Paul Brumpton, Rabid Redux: The Second Wave of abusive ICSID Annulments, 730.

⁴¹¹ ICSID Case No ARB/01/3, Decision on Annulment, 30 July 2010.

⁴¹² ICSID Case No ARB/02/16, Decision on Annulment, 29 January 2010.

⁴¹³ ICSID Case No ARB/03/25, Decision on Annulment, 23 December 2010.

⁴¹⁴ Antonio Crivellaro, 'Annulment of ICSID Awards: Back to the "First Generation"?' in Laurent Levy & Yves Derains (eds), *Liber Amicorum en L'honneur de Serge Lazareff* (Pedone, 2011) 145-75.

⁴¹⁵ Dohyun Kim, 'The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away from an Annulment-based System' (2011) 86 NYU L Rev 242.

the ICSID Convention are meant to be used as a limited and extraordinary remedy.⁴¹⁶ The limited nature of the post-award remedy of annulment has an indication that annulment is not a remedy against an incorrect decision, and consequently *ad hoc* committees may not, in effect, reverse an award on the merits.⁴¹⁷ Considering that annulment is limited, and in that sense extraordinary, article 52(1) should be interpreted rigorously in accordance with its object and purpose, which excludes perceptibly extending the review on the merits.⁴¹⁸

In the second place, although the alleged backlash against the regime governing international investment disputes can be attributable, partially but poignantly, to the current ICSID annulment mechanism for its insufficiency in resolving the issues of conflicting awards,⁴¹⁹ it has to reiterate that the purpose of the annulment has also been interpreted as the control of the essential integrity of the ICSID arbitral process in all its facets.⁴²⁰ The debate leads to a more crucial and fundamental issue as to whether the desire for the accuracy of awards is sufficient to compromise the finality of award. As the primary virtue of appeal, the greater substantive accuracy fosters the uniformity of law that accrues to the investment community in one respect, but also has the potential to lead to further undesirability and enormous hurdles in more important respects such as a significant change of the ICSID Convention, in particular given the fact that both States and investors have not been subject to inaccurate awards to the extent that they yearn for compromising the ICSID's underlying principle of finality in return for the potential accuracy.⁴²¹ In fact, the first generation of ICSID annulment decisions in which the *ad hoc* committees reviewed decisions in a manner approaching appeal has been described as a 'breakdown of the control mechanism in ICSID arbitration', though a breakdown in legal control does not necessarily amount to calamity or systematically dysfunction.⁴²² While the legitimacy of the ICSID arbitration is somehow affected by the current annulment practice, the influence

⁴¹⁶ Aron Broches, 'On the Finality of Awards: A Reply to Michael Reisman' (1993) 8(1) ICSID Rev-Foreign Investment LJ 92, 102.

⁴¹⁷ *MINE v. Guinea*, ICSID Case No ARB/84/4, Decision on Annulment of 22 December 1989, para 4.04.

⁴¹⁸ *Ibid*, para 4.05.

⁴¹⁹ Christina Knahr, 'Annulment and Its Role in the Context of Conflicting Awards' in Michael Waibel, *et al*, (eds), *The Backlash Against Investment Arbitration*, 163.

⁴²⁰ *Soufraki v. United Arab Emirates*, ICSID Case No ARB/02/7, Decision on the Application for the Annulment of the Award, 5 June 2007, para 23.

⁴²¹ Thomas W. Walsh, 'Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality' (2006) 24 Berkeley J Intl L 444, 456-61.

⁴²² W. Michael Reisman, 'The Breakdown of the Control Mechanism in ICSID Arbitration', 742, 755-70.

is not only limited to a few cases as compared to the large caseload of ICSID arbitration but also relatively inconsequential to challenge the ICSID arbitration as a whole. Besides, appellate review of awards is not yet powerful enough to shore up the legitimacy of international investment regime. As elucidated previously, at the present time there are no compelling reasons to introduce an appeal facility under the ICSID arbitration framework. Instead, an excessive annulment with appellate review of awards will, in turn, irreversibly undercut the ICSID's international reputation as a preeminent investment dispute resolution mechanism.⁴²³

Therefore, annulment proceedings are not supposed to be conducted to the detriment of the finality, stability and integrity of the awards rendered by arbitral tribunals, and *ad hoc* committees should be conscious of potential risk of acting like a court of appeal. Otherwise, the objective of the annulment will be undermined if the *ad hoc* committees exceed their competence to review awards on the merits (except for a few extremely limited reviews on the merits of awards as mentioned above). When making observations on such substantive questions, *ad hoc* committees ought to exert their powers prudently and make a distinction between annulment and appeal. All told, review on the merits in ICSID arbitration is, in general terms, unacceptable under the Convention and undesirable in practice.

By comparison, though a significant number of jurisdictions adopt the limited and exclusive grounds of recourse laid down in the UNCITRAL Model Law, there are also numerous jurisdictions permitting international arbitral awards to be set aside on grounds that are broader than those set forth in UNCITRAL Model Law, in which judicial review on the merits of arbitral awards may be legitimate. Review on the merits occurs in two circumstances where the intervention of national courts includes a limited right of appeal. In the first circumstance, the mistake of law can be a ground for setting aside arbitral awards. The English Arbitration Act explicitly provides that disputing parties to arbitral proceedings in a few categories of cases can appeal to the court on substantive errors of law.⁴²⁴ The U.S. Federal Arbitration Act (hereinafter 'FAA') does not expressly enumerate review on the basis of mistake of law, but national courts have followed the dictum in

⁴²³ David D. Caron, 'Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal', 53.

⁴²⁴ S 69 of the English Arbitration Act (1996).

Wilko v. Swan that a ‘manifest disregard of law’ is justified to set aside arbitral awards.⁴²⁵ The second circumstance in which arbitral awards would be subject to appellate review rests on the existence of a mistake of fact. In *LaPine v. Kyocera*, the Court of Appeals allowed judicial review because the contract permitted judicial scrutiny of award when parties agreed that review would be for errors of fact or law.⁴²⁶ In addition, a number of jurisdictions have provided a variety of grounds for substantive review of arbitral awards on the merits. For instance, Chinese national courts may set aside arbitral awards if the court concluded that the evidence that was sufficient to affect the impartiality of the award had been concealed by the other party, or that the proper law had been applied erroneously.⁴²⁷

One school of thought asserts that judicial review on the merits is conducive to the development of substantive legal principles.⁴²⁸ In the light of the public aspect of investment arbitration, an appellate review, arguably, provides justification for adjudicators to take part in the arbitration of public values.⁴²⁹ As far as the safeguarding of the integrity of the arbitral process is concerned, the existence of substantive review on the merits hangs over international arbitration like a sword of Damocles⁴³⁰ in view of the fact that limited judicial review on the merits is a bulwark that cannot be ignored against the abuses of arbitral authority, and thus it is, if properly cabined, desirable to safeguard against arbitrary or unjust awards. Such observation, however, has been criticized by scholars who maintain that review of awards on the merits is unnecessary.⁴³¹ Notwithstanding a variety of statutes and practice allowing review on the merits of awards, the vast majority of jurisdictions exercise relatively minimal control over arbitral awards and seldom provide for vacatur

⁴²⁵ *Wilko v. Swan*, 346 U.S. 427 (U.S. S.Ct. 1953). See Michael H. LeRoy, ‘Are Arbitrators above the Law? The “Manifest Disregard of the Law” Standard’ (2011) 52 BC L Rev 137, 140.

⁴²⁶ *LaPine v. Kyocera*, 139 F. 3d 884 (9th Cir., 1997). See Eric van Ginkel, ‘“Expanded” Judicial Review Revisited: Kyocera Overturns LaPine’ (2003) 4 Pepp Disp Resol L J 47.

⁴²⁷ Art 58(5) of Chinese Arbitration Act(1994) and art 20 of the Judicial interpretation of Chinese Arbitration Act.

⁴²⁸ The assumption behind such review is that court cases create precedents that provide guidance on business conduct. See William W. Park, ‘Why Courts Review Arbitral Awards’ in Briner Robert Georg, *et al* (eds), *Liber Amicorum Karl-Heinz Böckstiegel* (Carl Heymann, 2001) 602.

⁴²⁹ Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 1114-23.

⁴³⁰ William W. Park, ‘The Specificity of International Arbitration: The Case for FAA Reform’ (2003) 36 Vand J Transnatl L 1241, 1253.

⁴³¹ See, eg, Stephan Wilske, Nigel Mackay, ‘The Myth of the ‘Manifest Disregard of the Law’ Doctrine: Is this Challenge to the Finality of Arbitral Awards Confined to U.S. Domestic Arbitrations or Should International Arbitration Practitioners be Concerned?’ (2006) 24(2) ASA Bulletin 216.

grounds based on substantive review on the merits of awards. Even if arbitral awards are not entirely free from judicial review on the merits or appeal in some jurisdictions, national courts in these jurisdictions, by and large, take a restrictive view on challenging arbitral awards on the basis of substantive grounds. In England, for permission to appeal on a point of law to be upheld by national courts will need to meet a number of requirements which include (i) there is a consensual agreement by all parties; (ii) the tribunal's determination on the question of law will substantially affect the right of parties; and (iii) the tribunal's decision on the question is obviously wrong or the question is of general public importance and the decision is at least open to serious doubt.⁴³² These requirements indicated that the right of appeal is extremely limited and would be only granted in exceptional circumstances. The application of the manifest disregard of law as a ground for setting aside awards in the U.S. is more complicated. The review standard was critically doubted by the U.S. Supreme Court in *Hall Street Associates LLC v. Mattel* where the Court held that the statutory grounds for vacatur under the FAA were exclusive.⁴³³ In practice, the ground for setting aside awards on the basis of the manifest disregard of law is rarely requested by applicants and much less seldom successful.⁴³⁴ Overall, as there may remain a rationale for substantive review of non-ICSID awards on the merits by national courts, it is, at any rate, imperative that the scope of substantive review be restricted.

2.2.2 Public Policy

While public policy (or '*ordre public*') consideration is not enumerated under the ICSID Convention as a ground for annulment, public policy, which would include but not be restricted to peremptory rules of international law such as prohibition of slavery, piracy, drug trade, terrorism, genocide and the protection of basic human right, can be invoked in the form of a general failure to apply international law which amounts to an excess of powers.⁴³⁵ Nonetheless, in practice it is much far-fetched that international public policy will be applied to an investment contract.⁴³⁶

⁴³² S 69(2), (3) of the English Arbitration Act.

⁴³³ *Hall Street Assoc., LLC v. Mattel, Inc.*, 128 S.Ct. 1396 (U.S. S.Ct. 2008).

⁴³⁴ Gary B. Born, *International Commercial Arbitration*, 2639.

⁴³⁵ Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 975-76.

⁴³⁶ One exception is that the ICSID tribunal in *World Duty Free v. Kenya* based its decision partially on international public policy, stating that bribery was contrary to the international public policy in most States and thus claims based on contracts of corruption or obtained by corruption could not be upheld. See ICSID Case No ARB/00/7, Award, 4 October 2006, para 157.

In contrast, public policy is a standard ground for setting aside non-ICSID arbitral awards in most jurisdictions. The UNCITRAL Model Law also provides that an award may be set aside if the court *ex officio* finds that the award is in conflict with the public policy of the State involved.⁴³⁷ More importantly, the concept of ‘public policy’ in the non-ICSID arbitration context underlines, in general terms, the national values or the basic tenets under national laws. It is acknowledged that public policy in vacatur of arbitral awards not only originated from, but is also associated with, the application of public policy under (other areas of) private international law.⁴³⁸ Based on private international law, though the concept of public policy can be diverse under different national statutes, the trend has been towards emerging a convergence of a similar understanding of application of public policy to international disputes in most developed arbitral jurisdictions.⁴³⁹ The terms ‘public policy’ in the UNCITRAL Model Law context are not equivalent to the political stance or international policies of a State; instead, it comprises the fundamental notions of law and justice in both procedural and substantive respects which, taking corruption, bribery or fraud and similar serious cases for examples, would constitute a ground for setting aside awards.⁴⁴⁰

In practice, the application of public policy in vacatur actions is, consistent with its main function as ‘escape device’ under private international law, exercised in limited and exceptional cases. In *Parsons & Whittemore Overseas v. RAKTA*, a U.S. corporation received an unfavourable ICC arbitral award due to its failure to complete a project in Egypt as a result of the U.S. government’s actions against Egypt during the Six Day War, and sought relief on the ground of public policy. The Second Circuit held that the fact that U.S. policy supported the U.S. company’ position was insufficient to annul the award, and further stated that in case of refusal of enforcement of awards, public policy could only be

⁴³⁷ Art 34(2)(b)(ii) of the UNCITRAL Model Law.

⁴³⁸ Gary B. Born, *International Commercial Arbitration*, 2621.

⁴³⁹ For example, the degree of connection or proximity between the State and the dispute is one of the limits on the application of public policy to international dispute; in other words, the strength of a public policy consideration must be directly proportional to the intensity of the link which connects the facts of the case with the State (see Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (CUP, 2009) 258-59). In the international arbitration context, most developed jurisdictions adopt similar conceptions of public policy (Nigel Blackaby, *et al*, *Redfern and Hunter on International Arbitration*, 591).

⁴⁴⁰ Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session, Vienna, 3-21 June 1985, A/40/17, paras 296-97.

invoked in the case of the violation of a State's most basic notions of morality and justice.⁴⁴¹ In the same vein, the Ontario Superior Court of Justice declined a request for setting aside an award rendered under the NAFTA and ICSID Additional Facility Rules by determining that an award worthy of judicial interference on the ground of public policy should 'fundamentally offend the most basic and explicit principles of justice and fairness in Ontario, or evidence intolerable ignorance or corruption on the part of the arbitral tribunal'.⁴⁴² In France, public policy as a basis for setting aside international arbitral awards is limited practically to exceptional cases involving mandatory investment regulations, insolvency proceedings and bribery.⁴⁴³ Ordinarily, as noted in *Schreter v. Gasmac Inc.* that the ubiquitous resort to public policy as a justification for relief could malign the integrity of arbitration,⁴⁴⁴ national courts constantly take particularly restrictive view on challenging arbitral awards based on public policy, and the public policy arguments in vacatur actions are rarely successful.⁴⁴⁵

Notwithstanding the restriction, the risks that a non-ICSID arbitral award is set aside on the ground of public policy remain, in particular taking into account the following factors. First, despite the convergence of legislation in developed jurisdictions, the nebulous nature of the concept of public policy makes it possible that public policy is inappropriately and occasionally used since national courts in a State may set aside an arbitral award which is valid in terms of public policy in other States. Second, it is intriguing that national courts in France may set aside an arbitral award if it is contrary to 'public policy' in accordance with the 2011 French Decree reforming the law governing arbitration,⁴⁴⁶ as compared to the terms 'international public policy' (rather than domestic or local public policy) adopted in

⁴⁴¹ *Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir., 1974).

⁴⁴² *United Mexican States v. Marvin Roy Feldman Karpa*, Decision on the Application to Set Aside Award, Oct. 27, 2003, Ontario Superior Court of Justice, Court File No 03-CV-23500, para 80. The decision was upheld by the Court of Appeal for Ontario. See Decision on appeal from the judgment of Justice W. Dan Chilcott of the Superior Court of Justice, 11 January 2005.

⁴⁴³ Gary B. Born, *International Commercial Arbitration*, 2627.

⁴⁴⁴ *United Mexican States v. Marvin Roy Feldman Karpa*, Decision on the Application to Set Aside Award, Oct. 27, 2003, Ontario Superior Court of Justice, Court File No 03-CV-23500, para 117.

⁴⁴⁵ For example, the Indonesian State-owned oil corporation lost public policy arguments before the U.S. Court of Appeals, Fifth Circuit in *Karaha Bodas Co. (Cayman Islands) v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Indonesia)*, 364 F.3d 274 (5th Cir. 2004).

⁴⁴⁶ Art 1492(5) of French Code of Civil Procedure, Decree No 2011-48 of 13 January 2011. However, as to the ground for refusal of recognition and enforcement, the terms 'international public policy' are still retained in the new French Code. See arts 1514 and 1520.

the old French Code of Civil Procedure.⁴⁴⁷ It is also noteworthy that the traditional viewpoint that public policy should be construed narrowly and merely refers to ‘international public policy’ in the context of setting aside arbitral awards rests primarily on the French law and practice.⁴⁴⁸ Since the French law has been revised, it is ambiguous as to whether the revision would ostensibly disrupt the justification that structures the line drawn between ‘international public policy’ and ‘domestic public policy’ in vacatur proceedings. Third, a misapplication of mandatory statutes of the arbitral *situs* may amount to, on occasion, a violation of the underlying public policy. In *Marketing Displays International v. VR* where one of the objections of the respondent was based on public policy on the ground that the patent, trademark and know-how licence in question was contrary to EC antitrust rules since the licence agreement was entered into without being notified to the EC Commission under Regulation (EC) 17/62 in force at the time, the Hague Court of Appeal determined that the licence was in breach of article 81(1) of the Treaty Establishing the European Community and thus a national court must set aside the arbitral award. As the Court observed, article 81(1) of the EC Treaty was a fundamental provision that was essential for the fulfilment of the tasks of the Community for the functioning of the internal market.⁴⁴⁹ Although the judgment of the Hague Court of Appeal lends itself to severe criticism under both competition law and arbitration law and has been regarded a deplorable step back on the road towards the finality of arbitral awards,⁴⁵⁰ it at least reflects the relatively tendentious safeguard of underlying public values on the part of the sovereign States, and reveals the risk of non-ICSID arbitral awards being set aside on the ground of a violation of mandatory rules at the arbitral *situs*. Last but not least, public policy of a foreign State (other than the State of the arbitral *situs*) has a potential to play a role in vacatur process. In fact, an application of foreign public policy is available under

⁴⁴⁷ Arts 1502(5) and 1504 of French Code of Civil Procedure, Decree No 81-500 of 12 May 1981.

⁴⁴⁸ The French courts draw a clear distinction between ‘international public policy’ and ‘domestic public policy’, pointing out that no account should be taken of the domestic public policy for the purpose of setting aside arbitral awards. See Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, 954; Yas Banifatemi, ‘Defending Investment Treaty Awards: Is There an ICSID Advantage?’, 325.

⁴⁴⁹ Netherlands No 29, *Marketing Displays International Inc. (US) v. VR Van Raalte Reclame B.V. (Netherlands)*, Gerechtshof [Court of Appeal], The Hague, Not Indicated, 24 March 2005, XXXI YB Com Arb 808, 815-16 (2006).

⁴⁵⁰ Alexis Mourre and Luca G. Radicati di Brozolo, ‘Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back’ (2006) 23(2) J Intl Arb 171, 181-85.

private international law in numerous jurisdictions.⁴⁵¹ Accordingly, if domestic public policy demands giving effect to public policy of a foreign State in accordance with rules of choice of law, national courts can give effect in vacatur actions to that foreign public policy.

On balance, ICSID and non-ICSID arbitration employ, in a sense, two discrepant approaches with respect to the grounds for annulment or setting aside awards and the standards applied in specific cases. However, different paths lead to the same destination. It appears impractical to conclude that one approach necessarily brings about a higher likelihood of annulment or vacatur. Therefore, the evaluation of the two approaches lays more emphasis on illustrating the risks that prospective parties would face in the annulment proceedings. In terms of risks, considering that national courts normally display great deference to international arbitral awards,⁴⁵² in particular those dealt with investment disputes between investors and States, the standards of review applied by ICSID *ad hoc* committees seem to indicate, to some extent, a higher risk that an award would be annulled than a non-ICSID award would be set aside.⁴⁵³ In fact, the concerns regarding the danger that *ad hoc* committees might be tempted to exceed the role vested in them by the ICSID Convention have been expressed since the first generation of annulment decision.⁴⁵⁴ A survey conducted in 2010 also shows that the majority of international arbitration experts generally have negative views on the ICSID annulment proceedings for the reason that the proceedings are unpredictable and go too far into the merits of the cases, and they prefer UNCITRAL arbitration rather than ICSID arbitration.⁴⁵⁵ Although substantive review of

⁴⁵¹ For example, art 187(2) of the 1971 U.S. Restatement (Second) of Conflict of Laws stipulates that the law of the State chosen by the parties will be applied unless ‘application of the law of the chosen State would be contrary to a fundamental policy of a State which has a materially greater interest than the chosen State in the determination of the particular issue and which, under the rule of § 188, would be the State of the applicable law in the absence of an effective choice of law by the parties’. This provision is similar to art 7(1) (regarding the mandatory rules) of the Rome Convention on the Law Applicable to Contractual Obligations.

⁴⁵² For example, in a recent case the U.S. Court of Appeals for the Second Circuit issued on 7 January 2014 a non-precedential summary order in *Ometto v. ASA Bioenergy Holding A.G.*, affirming the U.S. District Court for the Southern District of New York’s denial of a petition to set aside an ICC arbitral award on the grounds of the evident partiality of the presiding arbitrator under the FAA. See No 12-4022(L), 13-225(con)-cv (2d Cir. Jan. 7, 2014).

⁴⁵³ Christoph Schreuer, ‘From ICSID Annulment to Appeal Half Way Down the Slippery Slope’, 211.

⁴⁵⁴ Georges R. Delaume, ‘The Finality of Arbitration Involving States: Recent Developments’ (1989) 5(1) *Arb Intl* 21, 31.

⁴⁵⁵ The questionnaires, which were distributed to 198 international arbitration experts, contained the following questions: ‘[I]n advising a future claimant investor, how does the possibility of ICSID annulment influence the advice as compared to the possibility of an award being challenged under U.S., French or

non-ICSID awards is legitimate in many jurisdictions, it appears that it is only the *ad hoc* committees' substantive review that causes considerable concerns, and such concerns would even hold back the growth of ICSID cases. Accordingly, it is advisable that *ad hoc* committees avoid reviewing awards in a manner approaching appeal, which is not only crucial but also necessary.

3 The Effect of Annulment

The issue concerning the effect of the annulment of an international arbitral award, which is of both significantly theoretical and substantial practical importance, has not yet reached a consensus. The matter seems to be less complicated when it comes to ICSID arbitration since in the light of the effect of annulment, an award or a part thereof which has been annulled by an *ad hoc* committee becomes a nullity.⁴⁵⁶ Given that the effect of annulment terminates the binding force of the award or the annulled portion of the award, the award or the annulled portion is therefore unenforceable under the ICSID Convention. While the decision to annul does not replace the original award or substitute the justification stated by the tribunal, either or both disputing parties can resubmit the dispute to a new tribunal in accordance with article 52(6) of the Convention. Although some practical concerns may arise regarding the resubmission,⁴⁵⁷ the relief provided under the ICSID Convention in case of annulment seems to be evident and concise.

A vacated non-ICSID arbitral award ceases, generally and arguably, to have continued legal effect, at least in the State where it was set aside. However, the effect of setting aside distinguishes itself from that of ICSID annulment in three aspects. First, there is a possibility of appealing lodged against the national court's decision on the application for setting aside an award to a higher court.⁴⁵⁸ Second, national courts can remand the case to the arbitral tribunal for reconsideration, provided that the serious irregularity has

English law'. Only a few expert respondents favoured ICSID procedures over domestic procedures: 16 per cent as compared to English law and 10 per cent as compared to French or US law. See Markus Burgstaller and Charles B. Rosenberg, 'Challenging International Arbitral Awards: To ICSID or not to ICSID?' (2011) 27(1) *Arb Intl* 91, 94-55.

⁴⁵⁶ The ICSID Secretariat, 'Background Paper on Annulment: For the Administrative Council of ICSID', 469.

⁴⁵⁷ For example, disputing parties may not introduce new claims when resubmitting the dispute to a new tribunal, and the change of the parties such as State succession, alteration of corporate structure, assignment of rights or a dissolution of a corporate investor may cause problems since the resubmitted dispute must be brought by the parties in the original proceedings.

⁴⁵⁸ For example, s 16(a)(1)(E) of the Federal Arbitration Act.

substantially affected the tribunal, the proceedings or the award.⁴⁵⁹ Last, but perhaps most important, recent decades have seen an increasing number of non-ICSID arbitral awards that have been set aside by national courts at the seat of arbitration being enforced in other jurisdictions. The underlying principle of such case law is based on the proposition that international arbitration is entirely detached from any legal system; in other words, international arbitration may ‘create obligations even if no such effect is recognized by *lex fori*’.⁴⁶⁰ To be more specific, given that the legal force of international arbitration is founded on the parties’ creation of a contractual institution, the effect of the arbitral proceedings may be left to be controlled by any legal system that is requested to recognize the award.⁴⁶¹ In practice since arbitral *situs* is determined for little more than the sake of neutrality and convenience, the effect of arbitration derives from the legal orders that recognize the validity of the arbitration agreement and the award rather than the arbitral *situs*, and thus national courts at the arbitral *situs* have little bearing on the effect of the award. Accordingly, as stated in *Bargues Agro Industrie* by the Paris Court of appeal, the rationale for such case law is that an award ‘is not integrated into the legal order [of the State of the seat] with the consequence that its possible setting aside by the courts of the seat does not affect its existence by precluding its recognition and enforcement in other national legal orders.’⁴⁶² The Court of Cassation provides a reinforced theoretical foundation in *Putrabali* by enunciating that ‘[an] international award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought.’⁴⁶³

The justification for the enforcement of vacated awards also rests on international conventions. Though the New York Convention is silent on the effect of awards set aside by national courts, article V(1) provides that enforcement ‘may be refused’ where the language is permissive and not mandatory since it is the diction of ‘may’ rather than ‘must’

⁴⁵⁹ For example, s 68(3) of the English Arbitration Act.

⁴⁶⁰ Jan Paulsson, ‘Arbitration Unbound: Award Detached from the Law of its Country of Origin (1981) 30 Intl & Comp L Q 358, 363.

⁴⁶¹ Ibid, 367.

⁴⁶² Emmanuel Gaillard, *Legal Theory of International Arbitration*, 139.

⁴⁶³ Ibid

or ‘shall’ that is adopted,⁴⁶⁴ thereby indicating that the article can be interpreted in such a way that the enforcement court has residual discretionary authority to enforce a vacated award.⁴⁶⁵ Furthermore, under article VII(1) which is commonly known as the ‘more-favourable-right provision’, the New York Convention acknowledges explicitly that if another national law or multilateral or bilateral agreement has a more favourable regime for the enforcement of foreign arbitral awards than the Convention itself, any party can invoke that regime to take advantage of the more favourable law or treaty. Besides the New York Convention, the European Convention goes a step further, under which if an award is set aside outside the grounds set forth in article IX(1)(a) to (d) of the Convention, taking grounds of a substantive review on the merits or public policy for examples, a foreign court of enforcement may not take into account the fact that the award has been set aside at the seat of arbitration.⁴⁶⁶

In addition to the justification in international conventions, scholars also provide a variety of theories supporting the enforcement despite the fact that the award was set aside at the arbitral *situs*.⁴⁶⁷ In contrast, a number of scholars have expressed their cautious academic

⁴⁶⁴ It is noteworthy that Pieter Sanders who engaged in drafting the New York Convention stated that even the extremely liberal and internationally minded previous draft of the Convention stipulated ‘shall be refused’ (see ICC’s Report and Preliminary Draft Convention (1953), art IV, 9 ICC Intl Ct Arb Bulletin 35). The initiative to replace the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards came from the ICC which issued a preliminary draft ‘the Report and Preliminary Draft Convention’ that was adopted by the Committee on International Commercial Arbitration in 1953 and eventually provided the basis for the New York Convention.

In addition, the French text of art V(1) of the New York Convention adopts the terms ‘seront refusées’ (shall be refused) which is mandatory. However, even in the French version, the objective of the Convention is to limit the conditions under which awards can be refused to enforce, while national laws remain entitled to take a more liberal stance in accordance with art VII (see Jan Paulsson, ‘May or Must under the New York Convention: An Exercise in Syntax and Linguistics’ (1998) 14(2) *Arb Intl* 227; Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, 983-40).

⁴⁶⁵ Albert Jan van den Berg, ‘Enforcement of Arbitral Awards Annulled in Russia - *Case Comment on Court of Appeal of Amsterdam, April 28, 2009*’ (2010) 27(2) *J Intl Arb* 179, 186.

⁴⁶⁶ Art IX(1) of the European Convention on International Commercial Arbitration.

⁴⁶⁷ Paulson proposed that the annulment of an award by a national court in the State where it was rendered should not be a bar to enforcement if the grounds for vacatur were under a local standard, and the local standard annulment was a decision consistent with the substantive provisions of the first four paragraphs of art V(1) of the New York Convention and art (1)(a) of the UNCITRAL Model Law (see Jan Paulsson, ‘Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)’ (1998) 9 ICC Intl Ct Arb Bulletin 14). However, Park maintained that enforcement of vacated awards should depend not on the nature of the vacatur standard, but on whether the vacatur was made in good faith and comported with fundamental notions of justice (see William W. Park, ‘Duty and Discretion in International Arbitration’ (1999) 93 *Am J Intl L* 805). Drahozal took an economic approach to the question under which the default rule was that

commentaries on the practice favouring the enforcement of vacated awards.⁴⁶⁸ In practice, there are also two divergent approaches regarding the treatment of a vacated award. The first approach endorsing the enforcement of arbitral awards that were set aside by national courts at the arbitral *situs* under some circumstances is dominant in many civil law States. This view is illustrated by a number of well-known cases emanating from the French courts.⁴⁶⁹ Remarkably, in June 2012 the Tribunal de Grande Instance in Paris court issued an order recognizing the award rendered by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (hereinafter 'ICAC') in favour of Nikolai Maximov for approximate U.S. \$300 million against Novolipetsk Steel Mill (NLMK). Though the award was set aside by the Moscow Arbitrazh Court whose judgement was subsequently upheld by the Federal Arbitrazh Court of the Moscow District and the Supreme Arbitrazh Court on the ground of non-arbitrability⁴⁷⁰, the Tribunal de Grande Instance in Paris determined that the ICAC award set aside by the Russian courts was insufficient to prevent its recognition in France, and further concluded that the award was valid since it had been procured in line with parties' agreed contractual method and thus should be recognized and enforced.⁴⁷¹ The enforcement of vacated awards has also again been thrust into the limelight in the

vacated awards were not enforceable with possible exception of decisions of the court of vacatur procured in bad faith. In the exceptional case, parties should be permitted to resolve the issue by contract (see Christopher R. Drahozal, 'Enforcing Vacated International Arbitration Awards: An Economic Approach' (2000) 11 Am Rev Intl Arb 451).

⁴⁶⁸ For example, by conceding that the New York Convention allowed an enforcing jurisdiction to disregard an annulment decision at the seat of arbitration, Reisman asserted that the New York Convention contained an implicit understanding that the arbitral *situs* would monitor the procedural integrity of arbitration, in exchange for which other States would recognize awards that passed muster where rendered. Therefore, to enforce annulled awards would violate an implicit allocation of national court authority (see W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (Duke University Press, 1992) 113-120). van den Berg had expressed that the Court of Appeal in Amsterdam's reasoning of its decision on enforcement of four awards annulled by Russian courts was at odds with the New York Convention (see Albert Jan van den Berg, *Enforcement of Arbitral Awards Annulled in Russia - Case Comment on Court of Appeal of Amsterdam, April 28, 2009*).

