

# *Investment Treaty Arbitration: Opportunities to reform arbitral rules and processes*

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Written by Nathalie Bernasconi-Osterwalder and Diana Rosert

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## *List of Acronyms*

BIT	Bilateral investment treaty
CRCICA	Cairo Regional Centre for International Commercial Arbitration
ECT	Energy Charter Treaty
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IIA	International investment agreement
ISDS	Investor-state dispute settlement
LCIA	London Court of International Arbitration
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
PCA	Permanent Court of Arbitration
SCC	Stockholm Chamber of Commerce
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development

## 1.0 Introduction

Investors are increasingly turning to investor-state arbitration to challenge a wide range of government measures, including laws, regulations and administrative decisions in all economic sectors. Less than 20 years ago this form of international arbitration was rarely used to settle disputes between foreign investors and host states. Now it is used frequently, and the number of cases is increasing rapidly. It has become common for states to agree to arbitration in advance through their treaties, their domestic laws or the contracts they negotiate with foreign investors. Typically, it is left to the investor who brings a claim against a state to choose the arbitral rules from the options specified in the individual treaty. This will impact whether the arbitration will be conducted in an arbitral institution and, if so, in which one.

Treaties most commonly allow the investor to bring a claim under the Rules of the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL). Some treaties also allow investors to bring claims under other arbitration rules, including those of the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC), the London Court of International Arbitration (LCIA), or the Cairo Regional Centre for International Commercial Arbitration (CRCICA). The UNCITRAL Rules, which are the second-most used rules after the ICSID Rules, are not attached to a specific institution; UNCITRAL itself does not administer disputes but only elaborates rules. Cases brought under the UNCITRAL Rules are therefore either conducted on an ad hoc basis or administered by an institution like the Permanent Court of Arbitration (PCA), ICSID or the SCC.

Many states, academics and civil society are voicing their discontent with investor-state arbitration and are calling for change. Issues of concern include the lack of transparency, questions surrounding the impartiality and independence of arbitrators, the predictability and consistency of interpretation, and the high costs involved, to name a few. This paper identifies opportunities for the reform of arbitral rules and processes, and assesses their potential impact and utility.

## BOX: OVERVIEW OF RELEVANT ARBITRAL INSTITUTIONS

**The International Centre for Settlement of Investment Disputes (ICSID)** was created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) signed by states in 1965 (ICSID, n.d.a). The ICSID Convention, which was drafted by the World Bank's Executive Directors, gave foreign investors and host states the possibility to submit disputes to international arbitration. ICSID is an autonomous institution within the World Bank Group, partly financed by the World Bank (ICSID, n.d.c). As of November 1, 2013, 150 states have ratified the ICSID Convention. An amended version of the Arbitration Rules entered into force in 2006.

**The United Nations Commission on International Trade Law (UNCITRAL)** was established by the United Nations (UN) General Assembly around the same time as ICSID (UNCITRAL, n.d.c), but it was not until 1976 that the UN body adopted its first arbitration rules, originally designed for commercial arbitrations involving private parties. UNCITRAL's governing body, the Commission, consists of 60 member states periodically elected by the UN General Assembly. A revised version of the UNCITRAL Arbitration Rules and the newly adopted Transparency Rules elaborated especially for treaty-based investor-state arbitration will come into force in 2014.

**The Permanent Court of Arbitration (PCA)** is an intergovernmental organization created by states in 1899 originally for the settlement of state-state disputes (PCA, n.d.a). Today, the PCA has 115 member states and its Arbitral Rules, last amended in 2012, apply to disputes that involve states, state-controlled entities and international organizations. More often, however, cases administered by the PCA are conducted under UNCITRAL Rules. The PCA is not a "court" in the judicial sense of the term, as it does not resolve the disputes. Rather, it is a permanent administrative organization that can serve as a registry for purposes of temporary international arbitration and similar processes.

**The Stockholm Chamber of Commerce (SCC) Arbitration Institute** is a non-governmental entity. The Stockholm Chamber of Commerce founded it as an independent, private body to administer commercial arbitrations in 1917 (SCC, n.d.c). The SCC Arbitration Institute oversees arbitral proceedings conducted under its own rules (amended in 2010) and other arbitration rules.

**The International Chamber of Commerce (ICC) International Court of Arbitration**, the ICC's independent arbitral body, and the ICC Arbitral Rules came into being in 1923, and play a significant role in the field of international commercial arbitration (ICC, n.d.b). The Court and the ICC Executive Board, two bodies sharing governing powers over arbitral proceedings, are not composed of member state representatives but individuals with a legal or private business background. The latest amendments to the ICC Arbitration Rules came into effect in 2012. The ICC "court" is not an actual court in judicial terms and does not resolve disputes. Rather, its primary role is to administer individual ICC arbitrations.

**The London Court of International Arbitration (LCIA)** is another such private body set up in 1892 by a municipal government authority, the City of London Corporation, and the London Chamber of Commerce to deal with commercial disputes (LCIA, n.d.). Today, the LCIA is a not-for-profit company with a Board, an Arbitration Court with up to 35 commercial arbitration practitioners and a Secretariat. The LCIA Arbitration Rules have remained unchanged since 1998. It does not function like a judicial court to resolve disputes.

In 1979, the **Cairo Regional Centre for International Commercial Arbitration (CRCICA)**, also known as the Cairo Centre, was founded by the Asian African Legal Consultative Committee and the Egyptian Government (CRCICA, n.d.). It has the status of an independent international organization working on a non-profit basis. The institution, which does not comprise member states, is overseen by a Board of Trustees with 10 to 30 eminent personalities and an Advisory Committee. The disputes filed with the Centre are typically of commercial nature and mainly involve claimants from Egypt as well as other African and Asian countries (CRCICA, 2012). The Arbitration Rules of the Cairo Centre were last revised in 2011.

Primarily active in international commercial arbitration, the LCIA and CRCICA play only a marginal role in investment treaty arbitration.