⁴⁶⁹ See, eg, (i) *Société Berardi v. Société Clair* (1980); (ii) *Société Pabalk Trecaret v. Société Norsolor* (1984); (iii) *Société Polish Ocean Line v. Société Jolasry* (1993); (iv) *Société Hilmarton Ltd. v. Société OTV* (1994); (v) *S.A. Lesbats et Fils v. Esterer WD GmbH (Dr. Volker Grub)* (2007); (vi) *Société PT Putrabali Adyamulia v. Société Rena Holding* (2007).

⁴⁷⁰ Disputes arising out of the parties' agreement aimed at the transfer of shares could not be resolved by arbitration since corporate disputes were not arbitrable under the Russian laws.

⁴⁷¹ Mike McClure, 'Enforcement of Arbitral Awards that have been Set Aside at the Seat: The Consistently Inconsistent Approach across Europe', Kluwer Arbitration Blog, 26 June 2012.

Netherlands, with two high-profile cases.⁴⁷² Even in Russia, which has not been traditionally regarded as a pro-arbitration State,⁴⁷³ the arbitrazh court of the city of Kemerovo issued a ground-breaking decision in 2011 by recognizing, based on article IX(2) of the European Convention, an ICC award in *Ciments Français v. Sibirskiy* which was set aside by a Turkish court.⁴⁷⁴

In common law States, the U.S. court in *Chromalloy Gas Turbine Corp. v. Arab Republic of Egypt* enforced an arbitral award that was set aside by an Egyptian court on the ground that Egyptian law had been misapplied. The analysis of the U.S. court is well-structured, based on articles V(1)(e) and VII of the New York Convention and the FAA which has been interpreted as establishing a compelling national policy favouring the enforcement of international arbitration agreements and awards.⁴⁷⁵ The reasoning in *Chromalloy* has frequently been acknowledged in subsequent decisions.⁴⁷⁶ However, there are also a number of courts that take another approach and refuse to recognize a vacated award.⁴⁷⁷ The approach of the U.S. courts is still evolving;⁴⁷⁸ as a whole, it is apparently less

⁴⁷² One is the case of *Yukos Capital SARL v OJSC Rosneft Oil Co.* in which the Amsterdam Court of Appeal held that the fact that a Russian court had set aside a Russian arbitral award on the ground of lack of independence of Russian judiciary was not sufficient to refuse enforcement in the Netherlands (see *Yukos Capital SARL v. OJSC Rosneft Oil Co.*, Court of Appeal, Amsterdam, 28 April 2009, case No LJN: BI2451). Despite the decision of Amsterdam Court of Appeal, Yukos did not obtain payment and then in 2010 further initiated actions before the English High Court, seeking to enforce the awards under common law and the New York Convention.

The other is the case of *Nikolai Maximov v. Novolipetsky Metallurgichesky Kombinat (NLMK)*, where in September 2012 the Amsterdam Court of Appeals rendered an interim judgment enforcement of award set aside by Russian courts. The case is identical to the above *Yukos* case in many respects, but the Amsterdam Court of Appeals applied different standards in this case, that were, ‘sufficiently specific indications’ were required to apply an exception of enforcement of a vacated award, and under art V(1)(e) of the New York Convention even unfair foreign setting aside proceedings might result in refusal of enforcement of the award. See *Nikolai Viktorovich MAXIMOV v. OJSC Novolipetsky Metallurgichesky Kombinat*, Judgment of Amsterdam Court of Appeals, Case number 200.100.508/01, 18 September 2012.

⁴⁷³ It appears that recently the Russian State courts aimed to extend their competence by restricting the scope of disputes that could be arbitrable. See Peter J. Pettibone, ‘The Nonarbitrability of Corporate Disputes in Russia’ (2013) 29(2) *Arb Intl* 263.

⁴⁷⁴ Arbitrazh Court of Kemerovo Oblast, Ruling on Recognition of a Foreign Arbitral Award, Case No A27-781/2011, 20 July 2011.

⁴⁷⁵ 939 F.Supp. 907 (D.D.C. 1996).

⁴⁷⁶ For example, *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 367 (5th Cir. 2003); *Compare Termorio SA v. Electranta SP*, 487 F.3d 928 (D.C. Cir. 2007).

⁴⁷⁷ For example, *Baker Marine Ltd v. Chevron Ltd*, 191 F.3d 194, 197 n.3 (2d Cir. 1999); *Spier v. Calzaturificio Tecnica, SpA*, 71 F.Supp.2d 279 (S.D.N.Y. 1999), *reargued*, 77 F.Supp.2d 405 (S.D.N.Y. 1999).

⁴⁷⁸ Gary B. Born, *International Commercial Arbitration*, 2687.

expensive than that of French courts and appears to be inclined towards a more restrictive solution.⁴⁷⁹ Nonetheless, it is also worth noting that in August 2013 a federal district court in the Southern District of New York confirmed an ICC award against a Mexican State oil corporation, even though the award had been set aside by a Mexican court.⁴⁸⁰ The latest case may signal a nuanced trend in international arbitration in which it is possible to enforce vacated awards in U.S., as compared to the arguably evolving restrictive approach. In addition, there is a possibility of enforcing a vacated award in many other jurisdictions.⁴⁸¹

The second approach is taken by English courts, which traditionally refuse to enforce a vacated arbitral award. In the long-running *Yukos* case, the England and Wales Court of Appeal found that the act of State doctrine did not apply to the appellant's (a State-owned Russian corporation) allegations of impropriety against foreign courts' decisions, and the decision of the Amsterdam Court of Appeal refusing to recognize the decisions made by Russian courts on setting aside the award did not create an issue *estoppel* preventing the appellant from resisting enforcement of the awards in England. As to the reasoning of the issue *estoppel*, more thoroughly, the England and Wales Court of Appeal determined that the Amsterdam Court of Appeal refused to recognize the annulment decisions by Russian courts depending on the Dutch public policy grounds, but whether the annulment decisions were not to be recognized as contrary to the English public policy would have to be a trial.⁴⁸² The German approach is similar to that of the English courts. The Berlin court evidenced that German courts preferred international comity towards annulment decisions made by foreign courts to the maintaining the finality of arbitral awards; further, German courts basically recognized the precedence of the European Convention (which limited the application of article V(1)(e) of the New York Convention in some circumstances) over the New York Convention.⁴⁸³

⁴⁷⁹ Emmanuel Gaillard, *Legal Theory of International Arbitration*, 139.

⁴⁸⁰ *Corporación Mexicana de Mantenimiento Integral, S. De R.L de C.V v. Pemex-Exploración y Producción*, No 10 Civ. 206 (AKH), 2013 WL 4517225, (S.D.N.Y. Aug. 27, 2013).

⁴⁸¹ The enforcement of vacated awards is also likely available in Austria, Brunei, Croatia, Denmark, Hong Kong, Ireland, Lebanon, Luxembourg, Mexico, Panama, Poland, Spain, and Turkey, though courts in these jurisdictions have yet to consider the issue. See ICC Guide to National Procedures for Recognition and Enforcement of Awards under the New York Convention, 2012, 20.

⁴⁸² *Yukos Capital SARL v. OJSC Rosneft Oil Company*, [2012] EWCA Civ 855.

⁴⁸³ Claudia Alfons, *Recognition and Enforcement of Annulled Foreign Arbitral Awards* (Peter Lang, 2010) 115.

To sum up, there is a radical difference between the two approaches on the fate of non-ICSID arbitral awards that were set aside at the arbitral *situs*, which translates a fundamental divergence of views on the underlying philosophical representation of international arbitration.⁴⁸⁴ Although the vacated awards that have been enforced in other jurisdictions are almost international commercial awards between business parties, it is notable that some of the respondents in relevant arbitral proceedings are State-owned corporations (such as in the *Yukos* case). Considering that national courts at the arbitral *situs* can take into account public policy of foreign States in certain circumstances, there is a possibility that States in the investor-State arbitration context seek to have unfavourable awards set aside by virtue of imposing political pressure. In view of this concern, the possible enforcement of vacated awards may be in accord with the expectation of investors. In addition, the issue also reaffirms the importance of taking great care to select an arbitral *situs* with a tradition of pro-arbitration and likely respecting the finality of international arbitral awards.

Concluding Observations

The post-award remedies in ICSID and non-ICSID arbitration are of considerable practical importance since they act as the first avenue for disputing parties to remedy possible injustice following the making of awards. In particular, if an award was disregarded in whole or in part by *ad hoc* committees or national courts, it or the annulled part will be treated as invalid and may be consequently unenforceable. Moreover, post-award remedies are directed at the legitimacy of the investor-State arbitration as a whole if the issue of annulment or setting aside proceeding deviates from its objective as a remedy against injustice.

It is notable that the ICSID annulment and non-ICSID vacatur proceedings are starkly divergent: (i) the frameworks of interior ICSID annulment and exterior non-ICSID vacatur are disparate; (ii) the grounds for annulling ICSID awards or setting aside non-ICSID awards derive from different heritages, which are respectively article 35 of the International Law Commission's 1958 Model Rules on Arbitral Procedure and normally article V of the New York Convention; (iii) the two genres of arbitration encompass a

⁴⁸⁴ Emmanuel Gaillard, *Legal Theory of International Arbitration*, 139.

converse effect of vacated awards. However, the evaluation of these divergences has revealed that both ICSID annulment and non-ICSID vacatur serve an ultimately similar function through two instruments with dissimilar natures, and the disparate natures do not necessarily lead to distinct outcomes. This is because the ratio of ICSID awards being annulled or of non-ICSID awards being set aside bears less significant distinctions, despite the different degree of uncertainty and inconsistency in ICSID and non-ICSID challenging proceedings, and the discrepant standards of review applied by *ad hoc* committees or national courts in ICSID and non-ICSID arbitration.

More fundamentally, the issue of post-award remedies denotes the tension between the finality and justice in investor-State arbitration and presents an essential proposition as to how to balance prevailing parties' concern for finality and the counterparts' desire for procedural safeguards in the annulment and vacatur mechanism, and ensure the construction of an efficient instrument for resolution of investment disputes in the meantime. Although a golden mean sensibly balancing the finality, accuracy and efficiency in post-award remedies proceedings remain mysterious, it can be still expected that in non-ICSID arbitration disputing parties weigh prudently the potential risks and relevant drawbacks entrenched in the seat of arbitration, while States deal with properly the ambivalence to the international arbitral autonomy and judicial scrutiny instrument. Furthermore, States can explore a more rational and acceptable counterpoise between international arbitral autonomy and judicial scrutiny instrument by virtue of, for instance, adopting relatively limited grounds for setting aside awards in accordance with the UNCITRAL Model Law and displaying greater deference to the investment arbitration awards rendered by international tribunals when it comes to the substantive review on the merits. In like manner, the annulment proceedings should be conducted in line with the objective of the ICSID Convention under which ICSID *ad hoc* committees have to be conscious of the undesirable consequences of extending their interpretation in ways similar to that of a court of appeal, in particular considering that the extensive authorities would jeopardize the finality of awards which is, in general terms, at the core of international investment arbitration.

Table IV: ICSID Annulment Proceedings

Case	Date of Decision	Outcome	Grounds for Annulment
<i>Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais</i> (ICSID Case No. ARB/81/2)	3 May 1985	Annulled in full	Article 52(1)(b) & (e) The tribunal failed to apply the proper law by failing to demonstrate the existence of the principle of confidence, loyalty and openness, thereby manifestly exceeding its power. In addition, the tribunal failed to state reasons by failing to adjudicate a number of crucial questions that had been submitted to it.
	17 May 1990	Annulment rejected	
<i>Amco Asia Corporation and others v. Republic of Indonesia</i> (ICSID Case No. ARB/81/1)	16 May 1986	Annulled in full	Article 52(1)(b) & (e) It was errors for

			the tribunal to conclude that the respondent's actions were illegal and the granting damages based on the actions.
	17 December 1992	Annulment of the award rejected, but annulled the decision on Supplement al Decisions and Rectificatio n	
<i>Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt</i> (ICSID Case No. ARB/84/3)		Proceeding discontinue d	
<i>Maritime International Nominees Establishment v. Republic of Guinea</i> (ICSID Case No. ARB/84/4)	22 December 1989	Annulled in part	Article 52(1)(e) The annulled parts of award included those granting the claimant damages as reparation for the respondent' breach of contract and those on the apportionment

			of arbitral costs.
<i>Wena Hotels Limited v. Arab Republic of Egypt</i> (ICSID Case No. ARB/98/4)	5 February 2002	Annulment rejected	
<i>Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic</i> (ICSID Case No. ARB/97/3)	3 July 2002	Annulled in part	Article 52(1)(b) It was an error for the tribunal to manifestly exceed its power by not examining the merits of certain claims against local authorities.
	10 August 2010	Annulment rejected	
<i>Philippe Gruslin v. Malaysia</i> (ICSID Case No. ARB/99/3)		Proceeding discontinued	
<i>CDC Group plc v. Republic of Seychelles</i> (ICSID Case No. ARB/02/14)	29 June 2005	Annulment rejected	
<i>Patrick Mitchell v. Democratic Republic of the Congo</i> (ICSID Case No. ARB/99/7)	1 November 2006	Annulled in full	Article (52)(1)(b) & (e) It was an error for the tribunal to conclude that there was an eligible investment which supported the tribunal's jurisdiction.
<i>Consortium R.F.C.C. v. Kingdom of Morocco</i> (ICSID Case No. ARB/00/6)	18 January 2006	Annulment rejected	

<i>Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)</i> (ICSID Case No. ARB/01/10)	8 January 2007	Annulment rejected	
<i>MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile</i> (ICSID Case No. ARB/01/7)	21 March 2007	Annulment rejected	
<i>CMS Gas Transmission Company v. Argentine Republic</i> (ICSID Case No. ARB/01/8)	25 December 2007	Annulled in part	Article 52(1)(e) The annulled part of award was the portion about the breach of the umbrella clause.
<i>Hussein Nuaman Soufraki v. United Arab Emirates</i> (ICSID Case No. ARB/02/7)	5 June 2007	Annulment rejected	
<i>Siemens A.G. v. Argentine Republic</i> (ICSID Case No. ARB/02/8)		Proceeding discontinued	
<i>Ahmonseto, Inc. and others v. Arab Republic of Egypt</i> (ICSID Case No. ARB/02/15)		Proceeding discontinued	
<i>Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru</i> (ICSID Case No. ARB/03/4)	5 September 2007	Annulment rejected	
<i>Malaysian Historical Salvors, SDN, BHD v. Malaysia</i> (ICSID Case No. ARB/05/10)	16 April 2009	Annulled in full	Article 52(1)(b) It was an error for the tribunal to dismiss the matter for lack of jurisdiction

			on the ground that there was no eligible investment under the ICSID Convention.
<i>Azurix Corp. v. Argentine Republic</i> (ICSID Case No. ARB/01/12)	1 September 2009	Annulment rejected	
<i>M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador</i> (ICSID Case No. ARB/03/6)	19 October 2009	Annulment rejected	
<i>Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan</i> (ICSID Case No. ARB/05/16)	25 March 2010	Annulment rejected	
<i>Joy Mining Machinery Limited v. Arab Republic of Egypt</i> (ICSID Case No. ARB/03/11)		Proceeding discontinued	
<i>Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic</i> (ICSID Case No. ARB/04/5)	11 May 2010	Annulment rejected	
<i>Helnan International Hotels A/S v. Arab Republic of Egypt</i> (ICSID Case No. ARB/05/19)	14 June 2010	Annulled in part	Article 52(1)(b) The annulled part of award was the portion which determined that in order to seek remedies before international arbitration the claimant had to first seek for

			remedies in domestic proceedings.
<i>Sempra Energy International v. Argentine Republic</i> (ICSID Case No. ARB/02/16)	29 June 2010	Annulled in full	Article 52(1)(b) It was an error for the tribunal's failure to apply Argentina's treaty-based defense.
<i>Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic</i> (ICSID Case No. ARB/01/3)	30 July 2010	Annulled in part	Article 52(1)(b) & (e) The annulled parts of award included those on availability of defenses, liability and the order for Argentina to pay compensation.
<i>Sociedad Anónima Eduardo Vieira v. Republic of Chile</i> (ICSID Case No. ARB/04/7)	10 December 2010	Annulment rejected	
<i>Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines</i> (ICSID Case No. ARB/03/25)	23 December 2010	Annulled in full	Article 52(1)(d) The committed determined on the basis of the right to be heard before the tribunal which constituted a serious

			departure from the fundamental rule of procedure.
<i>RSM Production Corporation v. Grenada</i> (ICSID Case No. ARB/05/14)		Proceeding discontinued	
<i>Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt</i> (ICSID Case No. ARB/05/15)		Proceeding discontinued	
<i>Ioannis Kardassopoulos v. Georgia</i> (ICSID Case No. ARB/05/18)		Proceeding discontinued	
<i>Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru</i> (ICSID Case No. ARB/03/28)	1 March 2011	Annulment rejected	
<i>RSM Production Corporation v. Central African Republic</i> (ICSID Case No. ARB/07/2)	11 July 2011	Annulment rejected	
<i>Togo Electricité and GDF-Suez Energie Services v. Republic of Togo</i> (ICSID Case No. ARB/06/7)	6 September 2011	Annulment rejected	
<i>Continental Casualty Company v. Argentine Republic</i> (ICSID Case No. ARB/03/9)	16 September 2011	Annulment rejected	
<i>Astaldi S.p.A. v. Republic of Honduras</i> (ICSID Case No. ARB/07/32)		Proceeding discontinued	
<i>ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan</i> (ICSID Case No. ARB/08/2)		Proceeding discontinued	
<i>Nations Energy, Inc. and others v.</i>		Proceeding	

<i>Republic of Panama</i> (ICSID Case No. ARB/06/19)		discontinued	
<i>Ron Fuchs v. Georgia</i> (ICSID Case No. ARB/07/15)		Proceeding discontinued	
<i>AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Hungary</i> (ICSID Case No. ARB/07/22)	29 June 2012	Annulment rejected	
<i>Victor Pey Casado and President Allende Foundation v. Republic of Chile</i> (ICSID Case No. ARB/98/2)	18 December 2012	Annulled in part	Article 52(1)(d) & (e) The annulled parts of award included those on the <i>dispositif</i> of the award and the corresponding paragraphs related to damages.
<i>Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v. Georgia</i> (ICSID Case No ARB/08/19)	January 10 2013	Proceeding discontinued	
<i>Toto Costruzioni Generali S.p.A. v. Republic of Lebanon</i> (ICSID Case No. ARB/07/12)	February 15, 2013	Proceeding discontinued	
<i>Libananco Holdings Co. Limited v. Republic of Turkey</i> (ICSID Case No. ARB/06/8)	22 May 2013	Annulment rejected	
<i>Malicorp Limited v. Arab Republic of Egypt</i> (ICSID Case No. ARB/08/18)	3 July 2013	Annulment rejected	
<i>Joseph C. Lemire v. Ukraine</i> (ICSID Case No. ARB/06/18)	8 July 2013	Annulment rejected	

<i>Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador</i> (ICSID Case No. ARB/09/17)	28 August 2013	Proceeding discontinued	
<i>Impregilo S.p.A. v. Argentine Republic</i> (ICSID Case No. ARB/07/17)	24 January 2014	Annulment rejected	
<i>Caratube International Oil Company LLP v. Republic of Kazakhstan</i> (ICSID Case No. ARB/08/12)	21 February 2014	Annulment rejected	
<i>SGS Société Générale de Surveillance S.A. v. Republic of Paraguay</i> (ICSID Case No. ARB/07/29)	19 May 2014	Annulment rejected	
<i>Alapli Elektrik B.V. v. Republic of Turkey</i> (ICSID Case No. ARB/08/13)	10 July 2014	Annulment rejected	
<i>El Paso Energy International Company v. Argentine Republic</i> (ICSID Case No. ARB/03/15)	22 September 2014	Annulment rejected	
<i>Renée Rose Levy de Levi v. Republic of Peru</i> (ICSID Case No. ARB/10/17)	24 September 24 2014	Proceeding discontinued	
<i>LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic</i> (ICSID Case No. ARB/02/1)		Pending (The suspension of the proceeding further extended until January 26, 2015)	
<i>Tza Yap Shum v. Republic of Peru</i> (ICSID Case No. ARB/07/6)		Pending	
<i>EDF International S.A., SAUR International S.A. and León</i>		Pending	

<i>Participaciones Argentinas S.A. v. Argentine Republic</i> (ICSID Case No. ARB/03/23)			
<i>Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador</i> (ICSID Case No. ARB/06/11)		Pending	
<i>Rafat Ali Rizvi v. Republic of Indonesia</i> (ICSID Case No. ARB/11/13)		Pending	
<i>Elsamex, S.A. v. Republic of Honduras</i> (ICSID Case No. ARB/09/4)		Pending	
<i>Highbury International AVV and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela</i> (ICSID Case No. ARB/11/1)		Pending	
<i>Ioan Micula, Viorel Micula and others v. Romania</i> (ICSID Case No. ARB/05/20)		Pending	
<i>Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey</i> (ICSID Case No. ARB/11/28)		Pending	
<i>Total S.A. v. Argentine Republic</i> (ICSID Case No. ARB/04/1)		Pending	
<i>SAUR International v. Argentine Republic</i> (ICSID Case No. ARB/04/4)		Pending	
<i>Daimler Financial Services AG v. Argentine Republic</i> (ICSID Case No. ARB/05/1)		Pending	
<i>Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka</i>		Pending	

(ICSID Case No. ARB/09/2)			
<i>Iberdrola Energía, S.A. v. Republic of Guatemala</i> (ICSID Case No. ARB/09/5)		Pending	
<i>KT Asia Investment Group B.V. v. Republic of Kazakhstan</i> (ICSID Case No. ARB/09/8)		Pending	
<i>Adem Dogan v. Turkmenistan</i> (ICSID Case No. ARB/09/9)		Pending	
<i>H&H Enterprises Investments, Inc. v. Arab Republic of Egypt</i> (ICSID Case No. ARB/09/15)		Pending	
<i>Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan</i> (ICSID Case No. ARB/10/1)		Pending	
<i>Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of the Congo</i> (ICSID Case No. ARB/10/4)		Pending	
<i>Standard Chartered Bank v. United Republic of Tanzania</i> (ICSID Case No. ARB/10/12)		Pending	
<i>TECO Guatemala Holdings, LLC v. Republic of Guatemala</i> (ICSID Case No. ARB/10/23)		Pending (First annulment proceeding filed by TECO)	
		Pending (Second annulment proceeding filed by	

		Guatemala)	
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Table V: Non-ICSID Vacatur Proceedings⁴⁸⁵

Case	Arbitration Rules	Annulment Court	Date of Decision	Outcome
<i>Saar Papier Vertriebs GmbH v. Poland</i>	UNCITRAL	The Swiss Federal Tribunal, Switzerland	20 September 2000	Arbitral award upheld
<i>Metalclad Corporation v. The United Mexican States</i>	ICSID Additional Facility, ICSID Case No. ARB(AF)/97/1	The Supreme Court of British Columbia, Canada	2 May 2001	Arbitral award partially set aside
<i>Swembalt AB, Sweden v. The Republic of Latvia</i>	UNCITRAL	The Maritime and Commercial Court, Copenhagen, Denmark	7 January 2003	Arbitral award upheld
<i>CME Czech Republic B.V. v. The Czech Republic</i>	UNCITRAL	The Svea Court of Appeal, Sweden	15 May 2003	Arbitral award upheld
<i>Marvin Roy Feldman Karpa v. United Mexican States</i>	ICSID Additional Facility, ICSID Case No.	The Superior Court of Justice Ontario, Canada	3 December 2003	Arbitral award upheld

⁴⁸⁵ A vacatur decision on a non-ICSID arbitral award in 1998 is unpublished, but it can be identified from Verhoosel's study. See Gaëtan Verhoosel, 'Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID' in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference*.

	ARB(AF)/99/ 1			
<i>S.D. Myers, Inc. v. Government of Canada</i>	UNCITRAL	The Federal Court of Canada, Canada	13 January 2004	Arbitral award upheld
<i>Mr. Franz Sedelmayer v. The Russian Federation</i>	SCC	The Svea Court of Appeal, Sweden	15 January 2005	Arbitral award upheld
<i>Loewen Group, Inc. and Raymond L. Loewen v. United States of America</i>	ICSID Additional Facility, ICSID Case No. ARB(AF)/98/3	The District Court for the District of Columbia, U.S.	31 October 2005	Arbitral award upheld
<i>France Telecom v. Lebanon</i>	UNCITRAL	The Swiss Federal Tribunal, Switzerland	10 November 2005	Arbitral award upheld
<i>William Nagel v. The Czech Republic</i>	SCC Case No. 049/2002	The Svea Court of Appeal, Sweden	26 August 2005	Arbitral award upheld
<i>Saluka Investments B.V. v. The Czech Republic</i>	UNCITRAL	The Swiss Federal Tribunal, Switzerland	7 September 2006	Arbitral award upheld
<i>Eureko B.V. v. Republic of Poland</i>	<i>Ad hoc</i> arbitration	The Court of First Instance of Brussels, Belgium	23 November 2006	Arbitral award upheld
<i>International Thunderbird</i>	UNCITRAL	The District	14	Arbitral

<i>Gaming Corporation v. The United Mexican States</i>		Court for the District of Columbia, U.S.	February 2007	award upheld
<i>Petrobart Limited v. The Kyrgyz Republic</i>	SCC Case No. 126/2003	The Svea Court of Appeal, Sweden	19 January 2007	Arbitral award upheld
<i>Occidental Exploration and Production Company v. The Republic of Ecuador</i>	LCIA Case No. UN3467	The Supreme Court of Judicature Court of Appeal (Civil Division), UK	4 July 2007	Arbitral award upheld
<i>Bayview Irrigation District et al. v. United Mexican States</i>	ICSID Additional Facility, ICSID Case No. ARB(AF)/05/1	The Superior Court of Justice Ontario, Canada	5 May 2008	Arbitral award upheld
<i>Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America</i>	UNCITRAL	The District Court for the District of Columbia, U.S.	14 August 2008	Arbitral award upheld
<i>Pren Nreka v. Czech Republic</i>	UNCITRAL	Cour d'appel de Paris, France	25 September 2008	Arbitral award upheld
<i>European Media Ventures SA v. The Czech Republic</i>	UNCITRAL	The High Court of Justice, Queen's Bench Division, UK	8 July 2009	Arbitral award upheld

<i>Binder v. Czech Republic</i> ⁴⁸⁶	UNCITRAL	The Municipal Court in Prague, Czech Republic	2 July 2010	Arbitral award upheld
<i>Kaliningrad Region v. Lithuania</i>	ICC	Cour d'appel de Paris, France	18 November 2010	Arbitral award upheld
<i>National Grid plc v. The Argentine Republic</i>	UNCITRAL	The U.S. Court of Appeals for the District of Columbia Circuit, U.S.	21 April 2011	Arbitral award upheld
<i>Cargill, Incorporated v. United Mexican States</i>	ICSID Additional Facility, ICSID Case No. ARB(AF)/05/2	The Supreme Court of Canada, Canada	11 May 2012	Arbitral award upheld
<i>Adria Beteiligungs GmbH v. The Republic of Croatia</i>	UNCITRAL	The District Court of The Hague, Netherlands	15 August 2012	Arbitral award upheld
<i>RosInvestCo UK Ltd. v. The Russian Federation</i>	SCC Case No. V079/2005	The Svea Court of Appeal, Sweden	5 September 2013	Arbitral award set aside
<i>BG Group Plc. v. The Republic of Argentina</i>	UNCITRAL	The Supreme Court of the U.S., U.S.	5 March 2014	Arbitral award upheld

⁴⁸⁶ The Czech District Court set aside the award on jurisdiction on 22 June 2009. However, the judgement was overturned by the Municipal Court in Prague (the appellate court) by its Resolution of 2 July 2010 which not only vacated the judgment of the court of first instance but also discontinued further proceedings. See Vladimír Balaš, 'Comment on Award on Jurisdiction in the Binder Case Appealed at Czech Courts' (2011) Czech YB of Public & Private Intl L 269.

<i>Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador</i>	UNCITRAL, PCA Case No. 34877	The Dutch Supreme Court, Netherlands	26 September 2014	Arbitral award upheld
<i>Achmea B.V. v. The Slovak Republic</i> ⁴⁸⁷	UNCITRAL, PCA Case No. 2008-13			Pending
<i>Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v. Kazakhstan</i>	SCC Arbitration V (116/2010)			Pending

⁴⁸⁷ The Slovak Republic challenged an interim Award on Jurisdiction, Arbitrability and Suspension before the Oberlandesgericht Frankfurt (Regional Court of Appeals), but the court refused in a decision of 10 May 2012 to set aside the arbitral award. When the issue proceeded to the The Bundesgerichtshof (Federal Court of Justice), the court issued a Preliminary Decision on 19 September 2013. Though the Preliminary Decision was just a procedural order, it reasoned that the Slovak Republic's application became inadmissible on the ground that the UNCITRAL tribunal had rendered a final award on 7 December 2012 in which the Slovak Republic was required to pay 22 million for expropriating Achmea's stake in a Slovak health insurer. As the court stated, it could not decide on the challenge of the interim Award on Jurisdiction, Arbitrability and Suspension because the final arbitral award had been rendered. See Decision of the Frankfurt Higher Regional Court, 10 May 2012; Preliminary Decision of the German Federal Supreme Court, 19 September 2013, available at <<http://www.italaw.com/cases/417>> accessed on 3 November 2014.

Chapter IV Recognition and Enforcement of Arbitral Awards

As one of the stark discrepancies between ICSID and non-ICSID arbitration, the recognition and enforcement system has considerable impacts on how a variety of participants in the arbitral proceedings vindicate their rights and safeguard their legitimate interests. To begin with, recognition and enforcement are essential in enhancing the fulfilment of disputing parties' reasonable expectation of a final binding resolution, without which a successful party in arbitral proceedings might eventually suffer a Pyrrhic victory. Second, though it is indubitable that an award is an *ad hoc* decision on whether a host State is liable or legally responsible for compensation to a particular investor, investor-State arbitral awards as a whole are arguably considered to implicate the global significance and resonance concerning States' relevant public and economic policy. At the very least, investor-State arbitral awards can be benchmarks in the domestic sphere as they provide for guidelines on optimizing the harmonization of national courts' decisions on issues relating to the ICSID Convention, the New York Convention or any other treaty. Investor-State arbitral awards consistently display the hallmark of such implication that never ceases to influence States' legal environment, in particular in a further globalized world where transnational investment proliferates in regions with diverse and uncertain legal systems. In this regard, more emphasis should be placed on the different recognition and enforcement regimes and their respective impacts, which should also be in the limelight when examining the divergence between ICSID and non-ICSID arbitration.

1 Distinction in General Framework

1.1 ICSID's Self-contained System/Non-ICSID Arbitration's Onerous Process

The self-contained nature of ICSID arbitration entails a thoroughly autonomous system for recognition and enforcement of arbitral awards, which imposes a presumptive obligation not only on the disputing parties to abide by and comply with the terms of the award,⁴⁸⁸ but also on all contracting States to recognize an award rendered under the ICSID Convention and further enforce the pecuniary obligations imposed by the award within its territories as if it were a final judgment of a court in that State.⁴⁸⁹ It has been held that this self-

⁴⁸⁸ Art 53(1) of the ICSID Convention.

⁴⁸⁹ Ibid, art 54(1).

contained enforcement scheme shelters ICSID arbitral awards from the scrutiny of domestic courts or other authorities before which enforcement is sought. Given that national courts or other authorities are not empowered to review an ICSID arbitral award on both the jurisdiction and the merits, no refusal ground can therefore be invoked by the losing party to prevent the enforcement.