To identify the importance of the respective rules and institutions, Section 2 of this paper looks at the number of investor-state disputes brought under the different arbitration rules and administered by different institutions. It also evaluates whether arbitrations conducted under different rules lead to similar outcomes for states and investors. The paper then examines the governing structures of the relevant institutions in Section 3, comparing the reform opportunities between inter- and non-governmental bodies. In Section 4, the paper identifies three selected areas for possible reform under different rules and institutions, including transparency, arbitrator independence, and consistency and correctness of arbitral awards. Finally, Section 5 discusses the findings of the paper in the context of the broader reform debate.

## 2.0 *Investor-State Dispute Settlement: What the numbers tell us*

### 2.1 Under Which Rules Are Investment Arbitrations Litigated?

According to the United Nations Conference on Trade and Development (UNCTAD), the total number of known investor-state dispute settlement (ISDS) cases based on bilateral investment treaties (BITs) and other investment agreements rose to 514 by the end of 2012 (UNCTAD, 2013a, p. 111). In 2012 alone, at least 58 treaty-based ISDS cases were filed under various arbitration rules and in different arbitration institutions. So far this is the highest number of known cases initiated in a year. These numbers only represent known cases, compiled from public sources. The actual number of treaty-based cases is likely to be higher, given that the relevant arbitration institutions, aside from ICSID,<sup>1</sup> do not maintain public registries for such cases, and only some cases become public. This raises the evident problem of lack of transparency which is discussed further in section 4.1.

By the end of 2012, the largest proportion of known ISDS cases have been brought under the ICSID Convention and the ICSID Additional Facility Rules (61.9 per cent of all disputes), followed by UNCITRAL Arbitration Rules (27.6 per cent).<sup>2</sup> Other disputes were brought under SCC Rules (5.1 per cent) and ICC Rules (1.6 per cent), as well as under other, sometimes unknown, rules (3.9 per cent) (UNCTAD, 2013b, p. 4).

Cases initiated under the ICSID Convention are always administered by the ICSID Secretariat, as are cases brought under the ICSID Additional Facility Rules. Cases brought under the UNCITRAL Rules, however, are not administered by UNCITRAL, since UNCITRAL has no institutional framework to do so. As a consequence, arbitral institutions and applicable rules do not always overlap. For example, one institution growing in importance for administering investor-state cases is the PCA; however, the PCA Rules are rarely used in investment arbitration. Rather, most PCA-administered arbitrations are conducted under the UNCITRAL Rules. According to UNCTAD, the PCA administered a total of 85 investment treaty cases by the end of 2012 (UNCTAD, 2013b). As of November 2013, the PCA has released basic information for only 22 of these cases, such as the names of the disputing parties, to the public (PCA, n.d.c). To date, UNCITRAL itself has not published statistics on the use of its rules in investment treaty arbitrations.

Among non-governmental institutions, only the SCC publishes annual statistics specifying the number of treaty-based cases. The SCC reported that about 46 cases were registered with the institution under SCC Rules, UNCITRAL Arbitration Rules and ad hoc proceedings between 2001 and 2012.<sup>3</sup> Ten investment treaty arbitrations were registered in 2012 alone.<sup>4</sup>

All arbitrations conducted under the ICC Rules have to be administered by the ICC International Arbitration Court, as stated in the ICC Rules.<sup>5</sup> Although the ICC does not officially report the actual number of administered cases, it is likely to be the 4th relevant institution.

<sup>1</sup> The ICSID Secretariat is required to publish all requests for conciliation and arbitration, both under the ICSID Arbitration Rules and the Additional Facility Rules. See ICSID Administrative and Financial Regulations (2006), Regulation 22.

<sup>2</sup> Based on unpublished UNCTAD data. For published UNCTAD data on this issue, see UNCTAD (2013b, p. 4).

<sup>3</sup> 43 of the cases were brought between 2003 and 2012. See SCC (2012). For the years 2001 and 2002, the SCC reported another three cases. See SCC (2011).

<sup>4</sup> See SCC (2012).

<sup>5</sup> ICC Arbitration Rules (2012), Article 1(2).

Other institutions administering investment arbitrations include the CRCICA and the LCIA. One case was registered under the CRCICA Rules in 2012 and another one in 2000.<sup>6</sup> CRCICA has reported a total of three cases by the end of 2012 (Raouf, 2012).<sup>7</sup> The LCIA registered one case in 2007 and, according to UNCTAD data, this is the only known case conducted under LCIA Rules.<sup>8</sup> Since the institution does not publish specific numbers on treaty-based cases, the actual number of cases submitted to the LCIA remains unknown.

Overall, the numbers available to date indicate that ICSID Rules are the most commonly used in investment arbitration, followed by UNCITRAL Rules. In terms of the institutions administering the largest number of investment treaty claims, the available data suggests that ICSID is by far the most active arbitral institution in this field, followed by the PCA and the SCC. Presumably the next most frequently used institution is the ICC, but numbers are not readily available. Yet, international commercial arbitration remains the main activity of private arbitration bodies like the SCC, ICC, LCIA and CRCICA.

## 2.2 Winning and Losing in Investment Arbitration

Investment treaty arbitrations are always initiated by investors, since treaties to date provide investors with rights and remedies against the state but not the other way around. As a consequence, a state can never actually “win” a treaty-based ISDS case—it can really only successfully defend itself.

Based on UNCTAD data,<sup>9</sup> out of 244 concluded cases by the end of 2012, 41.4 per cent of the decisions were rendered in favour of the state, 32.4 per cent in favour of the investor and 26.2 per cent were settled<sup>10</sup> by the disputing parties. The remaining 270 cases that have not been counted as “concluded” are either pending, discontinued for reasons other than settlement, or their outcomes are unknown. The ratio of cases awarded in favour of the investor or state or that were settled, have remained similar over the past four years.<sup>11</sup>

Data on concluded cases under individual arbitration rules by the end of 2012<sup>12</sup> indicates that the outcomes of cases under ICSID and UNCITRAL Rules led to similar results: the number of decisions in favour of the state amounted to a little over 40 per cent and the number of decisions in favour of the investor and settlements combined amounted to slightly below 60 per cent.<sup>13</sup> For disputes brought under SCC Rules by the end of 2012, only 25 per cent were in favour of the state and 75 per cent of the disputes resulted in decisions in favour of the investor (56 per cent) or were settled (19 per cent).<sup>14</sup> Given the small number of cases at the SCC (16 concluded cases) compared to ICSID (153 cases) and

<sup>6</sup> See UNCTAD (n.d.; 2011; 2012).