By comparison, a presumptive obligation to recognize and enforce non-ICSID arbitral awards is specified in different instruments. First, it has been acknowledged that a number of international conventions pragmatically take an enormous part in recognition and enforcement of the vast majority of non-ICSID arbitral awards in a case where the award fails to be complied with voluntary recognition and enforcement. In particular, the New York Convention has been the ‘most successful international instrument in the field of arbitration’, and can possibly be considered as ‘the most effective instance of international legislation in the entire history of commercial law’⁴⁹⁰ in view of the facts that it represents, to a large extent, a quantum leap forward for arbitration on an international plane, and that it forms the backbone of international regime for recognition and enforcement of foreign arbitral awards by virtue of imposing a general obligation on contracting States to recognize arbitral awards made in foreign countries as binding and enforce them under the rules of procedure of the territory where the award is relied upon, subject to procedural conditions not substantially more onerous than those applied to enforcement of domestic arbitral awards.⁴⁹¹ Second, several contemporary regional conventions also treat non-ICSID arbitral awards as presumptively valid, normally paralleling the Geneva Convention and the New York Convention.⁴⁹² Third, aside from multilateral convention, the presumptive obligation to recognize and enforce non-ICSID arbitral awards is also

⁴⁹⁰ Michael John Mustill, ‘Arbitration: History and Background’ (1989) 6 J Intl Arb 43, 49.

⁴⁹¹ Art III of the New York Convention.

⁴⁹² For example, the 1961 European Convention was designed primarily to manage disputes arising between European States, especially those between West and East Europe (it is worth mentioning that a presumptive obligation to recognize and enforce international arbitral awards is not expressly stipulated in the European Convention, but it can be implied by the limitations of the Convention upon the grounds on which an arbitral award may be set aside); The 1972 Moscow Convention promulgated by the Council for Mutual Economic Assistance (hereinafter ‘CMEA’) was originally signed by central and eastern European States; the 1975 Panama Convention was ratified by South American States and the U.S., as reflected in its name ‘Inter-American Convention’; and the 1987 Amman Convention made under the aegis of the Arab Centre for Commercial Arbitration. In a realm focusing mainly on investment disputes, NAFTA is applied to U.S., Canada and Mexico.

provided in bilateral treaties,⁴⁹³ some of which are recently apt to refer to the New York Convention so as not to derogate the uniformity facilitated by the New York Convention. Fourth, national arbitration statutes frequently require the recognition and enforcement of non-ICSID arbitral awards, merely incorporating the exceptions enumerated in article V of the New York Convention by reference,⁴⁹⁴ or following articles 35 and 36 of the UNCITRAL Model Law which provide that international arbitral awards shall be recognized and enforced, save where specified exceptions that actually mirror the New York Convention apply.⁴⁹⁵ Overall, the New York Convention can be laid claim to be the most essential international instrument with regard to the recognition and enforcement of non-ICSID arbitral awards. In addition, although diverse instruments operate in the recognition and enforcement of non-ICSID arbitral awards, these different regimes parallel, more or less, those in the New York Convention. Accordingly, this chapter concentrates primarily on the New York Convention when elucidating the divergence between ICSID and non-ICSID as regards the recognition and enforcement of arbitral awards.

It might be asserted, at first sight, that recognition and enforcement of ICSID arbitral awards have a number of practical advantages over that of non-ICSID arbitral awards. In fact, as compared to the compliance and enforcement under the ICISD Convention which provides a self-contained enforcement mechanism and relatively straightforward processes, the recognition and enforcement of non-ICSID arbitral awards suffer, of necessity, from more onerous procedures or even substantive review on the merits of awards. First, recognition and enforcement are, though intertwined in most circumstances, distinct in the non-ICSID arbitration context. On the one hand, recognition of a non-ICSID arbitral award does not necessarily guarantee enforcement of the award. Through confirming the award as binding or *res judicata*, recognition is used as a defensive process, acting as a shield⁴⁹⁶ to block any attempts by unfavourable parties to initiate new proceedings against the subject matter that has already been decided in the arbitral proceedings that produced the award whose recognition is sought. In other words, recognition is simply a formal confirmation of

⁴⁹³ Franz Matscher, 'Experience with Bilateral Treaties' in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Kluwer Law International, 1999) 452.

⁴⁹⁴ For example, U.S. FAA, 9 U.S.C. §207; arts 190 & 194 of the Swiss Law on Private International Law.

⁴⁹⁵ For example, ss 66, 101,103 of the English Arbitration Act; art 1514 of the French Code of Civil Procedure(2011).

⁴⁹⁶ Nigel Blackaby, *et al*, *Redfern and Hunter on International Arbitration*, 627-28.

the legal effect of the award, giving no effect to the enforcement of the award.⁴⁹⁷ On the other hand, a denial of recognition may give rise to the non-enforcement in some jurisdictions in that a decision declining an application for recognition of an award on the ground of article IV of the New York Convention is binding with *res judicata* effect. For instance, Italian courts had dismissed requests for enforcement since recognition of the award had been rejected due to the applicant's failure to provide a certified arbitration agreement.⁴⁹⁸ The reason why a party failed to be entitled to cure defects in subsequent proceedings was ambiguous, though some scholars maintained that efforts to redress wrongs should be permitted under national statutes.⁴⁹⁹ The Italian Court of Cassation, however, overruled in 1995 the *Nesher* decision and clarified that the rejection of an application on the ground of failure to submit requisite documents under article IV of the New York Convention neither affected the merits of the enforcement request nor prevented an applicant's *de novo* application.⁵⁰⁰ By contrast, it is conceivable that recognition and enforcement are normally inextricably linked in ICSID arbitration. The ICSID Convention provides for an automatic recognition of ICSID awards, and recognition is ordinarily described as a preliminary step towards enforcement; as a result of recognition, an award becomes a valid title that can form the basis of enforcement.⁵⁰¹ More importantly, given that an ICSID award is not subject to any condition for recognition not provided under the ICSID Convention, or to any review by national courts or other authorities, the task of domestic authorities at the stage of recognition is therefore restricted to verifying the authenticity of an ICSID award. As long as the parties duly provide the requisite documentation required by article 54(2) of the Convention, there will be no room for domestic authorities to refuse, at their sole discretion, the recognition of the award.

Furthermore, recognition and enforcement of non-ICSID awards under the New York Convention may be subject to two reservations, namely reciprocity and commercial

⁴⁹⁷ As is illustrated in *Dallal v. Bank Mellat*, the English courts recognized the validity of the arbitral award rendered by the Iran-United States Claims Tribunal whose competence seemed to derive from international law or practice, but did not enforce the award. See [1986] QB 441.

⁴⁹⁸ *Israel Portland Cement Works (Nesher) Ltd v. Moccia Irme SpA*, No 120. Corte di Cassazione, 19 December 1991, No13665, XVIII YB Com Arb 419 (1993).

⁴⁹⁹ Gary B. Born, *International Commercial Arbitration*, 2707.

⁵⁰⁰ *Srl Campomarzio Impianti v. Lampart Vegypary Gepgyar*, No 150. Corte di Cassazione, 20 September 1995, No 9980, XXIV YB Com Arb 698 (1999).

⁵⁰¹ Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 1129.

reservations.⁵⁰² In view of the generally broad definition of the term ‘commercial’ which commonly includes investment disputes, only reciprocity reservation would have an effect on the evaluation of ICSID and non-ICSID award enforcement mechanisms. In accordance with article I(3) of the New York Convention, if contracting States have signed the Convention on the basis of reciprocity, they would merely recognize and enforce ‘Convention awards’ which are made in the territory of another contracting State or apply the Convention only to the extent to which those States grant reciprocal treatment in case of awards made in the territory of non-contracting States. As of September 2014, 78 out of 150 contracting States have made the reciprocity reservation.⁵⁰³ Although the limiting effect of the reciprocity reservation is of less significant importance as the number of contracting States increases year by year, the reciprocity reservation has, undoubtedly, the effect of slightly narrowing the scope of application of the Convention and thus affect the enforcement of non-ICSID awards to an extent.

Last but certainly not least, the presumptive obligation to recognize and enforce non-ICSID arbitral awards is subject to a number of exceptions. The exceptions set out in article V of the New York Convention not only include five grounds related to procedural issues for denying recognition and enforcement of awards, but also confer on national competent authorities discretionary rights *ex officio* to raise the defense of public policy in a case where the recognition and enforcement of awards would be contrary to the public policy of the State. It is understandable that States’ own concept of public policy shall be allowed in the light of the cultural pluralism of international arbitration. However, it is also established that it would be extremely difficult, if not impractical, to define the notion of public policy exactly and to reach a consensus on a widely accepted notion of international public policy. In addition, it is the competent national authorities before whom enforcement is sought that have the power to determine whether the enforcement of an award would contradict the public policy of the State. Accordingly, public policy exception grants national competent authorities rather broad discretion to resist the recognition and enforcement of non-ICSID awards. In particular, investment arbitration ordinarily reflects fundamental issues of public interests such as legitimate regulatory interests, human rights and environmental protection that can be invoked, arguably, as public policy defense in the

⁵⁰² Art I(3) of the New York Convention.

⁵⁰³ The figure is available at UNCITRAL website
<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>.

enforcement proceedings. Moreover, though exceptions enumerated under the New York Convention are envisaged by the drafter to be exclusive,⁵⁰⁴ other reasons, including judicial review under the guise of excess of authority or public policy,⁵⁰⁵ may be not unanticipated at the enforcement stage.⁵⁰⁶

1.2 Debate on the Intrinsic Superiority of ICSID Arbitration

It is conspicuous that onerous procedures and substantive review can result in a high rate of non-compliance with non-ICSID arbitral awards. Despite the fact that the average rate of refusal of enforcement under the New York Convention reported in the *Yearbook of Commercial Arbitration* generally rose from 2 to 10 per cent in different years, one of the studies assessed that the rate of refusal in a sample of reported and unreported cases was higher (approximately 13 per cent in the U.S. and 25 per cent in China).⁵⁰⁷ The number would be even higher in a number of States that cannot be categorized as traditional pro-arbitration jurisdictions.⁵⁰⁸ In contrast, through creating an autonomous and relatively simplified regime for recognition and enforcement of awards, the record of compliance with ICSID arbitral awards has normally been good.⁵⁰⁹ Accordingly, several observers opine that the ICSID Convention ensures ‘a better and safer enforcement’ scheme as

⁵⁰⁴ Albert Jan van den Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation*, 265.

⁵⁰⁵ It is axiomatic that no review of the merits of the awards is permitted under the New York Convention. However, the grounds of excess of authority and public policy offer a degree of direction to national courts in interpreting them and incorporating national bias and political undertones into the assessments of the awards. See Jessica L. Gelandner, ‘Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations’ (1997) 80 Marq L Rev 625, 629-32.

⁵⁰⁶ Other reasons for denying enforcement of Convention awards include jurisdiction over applications for enforcement (*forum non conveniens*), retroactive application of the Convention and lack of implementing legislation (Albert Jan van den Berg, ‘New York Convention of 1958: Refusals of Enforcement’ (2007) 18(2) ICC Intl Ct Arb Bull 1, 22-34). In particular, some States adopt less favourable standards for recognition and enforcement of non-ICSID awards; eg, in several developing countries recognition and enforcement of Convention awards have encountered more hurdles, being subject to essentially *de novo* judicial review (Gary B. Born, *International Commercial Arbitration*, 2728-29).

⁵⁰⁷ Quentin Tannock, ‘Judging the Effectiveness of Arbitration through the Assessment of Compliance with and Enforcement of International Arbitration Awards’ (2005) 21 Arb Intl 71, 88.

⁵⁰⁸ For example, a survey revealed that out of thirteen cassation court resolutions regarding the enforcement of foreign arbitral awards in 2008, eight had been refused (61.54 per cent). See Patricia Nacimiento, Alexey Barnashov, ‘Recognition and enforcement of arbitral awards in Russia’ (2010) 27 J Intl Arb 295, 303.

⁵⁰⁹ Antonio R. Parra, ‘The Enforcement of ICSID Arbitral Awards’, 24th Joint Colloquium on International Arbitration, Paris, 16 November 2007, 9.

compared to the situation facing the enforcement of non-ICSID awards,⁵¹⁰ and some further assert that the ICSID enforcement system is ‘plainly superior’ to the enforcement under the New York Convention,⁵¹¹ and even to all other systems for enforcement of investment arbitral awards.⁵¹² These viewpoints make sense in certain respects, but it is still debatable whether the ICSID Convention achieves more success of enforcement, and whether the ICSID enforcement system is more effective and desirable than the other system in the investment arbitral award enforcement regime.

Admittedly, based on the autonomous and self-contained regime, the recognition and enforcement of ICSID awards are much easier to obtain than those under the New York Convention.⁵¹³ At any rate, such a simpler method ensures, to a large extent, shorter periods and lower costs in the pursuit of enforcement of ICSID awards. Nevertheless, non-ICSID arbitration also excels with its trustworthy mechanism of enforcement of international investment arbitral awards. Notwithstanding the relatively higher rate of refusals of enforcement under the New York Convention as a whole, the rate is not that high in the context of enforcement of investment arbitral awards. In fact, judicial enforcement of seven reported non-ICSID arbitral awards has demonstrated that the non-ICSID enforcement method is not inferior as perceived by some commentators. Among these cases, first, judicial enforcement was granted by national courts in *International Thunderbird Gaming Corporation v. The United Mexican States*,⁵¹⁴ *National Grid plc v. The Argentine Republic*⁵¹⁵ and *Swembalt AB, Sweden v. The Republic of Latvia*.⁵¹⁶ Second,

⁵¹⁰ Piero Bernardini, ‘ICSID versus non-ICSID Investment Treaty Arbitration’ in Miguel Ángel Fernández-Ballesteros, *et al* (eds), *Liber Amicorum Bernardo Cremades* (La Ley, 2010) 186.

⁵¹¹ Gaëtan Verhoosel, Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID, 317.

⁵¹² Sylvia Tonova, ‘Compliance and Enforcement of Awards: Is There a Practical Difference between ICSID and Non-ICSID Awards?’ in Ian A. Laird, *et al* (eds), *Investment Treaty Arbitration and International Law* (Vol 5, JurisNet, 2012) 229.

⁵¹³ Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 1118.

⁵¹⁴ Memorandum of Opinion of the U.S. District Court for the District of Columbia, 14 February 2007, Civil Action 06-00748 (HHK), Case 1:06-cv-00748-HHK; 473 F. supp. 2d 80 (D.D.C. 2007), *aff’d* 255 Fed. Appx. 531 (D.C. Cir. 2007) (denying Thunderbird’s petition to vacate a NAFTA award in favour of Mexico, and granting Mexico’s motion for confirmation of the award on the ground that judicial review of an international arbitration award was extremely limited and that a court had no discretion but to confirm an award if a legal basis to vacate the award was absent).

⁵¹⁵ Order of U.S. District Court for the District of Columbia, 7 June 2010, Civil Action No 09-248 (RBW), Case 1:09-cv-00248-RBW (dismissing Argentina’s petition to vacate or modify the award on the ground that the petition was time-barred under 9 U.S.C. § 12, and granting National Grid’s cross-motion for confirmation, recognition and enforcement of the award under the FAA and the New York Convention), *aff’d*

enforcement is underway in *Mr. Franz Sedelmayer v. The Russian Federation*⁵¹⁷ and *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. The Kingdom of Thailand*.⁵¹⁸ In these two cases, Sedelmayer has obtained partial enforcement, though the enforcement lasts for over sixteen years, and the German court's decision does not shut the door on the attempts of Walter Bau's liquidator to enforce the award in Germany. Third, with regard to two cases under the ICSID Additional Facility Rules, the applicant in *Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*⁵¹⁹ is currently pursuing the enforcement of the award, and Cargill in *Cargill, Incorporated v. United Mexican States* reached a settlement in 2013 with Mexico in a NAFTA dispute that resulted in a U.S. \$77 million arbitration award in favour of Cargill.⁵²⁰ These practical experiences, though somewhat limited, indicate that the success

Decision of the U.S. Court of Appeals for the District of Columbia Circuit, 11 March 2011, No 10-7093; Order of the U.S. Court of Appeals for the District of Columbia Circuit, 21 April 2011, Case: 10-7093 (denying the petition for rehearing *en banc*); Order List 565 of U.S. Supreme Court, 28 November 2011 (denying petition for *certiorari*).

⁵¹⁶ Decision of the Svea Court of Appeal, Stockholm, 2002, Case No Ö 7192-01 (granting enforcement of the award rendered under the Agreement between Sweden and Latvia on the Promotion and Reciprocal Protection of Investments (SÖ 1992:93)).

⁵¹⁷ In 1998 Franz Sedelmayer obtained a favourable SCC arbitral award against the Russian Federation, but had to attempt to enforce the awards against Russia's assets abroad since Russia failed to comply voluntarily with the award. His various applications were denied in Germany since German courts ruled that the assets and activities of the Russian Federation that he claimed were immune, except a building of the former Soviet Trade Office in Cologne which was not immune from enforcement because it was used for any official business (see, eg, Decision of the Oberlandesgericht Köln, Case No 16 W 35/02; Decision of the Kammergericht Berlin, Case No 25 W 15/03; Decision of the Landgericht Köln, Case No 22 O 410/03; Decision of the Kammergericht Berlin, Case No 20 Sch 1/07; Decision of the Landgericht Köln, Case No 7 O 26/06; Decision of the Oberlandesgericht Köln, Case No 8 W 59/07; Decision of the Oberlandesgericht Köln, Case No 11 U 6/07; Decision of the Bundesverfassungsgericht, Case No 2 BvR 2162/07 and Case No 2 BvR 2271/07; Decision of the Bundesgerichtshof, Case No VII ZB 37/08; Decision of the Kammergericht Berlin, Case No 1 W 276/09).

In Sweden, in 2011 the Supreme Court of Sweden declined Russia's request for sovereign immunity protection of the Russian trade mission (see Decision of the Swedish Supreme Court, Stockholm, 2011, Case No Ö 170-10).

⁵¹⁸ At first instance, in 2012 the Kammergericht in Berlin declared an UNCITRAL arbitral award against Thailand enforceable, but in 2013 the BGH overturned the first instance ruling by stating that recognition and enforcement proceedings should be characterized as a special type of adjudication proceedings *sui generis*, therefore the principle of sovereign immunity relating to immunity from the jurisdiction of a foreign State's courts should be applied to the enforcement. It is also worth mentioning that the BGH subsequently upheld a first instance decision which ordered Thailand to pay a security deposit for obtaining the release of the crown prince's Boeing 737-4Z6 at Munich airport (see Roland Kläger, 'Werner Schneider (liquidator of Walter Bau AG) v Kingdom of Thailand, Sovereign Immunity in Recognition and Enforcement Proceedings under German Law' (2014) 28(2) ICSID Rev-Foreign Investment LJ 1).

⁵¹⁹ ICSID Case No ARB(AF)/06/1; Decision of Superior Court of Justice, Ontario, 17 April 2012, 2012 ONSC 4351, COURT FILE NO: CV-11-9419-00CL.

⁵²⁰ ICSID Case No ARB(AF)/05/2.

rate of enforcement of non-ICSID awards is quite high.⁵²¹ Therefore, there appears to be little evidence demonstrating the inferiority of the mechanism for enforcement of non-ICSID awards as compared to the counterpart in ICSID arbitration.

It is further worth noting that while the exceptions to the enforcement of awards could be, from the perspective of parties seeking enforcement, a potential drawback as compared to no refusal ground available in ICSID Convention on the one hand, they also serve an indispensable function on behalf of host States to protect fundamental rights, justice and even national interests on the other. Such function might be contributed directly to States' choice of UNCITRAL or other non-ICSID arbitration. On no account would a State include ICSID arbitration clauses in relevant investment treaties if the State places considerable emphasis on sovereignty, in particular those relating to enhancement of national courts' scrutiny at the international arbitral enforcement stage. Consequently, despite that judicial review of national courts could lead to onerous and probably less effective procedures, which run perceptibly counter to the objectives of enforcement of international awards, it may sit as well at the heart of States' consideration of judicial sovereignty.

In addition, in recent times the voluntary ICSID enforcement scheme has encountered numerous obstacles in Latin America⁵²² where the compliance with ICSID awards has been challenged on the grounds of a variety of defenses within and outside the ICSID Convention. A number of tactics that unfavourable parties deploy to attempt to oppose the enforcement of ICSID awards has, unavoidably, an impact that cannot be ignored on the rate of successful enforcement. As compared to the limits to enforcement of ICSID awards, a range of system designs in non-ICSID arbitration are notable for facilitating transnational enforcement of non-ICSID arbitral awards.

⁵²¹ Insofar as the rate of enforcement is concerned, it should be noted that if there is a legitimate ground of refusal of enforcement, an award debtor will ordinarily be recommended in practice by his counsel to take the initiative through making use of a challenge of the award as a tactic rather than adopting a passive attitude in an attempt to resist enforcement later. Such an attitude (ie, challenging the award at the earliest possible opportunity) is not only likely to impress national courts, but also increases the possibility of successfully setting aside the award because grounds of setting aside awards are normally wider than those upon which enforcement of awards may be refused (see Nigel Blackaby, *et al*, *Redfern and Hunter on International Arbitration*, 677). Accordingly, there are fewer cases entering into the stage of resistance of enforcement.

⁵²² Andrew P. Tuck, 'Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules' (2007) 13 L & Bus Rev Am 885, 905-911.

2 The Obstacles to Enforcement of ICSID Arbitral Awards

2.1 Stay of Enforcement

Under the ICSID Convention, the enforcement of an ICSID arbitral award may be suspended in the light of the pending resolution of an application for interpretation, revision or annulment.⁵²³ The effect of stay of enforcement can be understood in two respects. First, as an exception to the binding force of an award, an ICSID award can no longer be deemed a decision with binding effect to execute as long as the stay is in place.⁵²⁴ As a consequence, the obligation for unfavourable party to abide by and comply with the award will be *pro tanto* suspended.⁵²⁵ Second, article 54 of the ICSID Convention does not mention the stay of enforcement, but the enforcement scheme contained in article 54 is subject to any stay of enforcement. In other words, though the intrinsic legal validity of the award remains unaffected, it is unambiguous that the suspension of a disputing party's obligation of compliance with the award necessarily carries with it suspension of a State's obligation to enforce the award.⁵²⁶

Stay of enforcement is a minor obstacle to enforcement of ICSID awards, but it can be deployed as a tactical manoeuvre since a stay request obviously postpones the enforcement procedure. There is even a risk that the unfavourable party would subsequently disobey the award even though the annulment application is declined by the *ad hoc* committee. By the end of January 2014, there were 25 cases in which written pleadings on a request for stay are filed, a number of which are requested by Argentina. In order to regulate the abuse of stay of enforcement, from 1985 when the *ad hoc* committee in *Amco Asia Corporation and others v. Republic of Indonesia* rendered the first decision on a stay of enforcement to 2004, losing parties who requested a stay of enforcement were ordinarily required to post a security as a condition for the continued stay of the enforcement of awards during the annulment proceedings.⁵²⁷ Most securities were in the form of an irrevocable and

⁵²³ Arts 50(2), 51(4) & 52(5) of the ICSID Convention.

⁵²⁴ Aron Broches, 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution' (1987) 2 ICSID Rev-Foreign Investment LJ 287, 294.

⁵²⁵ *MINE v. Guinea*, ICSID Case No ARB/84/4, Interim Order No 1 on Guinea's Application for Stay of Enforcement of the Award, 12 August 1988, 4 ICSID Rep 111, 112.

⁵²⁶ *Ibid*, 113.

⁵²⁷ Only one exception took place in *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*.

unconditional bank guarantee or escrow accounts. The practice, however, shifted in *Patrick Mitchell v. Democratic Republic of the Congo* where the committee granted a request for a stay without any condition. This jurisprudence is followed by many committees in later annulment proceedings. Meanwhile, a new trend in which the financial guarantee is not requested but other reasonable assurances should be provided to the committee emerged from 2006.⁵²⁸ On balance, in more than a third of cases a stay of enforcement was granted unconditionally,⁵²⁹ in 60 per cent of cases the application for stay of enforcement was upheld subject to conditions, either imposing obligation to provide financial security⁵³⁰ or

⁵²⁸ For example, the committee in *CMS Gas Transmission Company v. The Argentine Republic* requested a written statement on behalf of the Argentina Republic concerning its compliance with the award under the ICSID Convention in the event that the award was not annulled. See ICSID Case No ARB/01/8, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 1 September 2006, para 47.

⁵²⁹ This category comprises the following cases: (i) *MINE v. Guinea*, ICSID Case No ARB/84/4, Decision of the *ad hoc* Committee of 22 December 1989; (ii) *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No ARB/99/7, Decision on the Stay of Enforcement of the Award of 30 November 2004; (iii) *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No ARB/01/7, *Ad hoc* Committee's Decision on the Respondent's Request for a Continued Stay of Execution of 1 June 2005; (iv) *Azurix Corp. v. Argentine Republic*, ICSID Case No ARB/01/12, Decision on the Continued Stay of Enforcement of the Award of 28 December 2007; (v) *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No ARB/98/2, Decision on Stay of Enforcement of 5 August 2008; Decision on Republic of Chile's Application for a Stay of Enforcement of the Award, 5 May 2010; (vi) *Continental Casualty Company v. The Argentine Republic*, ICSID Case No ARB/03/9, Decision on Argentina's Application for a Stay of Enforcement of the Award of 23 October 2009; (vii) *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No ARB/06/8, Decision on Applicant's Request for a Continued Stay of Enforcement of the Award, 7 May 2012; (viii) *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No ARB/01/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award of 7 October 2008; (ix) *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No ARB/06/11, Decision on the Stay of Enforcement of the Award, 30 September 2013.

⁵³⁰ These cases include (i) *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No ARB/81/1, Interim Order No 1 Concerning the Stay of Enforcement of the Award of 2 March 1991; (ii) *Wena Hotels Limited v. Arab Republic of Egypt*, Case No ARB/98/4, Procedural Order No 1 of the *ad hoc* Committee concerning the continuation of the stay of enforcement of the award, 5 April 2001; (iii) *CDC Group Plc v. Republic of the Seychelles*, ICSID Case No ARB/02/14, Decision on Whether or Not To Continue Stay and Order in *CDC Group plc v. Republic of the Seychelles* of 14 July 2004; (iv) *Repsol YPF Ecuador S.A. v. Empresa Estatal Petroleos del Ecuador*, ICSID Case No ARB/01/10, Procedural Order No 1 concerning the Stay of Enforcement of the Award of Dec. 22, 2005; Procedural Order No 4 concerning the Stay of Enforcement of the Award of 22 February 2006; (v) *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No ARB/05/18, Decision on Applicant's Request for a Continued Stay of Enforcement of the Award, 12 November 2010; Decision of the *ad hoc* Committee to terminate the Stay of Enforcement of the Award, 19 Jan. 19, 2011; (vi) *Ron Fuchs v. The Republic of Georgia*, ICSID Case No ARB/07/15, Decision of the *ad hoc* Committee on the Stay of Enforcement of the Award of Nov. 12, 2010; Decision of the *ad hoc* Committee to terminate the Stay of Enforcement of the Award, 19 January 2011; (vii) *Sempra Energy International v. The Argentine Republic*, ICSID Case No ARB/02/16, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award of Mar. 05, 2009; Decision on Sempra Energy International's Request for the Termination of the Stay of Enforcement of the Award of 7

letter of assurance on the applicant,⁵³¹ and only in one case the award debtor itself agreed to post a bank guarantee in exchange for a waiver of the right by the award creditor to bring enforcement proceedings pending the outcome of the annulment proceedings.⁵³²

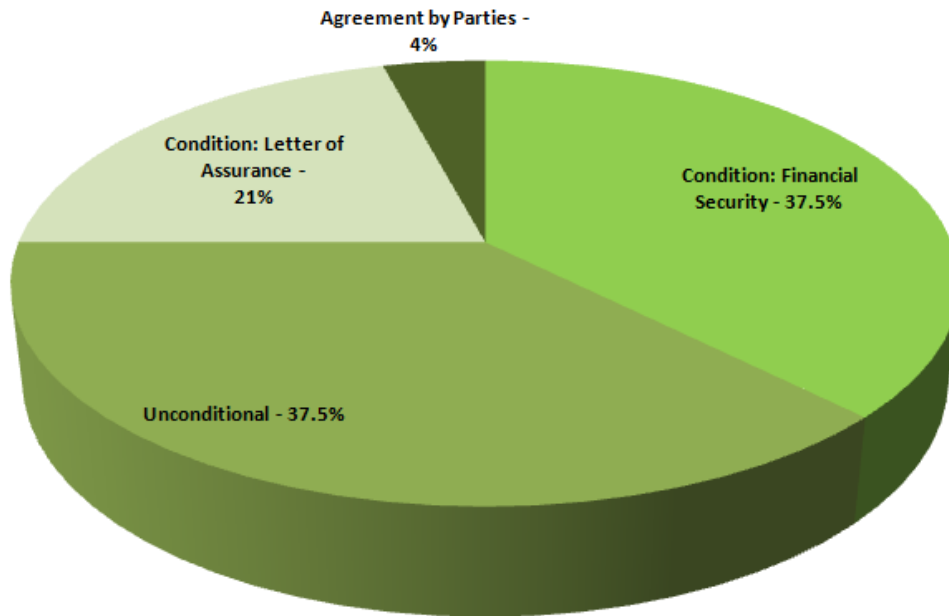


Figure IX: Condition on Stay of Enforcement

August 2009; (viii) *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No ARB/09/4, Decision on the Continuation of the Stay of Enforcement of the Award, 7 January 2014; (ix) *Joseph C. Lemire v. Ukraine*, ICSID Case No ARB/06/18, Decision on Ukraine's Request for a Continued Stay of Enforcement of the Award, 14 February 2012.

⁵³¹ These cases contain (i) *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No ARB/01/8, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award of 1 September 2006; (ii) *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No ARB/97/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (ICSID Rule 54) of 4 November 2008; (iii) *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No ARB/05/16, Decision of the *ad hoc* Committee on the Stay of Enforcement of 25 March 2008 (not public); (iv) *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No ARB/03/28, the *ad hoc* Committee released its Decision on Peru's Stay Request on 23 June 2009; (v) *Togo Électricité & GDF Suez Energies Services v. La République Togolaise*, ICSID Case No ARB/06/07, Decision on Annulment, 6 September 2011 (unpublished).

⁵³² The case is *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*. Though the case was settled by the parties and proceedings discontinued at their request, the condition on stay of enforcement can be inferred from *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No ARB/01/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award of 7 October 2008, para 27.