<sup>7</sup> Recently, an ad-hoc arbitration case, *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya* and others, applied the CRCICA Arbitration Rules, but was not administered by the Centre.

<sup>8</sup> UNCTAD notes that this case was conducted under LCIA Rules, while three other UNCITRAL Rules cases had been administered by the LCIA by that time. See UNCTAD (2012).

<sup>9</sup> Based on unpublished UNCTAD data. For published UNCTAD data, see UNCTAD (2013b).

<sup>10</sup> Settlements include cases in which it is known that the parties discontinued the proceedings because they agreed on a settlement, as well as those cases in which tribunals rendered final awards that embody a settlement agreement between parties. Settlements may involve compensation payments to the claimant or giving in to other investor demands such as granting of permits or adapting concession terms, or even the revocation of a proposed law, etc. In short, settled cases usually imply that the investor received something good enough to settle the case initiated. The settlement agreements are often not made public.

<sup>11</sup> Based on a comparison of UNCTAD data reported for the years 2009-2012 in the respective UNCTAD “IIA Issues Notes,” available at [www.unctad.org/iaa](http://www.unctad.org/iaa).

<sup>12</sup> Based on unpublished UNCTAD data. For published UNCTAD data, see UNCTAD (2013b).

<sup>13</sup> Of the approximately 60 per cent, the number of decisions in favour of investors compared to settled cases was slightly higher with respect to ICSID disputes (34 per cent vs. 23 per cent) in comparison to UNCITRAL disputes (25 per cent vs. 34 per cent).

<sup>14</sup> Based on unpublished UNCTAD data. For published UNCTAD data, see UNCTAD (2013b).

UNCITRAL (68 cases), these numbers are not as representative but they do provide some insight into the different outcomes nevertheless.

In terms of the size of claims, a list published by the American Lawyer in July 2013, counted 52 treaty disputes with investor claims above US\$1 billion (Goldhaber, 2013). It also showed that the great majority of these cases (about 4 out of 5) were brought under ICSID Rules. The rest was brought under UNCITRAL Rules and one under SCC Rules. However, the conclusion that high claims are more likely to end up under ICSID would be too simplistic, because the numbers appear to do no more than reflect the repartition of investor-state cases amongst rules and institutions in general. Given that more than three fifths of all claims are filed under ICSID Rules, the number of multi-billion dollar claims increases accordingly. A claimant's decision to bring a case under one set of rules over another might be only marginally based on the amount at issue, if at all. More important considerations of the claimant will relate to enforceability and ICSID membership.

As to the compensation awarded to investors under different rules, available data is largely limited to ICSID and UNCITRAL awards. Among the 83 awards rendered in favour of the investor by the end of July 2013, 52 are ICSID awards, 21 UNCITRAL awards, 9 SCC awards and 1 other award. The principal amounts awarded to the investor totalled US\$6.8 billion, excluding interest. The average amount, across all rules and venues, is US\$81.4 million.<sup>15</sup> The highest known award was rendered in *Occidental and others v. Ecuador*<sup>16</sup> under ICSID Rules, ordering Ecuador to pay US\$1.77 billion to the investor. The second highest known award of US\$935 million was delivered by an ad-hoc tribunal applying the CRCICA Arbitration Rules in *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*.<sup>17</sup>

### 2.3 Setting Reform Priorities in Light of Numbers and Trends

The impact of any reform efforts in the area of investor-state arbitration will be greatest at ICSID due to both the importance of its rules and the institution itself, since 62 per cent of all disputes were brought under ICSID Rules with the ICSID Secretariat. Any reform to the UNCITRAL Rules will also have an important impact given that they are the second most used rules after ICSID (28 per cent of all disputes). In terms of institutions besides ICSID, the PCA and SCC dominate in the area of investor-state arbitration. The ICC may also be increasing in importance though the numbers available are very incomplete and sketchy. Reform at institutions such as PCA might be limited despite its numbers, however, because its function is in most cases purely administrative, and its own arbitration rules are not applied frequently.

Based on the data available, it is safe also to conclude that ICSID and UNCITRAL Rules are relevant not only in terms of the number of cases but also with respect to the high awards rendered and the size of the of claims brought. Given the significant percentage of cases decided against states or settled at some level of cost, the numbers confirm that the threat and risks involved in investment arbitration are real. Unfortunately, information on the size of awards or claims is

<sup>15</sup> The average amounts awarded under ICSID Rules are higher than those under UNCITRAL Rules (US\$87,752,678 vs. US\$59,099,614), while the median values are at a similar level (US\$13,203,371 vs. US\$16,300,000). The available SCC awards show a considerable lower average and median amount of compensation (US\$2,324,798 and US\$2,026,480). IISD calculated the amounts based on information from the UNCTAD Investor-State Database and UNCTAD "IIA Issues Notes" from 2010 to 2013 ([www.unctad.org/iaa](http://www.unctad.org/iaa)), Investment Treaty Arbitration ([www.italaw.com](http://www.italaw.com)) and Investment Arbitration Reporter ([www.iareporter.com](http://www.iareporter.com)).

<sup>16</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/06/11, Award. Retrieved from <http://italaw.com/sites/default/files/case-documents/italaw1094.pdf>.

<sup>17</sup> *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, Final Award. Retrieved from <http://italaw.com/sites/default/files/case-documents/italaw1554.pdf>.



largely unavailable in cases brought under rules and institutions other than UNCITRAL and ICSID, so that it is difficult to make comparisons here.

Whether disputes may be more likely to be resolved in favour of the state or the investor under one set of rules as compared to another or lead to higher awards, would need to be analyzed in more detail to be able to draw conclusions on reform priorities. Besides limited public information on the existence and the outcomes of proceedings in some institutions, such as the SCC, it is difficult to determine to what extent the choice of arbitration rules or institution is relevant to the outcome.