The different practices ascribe to the absence of explicit rules in the ICSID Convention and Rules, leaving *ad hoc* committees with discretionary rights to determine on a case-by-case basis whether or not a stay request is subject to conditions. In general terms, it is tenable to condition the continued stay of enforcement on the posting of a security so as to avoid the potential non-compliance of awards. In particular, imposing conditions on a stay of enforcement is essentially effective in warding off any tactical manoeuvre employed by the unfavourable party in an attempt to delay or avoid the enforcement through a dilatory stay request. Given that so far all stay requests are submitted in annulment proceedings, *ad hoc* committees may, in view of some observers, take up a new role to assist in ensuring a better compliance at post-award enforcement level through taking into account the introduction of ‘inducing compliance’ threshold and the possibility of granting punitive conditions.⁵³³

Nevertheless, a number of practical problems will arise in case a stay of enforcement is subject to conditions. Among these problems, parties’ ambivalence towards annulment applications is palpable. On the one hand, conditioning a stay request upon a posting of financial security would have a deterrent effect on annulment application which is, however, an extant remedy under the ICSID Convention. The *ad hoc* committee in *Patrick Mitchell v. Democratic Republic of the Congo* had accepted Congo’s argument about the deterrent effect of posting financial security on developing countries’ annulment submission made in good faith, and further determined that though imposing conditions had a certain value, it was always a burden and would infringe on the right to seek post-award relief through invoking an annulment application.⁵³⁴ Furthermore, financial security has the potential to cause economic hardship and conditionality, especially where it is the investor who requests a stay of enforcement. For instance, the *ad hoc* committee in *Libananco Holdings Co. Limited v. Republic of Turkey* upheld a continued stay of enforcement without imposing a condition on the grounds that there was no evidence demonstrating that Turkey’s chances of obtaining enforcement of the award would deteriorate as a consequence of the stay of enforcement if the annulment application was

⁵³³ Tsai-Yu Lin, ‘Systemic Reflections on Argentina’s Non-Compliance with ICSID Arbitral Awards: A New Role of the Annulment Committee at Enforcement?’ (2012) 5(1) *Contemp Asia Arb J* 1.

⁵³⁴ ICSID Case No ARB/99/7, Decision on the Stay of Enforcement of the Award of 30 November 2004, para 40.

eventually declined,⁵³⁵ and that requiring financial security would be likely burdensome for the applicant in the light of its scarce financial means⁵³⁶ and would affect the applicant's situation in a disproportionate manner.⁵³⁷ On the other hand, the requirement of financial security as a condition of a stay of enforcement would give foreign investors a windfall in that it places investors in a better position than they would have been if no annulment application was filed.⁵³⁸ The windfall arises at least in such a scenario: a State has to provide financial security for its request for stay of enforcement; however, if the State did not initiate the annulment proceedings, they might apply sovereign immunity to insist the enforcement of the award.

2.2 Domestic Enforcement Approach

Notwithstanding the autonomous and self-contained system well-established in ICSID arbitration for recognition and enforcement of awards, a similar simple and self-governing system for execution of awards is not set up by the ICSID Convention.⁵³⁹ A number of national courts distinguish between enforcement and execution, and such practice gives rise to two obstacles to the enforcement of ICSID awards. The first one is the defense based on domestic enforcement approach, which has typically been adopted by Argentina. After *ad hoc* committees in *CMS Gas Transmission Company v. Argentina* and *Azurix Corp. v. Argentina* rejected respectively to annul parts of awards that were rendered in favour of investors with compensation in the amount of nearly U.S. \$298 million, Argentina refused to pay the compensation by contending that neither claimants had initiated a formal process before the competent Argentine authorities in order to obtain payment of awards. The same argument was raised later in *Siemens A.G. v. Argentina*.⁵⁴⁰

⁵³⁵ ICSID Case No ARB/06/8, Decision on Applicant's Request for a Continued Stay of Enforcement of the Award, 7 May 2012, para 60.

⁵³⁶ *Ibid*, para 59.

⁵³⁷ *Ibid*, para 61.

⁵³⁸ Paul D. Friedland, 'Stay of Enforcement of the Arbitral Award Pending ICSID Annulment Proceedings' in Emmanuel Gaillard & Yas Banifatemi (eds), *Annulment of ICSID Awards*, 180-81.

⁵³⁹ Though the interpretation which best reconciles the equally authentic English, French and Spanish text of the ICSID Convention would be that 'enforcement' and 'execution' are identical in meaning (see Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 1134-35), the distinction between the two terms is also of practical importance since enforcement is governed and decreed by the Convention and its implementation by execution is governed by domestic law (see Aron Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 318).

⁵⁴⁰ ICSID Case No ARB/02/8.

In Argentina's opinion, the obligation under article 53 of the ICSID Convention to comply with the award was not isolated; instead, articles 53 and 54 complemented each other. Argentina further explained that article 54 established 'the legal nature of the award in the domestic legal system of all contracting States', under which contracting States should 'equate ICSID awards to a final judgment of a local court'.⁵⁴¹ Consequently, domestic procedures must be initiated before the court that Argentina had designated for the purpose of enforcement pursuant to article 54(2). Argentina also referred to UK law, Chile's Resolution ordering payment of award rendered against Chile in *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile* and other practices, and argued that these law and practice were additional support for Argentina's position.⁵⁴²

It is notable that the domestic enforcement approach is not uniquely invoked by Argentina as defense to enforcement of ICSID awards. Until recently, four cases involving decisions regarding judicial enforcement of ICSID awards have been identified, including two cases in France (*S.A.R.L. Benvenuti & Bonfant v. Congo*⁵⁴³ and *Société Ouest Africaine des Bétons Industriels v. Senegal*⁵⁴⁴), one in U.S. (*Liberian Eastern Timber Corporation v. Liberia*⁵⁴⁵) and one in England (*AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Kazakhstan*⁵⁴⁶). These cases also leave open the possibility of applying domestic enforcement procedures to the judicial enforcement of ICSID awards.

The obstacle derived from domestic enforcement procedures attracts a fair deal of attentions since Argentina's interpretation of obligations under articles 53 and 54 of the

⁵⁴¹ Ibid, Argentina's Response to the Submission by the United States of America to the *ad hoc* Annulment Committee, 2 June 2008, paras 4-7.

⁵⁴² *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No ARB/01/3, Decision on the Claimants' Second Request to Lift Provisional Stay of Enforcement of the Award, 20 May 2009, para 20.

⁵⁴³ ICSID Case No ARB/77/2, Decision of Tribunal de grande instance, Paris, 13 January 1981; Decision of Cour d'appel, Paris, 26 June 1981; Decision of Cour de cassation, Paris, 21 July 1987; see 1 ICSID Rep 368-76.

⁵⁴⁴ ICSID Case No ARB/82/1; Decision of Cour d'appel, Paris, 5 December 1989; Decision of Cour de cassation, Paris, 11 July 1991; see 2 ICSID Rep 337-42.

⁵⁴⁵ ICSID Case No ARB/83/2; Decision of the US District Court for the Southern District of New York on 5 September 1986; Decision of the US District Court for the Southern District of New York on 12 December 1986; Decision of the US District Court for the District of Columbia on 16 April 1987; see 2 ICSID Rep 383-98.

⁵⁴⁶ ICSID Case No ARB/01/6; Decision of England and Wales High Court (Comm Court) [2005] EWHC 2239 (Comm).

ICSID Convention has been considered to be a far-reaching step.⁵⁴⁷ In fact, the enforcement mechanism provided under the ICSID Convention is automatic, and the rationale for the intact ICSID system is anchored specifically in voluntary compliance. More precisely, based on its imposing obligation to abide by and comply with the terms of the award on the parties to the arbitration, article 53 reflects customary international law through reiterating the *pacta sunt servanda* and *res judicata* principles in the ICSID system.⁵⁴⁸ Accordingly, such obligation applies equally to both parties, automatically and without any condition,⁵⁴⁹ and shall be honoured immediately with no need for further domestic enforcement process. In other words, the obligation is independent of any procedural obstacle that may arise at the enforcement stage. Furthermore, while article 53 is addressed at the disputing parties to the arbitration, article 54 provides all contracting States' obligation to collaborate in enforcement of awards containing pecuniary obligations. Article 54, which could not be interpreted to diminish or decline the obligation under article 53 to abide by and comply with awards, comes into play only when article 53 is violated by the defeated party. Therefore, the obligation under article 53 is not predicated on the award creditor's seeking enforcement proceedings before the host State's authorities pursuant to article 54. Such viewpoint can be also read from the *travaux préparatoires* to the ICSID Convention that article 54 was primarily designed as a means to cope with potential default on the investor's side. It was emphatically not the case that forcible execution against States should be provided by the Convention, considering that a direct obligation to carry out awards had been imposed under article 53 on States which were bound as signatories to the Convention to abide by the terms of the Convention;⁵⁵⁰ rather, the focus should shift to default by investors who were not signatories, since there was no direct sanction under the Convention for investors' failure to honour the award. Article 54 was, hence, initially introduced in response to the imbalance of obligation between States and investors. Based on article 54, in the event that investors failed to abide by and comply

⁵⁴⁷ Nigel Blackaby, *et al*, *Redfern and Hunter on International Arbitration*, 663.

⁵⁴⁸ Guido Santiago Tawil, 'Binding Force and Enforcement of ICSID Awards: Untying Articles 53 and 54 of the ICSID Convention' in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference*, 328-29.

⁵⁴⁹ The only exception is the possibility of the award being stayed temporarily.

⁵⁵⁰ ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention* (1968), vol II, pt I, 520.

with awards, host States could seek forcible execution in any contracting State without running into the obstacles that frequently stood in the way of the enforcement of awards.⁵⁵¹

The *ad hoc* committee in *Enron Corporation and Ponderosa Assets, L.P. v. Argentina* was the first tribunal that addressed in detail the distinction and interplay between articles 53 and 54, and concluded that under a good faith interpretation article 53(1) imposed on Argentina an obligation under international law *vis-à-vis* U.S. to comply with the award, without the need for action on the part of award creditors under Argentine law to which article 54 referred.⁵⁵² The decision was subsequently followed by *ad hoc* committees in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*,⁵⁵³ *Sempra Energy International v. Argentina*,⁵⁵⁴ *Continental Casualty Company v. Argentina*⁵⁵⁵ and *Ioannis Kardassopoulos v. The Republic of Georgia*.⁵⁵⁶ These cases have indicated that the obligation under article 53 to abide by and comply with ICSID awards is thoroughly independent of the domestic enforcement procedures set forth in article 54 and, more importantly, the foundation of the whole ICSID arbitration would eventually be undermined if domestic enforcement procedures are required prior to the obligation under article 53 to comply with the awards arises.

Finally, it should be noted that though there is no basis for a supporting domestic enforcement procedure requirement, the focus of national courts' approach towards compliance with ICSID awards may shift to the scrutiny of awards as a means of last resort. For example, the Tribunal de Grande Instance in *S.A.R.L. Benvenuti & Bonfant v. Congo* made an order for the enforcement of the award against Congo subject to the condition that an execution on assets located in France was only allowed if prior authorization was determined by the Court. The Court further incorporated review of public policy into its

⁵⁵¹ Aron Broches, *Selected Essays: World Bank, ICSID and Other Subjects of Public and Private International Law* (Martinus Nijhoff, 1995) 198.

⁵⁵² ICSID Case No ARB/01/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 7 October 2008, para 69.

⁵⁵³ Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (ICSID Rule 54) of 4 November 2008, para 36.

⁵⁵⁴ Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award of Mar. 05, 2009, para 52.

⁵⁵⁵ Decision on Argentina's Application for a Stay of Enforcement of the Award of 23 October 2009, para 12.

⁵⁵⁶ Decision on Applicant's Request for a Continued Stay of Enforcement of the Award, 12 November 2010, para 24.

approach towards enforcement of the award.⁵⁵⁷ Public policy also arose for consideration in *Société Ouest Africaine des Bétons Industriels v. Senegal*.⁵⁵⁸ Unlike procedural requirements, it appears that international law can provide justification for the national courts' scrutiny of awards. Given that international law of treaties applies to both the interpretation of States' obligations established by the ICSID Convention and the conditions regarding the suspension of those obligations, and that the Vienna Convention on the Law of Treaties requires that the interpretation of treaties should take into account 'any relevant rules of international law applicable in the relations between the parties',⁵⁵⁹ domestic courts might make use of 'abuse of right', 'denial of justice', 'unfair and inequitable treatment' or 'good faith' as bases to interpret States' obligations under the article 54 of the Convention, thus narrowly construing their enforcement obligations.⁵⁶⁰ Though the application of these international law doctrines is arguably tentative, it can be seen that such an approach not only affects investors' right in domestic enforcement proceedings, but also discourages, to a certain extent, the deference of ICSID awards.

2.3 Sovereign Immunity

The second obstacle partially caused by the distinction between enforcement and execution is sovereign immunity. The ICSID Convention preserves sovereign immunity from execution by providing that article 54 cannot be construed as derogating from laws in force concerning immunity of contracting States or of any foreign State from execution,⁵⁶¹ thus simply leaving immunity to be dealt with under the applicable law of States before which execution is sought.⁵⁶² Considering that the obligation of governments under article 53 to abide by and comply with awards remained unaffected by the limitation on their forcible

⁵⁵⁷ The court held that the ICSID award did not contain anything that was contrary to law and public order. See Aron Broches, 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution', 318-19).

⁵⁵⁸ According to the Decision of Cour d'appel, Paris, 5 December 1989, the execution of the award in France would be in conflict with public order because it would contravene sovereign immunity. See 2 ICSID Rep 337-40 (1994).

⁵⁵⁹ Art 31(3)(c) of the Vienna Convention.

⁵⁶⁰ Edward Baldwin, *et al*, 'Limits to Enforcement of ICSID Awards' (2006) 23 J Intl Arb 1, 18-20.

⁵⁶¹ Art 55 of the ICSID Convention.

⁵⁶² *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No ARB/01/7, *Ad hoc* Committee's Decision on the Respondent's Request for a Continued Stay of Execution of 1 June 2005, para 31.

execution,⁵⁶³ it appears that States that invoke the immunity defense will be in violation of their obligation under article 53.⁵⁶⁴ In this regard, the distinction between enforcement and execution has the potential to provide a basis for the immunity defense.

In practice the theories of restrictive immunity and a waiver of immunity from jurisdiction have been well-accepted by numerous States.⁵⁶⁵ However, a waiver of sovereign immunity for the purpose of jurisdiction does not encompass a waiver of immunity from execution of award. At the present time the attachment or injunction of a sovereign State's non-commercial property is still subject to absolute immunity. Accordingly, though most defeated respondent States have enforced awards against them, Congo, Senegal, Liberia and Kazakhstan have each failed to pay awards in the aforementioned four cases by successfully raising the sovereign immunity plea. Even if the prevailing investors collect awards wholly or in part, obstacles that they encounter in some cases⁵⁶⁶ can be enormous in view of the facts that the burden of proof that certain property does not serve non-commercial government purposes is on investors, and that the nexus requirement, which demands a specific connection between the commercial property subjected to execution and the underlying investment claims, would drag investors into a frustrating situation.⁵⁶⁷

What may be found fascinating about the divergence between ICSID and non-ICSID arbitration is not the sovereign immunity defense as a characteristic trait of ICSID arbitration, but rather the potential risk that foreign investors have to take when seeking enforcement under the ICSID Convention. The immunity plea is also available in non-ICSID arbitration; however, investors seeking enforcement under the New York Convention have argued, with a mixed degree of success, that the agreement in which

⁵⁶³ Aron Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 302.

⁵⁶⁴ Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 1150.

⁵⁶⁵ Dhisadee Chamlongrasdr, *Foreign State Immunity and Arbitration* (Cameron May, 2007) 69-77, 79-92.

⁵⁶⁶ For example, the obstacles have been typically illustrated by the Sedelmayer enforcement saga where Sedelmayer has not recovered the whole amount of the award after having spent 14 years locating Russian assets that could not be protected by any immunity plea.

⁵⁶⁷ Art 19(c) of the UN Convention on Jurisdictional Immunities of States and Their Property sets up a much looser requirement of connection by permitting execution of 'property that has a connection with the entity against which the proceeding was directed'. Nonetheless, though the essence of art 19 reflects current customary international law, it seems that art 19(3) is not consonant with custom, which merely carries with it the attempt at what the preamble to the Convention states as 'the harmonization of practice in this area'. See Roger O'Keefe and Christian J. Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (OUP, 2013) 327.

States give their consent to arbitration, irrespective of the form (either concession contract or investment treaty), encompasses an implied waiver of a claim of immunity from the jurisdiction of the courts before which enforcement is sought and from execution of any resulting award.⁵⁶⁸ Theoretically, the defense of implied waiver of immunity from execution is possible in non-ICSID arbitration since no express reservation of immunity from execution akin to article 55 of the ICSID Convention is contained in the New York Convention. In practice such argument has been endorsed in some jurisdictions. For example, while Creighton sought to enforce the award rendered by an ICC tribunal in *Creighton v. Qatar* and seized bank accounts held in France by the Qatari Ministry of Agriculture and Domestic Affairs, Qatar initiated challenge proceedings. As the Cour de Cassation determined, in agreeing to ICC arbitration, Qatar waived not only its immunity from jurisdiction but also immunity from execution. The decision based on article 24 of the then applicable ICC Rules which provided that by submitting disputes to tribunal's jurisdiction, the parties should be 'deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal in so far such

⁵⁶⁸ Andrea K. Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes' (2010) 21 Am Rev Intl Arb 211, 220.

In this regard, becoming a contracting State to the ICSID Convention and submitting dispute to ICSID arbitration may also constitute an implied waiver of sovereign immunity from enforcement. In *Blue Ridge Invs., L.L.C. v. Republic of Argentina*, CMS petitioned the Southern District of New York to enforce a favourable ICSID award rendered in *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No ARB/01/8). Blue Ridge purchased CMS's interest in the ICSID award in 2008 and took over the lawsuit. As Argentina moved to dismiss Blue Ridge's petition to confirm the ICSID award, one of its arguments was sovereign immunity under the Foreign Sovereign Immunities Act (FSIA). FSIA allowed immunity for sovereign nations being sued in U.S. courts, but such immunity could be waived under 28 U.S.C. § 1605(a)(1) and under arbitral award exception of § 1605(a)(6). In the present case, the Court of Appeals for the Second Circuit held that Argentina had impliedly waived its sovereign immunity (i) by verifying the ICSID Convention under which contracting States had to recognize ICSID awards and enforce the pecuniary obligations imposed by the awards (the ground of this decision was that by joining the ICSID Convention, as the court observed, Argentina must have contemplated enforcement actions in other member States of the Convention), and (ii) by submitting dispute to ICSID tribunal since an ICSID award fell within the arbitral award exception of the FSIA (see Docket No 12-4139-cv, 2d Cir. 2013).

It should be noted that the situation in this ICSID arbitration case is quite complicated. First, the obligation imposed on contracting States by the ICSID Convention is to enforce ICSID awards. However, the self-contained nature of ICSID arbitration does not extend to the execution. Second, the execution of the award is governed by laws in States where execution is sought, ie, U.S. laws in this case. Nevertheless, the subtitle of 28 U.S.C. § 1605 is 'general exceptions to the jurisdictional immunity of a foreign State' which might have an indication that immunity from execution does not fall within the ambit of its application. Besides, as elaborated above, Congo, Senegal, Liberia, Kazakhstan have refused to execute ICSID awards by successfully invoking the sovereign immunity defense.

waiver was validly made'.⁵⁶⁹ Given that similar provisions with respect to the waiver of rights are contained in a number of arbitration rules,⁵⁷⁰ the decision might set a positive example for national courts in other jurisdictions to find ways of circumventing the obstacle regarding defense of immunity from execution to the efficacy and integrity of arbitral process. The success of the argument of implied waiver of immunity from execution, however, relies primarily on domestic laws. More precisely, investors might be in a favourable position only if execution against assets of foreign sovereigns that do not serve non-commercial government purposes is allowed under the domestic laws.

Insofar as sovereign immunity from execution is concerned, one might argue that the ICSID system has provided somehow necessary remedies, putting extraordinary political and economic pressures on the unfavourable respondent States. Above all, the home State of an investor has the rights to revive diplomatic protection as per articles 27 and 64 of the ICSID Convention because non-compliance by States constitutes a violation of their international obligations, despite the fact that sovereign immunity may well afford a legal defense to forcible execution.⁵⁷¹ Meanwhile, the leverage of the World Bank with borrowing member States involving expropriation or external debt disputes might be applied to secure execution of awards.⁵⁷² Indeed, it is reasonably possible that the diplomatic protection and assistance from the World Bank have a certain impact on member countries' compliance with ICSID awards. However, exercising diplomatic protection that ranges from informal diplomatic acts to bringing cases before the ICJ entails a number of inherent difficulties. First, States are estopped under customary international law from invoking diplomatic protection relating to the rights contained in investment treaties to which they are signatories and on the basis of which States and investors express their mutual consent to ICSID arbitration.⁵⁷³ Second, since neither investment treaties nor the ICSID Convention provide for ICJ jurisdiction, it would lead to

⁵⁶⁹ *Creighton Limited v. Minister of Finance and Minister of Internal Affairs and Agriculture of the Government of the State of Qatar*, Cour de Cassation [Supreme Court], 6 July 2000, XXV YB Com Arb 458-60 (2000).

⁵⁷⁰ For example, art 34(6) of the ICC Arbitration Rules (2012); art 26.8 of the LCIA Arbitration Rules (2014); Possible waiver statement, Annex of the UNCITRAL Arbitration Rules (2010).

⁵⁷¹ *MINE v. Guinea*, ICSID Case No ARB/84/4, Interim Order No 1 on Guinea's Application for Stay of Enforcement of the Award, 12 August 1988, 4 ICSID Rep 111, 115-16.

⁵⁷² Antonio R. Parra, *The Enforcement of ICSID Arbitral Awards*, 24th Joint Colloquium on International Arbitration, 11.

⁵⁷³ Ben Juratowitch, 'The Relationship between Diplomatic Protection and Investment Treaties' (2008) 23 ICSID Rev-Foreign Investment LJ 10, 21-22.

general ambiguity as to how the home State of the investor initiates a case before the ICJ on behalf of its investor without consent given by the host State. Finally, as to the assistance by the World Bank, though the World Bank regional vice president is able to decide not to make any new loans to a member country or to make loans with the guarantee of the country in the event that the country's involvement in a dispute over default, expropriation or governmental breach of contract has attracted attention of the International Bank for Reconstruction and Development (hereinafter 'IBRD') and the International Development Association (hereinafter 'IDA'),⁵⁷⁴ it still needs to be made clear that an ICSID tribunal is not an arm of the World Bank, that an ICSID award rendered by an tribunal is not an obligation owing directly to the World Bank, and consequently that the World Bank Procedure does not address the scenario as regards the member country's non-compliance with an ICSID award.⁵⁷⁵ Therefore, the effect that the nexus between the World Bank and the ICSID weighs in favour of the member countries' execution of ICSID awards cannot be exaggerated.

3 Pro-enforcement Mechanisms in Non-ICSID Arbitration

3.1 More Favourable Enforcement Regime

As elucidated previously, enforcement of non-ICSID arbitral awards can be obtained relying on different instruments, and the relationship between different enforcement regimes indicates, in principle, a pro-enforcement bias. Article VII(1) of the New York Convention provides this pro-enforcement bias with a basis. According to the first part of article VII(1) which is deemed the 'compatibility-provision', the validity of the provisions on recognition and enforcement of arbitral awards in other multilateral or bilateral treaties is not affected by the New York Convention. As the so-called 'more-favourable-right provision', the second part of the article confers on parties rights to seek enforcement on the basis of domestic law or other treaties, instead of the New York Convention.⁵⁷⁶ Accordingly, it is acknowledged that a party can invoke a more favourable regime for the purpose of enforcement if a simpler and more effective measure of enforcement is

⁵⁷⁴ BP 7.40 - Disputes over Defaults on External Debt, Expropriation, and Breach of Contract, World Bank Procedures (BPs), March 2012.

⁵⁷⁵ Edward Baldwin, *et al*, Limits to Enforcement of ICSID Awards, 22.

⁵⁷⁶ Albert Jan van den Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation*, 81.

available. Apparently, this more-favourable-right provision is conducive to facilitating the enforcement of non-ICSID awards.

The application of article VII(1), however, remains disputed. It is assumed that a more favourable regime should be applied in its entirety, which means that a party can make a choice between different regimes, but a combination of both ('cherry picking') is not allowed since a combination would contradict the interdependence of the New York Convention' provisions which should be considered to constitute a whole.⁵⁷⁷ Conversely, some commentators assert that the reliance on a more favourable regime does not replace the New York Convention *in toto* and, hence, a party can rely on a more favourable provision when seeking enforcement under the New York Convention.⁵⁷⁸

While the first viewpoint is based principally on the unification of municipal law, which is absolutely the main concern of the drafters of the New York Convention, there are two arguments that support the second standpoint equally well. Above all, it should be noted that the pro-enforcement bias is also an essential object of the New York Convention. Moreover, replacement of the New York Convention *in toto* would lead the Convention to be static and allow no dynamic progress to be made.⁵⁷⁹ In this regard, article VII(1) can serve as a tool to accommodate the Convention in modern trends and, thus, a certain amount of 'cherry picking' should be permitted, especially given that the Convention should be deemed a dynamic instrument.⁵⁸⁰ In fact, even if 'cherry picking' by parties is prevented by the Convention, it is generally accepted that domestic courts can rely on its own initiative on a more favourable provision for the enforcement.⁵⁸¹ In this way, it is also possible to take advantage of a more favourable basis for the enforcement under the New

⁵⁷⁷ Ibid, 85-86.

⁵⁷⁸ Domenico Di Pietro & Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, 2001) 172.

⁵⁷⁹ For example, the in-writing requirement for arbitration agreement under art II(2) of the New York Convention is relatively stringent, and if the requirement is not met, neither the agreement nor the award based on such agreement shall be enforced. However, a number of arbitration statutes have less strict requirement, in particular for those electronic arbitration agreements. If the Convention applies as a whole and more favourable arbitration statutes applies separately as a whole, the Convention would not keep in tune with modern development.

⁵⁸⁰ Domenico Di Pietro, Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958*, 172-73.

⁵⁸¹ Albert Jan van den Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation*, 85-86, fn 216.

York Convention, though it depends on domestic courts' discretionary authority. In practice, if treaties would be taken into account, the principle of maximum efficacy⁵⁸² comes into play as the most appropriate rule in determining the relationships between treaties and the New York Convention.⁵⁸³ In the case of domestic laws, though domestic courts have been inconsistent in giving effect to the more-favourable-right provision, it is still acknowledged that the Convention does not supersede more favourable domestic laws by allowing parties simply to avail themselves of whatever provisions are more favourable for the purpose of enforcement.⁵⁸⁴ Thus, national courts constantly ensure that the most arbitration-friendly treaty or domestic law is applied as long as it favours and further promotes the enforcement of non-ICSID awards.

3.2 Few Limits on Enforcement Forum

It is commonly accepted that there is no limit under the New York Convention restricting the fora where a non-ICSID award might be sought to recognize and enforce. On a theoretical level, award creditors have the opportunity of selecting the enforcement forum and deciding how many fora in which they wish to recognize and enforce awards if award debtors have substantial assets in various States. In addition, two achievements of the New York Convention are significantly beneficial for award creditors to mitigate the difficulties of choosing enforcement forum. First, as elucidated above, the Convention imposes a general presumptive obligation on contracting States to recognize and enforce awards made in other States (or mere contracting States if reciprocity reservation is made), save where specifically identified, but limited, exceptions enumerated in article V apply. Second, the elimination of the 'double exequatur' dispenses with the burdensome requirement that award creditors have to obtain confirmation of awards from the courts in States of the arbitral *situs* under the 1927 Geneva Convention.⁵⁸⁵ In addition, the European Convention,

⁵⁸² According to the principle, if an award is unenforceable under an applicable treaty but there is also another applicable treaty under which the award can be enforced, the other treaty will be applied.

⁵⁸³ Albert Jan van den Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation*, 119.

⁵⁸⁴ Emmanuel Gaillard, 'The Relationship of the New York Convention with Other Treaties and with Domestic Law' in Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: the New York Convention in Practice*, 76.

⁵⁸⁵ As stated by Sanders who was often regarded as the founding father of the Convention, the main aim of the New York Convention was the elimination of the double exequatur which was a requirement under the Geneva Convention. See Pieter Sanders, 'The Making of the Convention' in *Enforcing Arbitral Awards under the New York Convention: Experience and Prospects*, UN No 92-1-133609-0, 1998, 3.

the Inter-American Convention and almost, if not all, bilateral treaties also leave award creditors entirely free to select any enforcement forum they deem appropriate. As a consequence, the New York Convention and other main conventions not only liberalize the enforcement procedures, but also facilitate the maximum international enforceability of awards in all potential fora where identifiable, unencumbered and accessible assets of award debtors are available.

Considering that it is the *lex fori* that determines procedural requirements for the execution, national arbitration statutes have also to be taken into account when selecting an enforcement forum. In general, consistent with the New York Convention, national statutes impose no limit on an enforcement forum. Be that as it may, it still leaves open the possibility of applying national statutes over and above the basic conditions set forth in the Convention. Under private international law, national courts ordinarily count the connecting factors that link the enforcement of foreign arbitral awards to the State's domestic statutes, and would not exercise jurisdiction if the award debtors or their assets have insufficient connections with the forum.⁵⁸⁶ One notable example is that U.S. courts have determined that actions to enforce foreign awards cannot proceed in the U.S. on account of the procedural non-jurisdictional and non-merits doctrine of *forum non conveniens* which allowed the disposal of enforcement actions under the provision of the New York Convention 'when considerations of convenience, fairness, and judicial economy so warrant'.⁵⁸⁷ However, the dismissal of enforcement actions based on the *forum non conveniens* doctrine has been criticized for contradicting article III of the New York Convention which only contemplates the exceptions set out in article V for resistance of enforcement, and for the substantive policies and discretionary judgments that are reflected in the *forum non conveniens* doctrine.⁵⁸⁸ To say the least, a key function of the *forum non conveniens* doctrine is to avoid forum shopping or multiplication of parallel, and possibly conflicting, enforcement proceedings initiated by award creditors in an attempt to harass award debtors or obtain award for use against award debtors elsewhere; nevertheless, such manoeuvre appears to be uncommon in international arbitration since award creditors regularly commence enforcement proceedings in appropriate jurisdictions in which they believe assets of award debtors are available, in particular given the costs of collecting

⁵⁸⁶ Gary B. Born, *International Commercial Arbitration*, 2399-2400.

⁵⁸⁷ *Sinochem Intl Co. v. Malay Intl Shipping Corp.*, 549 U.S. 422, 432 (decided 2007, U.S. Supreme Court).

⁵⁸⁸ Gary B. Born, *International Commercial Arbitration*, 2402.

awards. As the New York City Bar Association observes, any slight risk of forum shopping is, in any event, a tolerable consequence of furthering the New York Convention's objective of facilitating the transnational enforceability of awards.⁵⁸⁹

3.3 Exhaustive Grounds for Refusal of Enforcement

It appears at first sight that the enforcement of non-ICSID arbitral awards encounters more obstacles since the mandatory presumptive obligation of States to enforce arbitral awards under the New York Convention is subject to a limited number of exceptions. Nonetheless, it is axiomatic that the provisions of the New York Convention were drafted with a pro-enforcement bias and merely set out a restrictive list of grounds on which enforcement could be dismissed. Most grounds set forth in the New York Convention are analogous to the annulment grounds under the later ICSID Convention and mainly refer to procedural issues, such as excess of authority, denial of the opportunity to present case, irregular procedural conduct of the arbitration, lack of independence, bias and misconduct of the arbitrators and fraud.⁵⁹⁰ More importantly, combined with several rules that put up solid barriers shielding awards from resistance of enforcement, these exceptions ought to be applied narrowly and prudentially so as not to contradict the pro-enforcement policy of the New York Convention.

First, it is arguably accepted that national courts have, in line with global practice, residual discretionary authorities to grant enforcement even where a defense in accordance with article V is valid. As elucidated in chapter III, article V provides that enforcement of awards 'may' be refused only if a specified exception exists. It is conspicuous that the term of permissive 'may', rather than 'must', 'should' or 'shall', is adopted in the English text of the Convention, which seems to confer discretionary authorities on national courts. Traditionally, this approach has been taken by Anglo-American courts, despite the existence of a valid defense. For instance, the decision made by the English Court of Appeal in *Dallah Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* leaves open the possibility for discretionary authorities,

⁵⁸⁹ International Commercial Disputes Committee of the Association of the Bar of the City of New York, *Lack of Jurisdiction and Forum non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards*, April 2005, 22.

⁵⁹⁰ Art V of the New York Convention.

though the judges expressed different views.⁵⁹¹ However, the controversy arises in the light of the mandatory terms adopted in the French text of the Convention which can be construed to exclude any discretionary authority. The rationale of this approach is in accordance with the object of the New York Convention of standardization and harmonization of the application and interpretation of the grounds for refusal, given that national courts' discretion varies, depending upon their own arbitration laws and legal traditions and thus results in unpredictability and uncertainty. In practice national courts in most jurisdictions have discretion to grant enforcement where the violation set forth in article V is *de minimis*. It is intriguing that in some jurisdictions (eg, France) where discretion is not allowed, national courts also reach the same results as Anglo-American courts through taking into account 'whether defects of the award are immaterial or not causal for the rendition of the award'.⁵⁹² The discretion can reduce, to a certain degree, the non-enforcement of a number of non-ICSID awards.

Second, the *onus probandi* of overcoming the presumptive enforceability of arbitral awards has been allocated to the award debtors as article V of the New York Convention provides that the recognition and enforcement of awards may be declined at the request of the parties resisting enforcement if they furnish to the national courts certain proof that one of exceptions exists. Given that the grounds for refusal of enforcement have to be construed narrowly and should be accepted in serious cases only, the degrees or quantum of proof are consistently determined under a clear, cogent and fairly strict standard which requires award debtors to substantiate their arguments regarding resistance of enforcement sufficiently.⁵⁹³ It is noteworthy that the allocation of the burden of proof of grounds for non-enforcement plays an essential role in practice in that it can have a decisive impact on the final outcome of the whole enforcement proceedings.

Third, notwithstanding the non-waivable nature of the grounds under article V(2) which shall be scrutinized by national courts *ex officio*, most grounds for refusal of enforcement

⁵⁹¹ Based on their interpretation of s 103(2)(b) of the English Arbitration Act (1996), which was similar to art V1(a) of the New York Convention, Lord Justice Moore-Bick held that there was a restrictive notion of discretion expressing by the discretionary language of the Act. Lord Justice Rix, however, opined that the Act imposed a limitation on national courts' power to dismiss enforcement rather than granting discretionary authorities to enforce awards if a valid defense existed. [2009] EWCA Civ 755.

⁵⁹² Herbert Kronke, *et al* (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010) 208-09.

⁵⁹³ *Ibid*, 210.

under article V(1) can be waived, either explicitly or implicitly.⁵⁹⁴ As far as explicit waiver is concerned, it is generally accepted that disputing parties are able to reach an agreement to waive the refusal grounds. Nonetheless, whether the grounds can be waived *ex ante* or after the award has been rendered remains controversial.⁵⁹⁵ Considering that it would be rare for award debtors to waive their defenses under article V(1), and that a more favourable enforcement regime is permissible under the Convention and thus parties may select the applicable enforcement laws, it appears that a waiver granted prior to the award does not derogate from party autonomy and the fundamental principles of the Convention. Despite the small possibility of an explicit waiver, in practice refusal grounds are likely to be waived implicitly. More precisely, a party shall be deemed to have waived the right to object and will be precluded from complaining about irregularities at the later annulment and enforcement stages if he fails to raise a jurisdictional challenge, to object to a particular procedure or to raise promptly claims that one arbitrator lacks independence during the arbitral process. Such principle in which silence serves as a waiver derives from the more general principle of estoppel or *venire contra factum proprium*, and has been recognized in a number of institutional arbitration rules.⁵⁹⁶ In fact, national courts ordinarily rely on the implicit waiver in declining objection to annulment and enforcement of awards.⁵⁹⁷

3.4 Interim Relief

⁵⁹⁴ It is worth noting that a few defects in the arbitral proceedings, such as corruption or partiality, cannot be waived.

⁵⁹⁵ Herbert Kronke, *et al* (eds.), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, 216.

⁵⁹⁶ For example, art 32 of the UNCITRAL Rules, art 39 of the ICC Arbitration Rules and r 41 of the 2013 ICDR Rules (Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes)).

⁵⁹⁷ For example, the U.S. Court of Appeal in *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* determined that Pertamina had failed to show the prejudice required to decline enforcement of the award on the ground of procedural irregularity because the arbitral tribunal stated that all parties had waived their respective requests for discovery at the conclusion of the hearing; in addition, an arbitral tribunal's decision not to order a continuance of document did not constitute a denial of the opportunity to present a fair case. See 364 F.3d 274, 304 (5th Cir. 2004).

More recently, the Swedish Supreme Court upheld in 2013 a decision of the Svea Court of Appeal that the Russian company Technopromexport had waived its right to rely on the alleged erroneous jurisdiction for challenging a SCC award on the ground that the objection to erroneous jurisdiction must be raised during the arbitral proceedings. See *Technopromexport v. Mir's Limited*, Judgment of the Swedish Supreme Court, 14 June 2013, Case No Ö 2104-12.

One of the potential virtues of enforcement of non-ICSID awards is the availability of interim relief from national courts. Though parties in ICSID arbitration can also seek interim relief from, and only from, arbitral tribunals, non-ICSID arbitration distinguishes itself in at least three respects. First, it may be necessary to obtain immediate relief prior to the constitution of the arbitral tribunal, but the long period of time from requesting arbitration to the commencement of an ICSID arbitral tribunal might lead to irretrievable dissipation of respondent's assets or destruction of key evidence. In a worse case scenario, the ICSID tribunal even ruled that the claimant dissolved all attachments it had obtained and not sought any remedy in national courts.⁵⁹⁸ Second, ICSID tribunals can merely 'recommend' interim relief under article 47 of the Convention, and any interim relief issued by ICSID tribunals does not constitute a part of the final award, and would therefore not be recognized and enforced under the ICSID autonomous enforcement system. By comparison, interim relief ordered by national courts can be enforced by the courts, and auxiliary interim relief issued by arbitral tribunals can be enforced in Europe under article 31 of the 'Brussels I' Regulation.⁵⁹⁹ Third, extra-territorial interim relief can be ordered in support of foreign arbitration. More specifically, national courts (not at the arbitral *situs*) may recognize and enforce the request filed by parties to an arbitration seated in another jurisdiction and, accordingly, order interim relief in support of foreign arbitral

⁵⁹⁸ For example, in *Maritime International Nominees Establishment (MINE) v. Guinea*, MINE was granted a favourable AAA arbitral award and tried to confirm the award in U.S. court, but Guinea sought to dismiss the motion on the ground that the arbitral tribunal had lacked jurisdiction. MINE then initiated an ICSID arbitration based their contract which contained an ICSID arbitration clause. In the meantime, based on the AAA award, MINE obtained attachments of Guinean assets from Swiss and Belgian courts. Guinea requested an order from the ICSID arbitral tribunal, in an 'Emergency Request for Relief from Attachment of Its Assets by MINE', to dissolve all pending attachments of its bank account and assets in Europe. MINE asserted that the actions were meant to enforce the AAA awards, and that they were not prejudgment attachments within the ICSID arbitration. The ICSID tribunal at first denied Guinea's request as premature since it had not yet defended itself in the attachment proceedings. However, the tribunal later issued in a provisional measure that MINE's legal actions to seek enforcement of the AAA award constituted an 'other remedy' under the art 26 of the ICSID Convention and also breached its submission to ICSID arbitration under the contract. The ICSID tribunal further recommended, based on art 47 of the Convention, that MINE immediately withdraw and permanently discontinue all pending litigation, and that MINE dissolve every existing attachment and commence no new action before national courts. In the event that MINE failed to comply with the recommendation, the ICSID tribunal would take this failure into account in the final award. See ICSID Case No ARB/84/4, Award of 6 January 1988, XIV YB Com Arb 82-92 (1989).

⁵⁹⁹ Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. See V.V. Veeder, 'The Need for Cross-border Enforcement of Interim Measures Ordered by a State Court in Support of the International Arbitral Process' in Albert Jan van den Berg (ed), *New Horizons in International Commercial Arbitration and beyond* (Kluwer Law International, 2005) 242-71.

proceedings.⁶⁰⁰ It is apparent that interim relief ordered and enforced by national courts in non-ICSID arbitration not only guarantees more effective arbitral proceedings, but also ensure, essentially and necessarily in some cases, the execution of final awards.

Concluding Observations

It is conceivable that the ICSID Convention provides for a more simplified and effective method of obtaining the enforcement of arbitral awards in contrast to the relatively onerous recognition and enforcement procedures under the New York Convention. As all sorts of recourse to national courts is not required under the ICSID Convention, ICSID awards can be enforced, in principle, in less time and at lower cost. Furthermore, national courts' review of arbitral awards would not only incur extra expenses and fees in enforcement proceedings, but might also result in a higher rate of non-compliance with awards. In this context, the enforcement system under the ICSID Convention is more favourable than that under the New York Convention.

These procedural virtues, however, do not necessarily entail a thoroughly and systematically superior enforcement mechanism as compared to the regime established under the New York Convention. In the first place, since the ICSID autonomous regime merely covers the recognition and enforcement of awards and does not extend to the execution of awards, the lack of deference of ICSID awards cannot therefore be avoided completely. First, in addition to a lapse of time caused by a stay of enforcement, imposing a stay request on conditions, though effective to discourage tactical manoeuvre, can serve as a deterrent against attempts that aim to annul the award in good faith and even cause the applicant's economic hardship and conditionality. Second, while it is axiomatic that domestic enforcement procedures cannot be deployed as defenses for resistance of enforcement under the ICSID Convention, national courts' scrutiny of awards, coupled with a number of international law doctrines, may be applied to narrowly construe States' enforcement obligation. Finally, State immunity can sometimes play a pivotal role in

⁶⁰⁰ For example, the Hong Kong Arbitration Ordinance allows courts to award interim relief to support arbitral proceeding in other jurisdiction, including directing the inspection, preservation, custody, detention or sale of any relevant property, and directing sample to be taken from, observations to be made of, or experiments to be conducted on any relevant property in Hong Kong; however, the interim relief will only be ordered to arbitral proceedings that are capable of giving rise to an interim or final award that are enforceable in Hong Kong under Hong Kong's statutes or the New York Convention. See s 60(1), (6) of the Arbitration Ordinance (Cap 609).

resisting enforcing ICSID awards, and unlike non-ICSID arbitration in which an implied waiver argument might be understandable under the New York Convention, ICSID jurisprudence fails to indicate that an implied waiver leads to a general exclusion of the immunity from execution.

In the second place, given the high rate of successful enforcement of non-ICSID awards in the investor-State arbitration context, there appears to be little evidence demonstrating an inferior enforcement mechanism in non-ICSID arbitration. In fact, a major attraction of non-ICSID arbitration is that the New York Convention avowedly establishes a pro-enforcement approach towards foreign arbitral awards. Compared to the Geneva Convention, the New York Convention not only takes a more restrictive approach to the grounds for refusal of enforcement, but also requires that the exhaustive grounds be narrowly construed and subject to a number of conditions, such as national courts' discretionary authorities, the *onus probandi* of resisting enforcement and the waiver of grounds, which are created so as to endorse the finality and integrity of non-ICSID arbitration and thus favour the enforcement of awards. In addition, a more favourable regime for enforcement, few limits on enforcement forum and the availability of relief remedies are also indubitably conducive to facilitating the enforcement of awards. Aside from the pro-enforcement mechanisms established under the New York Convention and domestic statutes, national courts, by and large, behave in support of enforcement of non-ICSID awards. Despite the tedious and burdensome procedures required under domestic statutes on occasion, judicial assistance for recognition and enforcement of awards is ordinarily well-established, largely well-functioning and basically consistent with fundamental objective of the New York Convention of promoting the international enforceability of arbitral awards.

Chapter V The Convergence of ICSID and Non-ICSID Arbitration

Notwithstanding the intrinsic and cogent divergence, the recent decades have seen an emerging convergence of ICSID and non-ICSID arbitration. Prior to embarking on an elaborate inquiry into the convergence, three underlying issues need to be examined. First, what is converging? In general, the convergence of ICSID and non-ICSID arbitration can take place in form and in essence. The convergence in form relates basically to the ever-increasing *ex parte* influence⁶⁰¹ or interactive impact⁶⁰² in terms of procedural matters. The convergence in essence, however, looks into more substantially functional integration.⁶⁰³ Second, what is the convergence towards? The direction of convergence of ICSID and non-ICSID arbitration is less complicated since it can be accepted that the convergence moves or is directed, by and large, towards each other, towards neutral, efficient and more convenient mechanisms for resolution of investment dispute or towards *jurisprudence constant*.

Third, how can the convergence be measured? It is of tremendous importance to specify the dimensions of convergence, without which research on convergence cannot be conducted. Nevertheless, in recent times there has been a scarcity of a general conceptual framework for the convergence of ICSID and non-ICSID arbitration, which gives rise to an extremely ambiguous threshold of integration, interaction and resemblance which could be considered to form, indicate or at least promote the convergence. As a consequence, it is difficult to deduce precise standards to measure the convergence. The only certainty is that it is emphatically not the case that the simple similarities of ICSID and non-ICSID arbitration will be examined. In this thesis, the term 'convergence' is conceptualized as two processes converging ICSID and non-ICSID arbitration. First, the convergence occurs in the form of increasingly similar characteristic traits of ICSID and non-ICSID arbitration. However, the convergence is more than the basic and simple resemblance of ICSID and non-ICSID arbitration such as similar time limitations to avoid unintended delays in the process of constitution of tribunals; instead, it examines more essential similarity of ICSID and non-ICSID arbitration that is able to advance the investment arbitration jurisprudence

⁶⁰¹ For example, ICSID's administrative and organizational support for non-ICSID arbitration cases.

⁶⁰² For example, the enforcement of ICSID's non-pecuniary award under the New York Convention and the enforcement of non-ICSID award by virtue of ICSID arbitral proceedings.

⁶⁰³ For example, the UNCITRAL's new transparency rules perform a similar function as what has been provided in the ICSID arbitration.

in the long run.⁶⁰⁴ Second, the convergence extends beyond the similar characteristic traits and reaches a higher level, focusing on the relationship, interplay and interaction between ICSID and non-ICSID arbitration.⁶⁰⁵

It should be also noted that strictly speaking, the term ‘convergence’ is not precisely the same as ‘unification’ or as ‘harmonization’. There is a slight difference between unification and harmonization. Unification contemplates the substitution of two or more legal systems with one single system, while harmonization seeks to coordinate different legal systems by eliminating major differences and creating minimum requirements or standards.⁶⁰⁶ Accordingly, harmonization can be deemed as a step towards unification and aims, in a way, towards unification.⁶⁰⁷ Apparently, convergence of ICSID and non-ICSID arbitration is not the same as unification since they originate from two stark disparate legal frameworks and it appears that they cannot be combined and replaced by a single system. Meanwhile, convergence is not totally the same as harmonization. The ‘convergence’ in this thesis has two sides. One side of the convergence refers to the substantial similarities and resemblances between ICSID and non-ICSID arbitration. In this regard, convergence can be regarded the same as harmonization in view of the fact that harmonization is ordinarily associated via positive pursuit by implementing legislation.⁶⁰⁸ One example of harmonisation in international investment arbitration is that as many States adopts the UNCITRAL Model Law on International Commercial Arbitration, there is a possibility that the grounds for setting aside non-ICSID arbitral awards in national laws are uniform, and parallel the grounds under the ICSID Convention. The other side of the convergence, however, is normally associated with a passive approach such as a natural convergence through custom and frequent use of harmonized principles.⁶⁰⁹ In some cases, the interplay

⁶⁰⁴ For example, after ICSID arbitration introduces more transparency to its arbitral proceedings in 2006, the UNCITRAL arbitration also provides the Transparency Rules in late 2013. Such similarity is substantive, and can have significant impacts on the development of international investment arbitration.

⁶⁰⁵ For example, the possibility of enforcing non-ICSID arbitral awards through ICSID arbitration, and enforcing ICSID non-pecuniary remedies under the New York Convention.

⁶⁰⁶ K. L. Bhati, *Textbook on Legal Language and Legal Writing* (Universal Law Publishing Co., 2010), 243.

⁶⁰⁷ As the UNICTRAL observes, ‘harmonization’ of the law of international trade may conceptually be thought of as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions, while ‘unification’ may be seen as the adoption by States of a common legal standard governing particular aspects of international business transactions. See FAQ - Origin, Mandate and Composition of UNCITRAL, available at < http://www.uncitral.org/uncitral/en/about/origin_faq.html>.

⁶⁰⁸ K. L. Bhati, *Textbook on Legal Language and Legal Writing*, 244.

⁶⁰⁹ *Ibid.*

and interaction between ICSID and non-ICSID arbitration are natural processes. For instance, in case of the enforcement of ICSID non-pecuniary awards under the New York Convention, it requires that ICSID tribunals render a non-pecuniary award and that the prevailing party choose to enforce the award under the New York Convention. Nonetheless, ICSID tribunals may be reluctant to make a non-pecuniary award, while the prevailing party can seek to obtain the award under national laws.

Though the convergence of ICSID and non-ICSID arbitration remains largely unexplored, it has emerged in a number of regions in the realm of international investment. Presumably, a variety of trajectories are able to direct towards the convergence, but the following has increasingly come into the spotlight as compared to the divergence of ICSID and non-ICSID arbitration.

1 The Emerging Convergence

1.1 The Jurisdiction of Tribunals

1.1.1 Expansion of the Ambit of Subject Matter

The convergence in the realm of jurisdiction, both extant and emerging, is reflected outwardly in the form of subject matter and inwardly in the form of substantive criteria. Insofar as subject matter is concerned, as the last few decades have seen an expansionary trend in ICSID jurisdiction, coupled with an extraordinarily broad scope of jurisdiction in non-ICSID arbitration, adjudication of a variety of disputes gradually falls within the ambit of competence of tribunals in investor-State arbitration: First, disputes that used to be adjudicated under the world trade system, such as international protection of intellectual property rights which States have been traditionally engaged by virtue of negotiation, interpretation and performance of the WTO's Agreement on Trade Related Aspects of Intellectual Property Rights, have emerged recently as qualified claims in investor-State arbitration.⁶¹⁰ Second, as the historical antipathy from banks and other financial institutions towards international arbitration seems to be diminished due to the impact of

⁶¹⁰ For example, claimants in *Philip Morris Asia Limited v. The Commonwealth of Australia* (UNCITRAL, PCA Case No 2012-12) and *Eli Lilly and Company v. The Government of Canada* (NAFTA/UNCITRAL, Notice of Arbitration, 12 September 2013) attempted to protect rights concerning trademark and patents.

financial crisis, the emphasis on dispute resolution in the financial world may shift from traditional litigation policy to international arbitration, leaving open the possibility of banking and finance disputes being accepted in investor-State arbitration.⁶¹¹ Since 2011 when the ICSID tribunal in *Abaclat and others v. Argentine Republic* rendered a milestone decision confirming its jurisdiction on the ground that sovereign debt was qualified as an investment,⁶¹² the European sovereign debt crisis has further reinforced the progressively vigorous role of investment arbitration in solving disputes related to sovereign debt restructuring. For example, the recent Cypriot banking crisis has led to an ICSID arbitration case brought by Greek investors against Cyprus,⁶¹³ and the arbitration filed by Slovak and Cypriot investors against Greece is also underway in the aftermath of the Greek haircut of 2012.⁶¹⁴ In the way of extending jurisdiction similarly and equally over emerging disputes on the basis of the complexity and uncertainty of the concept 'investment', the discrepancy of jurisdiction requirements in ICSID and non-ICSID arbitration is somehow reducing, which can be deemed as a signal of the convergence in the long run.

1.1.2 'Salini Test' Applied in Non-ICSID Arbitration

As compared to the convergence in form resulting from emerging subject matter, a more essential convergence is ascribed to the substantive criteria for determining the eligible investment in both ICSID and non-ICSID arbitration. It is submitted that the UNCITRAL tribunal in *Romak S.A. (Switzerland) v. The Republic of Uzbekistan* brought, *de facto*, the gap between *ratione materiae* of the two different instruments - ICSID and non-ICSID arbitration. In this case, the claimant initially contended that the 'Salini test', which was developed from ICSID jurisprudence,⁶¹⁵ should be inapplicable and irrelevant since the

⁶¹¹ For example, *Abaclat and Others v. Argentine Republic*, ICSID Case No ARB/07/5; *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No ARB/97/4; *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No ARB/96/3.

⁶¹² ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011.

⁶¹³ For example, *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus*, ICSID Case No ARB/13/27.

⁶¹⁴ For example, *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No ARB/13/8.

⁶¹⁵ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 16 July 2001, paras 52-58.

present arbitration was conducted under the auspices of the UNCITRAL Rules.⁶¹⁶ Furthermore, the claimant asserted that even though the ‘Salini test’ could be applied in the present UNCITRAL case, its contractual right also fulfilled the test.⁶¹⁷ The submission of the claimant, however, was declined by the tribunal. In construing the notion of ‘investment’, the tribunal found it necessary to interpret the ordinary meaning of ‘investment’ under the Switzerland-Uzbekistan BIT (1993) on the basis of the context, object and purpose of the BIT.⁶¹⁸ Nonetheless, such approach failed to achieve the goal of identifying the investment: (i) as to the context analysis, the tribunal determined that the BIT was not exhaustive, and the term ‘investment’ had an intrinsic meaning which was independent of the categories enumerated in the BIT.⁶¹⁹ (ii) When denoting the object and purpose of the BIT, the tribunal referred to the ‘economic cooperation’ and ‘aim to foster the prosperity’ stated in the BIT, but concluded that the object and purpose left the term ‘investment’ ambiguous or obscure.⁶²⁰

In its search for the contours of the notion of ‘investment’, the tribunal denied the claimant’s argument that the meaning of ‘investment’ might vary, depending on the investor’s selection between ICSID and UNCITRAL arbitration. As the tribunal observed, the choice between a range of dispute resolution mechanisms offered by the investment treaty could not have an impact on the notion of investment, since it was absurd and unreasonable to maintain that the substantive protection provided by the investment treaty would be narrowed or widened merely by virtue of fora selection.⁶²¹ The tribunal further realized that the conceptualist approach to identifying the existence of investment in ICSID jurisprudence helped to explain the reasoning of the present case, and the ‘Salini test’ was a typical example of a conceptualist approach.⁶²² By trimming down the four requirements of the ‘Salini test’, the tribunal only considered three requirements, namely a contribution in money or other assets, duration and risk.⁶²³ The adoption of a ‘slimmed down Salini test’ in construing the dispute in UNCITRAL arbitration made it clear that according to the

⁶¹⁶ *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, PCA Case No AA280, Award, 26 November 2009, para 107.

⁶¹⁷ *Ibid*, para 108.

⁶¹⁸ *Ibid*, para 176.

⁶¹⁹ *Ibid*, paras 180, 188.

⁶²⁰ *Ibid*, para 189.

⁶²¹ *Ibid*, paras 193-94.

⁶²² *Ibid*, paras 197-98.

⁶²³ *Ibid*, para 207.

tribunal's decision, the benchmark against which an investment was measured under the ICSID Convention should also be applied equally in UNCITRAL arbitration, provided that the right to opt for UNCITRAL arbitration derived from investment treaties. Under the circumstance, no matter how broad the definition of 'commercial' in UNCITRAL arbitration might be, the notion of 'investment' in UNCITRAL arbitration was still subject to the jurisdictional requirement under article 25(1) of the ICSID Convention. In other words, the concept of 'investment' was the same in ICSID and UNCITRAL arbitration. If the landmark decision was buttressed by subsequent cases, this can be the first sign of a *jurisprudence constante* beginning to form.⁶²⁴

Nevertheless, it is apparent that what an UNCITRAL arbitral tribunal produces is merely an *ad hoc* award with no *stare decisis*. The tribunal in the *Romak* case also acknowledged that it had not been entrusted with a mission to ensure the coherence or development of arbitral jurisprudence; instead, its mission was to resolve the present dispute in a reasoned and persuasive manner.⁶²⁵ Furthermore, the reasoning for the tribunal's conclusion that the term 'investment' entailed the same meaning in an investment treaty and the ICSID Convention is debatable. As analysed above, the tribunal maintained that the substantial protection obtainable in the investment treaty would not be narrowed or widened simply by a choice of different dispute settlement instruments provided by the investment treaty. This observation, however, runs counter to the separate jurisdictional requirements in different instruments. In reality, every instrument can specify its rules with respect to *ratione personae*, *ratione materiae* and *ratione temporis*. For instance, a claim for violation of a right under an investment treaty that does not arise directly out of an investment falls within the jurisdiction under the ICSID Additional Facility Rules and most mainstream non-ICSID arbitration rules, but such claim would never enter into the competence of ICSID tribunals. Accordingly, the notion of investment under an investment treaty may diverge from that under the ICSID Convention or non-ICSID arbitration rules. Be that as it may, there is still a possibility for the *Romak* decision to be quoted in future cases, given that the decision itself is generally eloquent and tenable. As the tribunal in the *Romak* case virtually took a fundamental stride in the direction of bringing the gap in the definition of investment applicable in ICSID and UNCITRAL arbitration, it remains conceivable that

⁶²⁴ Laura Halonen, 'Bridging the Gap in the Notion of 'Investment' between ICSID and UNCITRAL Arbitrations: Note on an Award Rendered under the Bilateral Investment Treaty between Switzerland and Uzbekistan (*Romak SA v Uzbekistan*)' (2011) 29 ASA Bulletin 312, 324.

⁶²⁵ *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, Award, 26 November 2009, para 171.

the convergence of jurisdiction between ICSID and non-ICSID arbitration towards *jurisprudence constant* may occur, or is occurring.

1.2 The Role of Institutions

1.2.1 ICSID's Administrative Support for Non-ICSID Arbitration

The convergence concerning the role of institutions, akin to the convergence of jurisdiction, is also reflected outwardly in form and inwardly in essence. At present, the convergence in form is ordinarily involved with the *ex parte* utilization of ICSID administrative functions in non-ICSID arbitration. To be more specific, the ICSID Secretariat provides a variety of organizational and administrative support for non-ICSID arbitration, including services ranging from assistance with the organization of hearings to numerous administrative services comparable to those accommodated in ICSID arbitration.⁶²⁶ Furthermore, the ICSID Secretariat also acts as appointing authority in the event that an arbitrator is unsuccessfully appointed by the disputing parties, and decides proposals for disqualification of arbitrators.⁶²⁷ However, the ICSID Secretariat is not obliged to exercise its power of appointment in non-ICSID arbitration and in practice it does not agree to act as appointing authority for all cases.⁶²⁸ Therefore, disputing parties must obtain the Secretariat's consent in advance by submitting a designation request⁶²⁹ if they are determined to utilize such facility. By the end of 2013, the ICSID Secretariat had provided organizational and administrative assistance in 78 non-ICSID cases since 2005, 67 of which were conducted under the aegis of the UNCITRAL Rules.⁶³⁰ In fact, many non-ICSID arbitration institutions, such as the PCA, SCC, ICC and LCIA, also provide the services of organization of hearings for *ad hoc* arbitration. It is intriguing that as the only arbitration institution specified in the UNCITRAL Arbitration Rules,⁶³¹ the PCA acts as registry in 50 investor-State arbitration cases based on investment treaties or investment

⁶²⁶ ICSID, ICSID Caseload - Statistics, 2014-1, 9.

⁶²⁷ Ibid

⁶²⁸ Lucy Reed, *et al*, *Guide to ICSID Arbitration*, 20.

⁶²⁹ The ICSID Model Clause offers a sample of designation of the ICSID Secretariat as appointing authority. See clause 22 of the ICSID Model Clause.

⁶³⁰ ICSID, 'ICSID Caseload – Statistics', 2014-1, 9.

⁶³¹ Arts 6, 7, 8 & 12 of the UNCITRAL Arbitration Rules (2010) refer to designating and appointing authorities, and challenge of arbitrators.

laws.⁶³² The comparison of the number of non-ICSID cases administered and registered respectively in ICSID and PCA arbitration, though not exhausted, is sufficient to indicate that ICSID is gradually playing an active role in supporting non-ICSID cases with organizational and administrative services, which constitutes, to some extent, the convergence between ICSID and non-ICSID arbitration.

1.2.2 Incremental Transparency

The far-reaching convergence between ICSID and non-ICSID arbitration concerns the appropriate level of transparency in the investor-State dispute resolution mechanism. It is widely recognized that the ICSID Secretariat has long devoted a special proportion of its mission to promoting transparency. In particular, in 2005 the Secretariat finalized an overarching proposed amended text of the ICSID Arbitration Rules, attempting to adequately meet the requirements of ICSID's users and to reflect current arbitration practices. The resulting amendment attached great importance to the transparency, establishing a number of processes making ICSID arbitration more streamlined and transparent which included, *inter alia*, public attendance and observation of hearings,⁶³³ *amicus curiae* briefs and third-party participation,⁶³⁴ and publication of arbitral awards.⁶³⁵ The amendment was applied for the first time in *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* where the tribunal considered that the third-parties had a sufficient interest in the proceedings, and that the participation of third-parties had the reasonable potential to discharge the tribunal's mandate and secure wider confidence in the proceedings,⁶³⁶ thereby granting the third-parties the chance to file a written submission pursuant to Rule 37(2).⁶³⁷ However, the third-parties' requests to have access to the key documents and to attend the oral hearings were dismissed on the grounds that there were specific reasons of procedural integrity⁶³⁸ leading the tribunal to impose certain limitation

⁶³² See the official website of the Permanent Court of Arbitration <http://pca-cpa.org/showpage.asp?pag_id=1029> accessed 15 May 2014.

⁶³³ R 32 of the ICSID Arbitration Rules.

⁶³⁴ *Ibid*, r 37(2).

⁶³⁵ R 48 of the ICSID Arbitration Rules and reg 22 of the ICSID Administrative and Financial Regulations.

⁶³⁶ ICSID Case No ARB/05/22, Procedural Order No 6, 25 April 2007, para 50.

⁶³⁷ *Ibid*, para 55.

⁶³⁸ The reasons set out in Procedural Order No 3, 29 September 2006.

on disclosure,⁶³⁹ and that the tribunal had no power to permit the presence or participation of the third-parties at the hearing since the claimant objected to such petition.⁶⁴⁰ In any event, by establishing the incremental transparency and public participation which reflect the current trend in investment arbitration, ICSID strives to deliver a more dynamic and vigorous system for investor-State dispute resolution.

By contrast, investor-State non-ICSID arbitration, irrespective of *ad hoc* or institutional arbitration, generally inherits from international commercial arbitration the characteristic of confidentiality which is traditionally acknowledged as one of the essential advantages of arbitration,⁶⁴¹ in particular given that the same arbitration rules are applicable to the adjudication of both commercial and investment arbitration. As public interests in investment arbitration are broadly recognized, the harsh challenge of the presumption of confidentiality of the investor-State non-ICSID arbitral process has prompted arbitration institutions and other entities to mandate a degree of transparency throughout the investment arbitral process. ICC has intended to ensure transparency in dispute resolution processes,⁶⁴² especially those involving States and States entities. Nevertheless, third-parties' submission and publication of documents are absent in the ICC Arbitration Rules (2012). The ICC Commission Report on Arbitration Involving States and State Entities recommends that parties can modify the standard ICC Rules, and agree on greater transparency, for instance, by providing for submission and awards to be made public.⁶⁴³ ICC arbitration therefore leaves the issues to disputing parties, subject to relevant applicable laws. The PCA Arbitration Rules (2012) also offer a small amount of transparency, including open hearings agreed by disputing parties⁶⁴⁴ and publication of awards with the consent of all parties or where disclosure is required of one party by legal duty to protect legal rights or relevant judicial proceedings.⁶⁴⁵

⁶³⁹ Procedural Order No 6, 25 April 2007, para 66.