Finally, another quantitative factor—aside from those relating to the number of cases brought and the outcome of disputes that might also be potentially important for setting reform priorities—relates to the question of whether disputes in certain sectors are more often resolved under one institution over another or tend to occur in particular institutions. This might play a role for states whose economy is concentrated in a particular sector, such as extractive industries, for instance. The data available on investment arbitration by sectors indicates that disputes across all rules cover a wide range of sectors which have significant sustainable development impacts, especially in areas such as oil and gas, mining, food security, public services and financial sector reform. There appears to be no decisive pattern linked to a particular institution.<sup>18</sup> One exception to this is the use of the SCC for energy disputes. The SCC is listed as one of the alternatives available for investor-state arbitrations under the Energy Charter Treaty (ECT), a multilateral treaty governing trade and investment in the energy sector. It is one of the only sectoral investment protection agreements and includes 47 member states that have signed and ratified it by November 1, 2013.<sup>19</sup> Given that the SCC plays an important role in the resolution of energy disputes between states and investors,<sup>20</sup> it might provide some opportunities as a platform for discussions relating to the reform of energy-related investment rules and arbitration.

The next section examines the governing structures of the institutions behind the arbitration rules and discusses reform opportunities in this light.

<sup>18</sup> UNCTAD provides data on the sector distribution of ISDS cases. See UNCTAD (n.d.).

<sup>19</sup> 52 countries have signed or acceded to the ECT, but five have not yet ratified it (Australia, Belarus, Iceland, Norway, and the Russian Federation). Also the European Community and Euratom are parties. See Energy Charter (n.d.).

<sup>20</sup> Besides cases that invoked ECT provisions, some high-profile energy disputes invoking BIT provisions were also filed with the SCC, e.g. *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005; and *Renta 4 S.V.S.A., et al. v. The Russian Federation*, SCC No. 24/2007.

### 3.0 *Considering governing structures*

While at ICSID, UNCITRAL and the PCA, the governing bodies are composed of the institutions' respective contracting state parties or member states, the remaining arbitral institutions (SCC, ICC, LCIA and CRCICA) are governed by private bodies (in most cases boards) that are composed of individuals from the private sector such as directors of private companies, private lawyers, arbitrators or professors.

#### 3.1 Intergovernmental Structures: ICSID, PCA, UNCITRAL

Amongst the intergovernmental institutions, ICSID has the highest number of contracting state parties (150).<sup>21</sup> The representatives of the contracting states form the ICSID Administrative Council (ICSID, n.d.c) that, amongst other governing body functions (e.g. election of the Secretary-General, approval of the ICSID budget) (ICSID, n.d.c), is in charge of the proposal and approval of amendments to the ICSID Convention that need to be ratified by all contracting states before coming into force.<sup>22</sup> For the adoption of the ICSID Arbitration Rules and changes thereto, the Administrative Council requires a majority of two thirds of its members.<sup>23</sup> The Chairman of the Administrative Council, i.e. the President of the World Bank, as a default rule, may appoint arbitrators.

As an intergovernmental organization with 115 member states (as of November 1, 2013), the PCA has the second largest state membership (PCA, n.d.d). The member states are represented in the Administrative Council, the PCA's governing body that "oversees its policies and budgets" (PCA, n.d.h). The Council is presided over by the Minister for Foreign Affairs of the Netherlands as set out in the PCA's founding treaties (PCA, n.d.b). As President of the Council, the Minister for Foreign Affairs nominates the Secretary-General of the International Bureau, the PCA's Secretariat, which is then appointed by the Administrative Council.<sup>24</sup> Traditionally, the Secretary-General of the PCA is a Dutch diplomat or high representative of the Dutch Ministry of Foreign Affairs (PCA, n.d.f). The Secretary-General acts as appointing authority in PCA arbitrations.<sup>25</sup> Amendments to the PCA Rules, which in the past were prepared by a drafting Committee consisting of 'leading practitioners' in the field of international arbitration,<sup>26</sup> are adopted by the Administrative Council (PCA, n.d.e).

The governing body of UNCITRAL, the Commission, consists of the representatives of 60 member states elected for three or six years by the UN General Assembly (UNCITRAL, n.d.c). Amendments to the UNCITRAL Rules are initiated, drafted and adopted by the Commission with the participation of observer states, international organizations and NGOs (UNCITRAL, n.d.a). Intergovernmental working groups are involved in the preparation and pre-negotiation of draft rules and other issues within the Commission's program of work (UNCITRAL, n.d.b).

<sup>21</sup> 150 states signed and ratified the ICSID Convention as of November 1, 2013. An additional nine states signed the Convention, but did not (yet) ratify it. See ICSID (n.d.b).

<sup>22</sup> ICSID Convention (2006), Articles 65 and 66.

<sup>23</sup> ICSID Convention (2006), Article 6.

<sup>24</sup> 1899 Convention for the Pacific Settlement of International Disputes, Article 28. See Rules of Procedure of the Administrative Council of the PCA, Article VIII. See also PCA (n.d.g).

<sup>25</sup> PCA Arbitration Rules (2012), Article 6.

<sup>26</sup> The drafting Committee was chaired by Jan Paulsson. The other members were Lise Bosman, Brooks W. Daly, Alvaro Galindo, Alejandro Garro, H.E. Judge Sir Christopher Greenwood, Michael Hwang, Gabrielle Kaufmann Kohler, Salim Moollan, Michael Pryles AM, Judge Seyed Jamal Seifi, and Jernej Sekolec. See PCA (n.d.e).

### 3.2 Non-Governmental Structures: ICC, SCC and others

In contrast to ICSID, PCA and UNCITRAL, the ICC International Court of Arbitration, the SCC Arbitration Institute and other arbitral bodies, such as the LCIA and the CRCICA, have non-governmental structures.