⁶⁴⁰ *Ibid*, para 71.

⁶⁴¹ Nigel Blackaby, *et al*, *Redfern and Hunter on International Arbitration*, 136.

⁶⁴² As the booklet of ICC Arbitration and ADR Rules (2012) states, the rules 'define a structured, institutional framework intended to ensure transparency, efficiency and fairness' of arbitral process.

⁶⁴³ The ICC Commission Report on Arbitration Involving States and State Entities under the ICC Rules of Arbitration, 2012, paras 15 & 22.

⁶⁴⁴ Art 28(3) of the PCA Arbitration Rules.

⁶⁴⁵ *Ibid*, art 34(5).

The most recently notable initiative is taken by the UNCITRAL. Five years after officially acknowledging the implication of the public as a stakeholder in treaty-based investor-State arbitration,⁶⁴⁶ and three years after embarking on developing standards to foster transparency,⁶⁴⁷ UNCITRAL eventually adopted in 2013 the Rules on Transparency in Treaty-based Investor-State Arbitration which constituted an innovative set of procedural rules ensuring the public's accessibility to arbitration proceedings. The brand-new UNCITRAL Transparency Rules offer far wider openness of proceedings: first, a fairly wide set of documents, including information at the commencement of proceedings, written submission of parties and decisions of tribunals, should be published.⁶⁴⁸ Second, arbitral tribunals have their discretionary authority to accept submission from *amicus curiae*⁶⁴⁹ and from non-disputing State parties to relevant treaties on issues of treaty interpretation.⁶⁵⁰ Third, hearings should be open.⁶⁵¹ Though the Transparency Rules are subject to exceptions for confidential information protection, integrity of arbitral process protection⁶⁵² and logistical reasons for private hearing⁶⁵³ to balance diverse interests relating to disclosure, the Rules go one step further on the whole than ICSID, ICC and PCA. For instance, the ICSID Convention and Arbitration Rules do not require disputing parties' pleadings and other information to be published, but they require disputing parties' consent for third-parties' attendance of hearing⁶⁵⁴ and for publication of decisions.⁶⁵⁵

The promotion of transparency in non-ICSID arbitration reflects global acknowledgment of investor-State arbitration's connection with public interests and taxpayer funds, which is

⁶⁴⁶ The 41st session of UNCITRAL Commission instructed the Working Group II (Arbitration and Conciliation) to address transparency in treaty-based investor-State arbitration as a matter of priority immediately after the completion of revision of the UNCITRAL Arbitration Rules. See Report of the United Nations Commission on International Trade Law, 41st session, 16 June-3 July 2008, para 314.

⁶⁴⁷ Negotiation begun with the submission of comments from governments in the 2010 session of the Working Group II.

⁶⁴⁸ Arts 2 & 3 of the UNCITRAL Transparency Rules.

⁶⁴⁹ Art 4 of the UNCITRAL Transparency Rules. The Rules only permit 'written submissions', which indicates that other forms of participation, such as statements at hearings, are not acknowledged. Nonetheless, other forms of participation in accordance with art 15 of the 1976 UNCITRAL Rules and art 17 of the 2010 and 2013 UNCITRAL Rules might be allowed at the discretion of arbitral tribunals.

⁶⁵⁰ Art 5 of the UNCITRAL Transparency Rules.

⁶⁵¹ *Ibid*, art 6.

⁶⁵² *Ibid*, art 7.

⁶⁵³ *Ibid*, art 6.

⁶⁵⁴ R 32(2) of the ICSID Arbitration Rules.

⁶⁵⁵ Art 48(5) of the ICSID Convention and r 48(4) of the ICSID Arbitration Rules.

generally consistent with ICSID's arbitration practice. In this sense, it has become moderately evident that ICSID and non-ICSID arbitration is converging towards more neutral dispute resolution mechanisms in which the transparency is employed as a tool to ensure effective public participation, accountability, predictability and legitimacy that are essential to justice and fairness. Such convergence is, unambiguously, significant and substantial.

1.3 Post-award Remedies

It appears that convergence has not occurred in the field of post-award remedies due to the heterogeneous structures of annulment in ICSID arbitration and vacatur in non-ICSID arbitration. It is also unfeasible or impossible for the convergence to play a minor role in this part of investor-State arbitration in the future, since the divergence extends from different regulations contained in international or regional conventions⁶⁵⁶ to arbitration statutes in force in various States. Be that as it may, the current development of international arbitration might shed some light on how ICSID and non-ICSID arbitration move in the same direction to a tiny extent. First, the convergence in private international law has created harmonized rules in many ways,⁶⁵⁷ which is likely to have an inkling of uniform or worldwide accepted grounds for setting aside non-ICSID awards paralleling those set out under the ICSID Convention. Second, the AAA's 2013 Optional Appellate Arbitration Rules establish an appellate scheme under which arbitral decisions may be appealed to appeal tribunals comprised of arbitrators selected from panels maintained by the AAA or the International Centre for Dispute Resolution (hereinafter 'ICDR'). The decisions of appeal tribunals, which can uphold or reverse the underlying arbitral decisions, are final and binding. Though ICSID *ad hoc* committees cannot act as appellate courts, the way that AAA appeal tribunals commence and their authority to review decisions are similar to those applicable in ICSID arbitration. Nevertheless, given that international arbitral awards shall be commonly final, conclusive and binding on the parties, the AAA practice is quite exceptional and thus cannot be considered a signal of a convergence of ICSID and non-ICSID arbitration.

⁶⁵⁶ For example, the ICSID Convention and the European Convention on International Commercial Arbitration.

⁶⁵⁷ See, eg, Katharina Boele-Woelki, *et al* (eds), *Convergence and Divergence in Private International Law - Liber Amicorum Kurt Siehr* (Eleven International Publishing, 2010).

1.4 Recognition and Enforcement of Arbitral Awards

1.4.1 Enforcement of ICSID Non-Pecuniary Remedies under the New York Convention

Non-pecuniary remedies are not rare in the practice of international arbitration,⁶⁵⁸ and there are also a number of non-pecuniary obligations that investor-State arbitral tribunals may impose upon disputing parties. Such obligations include the compliance with performance requirements⁶⁵⁹ and the reinstatement of wrongfully discharged personnel which are applied to investors, and the restitution of seized property, the cessation of collecting unreasonable taxes, the permission to transfer currency and the discontinuance of disturbing investors' personnel which are imposed on States.⁶⁶⁰ An intriguing question arises as the ICSID Convention creates a self-contained system for the purpose of enforcement, the system does not extend to the enforcement of non-pecuniary obligations arising from awards.⁶⁶¹ The *travaux préparatoires* of the Convention indicated that concerns about the unfeasibility of enforcement of non-pecuniary obligations led to the restriction of enforcement to pecuniary obligations.⁶⁶² Thus, the enforcement of non-pecuniary remedies included in ICSID awards has to rely on other instruments. It is conceivable that non-pecuniary remedies might be enforced under the national laws of States where the enforcement is sought or under the New York Convention. Obviously, the general ubiquity of enforcement and no comparable restriction to pecuniary obligations make the New York Convention a potential instrument to enforce non-pecuniary remedies

⁶⁵⁸ Michael E. Schneider, 'Non-Monetary Relief in International Arbitration: Principles and Arbitration Practice' in Michael E. Schneider, *et al* (eds), *Performance as a Remedy: Non-Monetary Relief in International Arbitration* (JurisNet, 2011) 15-26.

⁶⁵⁹ The imposition of performance requirements to inward foreign direct investment may serve as a crucial policy tool in an attempt to strengthen the industrial base and gear industries towards host States' economic development. The performance requirements can be ordinarily divided into three types: (i) the requirements that are prohibited by the WTO Agreement on Trade-Related Investment Measures (hereinafter 'TRIMs') such as local content requirements; (ii) the requirements that are normally prohibited, conditioned or discouraged by investment treaties, and (iii) all other requirements that are not subject to any investment treaties. The performance requirements relating to investor-State arbitration fall into the second type which mainly contains joint ventures or domestic equity, technology or other proprietary knowledge transfer and employment requirements.

⁶⁶⁰ Christoph Schreuer, 'Non-Pecuniary Remedies in ICSID Arbitration' (2004) 20 *Arb Intl* 325, 332.

⁶⁶¹ Art 54 of the ICSID Convention.

⁶⁶² For example, the enforcement of an ICSID award which granted a specific performance may encounter a main hurdle if courts in the State where enforcement is sought have no authority to issue or order the specific performance. See Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 1136-37.

granted in ICSID awards. Though ICSID tribunals have not ordered any non-pecuniary remedy, it is still possible that injunctions or specific performance are issued in future ICSID awards⁶⁶³ and such non-pecuniary remedies would be enforced under the New York Convention. The enforcement of non-pecuniary remedies by virtue of traditional non-ICSID arbitration enforcement mechanism therefore leaves open the possibility of future convergence between ICSID and non-ICSID arbitration.

It should further be noted that the convergence in regard to the enforcement of non-pecuniary remedies, however, will be extraordinarily limited in the light of the nearly unrealistic circumstance where non-pecuniary remedies are ordered by ICSID tribunals. The scarcity of non-pecuniary remedies being issued in ICSID awards can be ascribed, in principle, to three factors. First, non-pecuniary remedies are not necessary in many claims, and even if they are applicable, in theory, they normally fail to correspond to investors' expectation of seeking compensation. As a matter of fact, while investors may seek non-pecuniary remedies as provisional relief before and during the arbitral proceedings, they ordinarily claim damages in monetary terms. Second, investment treaties usually focus merely on monetary compensation because only when the expropriation, regardless of overt or indirect forms, is accompanied by compensation that is prompt, adequate and effective,⁶⁶⁴ will the States be able to successfully defend that the expropriation conducted under sovereign rights is legal. In any event, it seems that emphasis in most cases will always be on whether compensation was prompt, adequate and effective, rather than the *restitutio in integrum* (ie, restoration of investors' rights to the contractual position).

The third factor relates to the general reluctance of ICSID tribunals to order non-pecuniary remedies. Investors in a few cases had raised the non-pecuniary claims, but early practice showed that ICSID tribunals doubted their authority to issue non-pecuniary remedies. In *Amco Asia Corporation and others v. Republic of Indonesia* where Indonesia revoked a licence granted to Amco for the purpose of hotel construction and operation, the tribunal

⁶⁶³ For example, as elucidated previously, the claimants in *Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. Republic of Indonesia* (ICSID Case No. ARB/14/15) filed in July 2014 an arbitration request, seeking relief to resume export as the Indonesian government issued a mineral-export ban policy.

⁶⁶⁴ The UNCTAD report had shown that an overwhelming majority of investment treaties include four requirements for a lawful expropriation: public purpose, non-discrimination, due process and payment of compensation. As to standard of compensation, most treaties have incorporated the Hull formula of prompt, adequate and effective compensation. See UNCTAD, 'Expropriation', UNCTAD Series on Issues in International Investment Agreements II, 2012, 27, 40.

determined that it could not substitute itself for the Indonesian government to cancel the revocation and restore the licence since this kind of *restitutio in integrum* could be ordered against a sovereign State.⁶⁶⁵ More than a decade later, the tribunal in *Antoine Goetz and others v. Republic of Burundi* deliberately bypassed the issue as to whether its authority extended to ordering non-pecuniary remedies; instead, the tribunal rendered an interim decision on liability in which Burundi must either pay effective and adequate indemnity for the termination of the licence or reinstate the licence.⁶⁶⁶ In other words, the restoration of investor' right was one of the options and the final choice lay within the sovereign discretion of Burundi. Until the decision on jurisdiction was rendered in 2004 in *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, the ICSID tribunal eventually affirmed its power to order measures involving performance or injunction of certain acts.⁶⁶⁷ However, the tribunal only granted compensation in the form of pecuniary damages but did not order restitution due to the absence of an agreed form of restitution. As a consequence, non-pecuniary remedies still remain as *de jure* relief without being ordered by any ICSID tribunal.

1.4.2 Enforcing Non-ICSID Awards Through ICSID Arbitration

The convergence in recognition and enforcement of arbitral awards is also reflected in a possible and feasible enforcement scheme in which non-compliance with non-ICSID awards can be a critical factor for ICSID tribunals to determine a violation of obligations under investment treaties. In *Desert Line Projects LLC v. The Republic of Yemen*, the Omani corporation initiated *ad hoc* arbitration in Yemen against the government of Yemen in the aftermath of the outstanding payments from a series of construction contracts, and obtained in 2004 a favourable arbitral award. However, the government of Yemen applied to the Yemeni courts in an attempt to set aside the arbitral award on the grounds of the invalidity of the arbitration agreement and the violation of its due process rights. Under the pressure of hostility and intimidation from the respondent and its national courts, Desert

⁶⁶⁵ ICSID Case No ARB/81/1, Award, 20 November 1984, para 202.

⁶⁶⁶ ICSID Case No ARB/95/3, Award, 10 February 1999, para 135; English translation in 6 ICSID Rep 5, 45 (2004).

⁶⁶⁷ ICSID Case No ARB/01/3, Decision on Jurisdiction, 14 January 2004, para 81. The tribunal examined the powers of international courts and tribunals to order non-pecuniary remedies by referring to awards rendered in *Case Concerning the Rainbow Warrior Affair (New Zealand v. France)* and *Antoine Goetz et consorts v. République du Burundi* and Schreuer' masterwork *The ICSID Convention: A Commentary* prior to making the conclusion (Decision on Jurisdiction, paras 79 & 80).

Line Projects LLC signed an agreement proposed by the respondent offering the claimant a substantially lesser amount of compensation than that in the arbitral award as a final settlement of the dispute. After several efforts to challenge the validity of the settlement agreement were to no avail, Desert Line Projects LLC brought the case before an ICSID arbitral tribunal, contending that the government of Yemen had breached the Yemen-Oman BIT and/or international law.⁶⁶⁸

The ICSID tribunal found that the present arbitration case had three jurisdictional pillars, namely the undisputable article 25 of the ICSID Convention, the claimant's request for arbitration and the controversial Yemen-Oman BIT under which the tribunal was alleged by the respondent lacking jurisdiction.⁶⁶⁹ As to the controversy concerning the Yemen-Oman BIT, the tribunal was of the opinion that the dispute was a qualified investment under the BIT,⁶⁷⁰ and that the Yemeni arbitration which was commenced pursuant to contracts was fundamentally distinct from the present ICSID arbitration which related to the BIT claim.⁶⁷¹ Following the confirmation of jurisdiction over the dispute, the tribunal further denied the validity of the settlement agreement since the Yemeni arbitration had a final and binding character, precluding any negotiation aiming to reduce the amount of payment stated in the arbitral award.⁶⁷² Based on the findings regarding Yemen's breach of BIT, the tribunal ultimately awarded compensation equivalent to the value of the Yemeni arbitral award. The rationale of this case rested principally on the different jurisdictional bases of non-ICSID and ICSID arbitration: the non-ICSID arbitration (Yemeni arbitration) was based on the violation of private rights under contracts, whereas the ICSID arbitration was commenced in view of the fact that the government of Yemen had breached substantial standards under the BIT. Accordingly, the ICSID tribunal exercised its jurisdiction over the disputes without running counter to the principle of *res judicata*. Strictly speaking, this case merely indicates that ICSID arbitration can take a part in remedying injustice that investors suffer from States' non-implementation of their obligation to enforce non-ICSID arbitral awards under the New York Convention, rather than buttressing the direct enforcement of non-ICSID arbitral awards through ICSID arbitration. More precisely, what current jurisprudential rationale acknowledges is simply

⁶⁶⁸ ICSID Case No ARB/05/17, Award, 6 February 2008, paras 3-48.

⁶⁶⁹ *Ibid.*, paras 83-84.

⁶⁷⁰ *Ibid.*, para 122.

⁶⁷¹ *Ibid.*, para 137.

⁶⁷² *Ibid.*, para 177.

the ICSID arbitration's possible role in dealing with contract-based non-ICSID arbitral awards.

A more unequivocal interaction between ICSID and non-ICSID arbitration in the realm of enforcement focuses on more direct enforcement of non-ICSID arbitral awards through ICSID arbitration. In *Saipem S. p. A. v. Bangladesh*, the Italian investor Saipem first claimed compensation in an ICC arbitration case against Petrobangla (a State entity in Bangladesh) on the basis of the Petrobangla's violation of contracts for the construction of a pipeline to carry condensate and gas in Bangladesh. During the arbitral process and after receiving an adverse award, Petrobangla took a variety of measures to disrupt the integrity of arbitration and applied to set aside the ICC award before the High Court Division of the Supreme Court of Bangladesh. The High Court Division dismissed the application as it was misconceived and incompetent, since the High Court Division held that the ICC award was non-existent and devoid of any legal foundation.⁶⁷³ In 2004 Saipem initiated ICSID arbitration under the Italy-Bangladesh BIT, and one of the claims was that Bangladesh, in the form of its national courts, had extinguished Saipem's right to acquire the payment awarded by the ICC award.⁶⁷⁴ In determining whether actions of (or actions attributable to) Bangladesh amounted to, or were tantamount to, expropriation, the ICSID tribunal in the first place emphasized that the substantial deprivation of Saipem's right to enjoy the benefit of the ICC award was insufficient to draw a conclusion that the intervention of the High Court Division was tantamount to an expropriation since the vacatur of an award was within the ambit of sovereign rights and could not necessarily constitute a claim for expropriation.⁶⁷⁵ However, based on the findings that the Bangladeshi courts' revocation of the ICC arbitral tribunal's authority contradicted with the principle of prohibition of abuse of rights under international law⁶⁷⁶ and the right to arbitrate under article II of the New York Convention,⁶⁷⁷ the ICSID tribunal further determined that the decision of the High Court Division was flawed under international law despite its plausible legitimacy under domestic law, in particular given that Petrobangla felt compelled to set aside the ICC award. As the ICSID tribunal observed, the High Court Division's decision declaring the

⁶⁷³ ICSID Case No ARB/05/7, Award, 30 June 2009, paras 6-50.

⁶⁷⁴ Saipem alleged that Petrobangla had colluded with Bangladesh courts to sabotage the ICC arbitration thus its investment had been expropriated under Italy-Bangladesh BIT.

⁶⁷⁵ *Ibid*, para 133.

⁶⁷⁶ *Ibid*, paras 156-161.

⁶⁷⁷ *Ibid*, paras 165-170.

ICC award non-existent indeed constituted the *coup de grâce* given to the arbitral process, therefore casting out all doubt about the effect of the intervention of the Bangladeshi courts.⁶⁷⁸ In conclusion, the tribunal considered that the amount of compensation the ICC had awarded corresponded to the evaluation of the compensation resulting from Bangladesh's violation of the BIT.⁶⁷⁹

The case has demonstrated that the fact that Bangladesh, through its domestic courts, frustrated Saipem's ability to obtain the benefit of the ICC award was a critical factor for the ICSID tribunal to uphold the claim of expropriation. In essence, the effect of the ICSID tribunal awarding the amount of compensation equating to the value of the underlying ICC award is somehow equivalent to the enforcement of the ICC award through ICSID arbitral proceedings. Though the ICC award is rendered in arbitral procedures only involving businessmen, it is slightly analogous to an investor-State award in the light of the status of Petrobangla as a State entity. In fact, as States have increasingly engaged in commercial activities over the past decades, the boundary between the public and private sectors is seemingly blurred.⁶⁸⁰ More importantly, the reasoning that the intervention of Bangladeshi courts in relation to the enforcement of the ICC award was taken into account when determining Bangladesh's violation of the BIT in ICSID arbitration may shed new light on the interaction between ICSID and non-ICSID investor-State arbitration.

2 The Driving Force of Convergence

2.1 Influence of Convergence on Related Areas

2.1.1 Convergence of International Trade and Investor-State Arbitration

The identical missions to promote investment protection and economic integration have shored up an emerging convergence of international trade and investor-State arbitration. The convergence appears increasingly in an interactive manner. First, one salient development signalling the convergence of international trade and investor-State

⁶⁷⁸ Ibid, para 173.

⁶⁷⁹ Ibid, para 202.

⁶⁸⁰ Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law*, 94.

arbitration is the utilization of trade remedies to enforce investment arbitral awards. Considering that preferential trade benefits accorded by developed countries to developing countries are allowable under the WTO framework and that the conditions imposed upon beneficiary countries may include the recognition and enforcement of investment arbitral awards, a developed country may suspend, withdraw or cancel the preferential trade benefits if the beneficiary country fails to comply with investment arbitral awards in favour of investors of the developed country. In other words, in case of a particular country's non-compliance with investment arbitral awards, the suspension, withdrawal or cancellation of preferential trade benefits would nudge the country towards the enforcement of awards. Though controversy exists as to whether the withdrawn of preferential trade benefits is consistent with the WTO obligation,⁶⁸¹ U.S. water services company Azurix Corp and

⁶⁸¹ In the light of the scarce WTO jurisprudence on the preferential trade benefits, it is still controversial as to whether imposing compliance with investment arbitral awards on beneficiary countries is consistent with WTO obligation. According to the enable clause, contracting parties may accord differential and more favourable treatment to developing and least developed countries, provided that such treatment (i) is accorded in a non-discriminatory manner among similarly-situated countries, and (ii) is designed or modified to respond positively to the development, financial and trade needs of the developing and least developed countries (see Decision of the General Agreement on Tariffs and Trade in 1979 (L/4903)).

As to the first requirement, it is apparent that only the country that fails to comply with investment arbitral award would suffer the withdrawal of preferential trade benefits, and such withdrawal would have a disparate impact which would tantamount to denying the non-discriminatory basis. As to the second requirement, it is arguable that whether the recognition and enforcement of investment arbitral awards is actually related to the developing country's development and trade needs.

In response to the query, some scholars present that in the first place there is no discrimination for all developing countries to apply to preferential trade benefits since developing countries are equally eligible to be accorded such benefits on the same terms which may include, *inter alia*, the recognition and enforcement of investment arbitral awards in good faith, and there is also no discrimination to withdraw a developing country's eligibility since the same terms are applied equally to all developing countries. Therefore, in case of a violation of the terms, ie, failure to fulfil its obligation to comply with investment arbitral awards under relevant conventions or treaties, the country is aware of the risks of losing its preferential trade benefits eligibility. In the second place, strings attached to preferential trade benefits contain legion needs ranging from human rights to contractual compliance, which are mutually-beneficial to both developed and developing countries. Non-compliance with investment arbitral awards sends a signal to existing and prospective investors that the country is not a predictable and reliable trading partner.

In addition, art XX(d) of the GATT 1947 provides an exception that a measure is necessary to secure the compliance with laws or regulations which are not inconsistent with the provisions of GATT. Laws and regulations according preferential trade benefits to developing countries on conditions that investment arbitral awards should be honoured are not inconsistent with WTO obligation since they simply create a private right of action for claimants (investors). Some commentators assert that the common theme of art XX(d) is government regulations of activity undertaken by a variety of economic actors and refers to rules that form part of the domestic legal system of a WTO member; accordingly, laws and regulations requiring the compliance with investment arbitral awards are the kind of domestic economic regulations. In contrast, opponents contend that securing the compliance with investment arbitral awards does not fall within the scope of domestic economic regulations. Domestic economic regulations normally deal with customs enforcement and anti-competitive or deceptive trade practices, which are obvious within the ambit of art

CMS Gas Transmission Company⁶⁸² have successfully campaigned to suspend Generalized System of Preferences conferred on Argentina because Argentina has not ‘acted in good faith in enforcing arbitral awards in favour of United States citizens’.⁶⁸³ If the withdrawal of preferential trade benefits is not sufficient to pressure Argentina to comply with an investment arbitral award, further pursuit of a Section 301 action may be justifiable.⁶⁸⁴

Second, investor-State arbitration can also be employed as an instrument to enforce WTO commitments. More precisely, it is the broad umbrella clause contained in a number of BITs⁶⁸⁵ that can be adopted to vindicate international trade rights. In fact, many ICSID tribunals have taken a broad approach to construe the umbrella clause, granting foreign investors treaty rights concerning unilateral undertakings of host States contained in relevant contracts, national statutes or treaties.⁶⁸⁶ Relying on the broad umbrella clause,

XX(d); but these customs enforcement and trade practice are not similar to the compliance with investment arbitral awards. See Roger P. Alford, ‘The Convergence of International Trade and Investment Arbitration’ (2014) 12 Santa Clara J Intl L 35, 50-60; Simon Lester, ‘More on GSP Withdrawal to Enforce Arbitration Awards’, International Economic Law and Policy Blog, 25 March 2014.

⁶⁸² In *Azurix Corp. v. The Argentine Republic* (ICSID Case No ARB/01/12), Azurix obtained a favourable award against Argentina but Argentina failed to enforce the award. Argentina also refused to enforce the award rendered in *CMS Gas Transmission Co. v. Argentine Republic* (ICSID Case No ARB/01/8).

⁶⁸³ Presidential Proclamation, To Modify Duty-free Treatment under the Generalized System of Preferences and for Other Purposes, No 8788, 77 Fed. Reg. 18,899 (26 March 2012).

⁶⁸⁴ Azurix Corp filed a Section 301 case in 2011 to pressure Argentina to enforce the ICSID award rendered in *Azurix Corp. v. The Argentine Republic* (ICSID Case No ARB/01/12). See U.S. Firm Readies Section 301 Petition to Collect ICSID Award from Argentina, Inside U.S. Trade, 11 August 2011.

⁶⁸⁵ Nowadays, a number of BITs extend international tribunals’ jurisdiction to ‘any dispute relating to investments’ (eg, art 8(1) of the France-Argentina BIT, see *Compañía de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v. Argentine Republic*, ICSID Case No ARB/97/3, Award of 21 November 2001, Appendix 1); other BITs create an international law obligation that States shall ‘observe any obligation it may have entered to with regard to investment’ (eg, art 3(4) of the Belize-Netherlands BIT (2004), available at: http://unctad.org/sections/dite/ia/docs/bits/netherlands_belize.pdf), ‘constantly guarantee the observance of the commitments it has entered into’ (eg, art 11 of the Switzerland-Pakistan BIT, see *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No ARB/07/29, Decision on Jurisdiction, 12 February 2010, para 162), or ‘observe any obligation it has assumed’ (eg, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para 34).

⁶⁸⁶ For example, ICSID tribunals have a broad interpretation of the umbrella clause in the followings cases: i) *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No ARB/96/3, Award, 9 March 1998; ii) *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004; iii) *Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire*, ICSID Case No ARB/03/08, Award, 10 January 2005; iv) *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No ARB/01/8, Award, 12 May 2005; v) *Noble Ventures, Inc. v. Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005; vi)

investment commitments in trade agreements can be enforced by virtue of investor-State arbitration. For instance, while five cigar-producing countries had brought actions against Australia at the WTO to challenge Australia's Tobacco Plain Packaging Act for its establishing a barrier to trade and restricting intellectual property,⁶⁸⁷ Philip Morris turned to the private right of action by initiating investor-State arbitration on the basis of the Australia-Hong Kong BIT.⁶⁸⁸ Aside from allegations relating to the expropriation of intellectual property, violation of fair and equitable treatment and full protection and security guarantee, Philip Morris also relied on the broad umbrella clause in the BIT⁶⁸⁹ and asserted that the wording of 'Contracting Party shall observe any obligation it may have entered into' in article 2(2) of the BIT encompassed international obligations enshrined in the Agreement on Trade Related Aspects of Intellectual Property Rights (hereinafter 'TRIPs'), the Paris Convention for the Protection of Industrial Property and the Agreement on Technical Barriers to Trade (hereinafter 'TBT Agreement').⁶⁹⁰ The case is still pending and it is quite uncertain whether such claim will be upheld by the UNCITRAL *ad hoc* tribunal. However, in spite of the assumption that disputes against States arising from international trade should be submitted to the WTO Dispute Settlement Body, the broad umbrella clause in BITs may blaze a trail in enforcing WTO commitments through investor-State arbitration.

The convergence of international trade and investor-State arbitration does not have a direct and considerable impact on the interaction between ICSID and non-ICSID arbitration; instead, it affects these two genres of arbitration as an external cause. It has been indicated previously that the preferential trade benefits come ordinarily with strings attached. As the conditions imposed by preferential trade benefits have to promote particular development, financial or trade needs of developing countries, such needs normally encompass environmental sustainability, human rights and other legitimate objectives. These

LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006.

In addition, an *ad hoc* tribunal also interpreted a broad umbrella clause in *Eureko B.V. v. Republic of Poland*, UNCITRAL Arbitration, Partial Award, 19 August 2005.

⁶⁸⁷ Australia - Tobacco Plain Packaging (Ukraine), WT/DS434; Australia - Tobacco Plain Packaging (Honduras), WT/DS435; Australia - Tobacco Plain Packaging (Dominican Republic), WT/DS441; Australia - Tobacco Plain Packaging (Cuba), WT/DS458; Australia - Tobacco Plain Packaging (Indonesia), WT/DS467.

⁶⁸⁸ *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12.

⁶⁸⁹ *Ibid*, Notice of Arbitration, 21 November 2011, para 7.2.

⁶⁹⁰ *Ibid*, paras 7.15-7.17.

legitimate objectives are of great importance in international trade,⁶⁹¹ and they can turn into forces to be reckoned with during ICSID and non-ICSID arbitral proceedings if there is a possibility that awards resulting from the arbitral proceedings need to be enforced through trade remedies. More specifically, if an ICSID or non-ICSID arbitral award was rendered without sufficient and necessary trade objectives consideration, developing countries may use the lack of trade objectives consideration as a defense to object to the withdrawal of preferential trade benefits for their non-compliance with arbitral awards. Likewise, considering that the scarcity of human rights, environment protection and other trade objectives in investment arbitral awards is contrary to the requirement of conditions of preferential trade benefits, it also seems that no adequate grounds exist for developed countries to withdraw the preferential trade benefits.

Consequently, both ICSID and non-ICSID arbitration should be configured, to a certain extent, so that they correspond with legitimate objectives of international trade as long as any objective indeed affects the underlying investment disputes and the outcome of adjudication. In this sense, using trade remedies to enforce investment arbitral awards is somehow directing ICSID and non-ICSID arbitration towards a similar end, namely a dispute resolution mechanism compatible with one or more fundamental trade objectives. Similarly, the utilization of investor-State arbitration aiming to enforce investment commitments under the international trade framework also configures ICSID and non-ICSID arbitration to some extent. Such configuration makes ICSID and non-ICSID arbitration more compatible with investment disputes that relate to international trade, and thereby ICSID and non-ICSID tribunals can exercise their jurisdictional authority over these disputes. The current Argentina enforcement kerfuffle and other States' non-compliance with investment arbitral awards might give rise to increasing recourses to trade remedies for the purpose of enforcement of ICSID and non-ICSID arbitral awards;⁶⁹²

⁶⁹¹ For example, trade liberalization may relocate goods and services to States with lax standards and bring about environmental degradation, labour redundancy, inequality exacerbation and other adverse consequences. In particular, States at the margins of the global market are also obliged under international law to fulfil commitments related to all these concerns.

⁶⁹² For example, following the suspension of Argentina's Generalized System of Preferences, U.S. corporation Chevron (the claimant in *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No 2009-23) petitioned the U.S. Trade Representative to suspend Ecuador's preferential trade benefits under Andean Trade Preference Act/Andean Trade Promotion and Drug Eradication Act (see Sixth Report to the Congress on the Operation of the Andean Trade Preference Act as Amended, 30 June 2012, 36). The new EU Generalized System of Preferences scheme takes effect in 2014, and Argentina has been removed from the list of beneficiaries (see Peter D. Fox and

accordingly, a convergence of international trade and investor-State arbitration will continue to play a part in a manner such that ICSID and non-ICSID arbitration converge towards considerations of more necessary human rights, environment protection and other trade objectives as long as any trade objective essentially affect the underlying investment disputes and the result of the arbitration case. Nonetheless, it should be noted that such impact of the convergence of international trade and investor-State arbitration on the convergence of ICSID and non-ICSID arbitration is peripheral and relatively limited.

2.1.2 Convergence of Private International Law

The American choice-of-law revolution in which courts moved away from territory-based to consequence-based rules has led to the most fundamental divergence in private international law in the twentieth century.⁶⁹³ In the meantime, the globalization and economic integration over the past decades have also promoted the progress of private international law in the direction of moderate convergence in response to the need for acceptable solutions of issues resulting from the growth in transnational flows of people and property. International arbitration is one of the significant parts among a variety of matters related to the convergence of private international law.⁶⁹⁴ It would be not absurd to conceive that the future convergence of private international law is able to foster greater convergence of ICSID and non-ICSID arbitration. As one of the core aspects of the convergence of private international law is the harmonization and unification of national laws, the converging national laws on the vacatur and enforcement procedures have the potential to reconcile the gap between ICSID and non-ICSID arbitration. For example, the scrutiny by national courts of non-ICSID arbitral awards is conducted in accordance with generally accepted standards, and their authority to set aside non-ICSID awards is

Charles B. Rosenberg, 'The Hidden Tool in a Foreign Investor's Toolbox: The Trade Preference Program as a "Carrot and Stick" to Secure Compliance with International Law Obligations' (2013) 34 *Nw J Intl L & Bus* 53, 78).

⁶⁹³ As compared to classical rules focusing on predictability and certainty, the American choice-of-law revolution abandoned the traditional selection of the jurisdiction where the relationship in question had connections, and adopted a selection of the rule that would be applied to the matter in question, thus paving the way for a number of new approaches favouring flexibility and material justice in an individual case. See Symeon C. Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future* (Martinus Nijhoff Publishers, 2006) 365-418.

⁶⁹⁴ See, eg, Tibor Várady, 'Observation of Group Affiliation (or: Cohabitation with the Impossible) in International Commercial Arbitration' in Katharina Boele-Woelki, *et al* (eds), *Convergence and Divergence in Private International Law - Liber Amicorum Kurt Siehr*, 745-62.

narrowly construed and restricted to exceptional cases where the exhaustive grounds for setting aside arbitral awards parallel those permitted under article 52 of the ICSID Convention.

In fact, as the mandate of UNCITRAL is to further the progressive harmonization and unification of the law of international trade, the UNCITRAL Model Law on International Commercial Arbitration (1985, with amendments as adopted in 2006) has reflected worldwide consensus on key aspects of intentional arbitration practice. One of the aspects is the grounds for setting aside non-ICSID arbitral awards. Pursuant to the UNCITRAL Model Law, the grounds for challenge of arbitral awards can be categorized into two classes, namely the grounds that claimants have to furnish proof (including the incapacity of disputing parties, the invalid arbitration agreement, the improper notice of arbitral proceedings, arbitral tribunals' excess of power and the inappropriate composition of tribunals or procedures),⁶⁹⁵ and the grounds that national courts *ex officio* finds (such as the arbitrability of subject matter and the public policy of States).⁶⁹⁶ These grounds are taken from article V of the New York Convention,⁶⁹⁷ and they parallel some of the grounds for annulment set out under the ICSID Convention. For instance, applicants can request annulment of an ICSID award on the grounds (i) that arbitral tribunal was not properly constituted, (ii) that arbitral tribunals has manifestly exceeded its powers and (iii) that there has been a serious departure from a fundamental rule of procedure.⁶⁹⁸ Currently, legislation based on the UNCITRAL Model Law has been adopted in 67 States in a total of 97 jurisdictions.⁶⁹⁹ As more States adopt the UNCITRAL Model Law, it can be expected a convergence of ICSID and non-ICSID arbitration in the field of challenge of arbitral awards.

2.2 Confluence of Public and Private International Law

Notwithstanding the stark distinction between public and private international law, it appears that the conceptual boundary between public and private international law has

⁶⁹⁵ Art 34(2)(a) of the UNICTRAL Model Law.

⁶⁹⁶ Art 34(2)(b) of the UNICTRAL Model Law.

⁶⁹⁷ Some linguistic changes were introduced in the UNCITRAL Model Law.

⁶⁹⁸ Art 52(1)(a),(b) & (d) of the ICSID Convention.

⁶⁹⁹ See the UNCITRAL website:

<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>.

been obscured over the past decades since what public international law deals with is no longer limited to relations between States and international organization. Meanwhile, private international law is deemed a single international system that functions through national law rather than a series of discrete national rules.⁷⁰⁰ Viewed from this international systemic perspective, on the one hand, the norms of public international law shape and give effect to private international law,⁷⁰¹ and on the other, as private international law reflects concepts of justice pluralism based on principles of ‘tolerance of difference’ and ‘mutual recognition’,⁷⁰² the operation of private international law constitutes ‘an international system of global regulatory ordering...a system of secondary legal norms for the allocation, the ‘mapping’, of regulatory authority’.⁷⁰³ Accordingly, the rules of private international law are not merely concerned with private justice or fairness,⁷⁰⁴ but with the implication of justice pluralism through providing a number of tools to coordinate the consequential diversity of rules of private international law and minimize the potential regulatory conflict.⁷⁰⁵

As international investment law possesses inherent ‘public-private’ dualities that may have created a dilemma for the law,⁷⁰⁶ the confluence of public and private international law implies a more active interaction between the public and private aspects of international investment law and is thus conducive to relieving the tension of the public and private

⁷⁰⁰ Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law*, 3.

⁷⁰¹ For example, the norms regarding territoriality and personality in public international law have great impacts on the identification of connecting factors such as domicile, nationality, the places where transaction occur and where a court is sitting under private international law, thus enabling courts to determine the applicable law.

⁷⁰² Justice pluralism is the reflection in law of the concept of value pluralism in philosophy, under which the just outcome to a dispute depends on the context in which it occurs where the variety of legal cultures representing significant and distinct sets of norms should be independently valued. Private international law therefore embodies a principle of tolerance of difference in a sense of respect between equals. Meanwhile, the principle of mutual recognition demonstrates the obligations of respectful engagement between States. Apparently, the recognition of foreign laws is an acknowledgement of the value of both foreign States and their people, and an acceptance of the diversity of their values in international society. See Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law*, 5-6, 14-15.

⁷⁰³ *Ibid*, 299-300.

⁷⁰⁴ Though such concerns may arise in the question of whether jurisdiction will be exercised.

⁷⁰⁵ Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law*, 300-301.

⁷⁰⁶ Alex Mills, ‘Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration’ (2011) 14(2) *J Intl Econ L* 469.

interests or objectives of international investment law. In the field of investment arbitration, such confluence is able to have a significant effect on the convergence of ICSID and non-ICSID arbitration, especially when it comes to the enforcement of arbitral awards. The recent jurisprudence developed in *Desert Line Projects LLC v. The Republic of Yemen* and *Saipem S.p.A. v. Bangladesh* has indicated that ICSID arbitration might take a part in remedying injustice which is, in essence, equivalent to the enforcement of non-ICSID arbitral awards. It is indubitable that such jurisprudence is fundamentally resting on the increasing influences of public international law on rights under private international law. More specifically, in the event that national courts or other authorities fail to implement their obligations to uphold the integrity of international arbitration, public international law is able to step in to protect private rights derived from articles II and V of the New York Convention. Given that non-compliance with the New York Convention is an issue concerning sovereign rights which shall not be subject to any appeal, in none of these two cases did the ICSID tribunals simply act as appellate bodies. In fact, the egregiousness of the States' interference with investors' rights in these cases amounted to the abuse of rights and the denial of justice and therefore constituted a breach of the relevant BIT. In other words, public international law can provide a tangible weapon in protecting non-ICSID arbitral awards from the interference of national courts, and such function will be enhanced as the confluence of public and private international law deepens further.

2.3 Evolution in Investor-State Arbitration

The convergence of ICSID and non-ICSID arbitration is largely driven by the necessary evolution of investor-State arbitration. It appears less arguable that the emergence of new levels of complexity of procedural issues and the development of substantial investment treatments lead to an evolution in investment treaty law and arbitration. The status quo of international investment arbitration, as asserted by Sornarajah, is normlessness where the persistent conflict between arbitral tribunals' neoliberal ideology and respondent States' restriction on the expansive interpretation causes confusing conceptual chaos.⁷⁰⁷ While the investment arbitration system is in the process of tackling challenges to its legitimacy and uncertainty of its tenets,⁷⁰⁸ the need to reconcile various interests and diverse conflicts

⁷⁰⁷ M. Sornarajah, 'Evolution or Revolution in International Investment Arbitration? The Descent into Normlessness' in Chester Brown, *et al* (eds), *Evolution in Investment Treaty Law and Arbitration*, 632-34.

⁷⁰⁸ Franklin Berman, 'Evolution or Revolution?' in Chester Brown, *et al* (eds), *Evolution in Investment Treaty Law and Arbitration*, 658-66.

pushes forward the evolutionary process. The evolution reaches into several, if not large, areas in investor-State arbitration, encompassing clearer and uniform criteria of eligible investments, more effective and transparent arbitral proceedings and the promotion of the recognition and enforcement of arbitral awards, most of which virtually direct ICSID and non-ICSID arbitration to a discernible convergence.

Such evolution, however, undergoes against the old and longstanding root of international investment arbitration in international law which possesses more traditional traits. The prospect of convergence is therefore subject to the breadth and depth of the evolution. As regards transparency, for example, it is apparent that most non-ICSID arbitration rules are emphatically silent on the issues relating to the transparency since these rules have been, in principle, crafted to apply to international commercial arbitration involving private parties on an equally legal basis. Transparency is not indispensable in the proceedings of solving business disputes and even contradictory to disputing parties' desire of confidentiality in some cases. While these rules are being employed to adjudicate investor-State disputes, the presumption of confidentiality also serves to ensure the privacy of arbitral proceedings, thereby protecting confidential business information and sensitive government documents. Despite the worldwide acknowledgement of the fundamental role of public interests in investment arbitration as well as the ground-breaking works by UNCITRAL and other entities, the potential risks and increased arbitral costs caused by transparency cannot be ignored due to their significant impact on the whole arbitral process. The undesirable consequence generated by increased time and arbitral costs is noticeable,⁷⁰⁹ in particular where small and medium-sized enterprises file a motion to initiate arbitration or where the respondents are developing States.

More importantly, incremental transparency has the potential to revive the politicization of investor-State disputes through the abuse of transparency by both claimants and respondents. Investors can impose upon respondent States the burden of criticism on a diplomatic level and external pressure from international lenders, seeking nuisance value

⁷⁰⁹ For example, arbitral tribunals have to spend time on determining whether *amicus curiae* briefs are acceptable, if so, then analysing whether such *amicus curiae* briefs affect their decisions. Disputing parties also have to respond to *amicus curiae* briefs which incur more time and arbitral costs. Furthermore, public participation may reduce the opportunity of settlement since it would be complex to reconcile different conflicts and various interests.

compensation by virtue of extensive publicity.⁷¹⁰ By the same token, the possibility also exists that respondent State relies on transparency to politicize the disputes. In *S.D. Myers, Inc. v. Government of Canada*, Canada made certain material available to provincial and territorial governments,⁷¹¹ but the UNCITRAL tribunal imposed restrictions on such practice on the grounds that Canada's practice was a departure from the Procedural Order No 11 which applied a general principle of confidentiality in the present arbitral proceedings⁷¹² and that in the absence of parties' otherwise agreement, article 25.4 of the UNCITRAL Arbitral Rules which required hearings to be held *in camera* should be applied.⁷¹³ A more notable example is *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* in which Tanzania attempted unilaterally to disclose certain orders rendered by the tribunal to a third party and make them available on a website. Though the tribunal affirmed that there was a marked tendency towards transparency in investment arbitration⁷¹⁴ and the position of ICSID concerning transparency had evolved from the old one to the 2006 Arbitration Rules,⁷¹⁵ it determined that all parties should refrain from disclosing to third-parties a wide range of documents related to the arbitral proceedings.⁷¹⁶ As the tribunal observed, the disclosure that Tanzania proposed entailed risks to the integrity of arbitral proceedings and the danger of an aggravation or exacerbation of the dispute.⁷¹⁷ Considering that the media campaign had already been fought on both sides of the present case, there indeed existed an adequate risk of harm, prejudice or aggravation to warrant a certain form of control of such disclosure.⁷¹⁸

It can thus be identified that the evolution towards transparency is duly compromised but not self-evident, and that whether it moves towards common standards that permeate all genres of investor-State arbitration and whether the evolution is positive on a practical

⁷¹⁰ Noah Rubins, 'Investment Arbitration - "Transparency" in Investment Arbitration: A Call to Cost-Benefit Analysis' (2010) *Austrian YB Intl Arb* 293, 299.

⁷¹¹ Canada contended that such practice was based on a process known as 'C-Trade' mechanism and was necessary to enable Canada to fulfil its obligations under art 105 of the NAFTA. See Procedural Order No 16 (concerning confidentiality in materials produced in the arbitration), 13 May 2000, paras 3 & 6.

⁷¹² *Ibid*, para 18.

⁷¹³ *Ibid*, para 19.

⁷¹⁴ ICSID Case No ARB/05/22, Procedural Order No 3, 29 September 2006, para 114.

⁷¹⁵ *Ibid*, para 121.

⁷¹⁶ *Ibid*, paras 148-63.

⁷¹⁷ *Ibid*, para 144.

⁷¹⁸ *Ibid*, para 146.

level still remain uncertain. Though the assessment of an evolution is essentially determined by the perspective assessors take, a dynamic view of controversy within the parameters of a basic consensus is also possible. In general, in view of the facts that international hearings concerning States acting with *ius imperii* (sovereign authority) have been historically in the public domain⁷¹⁹ and that investor-State dispute resolution not only deals with claimants and respondents' interests at stake but also relates to public interests where human rights or environmental issues may be in play, transparency can be vigorously justified and finds its place in investor-State arbitration. Accordingly, what truly matters is no longer the existence of transparency, but rather the appropriate level of transparency in the dispute settlement mechanisms. Practice to date has revealed that the vast majority of, if not all, arbitration rules impose reasonable restrictions on the request of transparency in investor-State arbitration. Arbitral tribunals ordinarily remain discretionary authority to make determinations on the issue of transparency on a case-by-case basis, and disputing parties also retain their rights to oppose third-parties participation.⁷²⁰ In addition, a number of exceptions, such as procedural integrity which is stated in the *Biwater Gauff* case and confidential and privileged information protection, normally protect the arbitral process against publicity.⁷²¹ The level of transparency varies depending on the forum that is selected for adjudicating investment disputes. So far, the highest level of transparency in investment arbitration is probably achieved by NAFTA.⁷²² As compared to ICSID arbitration, the new UNCITRAL Transparency Rules ensure a higher level of transparency, but the impact of the Transparency Rules relies on political consideration since States can opt out of the Rules in further BITs or Preferential Trade and Investment Agreements (hereinafter 'PTIAs'). The dissimilar level of transparency also has implications for investors, especially in assessing and determining the favourable forum based on the different levels of visibility of risks that investors would encounter in prospective arbitral proceedings.

⁷¹⁹ See eg, the practice of ICJ, Mexico-United States Claim Commission and Iran-US Claims Tribunals.

⁷²⁰ See eg, r 37 of the ICSID Arbitration Rules.

⁷²¹ See, eg, art 7 of the UNCITRAL Transparency Rules.

⁷²² Under chapter 11 of the NAFTA, memorials, orders, decisions and awards are made in the public domain on a routine basis (see arts 1127-29, 1133 & 1137(4)). The NAFTA Free Trade Commission issued in 2003 a Statement on Non-Disputing Party Participation which aimed at ensuring more transparency by recommending guidelines for arbitral tribunals on the issue of *amicus curiae* briefs.

2.4 The Homogeneity of Dispute Resolution

The convergence of ICSID and non-ICSID arbitration has been driven not only by external factors but also by the relative homogeneity of investment dispute resolution. The homogeneity which contributes, internally and primarily, to the convergence of ICSID and non-ICSID arbitration reflects in at least three respects. First, the network of international investment arbitration professionals has a considerable influence on how the investment dispute resolution operates in a converging manner. Such influence can be elucidated in three circumstances. The first circumstance focuses on the background of arbitrators. It is noteworthy that a large number of decision-makers in investment arbitration come from Western Europe and North America who can be discerned demonstrating a cultural and legal homogeneity. For instance, up to 68 per cent of arbitrators, conciliators and *ad hoc* committee members appointed in ICSID cases are from Western Europe and North America,⁷²³ and arbitrators with nationalities of developing countries normally obtain at least a law degree in the UK, France or U.S. for developing a pedigree as international arbitrators.⁷²⁴ A combination of timing, the limited cognitive scope (or heuristic biases), risk aversion and a desire for predictable outcomes on the part of those who appoint arbitrators give rise to a core, close-knit and small network of international arbitration professionals.⁷²⁵ It can be maintained that arbitrators in the core network share relatively similar social interests, ideological observations and even political philosophy. Such coessential characteristics, qualifications and points of view can play a part in examining and determining issues with regard to arbitral proceedings (such as the degree of legitimate urgency for ordering interim relief and the potential effect of the order on the defendant) and further render similar decisions.

The second circumstance relates to the role alteration of arbitrators. At present it is not uncommon for an arbitrator to sit on both ICSID and non-ICSID arbitration cases at different times.⁷²⁶ The alteration of roles in adjudicating ICSID and non-ICSID arbitration

⁷²³ ICSID, 'ICSID Caseload – Statistics', 2014-2, 18.

⁷²⁴ Sergio Puig, 'Social Capital in the Arbitration Market (2014) 25 Eur J Intl L 387, 405.

⁷²⁵ Institutions and disputing parties tend to favour arbitrators with a track record of appointment due to their high moral characters and recognized competent, while parties are likely to avert the risks that a newcomer may bring because it will be difficult to forecast his/her behaves once appointed. See *ibid*.

⁷²⁶ For example, Professor Gaillard sat on a number of ICSID and non-ICSID arbitration cases as an arbitrator, including, *inter alia*, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic* (ICSID Case No ARB/14/14), *Lundin Tunisia B.V. v. Republic of Tunisia* (ICSID Case No ARB/12/30), *CEZ v. The*

cases may nudge decision-makers, to a certain extent, into filling the apparent procedural gap between what investor-State arbitration should be proceeded with under different arbitration rules and what it should be proceeded with in accordance with general international law.

The third circumstance concerns the issue conflicts which are prevalent in investor-State arbitration. Issue conflicts arise when an arbitrator has taken, or gives the appearance of having taken, a stance on a recurring issue, including the scenarios where an ICSID arbitrator previously acted, or is currently acting, as counsel or expert in a non-ICSID arbitration case in which similar legal issues were raised.⁷²⁷ Issue conflicts have been questioned for the problematic relationships that can cause doubt about the independence, impartiality and neutrality of the arbitrator,⁷²⁸ and, more specifically, they may even contradict the maxim *nemo iudex in causa sua*.⁷²⁹ In practice issue conflicts have also been raised in a few arbitration cases.⁷³⁰ Be that as it may, issue conflicts will continue to exist

Republic of Albania (UNCITRAL) and Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America (UNCITRAL/NAFTA).

⁷²⁷ Nassib G. Ziadé, 'How Many Hats Can a Player Wear: Arbitrator, Counsel and Expert?' (2009) 24(1) ICSID Rev-Foreign Investment LJ 49, 49-58.

⁷²⁸ Roberto Dañino (the ICSID Secretary-General) had expressed that the roles as arbitrator and counsel in different cases might lead to the challenge for potential conflicts (see Roberto Dañino, Opening Remarks, Symposium on Making the Most of International Investment Agreements: A Common Agenda, 12 December 2005, <<http://www.oecd.org/daf/inv/internationalinvestmentagreements/36053800.pdf>> accessed 28 September 2014). ICJ Judge Thomas Buergenthal had long believed that the practice of allowing arbitrator to serve as counsel and counsel to serve as arbitrator raised the issue of due process of law, and arbitrator and counsel should be required to decide to be one or the other, at least for a specific period of time (see Thomas Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law' (2006) 21(1) ICSID Rev-Foreign Investment LJ 126, 129).

⁷²⁹ As alluded in chapter II, though there is no doctrine of *stare decisis* under international investment law, many ICSID tribunals tend to rely on decisions rendered by other tribunals, thus developing a coherent case law or jurisprudence. Wälde had presented that modern system of international investment law grew more out of the emerging case law but not the treaties (see Thomas W. Wälde, 'The Special Nature of Investment Arbitration - Report of the Director of Studies of the English-Speaking Section of the Centre' in Philippe Kahn & Thomas W. Wälde (eds), *New Aspects of International Investment Law* (Martinus Nijhoff, 2007) 66). As a consequence, the reversible personality of arbitrator will give rise to two roles that the same person serves, ie, rule-maker (arbitrator) and rule-user (counsel or expert) and he may get benefits of a rule that he made (see Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a "Real Danger" Test* (Kluwer Law International, 2009) 240).

⁷³⁰ For example, Professor Gaillard was challenged as an arbitrator in *Telekom Malaysia Berhad v. The Republic of Ghana* (UNCITRAL Case No HA/RK 2004, 788) by Ghana on the grounds that as a counsel in *Consortium R.F.C.C. v. Kingdom of Morocco* (ICSID Case No ARB/00/6) he provided legal advice for the annulment of an award on which Ghana was relying in the present UNCITRAL case (see Decision in Respect of the Written Challenge Pursuant to Article 1035 (2) Code of Civil Procedure, Challenge No13/2004, Petition No HA/RK 2004.667, District Court of The Hague, 18 October 2004). In *Eureka B.V. v. Republic*

in investor-State arbitration in view of the core and small network of international arbitration professionals. In addition, issue conflicts are perceived to be better self-regulating.⁷³¹ Despite the controversy, it is apparent that the combined roles of arbitrator, counsel and expert in ICSID and non-ICSID arbitration promote the consistency of ICSID and non-ICSID in many ways not only relating to arbitral procedures but also concerning the substantive issues, thus converging ICSID and non-ICSID arbitration towards a more coherent investment dispute settlement system.

Second, disputing parties and the cause of action in ICSID and non-ICSID arbitration are somehow homogeneous. In most cases the resolution of investment disputes deals with the compensation for nationalization or expropriation, concentrating commonly on the interpretation of most-favoured-nation treatment, national treatment and standard for fair and equitable treatment. No matter what agreement disputing parties reach regarding the choice between ICSID or non-ICSID arbitration, the interest of foreign investors is consistently protected by vindicating their rights under investment treaties (or sometimes contracts) in international arbitral proceedings, while the interest of host States is safeguarded by defending their regulatory measures that would be legitimate. Therefore, the deviation of different forms of procedural protection provided by ICSID and non-ICSID arbitration cannot be too absurd.

Third, regardless of the forum that was selected, the applicable laws for a specific claim are more or less cognate, in particular considering that investment treaties and other relevant laws would be applied equally in ICSID and non-ICSID arbitration. Though arbitrators are entitled to discretionary authority in interpreting the applicable laws, it is conceivable that the applicable BITs, national statutes and rules guarantee a certain amount of regularity and even predictability that would lead the arbitral proceedings to an

of Poland, Poland served a notice of recusal on Judge Stephen Schwebel as an arbitrator since he was co-counsel in an unrelated case (*Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No ARB/97/3) where Judge Schwebel had cited the award of *Eureko* case as authority for certain arguments he was making on behalf of his client; additionally, in both of the two cases the interpretation of the fair and equitable treatment was necessary (see Damon Vis-Dunbar and Luke Eric Peterson, *Belgian Appeals Court Rejects Poland's Challenge to Arbitrator in Eureko Case*, Investment Treaty News, 17 January 2007).

⁷³¹ Roberto Dañino, Opening Remarks, Symposium on Making the Most of International Investment Agreements: A Common Agenda.

established track in a manner such that the departure from procedural justice will be eliminated, avoided or reduced to the maximum extent possible.

Besides, it appears that while ICSID tribunals at times make reference to the case law of other international judicial bodies which may include non-ICSID case law, non-ICSID arbitration also make reference to decisions rendered by ICSID tribunals. In the first place, it is acknowledged that ICSID tribunals are explicitly allowed to make references to ICJ decisions for the identification of substantive rules of international law.⁷³² In construing the scope of protection under the most-favoured-nation treatment, the ICSID tribunal in *Emilio Agustín Maffezini v. Kingdom of Spain* relied heavily upon the ICJ case law and the award of a Commission of Arbitration.⁷³³ The ICSID tribunals in *Tokios Tokelès v. Ukraine*⁷³⁴ and *Plama Consortium Limited v. Republic of Bulgaria*⁷³⁵ also made reference to the ICJ or even PCIJ case law. In the second place, as non-ICSID arbitration rules contain no substantive rules of law and accordingly and ordinarily confer, subject to mandatory national laws, on tribunals discretionary rights in determining substantive laws, the possibility also exists that non-ICSID arbitral tribunals make reference to ICSID decisions. In dealing with the sensitive issue as to whether ‘claims to money’ should be deemed as an eligible investment, the SCC tribunal in *Petrobart Limited v. The Kyrgyz Republic* made specific reference to three ICSID decisions.⁷³⁶ On balance, it can be asserted that the practice that ICSID tribunals rely on non-ICSID decisions as applicable rules and non-ICSID tribunals make reference to ICSID case law demonstrates, to some extent, a convergence between ICSID and non-ICSID arbitration.

⁷³² According to the Report of the Executive Directors, the reference to international law pursuant to art 42(1) of the ICSID Convention should be understood in the sense given by art 38 of the Statute of the ICJ (see Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, para 40).

⁷³³ The ICSID tribunal made reference to *Anglo-Iranian Oil Company Case (Jurisdiction)*, *Case concerning the rights of nationals of the United States of America in Morocco*, *Ambatielos Case (merits: obligation to arbitrate)* and the *Ambatielos case* before a Commission of Arbitration. See ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, paras 43-50.

⁷³⁴ The tribunal made reference to the ICJ decision in the *Barcelona Traction* case when interpreting the equitable doctrine of the piercing of the corporate veil. See ICSID Case No ARB/02/18, Decision on Jurisdiction, 29 April 2004, para 54.

⁷³⁵ The tribunal made reference to the PCIJ decision in *Mavrommatis Palestine Concessions, Greece v. United Kingdom* in dealing with the burden of proof on the issue of jurisdiction. See ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005, para 118.

⁷³⁶ These three cases are *Fedax N.V. v. the Republic of Venezuela*, *Salini Costruttori and Italstrade v. Morocco* and *SGS Société Générale de Surveillance S.A. v. the Islamic Republic of Pakistan*. See SCC Case No 126/2003, Arbitral Award, 29 March 2005, 72-73.

2.5 Competition and Cooperation of Arbitration Institutions

The long-term outlook for the global economy seems to be far from certain due to worldwide or regional financial and economic crisis as well as the prolonged economic recession, which unavoidably give rise to an increasing number of investment disputes between host States and foreign investors and, subsequently, create a global market for investor-State arbitration. It is not difficult to assume that a variety of arbitration institutions have to compete for the same resources to increase or at least keep their market share of dispute resolution.

Although the existence of competition does not necessarily entail a mutual exclusion since the coexistence of investment arbitration in diverse forms has been well acknowledged by numerous BITs⁷³⁷ and Conventions,⁷³⁸ the implication of Gause's law of competitive exclusion in ecology also has an indication that when one genre of arbitration has several advantages or edges over another, then the arbitration with advantages will possibly dominate in the long run. Accordingly, aside from the perceived competition, arbitration institutions are normally coerced (under the pressure to vie for world market share) or voluntary learn from one another, and even cooperate on a proper scale if they have something in common qua interests or goals. A remarkable example is that following the 2006 revision of the ICSID Rules in which greater transparency could be considered as an advantage for investment dispute resolution, the UNCITRAL Working Group II negotiated over the past three years and worked out its own transparency rules in 2013. In the meantime, cooperation is not only reflected in ICSID's administrative support for non-ICSID arbitration, but also in academic exchanges where arbitration institutions can share their insights about their experience in administering investor-State arbitration and present their observations on current trends and future directions of investor-State arbitration.⁷³⁹ There are even business collaborations between ICSID and non-ICSID arbitration

⁷³⁷ For example, BITs ordinarily provides for ICSID and UNCITRAL arbitration.

⁷³⁸ For example, arbitration under the auspices of the ICSID Rules, ICSID Additional Facility Rules, UNCITRAL Rules and ICC Rules are applicable for contracting parties of the ECT.

⁷³⁹ For example, ICSID and SCC recently organized a seminar on the role played by investor-State dispute settlement in international investment protection in May 2014. ICSID, SCC and ECT launched a conference to discuss and reflect on the implementation of the ECT and to contemplate future developments under the ECT in March 2014 to mark the 20 year anniversary of the signing of the ECT. See ICSID News Release, 16, May and 7 April 2014.

institutions.⁷⁴⁰ Healthy competition and appropriate cooperation can provide, unambiguously, a suitable environment for the convergence of ICSID and non-ICSID arbitration.

3 The Prospect of Convergence

3.1 Converging towards Fairer and More Efficient Dispute Resolution

The recent jurisprudence has revealed a conspicuous convergence of ICSID and non-ICSID arbitration, and such convergence is supposed to be continued in the future in view of the symbiotic relationship between ICSID and non-ICSID arbitration. The symbiotic relationship is not only embodied in the fact that ICSID and non-ICSID arbitration are ordinarily embedded in the same BIT or convention, but also in the similar objectives that they promote. Such relationship may imply a system of complementarity. Currently, the constitution of a system of complementarity is largely attributable to the possibilities of enforcing ICSID non-pecuniary remedies under the New York Convention and enforcing non-ICSID awards through ICSID arbitration. If a system of complementarity is established, it would be one of underlying foundations for the convergence of ICSID and non-ICSID arbitration. Furthermore, as stated previously, there are also a number of internal engines associated with external forces building up and fostering the convergence of ICSID and non-ICSID arbitration in practice.