The ICC International Court of Arbitration, for example, is a “Court” consisting of over 100 individuals, who are commonly lawyers specialized in international commercial arbitration, acting as the governing body (ICC, n.d.a; n.d.e). The ICC World Council, consisting of private sector business delegates from ICC company members (ICC, n.d.f) appoints the Court members for three-year terms. The ICC Court is not a judicial court deciding disputes, but rather it carries out functions such as assessing whether there is a *prima facie* ICC arbitration agreement, appointing arbitrators, and deciding arbitrator challenges, among other things (ICC, n.d.d). The ICC Executive Board comprises 20 persons, representatives of private sector businesses and chambers of commerce (ICC, n.d.c) that have some decision-making powers, for example with regard to the ICC Arbitration Rules.<sup>27</sup> While the Court proposes amendments to the rules, it is up to the ICC Executive Board to approve them.

The SCC Arbitration Institute, while not having member states, has an SCC Board that functions as the governing body, and consists of 15 to 16 law experts (SCC, n.d.a). The Board members are elected by the Board of Directors of the Stockholm Chamber of Commerce,<sup>28</sup> which is composed of representatives of Swedish companies (SCC, n.d.b). All SCC Board members are “distinguished and highly qualified experts in international commercial dispute resolution” (SCC, n.d.a) affiliated with law firms, other arbitration institutions and universities (SCC, n.d.d). Among other things, the Board of the SCC Arbitration Institute takes “decisions regarding *prima facie* jurisdiction, appointment of arbitrators, challenge to arbitrators and the arbitration costs” (SCC, n.d.a). How amendments to the SCC Rules are adopted under this governing structure is not fully transparent.

### 3.3 Reform Opportunities for States

States, especially developing states, should choose carefully which arbitral institutions and rules they make available to investors in their investment treaties. They should assess the institutions’ governing structures and who is behind the decision making (see Table 1), including in crucial areas such as the amendment of arbitration rules and arbitrator appointments.

Where a state is not satisfied with the applicable arbitral rules and processes, it will have different degrees of influence for change depending on the target institution. The three intergovernmental institutions arguably provide the best opportunities due to their structures, though each forum presents its own challenges and limitations: ICSID, with its extensive state membership, might be quite difficult to get moving towards reform, although significant reforms of the arbitral rules were in fact achieved in 2006. The impact of reforms would be rather limited at the PCA given that the PCA most often acts merely as an administrator of investment arbitrations conducted under UNCITRAL Rules, offering no possibilities to reform the actually applicable rules. UNCITRAL, on the other hand, offers opportunities to reform its rules—which are widely applicable—but, given its absence of an administrative function in investment arbitration, makes it less opportune to push for institutional changes, such as creating an appellate mechanism, for example. ICSID unites the rule-making and administrative functions and therefore provides the best opportunities for reform at both levels. However, focusing on reform only at ICSID might limit opportunities to “think outside the box” given the extent to which ICSID is already engrained in how investment arbitration functions today.

<sup>27</sup> ICC Arbitration Rules (2012), Appendix I – Statutes of the International Court of Arbitration.

<sup>28</sup> SCC Arbitration Rules (2010), Appendix I – Organisation.

Finally, it is worth noting that despite the governmental structures of UNCITRAL and PCA, the influence of private practitioners and “experts” in the revision processes is significant. Many of the government members in the UNCITRAL Working Group revising UNCITRAL Arbitration Rules were represented by private practitioners and arbitrators, and a host of arbitration associations were represented as observers. Similarly, the committee tasked with the review of the PCA arbitration rules was composed of several private practitioners and arbitrators, some PCA officials, one UNCITRAL official and one judge of the International Court of Justice, but no state representatives or representatives of non-governmental organizations (PCA, n.d.e).

**TABLE 1: GOVERNING STRUCTURES OF ARBITRAL INSTITUTIONS**

	COMPOSITION	MAIN FUNCTIONS
ICSID	<ul style="list-style-type: none"> <li>▪ 150 contracting state parties represented in the Administrative Council (governing body)</li> <li>▪ Secretariat (mostly administrative functions)</li> </ul>	<p>Administrative Council:</p> <ul style="list-style-type: none"> <li>▪ Adopts amendments to the ICSID Convention, conciliation and arbitration rules</li> <li>▪ Elects Secretary-General</li> <li>▪ Approves ICSID budget</li> <li>▪ Adopts administrative and financial regulations</li> <li>▪ Chairman of the Council (President of the World Bank, traditionally a U.S. citizen)               <ul style="list-style-type: none"> <li>◦ Decides arbitrator challenges by default rule</li> <li>◦ Appoints arbitrators by default rule</li> </ul> </li> </ul> <p>Secretariat:</p> <ul style="list-style-type: none"> <li>▪ Administers disputes</li> <li>▪ Secretary-General of ICSID               <ul style="list-style-type: none"> <li>◦ Decides whether dispute is manifestly outside ICSID jurisdiction</li> <li>◦ Determines administrative costs</li> </ul> </li> </ul>
UNCITRAL	<ul style="list-style-type: none"> <li>▪ 60 member states represented in the Commission (governing body)</li> <li>▪ Six intergovernmental Working Groups composed of all member states, including Working Group II on Arbitration and Conciliation</li> </ul>	<p>Commission:</p> <ul style="list-style-type: none"> <li>▪ Initiates, drafts and adopts amendments to arbitration rules</li> <li>▪ Working Group II (Arbitration and Conciliation):               <ul style="list-style-type: none"> <li>▪ Discusses and prepares substantive content of rules and amendments</li> <li>▪ Works on other issues within the Commission’s program of work</li> </ul> </li> </ul>