In addition, the convergence of ICSID and non-ICSID is conducive to promoting and advancing the development of international investment arbitration, which is a crucial factor affecting the prospect of convergence. The convergence can be seen as a consequential evolution towards fairer and more efficient dispute resolution. First, the convergence in the field of the role of institutions has pushed for greater efficiency and fairness in investor-State disputes. As ICISD is the world's leading institution having extensive experience in international investment dispute settlement, ICSID's administrative support for non-ICSID arbitration would ensure *ad hoc* arbitral proceedings to be operated in a more efficient way. Furthermore, incremental transparency in ICSID and non-ICSID arbitration strives to

⁷⁴⁰ For example, ICSID and the Lagos Regional Centre for International Commercial Arbitration signed an update collaboration agreement in November, 2013 with the purpose of further encouraging cooperation and knowledge sharing between the two institutions. See ICSID News Release, 20 November 2013.

balance the public interest and the interest of disputing parties in an efficient resolution of their disputes. Since investment arbitration acknowledges the essential role of the public as a stakeholder, it becomes fairer to third-parties and the public if they have legitimate interests in investor-State disputes.

Second, the convergence of ICSID and non-ICSID arbitration can lead to certainty and predictability, thus reducing the possibility of contradictory outcomes where parallel proceedings take place. As stated previously, based on similar circumstances, ICSID tribunals rendered five decisions with contradictory outcomes as to whether Argentina violated treaties obligations. In a worse situation, international tribunals had come to opposite results in situations where the same investment dispute was brought before different arbitral tribunals by a subsidiary company and its parent company. Two simultaneous arbitral proceedings were brought before two UNCITRAL tribunals against the action of the Czech Media Council. However, while the tribunal in *Ronald S. Lauder v. The Czech Republic* determine that Czech Republic' minor breach of treaty did not lead to the liability of compensation,⁷⁴¹ the tribunal in *CME Czech Republic B.V. v. The Czech Republic* held that Czech Republic breached various BIT standards and hence must pay damages.⁷⁴² Since the convergence of ICSID and non-ICSID arbitration has been driven by the legal and cultural homogeneity of investment dispute resolution, it can be seen that the network of international investment arbitration professionals, the cause of action, the cognate applicable law and the reference to case law are able to promote the commonly accepted standards for the interpretation of applicable law that would apply to both ICSID and non-ICSID arbitration, and therefore create certainty in international investment arbitration.

Third, the convergence of ICSID and non-ICSID arbitration can enhance the function and value of international investment arbitration, thereby ensuring the integrity of international investment arbitration as a whole. The *raison d'être* of the ICSID is to provide facilities for resolution of investment disputes and further promote the enforcement of awards. It is obvious that an ICSID non-pecuniary award cannot be enforced under the ICSID Convention. If the enforcement scheme in non-ICSID arbitration cannot step in and play a supporting role, the prevailing party may question the function and value of the ICSID and

⁷⁴¹ *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001.

⁷⁴² *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award, 14 March 2003.

even challenge the whole international investment arbitration. Accordingly, the convergence of ICSID and non-ICSID arbitration maintains the integrity of the whole international investment arbitration.

3.2 Limitation of Convergence

It is too early to conclude that greater convergence of ICSID and non-ICSID arbitration will be seen and that, on the whole, the convergence represents the future development of invest-State arbitration. In fact, the prospect of convergence of ICSID and non-ICSID arbitration is essentially shaped by a number of limitations. In the first place, one of the unavoidable parts of the convergence is its relatively small scale. For instance, specific performance or other non-pecuniary remedies are rarely awarded by ICSID arbitral tribunals since it is more possible, feasible and even desirable to order provisional measures pending the resolution of disputes than ordering a specific performance in the award. As a consequence, it appears that the convergence would not commonly occur in the realm of enforcement with regard to the New York Convention's role in enforcing ICSID non-pecuniary remedies.

In the second place, the convergence of ICSID and non-ICSID arbitration, though significant, is controversial in some respects. At the very least, it still remains uncertain whether the 'Salini test' developed in ICSID jurisprudence shall be applied to non-ICSID arbitration, especially given that it would render meaningless the choice provided by investment treaties to foreign investors between diverse avenues of recourse. The UNCITRAL tribunal in *Romak S.A. (Switzerland) v. The Republic of Uzbekistan* also denied the role of the *Romak* award in developing jurisprudence constant, stating that it was merely tasked with a mission that was more mundane but no less important. The mission was to resolve the present dispute between disputing parties in a reasoned and persuasive manner, irrespective of the unintended consequences that the tribunal's analysis might have on future disputes in general.⁷⁴³

In the third place, the divergence and convergence of ICSID and non-ICSID arbitration are two opposing trends, and the divergence is perceptibly more powerful. The divergence of ICSID and non-ICSID arbitration is intrinsic since ICSID and non-ICSID arbitration are

⁷⁴³ PCA Case No AA280, Award, 26 November 2009, para 171.

different in nature. ICSID arbitration distinguishes itself from non-ICSID arbitration not only because of its public characteristic which is indubitably of consequence for settlement of disputes arising out of States' action to regulate investment activities, but also in view of the self-contained system which eliminates any potential exterior interference. The endogenous and exogenous effect of the systemic divergence of a general nature has significantly affected the evolution of ICSID and non-ICSID arbitration. Moreover, maintaining certain divergences within an overarching system of investor-State arbitration is beneficial for the further development of investment arbitration. The prospect of convergence is in part contingent upon arbitration institutions' endeavours to reconcile the gap between ICSID and non-ICSID arbitration. While galvanizing collective efforts to promote the convergence of ICSID and non-ICSID arbitration at the national and international levels, arbitration institutions shall also account for the diversity of arbitration which provides with unique and inspirational perspectives in facilitating dispute resolution and bringing about outcomes that are more suitable to the claimant, respondent, third parties or all of them in a particular case. For example, in order to protect confidential, sensitive or legally privileged information, foreign investors would opt for a dispute resolution mechanism that emphasizes less transparency. As stated previously, becoming a respondent before an international arbitral tribunal would have a detrimental impact on State's investment environment reputation. Accordingly, there is a possibility that States also favour a more confidential dispute resolution process for a specific case where the arbitration does not involve issues of public issues.

Concluding Observations

It has become quite conspicuous at the present time that a level of convergence of ICSID and non-ICSID arbitration has occurred and such occurrence will be expected to continue to a much greater extent in some areas of investor-State arbitration. In fact, ICSID and non-ICSID arbitration are precisely that in spite of singularity, which is appeared in numerous respects, they are also a jumbled together mechanism on the whole known as investor-State arbitration. The symbiosis of ICSID and non-ICSID arbitration creates and maintains a relatively stable environment for the convergence of ICSID and non-ICSID arbitration, in which a number of factors act as engines for promoting the convergence. However, as compared to the inherent and apparent divergences between ICSID and non-ICSID arbitration, the convergence is somehow limited at present and is likely to maintain

the current scale in the future primarily due to the need for diversity of investor-State arbitration.

Conclusion

1 Delivering Justice in a Fair, Efficient, Accountable and Legitimate Way

It is widely acknowledged that ICSID and non-ICSID arbitration are the primary and divergent mechanisms of global justice that seek to uphold rights and obligations arising out of investment between foreign investors and sovereign States. More important than singling out their characteristic traits in a straightforward manner is to evaluate them in the light of their ends. In general terms, the very premise of the evaluation of ICSID and non-ICSID arbitration, or the benchmark for evaluating the divergence of ICSID and non-ICSID arbitration to be precise, is anything but univocal, lying mainly in traditional fairness and efficiency. While fairness, which can be identified in at least three dimensions, namely fairness as an end (substantive justice), a process (procedural integrity) and legitimate power, is unequivocally an *a priori* criterion, it can also readily discern the current zeitgeist that demonstrates an aspiration towards greater efficiency in international arbitration, aiming to foster the optimum administration of justice.

Furthermore, in view of its *sui generis* characteristics, the multi-faceted investor-State arbitration not only underpins the eclectically fair and efficient delivery of justice in the traditional sense, but also concentrates on the legitimacy of the dispute resolution method which has decisive effects on the accountability, stability, vitality and long-term viability of ICSID and non-ICSID arbitration. In particular, the impact of investor-State arbitration on sovereign States is far more than the amount of compensation (which is obviously of considerable consequence for its draining public treasuries), and further extends dynamically to States' future policy-making and regulation-making since investor-State arbitration exhibits traits that characterize adjudication that is virtually tantamount to the exercise of public authority over issues relating to public interests. In fact, investor-State arbitration is perceived to be interplay of a variety of actors in which the divergence of ICSID and non-ICSID arbitration takes a crucial part in pulling the arbitral processes in discrepant directions, namely delivering fair, efficient, accountable and legitimate justice to a different extent. The endogenous and exogenous effect of the systemic divergence of a general nature, coupled with specific divergence derived from the disparate nature and architectural design, lies within variable and somewhat broad parameters. In fact, the implication of the divergence of ICSID and non-ICSID arbitration for the international

investment regime can be extraordinarily profound, ranging not only from the procedural efficiency to the substantial outcome of cases but also from the traditional pursuit of fairness to the enhancement of legitimacy through reconciling investors' interests and comparable political, economic and social concerns of States, arbitration institutions, third-parties and the public.

First, insofar as State sovereignty is concerned, it is conspicuous that States have to transfer, by and large, more alienable sovereign rights in ICSID arbitration due mainly to its self-contained system which excludes any relief and supervision from national courts. The difference as to how far these sovereignty transfers can go becomes essential when States consider joining or withdrawing from the ICSID Convention. Ordinarily, developing countries enter into BITs at the expense of surrendering judicial sovereignty because they rely on the assumption that BITs' commitment of providing foreign investors with access to investor-State arbitration is directly correlated with FDI inflows, which, however, remains controversial. As developing countries concede sovereignty by coercively subjecting themselves to investor-State arbitration only in the belief that they would benefit from the global capital market, they would abandon investment arbitration and resume their regulatory rights if such expected commitment could not be achieved. In fact, one of the primary reasons why several Latin American countries denounced the ICSID Convention but accepted UNCITRAL arbitration is precisely that the ICSID Convention, as they asserted, was an infringement of national sovereignty. In recent years developed countries have also paid more attention to the relinquishment of sovereignty since their governmental measures have been challenged in investor-State arbitration by investors from both developing and developed countries. Hence, in what ways and to what extent would States consider transferring their sovereign rights to international tribunals are of principal importance in their pursuit of economic development or overseas investment protection.

Second, the proposition of the divergence of ICSID and non-ICSID arbitration is anchored firmly and directly in the protection of investors on the international plane since in real practice it is normally the investors who select the dispute resolution method and initiate arbitral proceedings. Investors' choice between ICSID and non-ICSID arbitration is not a philosophical or theoretical question but an intensely practical and delicate matter which becomes more crucial in particular considering the fact that investment protection has been

austere in extraordinary times when financial crises sweep across the globe. Furthermore, as international arbitration is evolving into a veritable industry led by entrepreneurial counsels advising potential clients about options for resolving disputes between investors and States through investor-State arbitration, the integral impulse of counsels, coupled with incentive of third-party funding, can be asserted having measurable influence on the selection of ICSID and non-ICSID arbitration.

Third, notwithstanding the current ascendancy of ICSID arbitration, the past decade has seen an increasing number of investment cases adjudicated under the auspices of non-ICSID arbitration rules. Accordingly, it is tenable to conceive that there will be more competition among different investment fora in the future, especially given that the vast majority of investment treaties do not provide for a hierarchy of fora. While arbitration institutions have to engage in aggressive marketing campaigns and compete for their world market share of disputes, an assessment of the divergence between ICSID and non-ICSID arbitration is by no means negligible. Meanwhile, despite the competition, both ICSID and non-ICSID arbitration face the challenge against their legitimacy as an international dispute resolution mechanism. It is generally submitted that much of the so-called backlash against investor-State arbitration has been directed at ICSID arbitration. It might be an exaggeration to speak of an acute legitimacy crisis or a backlash. However, it should be noted that the challenge of legitimacy ought to be taken seriously by arbitration institutions, and the reaction and response by arbitration institutions would influence their public acceptance and further affect their functioning and viability in the future arbitration community.

Fourth, as investment disputes are more often than not claimed against actions of public service sections in host States, public interest issues, in particular those related to sustainable development, have been brought before investor-State arbitral tribunals and make two primary enquiries into the potential protection in ICSID and non-ICSID arbitration. The first enquiry concerns the procedural protection in which the ambivalence between public participation and sensitive information protection leads to different approaches to *amicus curiae* in ICSID and non-ICSID arbitration. The second enquiry focuses on the substantive protection. Though the observations that investor-State arbitration is not intrinsically biased towards sustainable development or investment protection and that tribunals shall essentially be neutral in adjudicating investment cases

are axiomatic, the rules on treaty interpretation under the Vienna Convention on the Law of Treaties have provided tribunals with potential to reconcile sustainable development and investment protection concerns. Moreover, without prejudice to their independence, neutrality and impartiality, ICSID arbitral tribunals are supposed to be intensely thoughtful of economic development (one of indispensable components of sustainable development) since the promotion of economic development is one of the fundamental objectives of the ICSID Convention. In contrast, non-ICSID arbitral tribunals may simply be charged with a commission to resolve particular claims without contemplating the wider implication on the economic and even sustainable development due to the scarcity of sustainable development clause in non-ICSID arbitration rules. The evaluation of bringing sustainable development issues before investor-State arbitral tribunals and balanced approaches to examining the relationship between sustainable development and investment protection are not yet sufficiently developed, but diverse extents of public participation in ICSID and non-ICSID arbitration and the possibility of ICSID tribunals considering sustainable development issues would have significant implications for the sovereign choice between ICSID and non-ICSID arbitration in the course of investment treaties negotiations.

Overall, investor-State arbitration is hybrid in character, inherently associating with the tension between the public regulatory powers of sovereign States on the one hand and the essentially contractual nature of the private investment on the other, and with the non-equilibrium function in pursuit of justice through resolving particular disputes *inter partes* (which is directly mandated by investors and respondent States) and of, additionally, the public interests at stake (that should be potentially guarded for the purpose of the general interest of development). Given the distinctive origins of ICSID (which is specially designed for settlement of investment disputes) and non-ICSID arbitration (that is originally crafted to apply to commercial disputes), the divergence of ICSID and non-ICSID arbitration in dealing with investment disputes alludes indubitably to different impacts on foreign investors and their counsels, sovereign States, arbitration institutions, third-parties and the public. However, the evaluation of the divergence of ICSID and non-ICSID cannot be achieved by a tally of points on the basis of a one-dimensional caricature of each alternative; rather, it not only needs a critical weighing of pros and cons of ICSID and non-ICSID arbitration, but also requires further inspection to examine the interplay and interaction between the two mechanisms and to scrutinize, accordingly, fair, efficient, accountable and legitimate ways that would improve the entire resolution system in the

realm of international investment, especially considering that the present landscape of investor-State arbitration is distinctly different from what it was nearly 50 years ago when the ICSID Convention was concluded.

2 The Divergence of ICSID and Non-ICSID Arbitration

2.1 Two General Divergences

The first divergence in nature is the public characteristic of ICSID arbitration as compared to the relatively private characteristic of non-ICSID arbitration. Although investor-State arbitration is hybrid in character primarily in the light of its adjudication of disputes that relate to private investment and States' regulatory rights, each genre of arbitration intrinsically has a public or private nature which reflects most of its characteristics, whether broadly or narrowly defined. As a multi-faceted dispute settlement mechanism, ICSID is situated at the intersection of laws, politics and economics, and the intersection typically implicates issues of international magnitude that have essential impacts on various interests. The public characteristic of ICSID arbitration is reflected in its inheritance to the notion of arbitration as a means of resolving inter-State disputes, the crucial impacts on sovereign States' future investment policy-making and regulation-making, and the designation of arbitrators by sovereign States. By comparison, though non-ICSID arbitration has enormous public significance in some cases, it is still apparent that the private characteristic is an orthodox and indispensable part of non-ICSID arbitration since UNCITRAL, SCC and other non-ICSID arbitration rules are originally and principally created for use in international commercial disputes between private businessmen. Such perception of private characteristic has caused scepticism about non-ICSID arbitration's unduly weighting on the preferences and interests of capital-exporting countries.

The second divergence of a general nature relates to the legal framework of ICSID and non-ICSID arbitration. The ICSID Convention provides a self-contained system of resolving investment disputes in which the ICSID Convention, complemented by a set of its institutional rules, is the only source of regulation of all aspects of arbitral proceedings, thus being thoroughly autonomous and explicitly independent of any legal system. On the contrary, the effectiveness of non-ICSID arbitration rests, in principle, upon a patchwork

of international and national laws. Insofar as *lex arbitri* is concerned, non-ICSID adjudicatory proceedings are subject to various procedural rules, depending on the applicable legal system at the arbitral *situs*. The application of *lex arbitri* also extends to the post-award remedies and the enforcement procedure where national courts at the arbitral *situs* are entitled with authority to review arbitral awards in accordance with national statutes, while national courts before which the enforcement is sought are conferred on broad discretionary powers under national statutes or conventions to resist the enforcement of awards.

ICSID Arbitration, which is primarily identified in terms of its public characteristic and the innovative self-contained legal framework in specially providing resolution for investment disputes, is ordinarily viewed as an immense virtue, whereas non-ICSID arbitration (with the exception of ICSID additional facility arbitration) that is allegedly perceived to be inherited a private characteristic from traditional commercial arbitration and relied on *lex arbitri* as complement seems to be slightly detrimental to the maintenance of integrity and all-inclusiveness of investor-State arbitration, and hence viewed as a relative outsider and newcomer as a form of resolution for solving investment disputes between foreign investors and sovereign States. The disparate natures and discrepant legal frameworks are not merely conceptual distinctions; instead, they bring about a number of specific procedural and substantial divergences between ICSID and non-ICSID arbitration.

2.2 Four Specific Divergences

2.2.1 Front End of Divergence: Jurisdiction

It is recognized that more sovereign rights have to be transferred to ICSID arbitral tribunals than to non-ICSID arbitral tribunal. In evaluating in what way and to what degree foreign investors can rely on investor-State arbitration, States have to consider three divergences regarding jurisdiction in ICSID and non-ICSID arbitration so as to strike a balance between State sovereignty and foreign investors' interests. First, it is conspicuous that the scope of subject matter eligible for both treaty-based and contract-based non-ICSID arbitration is broader than that in ICSID arbitration. Notwithstanding its condition on arbitrability, the subject matter covered in non-ICSID arbitration contains a broad set of transactions, allowing nearly all relevant disputes related to the whole transaction to be

settled within a proper single instrument and thereby enhancing the efficiency and effectiveness of dispute settlement. As compared to the party-centric subject matter in non-ICSID arbitration, the subject matter in ICSID arbitration is restricted to those that passed the 'dual test'. Nevertheless, while the current trend in international investment treaties appears to move in the direction where the wide-ranging subject matter is increasingly covered in ICSID arbitration, ICSID tribunals also contribute to the emerging trend through constantly ruling in favour of jurisdiction and investment protection, which signals to foreign investors that their rights would be actually and ultimately protected under the ICSID Convention and relevant investment treaties. The expansion of ICSID jurisdiction, however, gives birth to the Gordian knot which has caused and continues to cause confusion in ICSID arbitration. In order to reduce, or at least mitigate, the risks and damages caused by the Gordian knot, it is recommended that States should consider including in investment treaties a narrower definition of investment if they intend to adopt a restrictive method when being respondents in arbitral proceedings. In addition, article 25 of the ICSID Convention could not be construed by ICSID tribunals restrictively, nor liberally, but in good faith.

Second, non-ICSID arbitration is more compatible with other dispute resolution procedures, which can be identified in two aspects. In the first place, the tacit waiver rule on exhaustion of local remedies distinguishes ICSID from non-ICSID arbitration, and the explicit waiver requirement under the ICSID Convention seems to be a derogation of State sovereignty in that States normally lose their chance to protect sovereignty through involving domestic procedures due to the common negligence of the different waiver requirements between customary international law and the ICSID Convention. Nevertheless, the ICSID's explicit waiver requirement and the fork-in-the-road clause in BITs facilitate to some extent the access for foreign investors to the international remedies, and tricky investors can even enjoy a double benefit from both domestic instrument and international arbitration. In the second place, while conciliation is excluded from ICSID arbitral proceedings, the complementary use of conciliation in non-ICSID arbitration is able to reduce, if not entirely avoid, both extra time and cost consequences which can occur in ICSID arbitration. If the complementary use of conciliation is desirable, the drawback of ICSID's incompatibility can be solved by revising the ICSID Arbitration Rules. Moreover, the incompatibility has been buffered in some cases where BITs provide a waiting-period requirement under which disputes shall be initially settled amicably through consultations

and negotiations between the parties to the dispute. However, given that conciliation can be conducted under private and confidential conditions, the confidentiality of the proceedings not only fails to be accord with ICSID's general need for transparency, but also undermines the interests of various stakeholders.

Third, as compared to the exclusion of any remedy from national courts due to the depoliticization and delocalization of ICSID arbitration, the support from national courts is not only available in non-ICSID arbitration but also takes an extraordinarily essential part in some cases where a request for interim relief prior to the constitution of tribunal and the judicial enforcement of interim relief are urgent. While the role of national courts can be played in an appropriate manner that provide necessary assistances without detracting the effect of arbitration on the one hand, it also has a potential to cause a tension between jurisdiction of national courts and arbitral tribunals and further invokes its potential to bring about interference in arbitral proceedings which would unequivocally diminish crucial functions of the arbitral process on the other. In general, the abusive intervention of national courts may be not only identified as a delay tactic because it is ordinarily exercised in bad faith, but also deemed as a breach of obligation under investment treaties since it fails to comply with the rule of law and universally accepted principles of international arbitration.

2.2.2 Middle End of Divergence: The Role of Institutions

Arbitration institutions have a unique position at the fulcrum of investor-State dispute resolution mechanism, and the involvement of institutions is particularly constructive in reducing the risks of procedural breakdowns and further essentially promotes the development of investor-State arbitration. A premise of the role of institutions lies in the independence of institutions in view of the fact the *raison d'être* of investment arbitration is primarily the neutral fora delivering justice independent of exterior political, administrative and judicial interference. Admittedly, ICSID's present 'independence' as an arbitration institution is insufficient since it is administratively and financially associated with or attached to the World Bank which might be a stakeholder in ICSID arbitration cases. In contrast, except *ad hoc* arbitration under the UNCITRAL Rules, mainstream non-ICSID arbitration is commonly conducted under the aegis of independent commercial arbitration

institutions, thus effectively avoiding institutions' inappropriate or illegitimate interference towards arbitral tribunals.

The role of institutions takes two main forms. The first form concerns the substantive case-related functions of the Secretariat. While *ad hoc* arbitration without a Secretariat is arguably more flexible and some sovereign States appear reluctant to have recourse to the authority of any institution, regardless of its standing, the Secretariat in institutional arbitration entails a more predictable character of international arbitration, ensuring, to a large extent, the continued integrity and efficiency of the investment dispute settlement facilities. As compared to the Secretariat in non-ICSID institutional arbitration, the ICSID Secretariat performs two distinctive functions, ie, the screening power and the appointing authority which increase the efficiency of arbitral proceedings and guarantee the *bona fide* use of the Centre's facility.

The second form concentrates on the functions that would have profound impacts on the investor-State arbitral jurisprudence and the coherent development of investment dispute settlement mechanism, in particular the vital functions that arbitration institutions perform in controlling arbitral costs and fostering the consistency of investment arbitration. Arising out of a number of interconnected causes, the arbitral cost conundrum reveals two sensitive issues, namely the spiralling arbitral costs and the apportionment of arbitral costs. Many non-ICSID arbitration institutions are increasingly sensitive to the discontentment of the skyrocketed costs and time expenditure, and accordingly a variety of initiatives have been launched, attempting to avoid an expensive, lengthy and cumbersome process by virtue of a range of techniques which include measures that enable disputing parties to dispense with procedural formalities and tailor arbitral proceedings to their particular claims. Though the initiatives may bring with them several problems leading to unintended consequences, they set a generally positive example in directing disputing parties and tribunals to take steps to promote the cost-efficiency. In the meantime, rationalizing the cost apportionment and probably adopting the English rule would indubitably promote the clarity and determinacy of decisions and thus enhance the efficacy and efficiency of investor-State arbitration. As to the consistency, though inconsistency may ultimately imperil the legitimacy of investment arbitration, it appears extremely difficult to foster a harmonized non-ICSID case law due to the generally less transparent proceedings and a variety of applicable laws. In contrast, it is advisable that the ICSID Secretariat serves to

foster consistency and further promote a coherent development of investment arbitration jurisprudence.

2.2.3 Back End of Divergence: Challenge and Enforcement of Awards

The back end of the arbitral process, ie, the post-award remedies and the recognition and enforcement of arbitral awards, demonstrates the most dramatic divergence between ICSID and non-ICSID arbitration. As an extraordinary post-award remedy, the annulment in ICSID arbitration is an internal and centralized mechanism in which *ad hoc* committees are entitled with powers for reviewing awards on the basis of a rather limited number of specific grounds. Conversely, non-ICSID arbitral awards are subject to the judicial review by national courts at the arbitral *situs* where applicable standards of setting aside awards vary from jurisdiction to jurisdiction. The relatively decentralized framework indicates various standards of review and such disparity found in national statutes entails, *prima facie*, a remarkable degree of uncertainty. However, it is insufficient to infer that different approaches provided in ICSID and non-ICSID arbitration are inherited with superiority or inferiority from the perspective of challenging the finality of arbitral awards. In fact, it would be imprudent to conclude that non-ICSID arbitration necessarily brings about a higher likelihood of vacatur. For one thing, it appears that national courts display, by and large, great deference to international arbitral awards and the experience of vacatur before national courts can even generate a coherent and stable jurisprudence. For another, despite the restricted grounds for annulment, it is not uncommon that *ad hoc* committees exceed the role vested in them by the ICSID Convention and go too far into the merit of the cases, resulting in unpredictable proceedings in real practice.

The fate of vacated non-ICSID arbitral awards also exhibits a radical divergence between ICSID and non-ICSID arbitration. Unlike the nullity effect of annulment in ICSID arbitration, a decision on vacatur of a non-ICSID arbitral award can be appealed to higher national courts, or national courts can remand the case to the arbitral tribunals for reconsideration. More importantly, a vacated non-ICSID award may even be enforced in jurisdictions other than the arbitral *situs*, which is not only buttressed by scholars' standpoint that international arbitration is entirely detached from any legal system, but also justified under the New York Convention and the European Convention. On the one end of the spectrum, the possible enforcement of vacated non-ICSID arbitral awards gives rise to

inconsistency and unpredictability in the light of diverse court rulings in different jurisdictions. However, it may be at the opposite end of the spectrum since the effect of enforcement of vacated awards is in accord with investors' expectation, especially considering that respondent States can seek for setting aside unfavourable awards by imposing political pressure on national courts at the arbitral *situs* and that national courts at the arbitral *situs* can take into account the public policy of respondent States when vacating non-ICSID arbitral awards.

In addition to annulment, the self-contained ICSID system further contains an autonomous regime, imposing a presumptive obligation not only on disputing parties to abide by and comply with awards but also on all contracting States to enforce the pecuniary obligation imposed by awards. By comparison, the presumptive obligation to enforce non-ICSID arbitral awards is specified in different instruments under which the enforcement of arbitral awards may suffer from more onerous procedures, including the separate procedure of the recognition and enforcement and the reservations under the New York Convention. Furthermore, there is a possibility that non-ICSID arbitral awards are subject to substantive review by national courts on the merit of the awards. Accordingly, it is conceivable that the ICSID Convention provides a simplified and effective architectural design for obtaining enforcement and further ensures to a large extent the pursuit of enforcement of ICSID awards against sovereign States in less time and with less cost.

Similar to the evaluation of post-award remedies, ICSID's procedural virtues, however, are not sufficient to implicate a systematically superior enforcement mechanism. In fact, the ICSID's voluntary enforcement scheme has encountered a number of obstacles in Latin America where the compliance with awards was challenged on the grounds of a variety of defenses within and outside the ICSID Convention. The challenge of enforcement of ICSID arbitral awards not only reflects in the procedural tactical manoeuvre that unfavourable parties deploy before national courts in an attempt to delay or resist enforcement, but also extends to the sovereign immunity from execution which can take a pivotal role in refusing the enforcement of awards. Though sovereign immunity is also a potential risk in non-ICSID arbitration, it is noteworthy that there is no express reservation of immunity from execution akin to article 55 of the ICSID Convention containing in the New York Convention. In practice, investors seeking enforcement under the New York Convention had successfully contended that States' consent to arbitration encompassed an

implied waiver of a claim of immunity from execution. Moreover, as compared to the limits to enforcement of ICSID awards, a range of system designs in non-ICSID arbitration, such as a more favourable enforcement regime, few restrictions on enforcement fora, exhaustive grounds for refusal of enforcement and the availability of interim relief, are constructive in facilitating transnational enforcement of non-ICSID arbitral awards.

On balance, the divergences between ICSID and non-ICSID arbitration are manifold, reflecting in a significant number of procedural and substantive matters that range from the threshold of jurisdiction to the final execution of awards. As ICSID is specially created for investor-State arbitration, its effective and more adaptive architectural design has led to the relative ascendancy in the contemporary investment arbitration. Nonetheless, the foremost virtue of ICSID arbitration is not in itself a prevalent hallmark of superiority of an investment dispute resolution over non-ICSID arbitration. In fact, it has been an acknowledgement that non-ICSID arbitration, though original for settlement of international commercial disputes (except the ICSID additional facility arbitration), is also suitable for solving investment disputes. More importantly, several non-ICSID arbitration rules are dynamically adapting themselves, to various degrees, to prove their *raison d'être* in the context of investor-State arbitration. Accordingly, the perception of the divergence of ICSID and non-ICSID arbitration is by far more complex than simplistic sketch in which the divergence is merely considered as a matter of choice rather than of hierarchy. It is conspicuous that ICSID and non-ICSID arbitration have different and substantial impacts on legitimate interests of diverse actors in investor-State arbitration, but they also serve similar ends of delivering justice in a fair, efficient, accountable and legitimate way. In a broader context, ICSID and non-ICSID arbitration even construct complementary mechanisms of a global justice system, in particular given the emerging convergence of ICSID and non-ICSID arbitration.

3 The Convergence

Notwithstanding the inherent divergence, it appears that ICSID and non-ICSID arbitration are overstepping or have overstepped, to a certain extent, the formerly existing boundaries that underscore the characteristic traits of diverse avenues of recourse to investor-State arbitration, thereby leaving the door open for the convergence between ICSID and non-ICSID arbitration. As a matter of fact, contemporary jurisprudence has demonstrated the

distinctive relationship and interaction between ICSID and non-ICSID arbitration that might be attributed with characteristics ranging from an array of divergences which are obviously understandable on the one hand, to a noteworthy convergence that can be perceived as a new-fangled evolvement on the other. It has become evident by now that the convergence, both extant and emerging, reflects in a number of regions in the realm of international investment. Such convergence is promoted not only indirectly by the influence of convergence on international trade and investor-State arbitration and on private international law and the confluence of public and private international law, but also directly by the evolution in investor-State arbitration, the legal and cultural homogeneity of dispute resolution and the competition and cooperation of arbitration institutions. Nevertheless, while the imperative of ICSID and non-ICSID arbitration is to maintain the procedural and substantive fairness, efficiency and legitimacy applied equally, if not more so, to all actors in investor-State arbitration pursuant to protection standards enshrined in investment treaties or other applicable statutes, it is quite unequivocal that investment treaties or other applicable laws normally provide distinct recourses to remedies of the violation of protection standards. The need for diverse dispute resolution mechanisms, the parochial scale and the ambiguousness of the application of several rules make the convergence of ICSID and non-ICSID arbitration run through the centre of controversies. At the present time it is perceptible that the convergence of ICSID and non-ICSID arbitration is relatively limited, but significant.

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