	COMPOSITION	MAIN FUNCTIONS
PCA	<ul style="list-style-type: none"> <li>115 member states represented in the Administrative Council (governing body)</li> <li>International Bureau, Secretariat (mostly administrative functions)</li> </ul>	<p>Administrative Council:</p> <ul style="list-style-type: none"> <li>Oversees administration, policies and budget</li> <li>Directs and controls International Bureau</li> <li>Adopts amendments to arbitration rules</li> <li>Appoints Secretary-General of the International Bureau</li> <li>President of the Council (Dutch Minister of Foreign Affairs) <ul style="list-style-type: none"> <li>Nominates Secretary-General of the International Bureau</li> </ul> </li> </ul> <p>International Bureau:</p> <ul style="list-style-type: none"> <li>Serves as registry and provides administrative support</li> <li>Secretary-General (traditionally a high-level Dutch diplomat) <ul style="list-style-type: none"> <li>Appoints arbitrators by default rule</li> <li>Decides arbitrator challenges</li> <li>Replaces arbitrator by default rule</li> <li>Reviews costs and fees fixed by the tribunal upon parties' request</li> </ul> </li> </ul>
SCC Arbitration Institute	<ul style="list-style-type: none"> <li>No member states</li> <li>SCC Board consisting of 15 to 16 law experts (governing body)</li> <li>Secretariat (administrative functions)</li> </ul>	<p>Board:</p> <ul style="list-style-type: none"> <li>Decides whether dispute manifestly lacks jurisdiction</li> <li>Appoints presiding arbitrator and, by default rule, other arbitrators</li> <li>Decides arbitrator challenges</li> <li>Releases and replaces arbitrators</li> <li>Fixes advance arbitration costs</li> <li>Fixes arbitration place by default rule</li> </ul>
ICC International Court of Arbitration	<ul style="list-style-type: none"> <li>No member states</li> <li>Court with over 100 members (governing body)</li> <li>ICC Executive Board with 20 members (some governing body powers)</li> <li>Secretariat (administrative functions)</li> </ul>	<p>Court:</p> <ul style="list-style-type: none"> <li>Proposes amendments to arbitration rules</li> <li>Administers disputes</li> <li>Decides on existence of prima facie arbitration agreement under ICC Rules</li> <li>Appoints presiding arbitrator and confirms remaining arbitrators or, by default rule, appoints them</li> <li>Decides on challenge and replacement of arbitrators</li> <li>Scrutinizes and approves Tribunal's Award</li> <li>Fixes (advance) arbitration costs</li> <li>Fixes place of arbitration</li> </ul> <p>Executive Board:</p> <ul style="list-style-type: none"> <li>Approves amendments to arbitration rules</li> <li>Recommends President of the Court</li> </ul>

Source: IISD table based on information available on the institutions' official websites and arbitration rules

## 4.0 Selected Issues for Reform

The following section focuses on three potential areas for reform—transparency, arbitrator independence and impartiality, and consistency and correctness of awards—and indicates the strengths and weaknesses that different sets of arbitration rules have in these areas. Many of the issues could be addressed by states in individual investment treaties (and several existing treaties can serve as examples). However, states could also consider opting for a more systemic reform approach that involves direct changes to the arbitral rules and processes that are referred to in the great majority of treaties.

### 4.1 Evolving Transparency in Investor-State Arbitration

Unlike domestic and most international judicial proceedings, investment arbitration proceedings are typically not public and can remain secret from beginning to end, including with respect to the commencement of a proceeding, the awards and other documents, as well as hearings. This is due to the arbitration rules that apply in investment arbitration cases, including ICSID and UNCITRAL Rules. Some states have supplemented these rules through their treaties in order to ensure transparency. The United States and Canada began this practice a little over a decade ago, and the practice is now steadily expanding to other treaties as well. The majority of the treaties existing today remains silent on transparency, and simply refer to the applicable arbitration rules.

Unsatisfied with the state of secrecy, ICSID member states agreed to increase transparency in ICSID Rules that entered into force in 2006. The reform included the obligation to register all new disputes, to publish the outcome and legal reasoning of the award and to set up a process to allow for amicus curiae submissions. Most other arbitration rules (ICC, SCC, LCIA, etc.) remain secretive even today, despite the fact that many have been revised recently (SCC in 2010, ICC and PCA in 2012). This was also the case with UNCITRAL Rules—until recently, when UNCITRAL Rules made a leap towards transparency in adopting new rules in July 2013. These rules are the result of a process that lasted over six years. It began in 2006, the same year that the new ICSID Rules came into force, when the UNCITRAL Working Group on International Arbitration and Conciliation began its revision of the 1976 UNCITRAL Rules. In that process, several countries, such as Argentina and Canada, and expert observers including those from the International Institute for Sustainable Development (IISD), urged the Working Group and the Commission to consider special rules for investment arbitration. The discussion on transparency in investment arbitration was finally postponed until after the adoption of the 2010 generic arbitration rules, so that the discussions on the actual transparency rules began in the fall of 2010. After many hurdles, Transparency Rules were finally adopted by the UNCITRAL Working Group in February 2013 and formally adopted by the UNCITRAL governing body, the Commission, in July 2013 (United Nations Information Service, 2013). They are now an integral part of the UNCITRAL Arbitration Rules as applicable to treaty-based investor-state arbitration.

The “UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration,” which will officially come into effect on April 1, 2014, provide for a significant degree of openness throughout the arbitral proceedings (UNCITRAL, 2014; Johnson & Bernasconi-Osterwalder, 2013). They will be an integral part of the UNCITRAL arbitration proceeding under treaties that refer to UNCITRAL Rules. However, for those treaties concluded before the Transparency Rules come into effect, an extra step needs to be taken. In those cases, states or disputing parties need to expressly “opt in” to the new rules. To facilitate that “opt in” process, UNCITRAL has begun to negotiate a convention under which states commit to applying the new UNCITRAL Rules on Transparency to *all* treaty-based investment arbitrations, including not only those conducted under UNCITRAL Rules and based on pre-existing treaties, but also disputes under ICSID,

SCC, ICC, and others. The exact contours of the convention remain to be set out. The discussion on this began in fall 2013 (UNCITRAL, 2013).

Since investor-state arbitrations might have repercussions for public policies and public finances, member states of ICSID and UNCITRAL acknowledged that rules applicable to investor-state arbitrations need to ensure transparency, public participation and accountability. However, those arbitration rules designed and adopted by private-sector, non-governmental entities (including, amongst others, those of the ICC and SCC), continue to place emphasis on the confidentiality of proceedings, while disregarding the public interest at stake in investment treaty arbitrations. The main reform opportunity to extend transparency standards to all treaty-based investment arbitrations is therefore the envisaged transparency convention under the auspices of UNCITRAL.

## 4.2 Independence and Impartiality of Arbitrators

Several characteristics of the investment arbitration process have led to concerns about the independence and impartiality of the arbitrators and investor-state dispute settlement overall. The same concerns reach across rules and institutions. One cross-cutting concern is that disputing parties appoint their own arbitrator. This holds true for all the relevant arbitration rules. Typically, investment tribunals include three arbitrators of which two are party-appointed and the President is either chosen by the party-appointed arbitrators (in the case of UNCITRAL) or by the disputing parties themselves (in the case of ICSID) if they can come to an agreement. In either case, if no agreement can be reached, the President will be appointed by the dedicated appointing authority. The appointing authority for ICSID is the Chairman of the Administrative Council, i.e., the President of the World Bank (traditionally a U.S. citizen), and for UNCITRAL either an appointing authority designated by the parties or, if no agreement can be reached between the parties, by the PCA Secretary-General (traditionally a Dutch citizen) at the request of either party. The system of party-appointed arbitrators raises the question whether arbitrators can be truly impartial or independent. Even if the arbitrator is not actually biased in favour of the party that appointed him or her, there remains an appearance of partiality. Supposedly, a party will select a particular arbitrator because of his or her likeliness to rule in this party's favour.

There are also concerns with respect to the way the President is designated. Given that this is “widely seen as the most important step in the constitution of an investment tribunal” and that the “presiding arbitrators play a key role in arbitration decision-making” (OECD, 2012, p. 89), it is of note that under the rules of the SCC and the ICC, neither the parties nor the arbitrators determine the appointment of the President. Instead it is the SCC Board or the ICC Court—both organs composed of members that are appointed by business representatives—that make that determination.

The manner in which arbitrator challenges are resolved also raises serious issues. The same entities and persons responsible for designating the President of an investment tribunal are also in charge of deciding on the possible disqualification of an arbitrator who may be challenged by a disputing party with respect to impartiality or independence concerns or other reasons (see Table 2). The general rule under the ICSID Convention is that the remaining arbitrators decide a challenge against a co-arbitrator, unless the challenge is directed at more than one arbitrator, or the two arbitrators are “equally divided” on the issue (Art. 58). In the latter cases, the Chairman of the Administrative Council, i.e., the President of the World Bank, will decide on the challenge. Under UNCITRAL Rules, the appointing authority chosen by the disputing parties or the PCA Secretary-General decides arbitrator challenges (Art. 13).

Having arbitrators decide on challenges to colleague arbitrators seems highly problematic given the fact that the deciding arbitrators themselves might likely be in the situation of being challenged in the future, and possibly even by the arbitrator challenged in the first place. This constellation makes it difficult not to conclude that an arbitrator might

be influenced by his or her personal considerations when deciding the challenge. While it appears less problematic when an entity other than the remaining arbitrators decides an arbitrator challenge, the fact that the person responsible will in most cases be either American (President of the World Bank pursuant to the ICSID Convention) or Dutch (Secretary General of the PCA pursuant to UNCITRAL Rules) remains an issue of concern. The option of having an organ consisting of several persons decide on the challenge, as is the case with the SCC Board or the ICC Court, appears preferable at first glance. However, when the decision-making instance is composed of members that are appointed by business representatives and includes mostly commercial law arbitrators and practitioners, the solution in SCC and ICC arbitration seems equally inadequate for resolving disputes involving state parties and public interest issues.

As can be seen in the chart below, the standards applicable in the various rules for deciding a challenge are broad enough to allow for ample interpretation by the person or entity deciding the challenge. This makes it even more important to ensure that the decision maker him or herself be impartial and independent. The threshold for disqualification pursuant to ICSID Rules has been understood in the past as higher than pursuant to other arbitration rules, requiring evidence of a “manifest” lack of qualities such as independence or impartiality as opposed to applying the “reasonable doubts test” known in UNCITRAL and other arbitration rules. This ICSID threshold has increasingly been seen as too high, leading to less than a handful of successful arbitrator challenges at ICSID over a period of roughly 40 years.

There have been numerous attempts by disputing parties to disqualify arbitrators for different reasons and under different arbitral rules. In the history of ICSID, in operation since 1972, only three arbitrator challenges appear to have been successful, however. Importantly, in two of the three cases the challenge was decided by ICSID Chairman of the Administrative Council (i.e., the President of the World Bank), both in 2013,<sup>29</sup> and in the third case the challenge was upheld by the ICSID Chairman upon recommendation of the Secretary-General of the PCA in 2006.<sup>30</sup> In none of the cases did the two co-arbitrators—who are in charge of deciding on challenges unless unable to do so—take the decision. While in *Burlington v. Ecuador* the two co-arbitrators had failed to reach a decision on the proposal to disqualify Professor Orrego Vicuña,<sup>31</sup> the proposal for disqualification in *Victor Pey v. Chile* was directed at all three members of the tribunal and against two arbitrators in *Blue Bank v. Venezuela*.

One specific issue of concern relating to arbitrators’ impartiality and independence lies in the fact that arbitrators sitting on treaty-based investor-state tribunals can simultaneously serve as counsel or expert in other such disputes (the “dual-role” or “multiple hat” issue). None of the arbitration rules or institutions relating to arbitrator independence explicitly disallow arbitrators from simultaneously making investor-state arbitration their main economic activity as counsel – an approach that is taken in other areas such as sports arbitration, for example. The rules applicable to investor-state arbitration generally do not specify which activities may be considered to harm independent judgment, or impartiality and independence.

The question that must be asked then is whether the combination of “flexible” rules on arbitrator challenges (see below) and leaving the decision making to persons who may themselves wear multiple hats provides for adequate safeguards to ensure impartiality and independence.

<sup>29</sup> *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20) and *Burlington Resources, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5).

<sup>30</sup> *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2).

<sup>31</sup> *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for the Disqualification of Professor Orrego Vicuña, para. 16.



**TABLE 2: CHALLENGES OF ARBITRATORS UNDER DIFFERENT RULES**

	WHAT IS THE STANDARD FOR ARBITRATOR CHALLENGES?	WHO DECIDES CHALLENGES?
ICSID Convention & Arbitration Rules (2006)	<ul style="list-style-type: none"> <li>Arbitrators may be challenged for “any fact indicating a manifest lack” of such qualities as:               <ul style="list-style-type: none"> <li>high moral character;</li> <li>ability to be relied upon to exercise independent judgment;</li> </ul> </li> <li>In addition, an arbitrator may be challenged on the ground that he was ineligible for appointment to the Tribunal.</li> <li>Arbitrators <b>must be</b> disqualified if the proposal is well-founded.</li> </ul> (Convention, Art. 57, 58, 14 & 40)	<ul style="list-style-type: none"> <li>The remaining members of the Tribunal will decide the challenge.</li> <li>In cases when the proposal is to disqualify a sole arbitrator, a majority of a tribunal, or when the two members cannot decide on the challenge, the Chairman of the Administrative Council will take the decision (President of the World Bank, traditionally a U.S. citizen).</li> </ul> (Convention, Art. 58)
ICSID Additional Facility Rules for Arbitration (2006)	<ul style="list-style-type: none"> <li>These rules essentially follow the ICSID Convention and Arbitration Rules.</li> </ul> (Art. 7, 8, & 15)	<ul style="list-style-type: none"> <li>The remaining members of the Tribunal will decide the challenge. In cases when the proposal is to disqualify a sole arbitrator, a majority of a tribunal, or when the two members cannot decide on the challenge, the Chairman of the Administrative Council will take the decision (President of the World Bank, traditionally a U.S. citizen).</li> </ul> (Art. 15)
UNCITRAL Arbitration Rules (2010)	<ul style="list-style-type: none"> <li>Any arbitrator may be challenged if “circumstances exist that give rise to <b>justifiable doubts as to the arbitrator’s impartiality or independence.</b>”</li> </ul> (Art. 12(1))	<ul style="list-style-type: none"> <li>The appointing authority that will be chosen by the parties or the Secretary-General of the PCA, decides the challenge (Secretary-General, traditionally a high-level Dutch diplomat).</li> </ul> (Art. 13)
Arbitration Rules of the SCC (2010)	<ul style="list-style-type: none"> <li>A party may challenge any arbitrator if “circumstances exist which give rise to <b>justifiable doubts as to the arbitrator’s impartiality or independence</b> or if he/she does not possess qualifications agreed by the parties.”</li> </ul> (Art. 15(1))	<ul style="list-style-type: none"> <li>The SCC Board decides the challenge.</li> </ul> (Art. 15(4))
Arbitration Rules of the ICC (2012)	<ul style="list-style-type: none"> <li>A party may challenge an arbitrator for a “alleged lack of impartiality or independence, or otherwise.”</li> </ul> (Art. 14(1))	<ul style="list-style-type: none"> <li>The ICC Court decides arbitrator challenges.</li> </ul> (Art. 14(3))
Arbitration Rules of the PCA (2012)	<ul style="list-style-type: none"> <li>A party may challenge any arbitrator “if circumstances exist that give rise to <b>justifiable doubts as to the arbitrator’s impartiality or independence.</b>”</li> </ul> (Art. 12(1))	<ul style="list-style-type: none"> <li>The appointing authority, the Secretary-General of the PCA, decides the challenge.</li> </ul> (Art. 13(4))
Arbitration Rules of the LCIA (1998)	<ul style="list-style-type: none"> <li>A party may challenge any arbitrator if “circumstances exist that give rise to <b>justifiable doubts as to his impartiality or independence.</b>”</li> </ul> (Art. 10(3))	<ul style="list-style-type: none"> <li>The LCIA Court decides the challenge.</li> </ul> (Art. 10(4))

A number of alternatives have been suggested to strengthen the independence and accountability of an international system for settling investment disputes. One is to introduce a roster of permanent arbitrators, under tenure for a given number of years, that would help insulate arbitrators from economic and political pressures. Another possibility would be to have institutions appoint all arbitrators (thereby removing party appointments) and to disallow arbitrators from also serving as counsel in investment treaty arbitrations for a certain period of time. However, if arbitral institutions were to appoint arbitrators as a general rule, the institutions' organs and persons potentially in charge of making appointments first should be placed under scrutiny and required to fulfil certain standards (e.g., independence, representativeness and accountability). Arguably, the institutional arrangements in place today would not meet all such standards. Finally, a more ambitious proposal is an international investment court and/or a mechanism for appeals. Some of these proposals could be addressed in one or more arbitral institutions or by amending applicable rules through individual investment treaties and chapters. One could also argue that fundamental reform should take place outside any arbitral institution in the first place, for example in a regional or other existing or new institutional setting.

### 4.3 Consistency and Correctness of Arbitral Awards in Law and Fact

One aspect of investor-state arbitration that poses challenges to respondent states is that, in contrast to judgments issued by domestic courts, governments have only minimal avenues for challenging awards and resisting their enforcement when the awards involve errors of law or fact. While this approach might be acceptable for purely commercial cases involving two private entities, it is of concern when considering the public policy issues often at stake in investment disputes and the high amounts claimed. The limited scope of review of awards also leads to inconsistency in the interpretation of the law. Tribunals have come to contradicting views on several of the key legal issues in investment arbitration, such as the concept of "fair and equitable treatment" and the application of the most-favoured-nation clause.

Two international treaties give arbitral awards the force of finality, providing for only limited review opportunities. The first is the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"); the second is the 1965 ICSID Convention.

The New York Convention requires its roughly 150 state parties to recognize and enforce foreign arbitral awards. It provides that states may only refuse to do so on seven limited grounds: (1) there was no valid arbitration agreement; (2) there was a lack of proper notice of, or due process in, the proceedings; (3) the award falls outside the terms of the submission to arbitration; (4) the tribunal was improperly constituted; (5) the award has been suspended or set aside at the place of arbitration; (6) the subject matter of the dispute is not subject to arbitration; and (7) enforcement of the award would be contrary to the public policy of the state where enforcement is sought. The New York Convention does not list errors of law or fact as grounds for refusing to recognize or enforce an award. If an arbitral tribunal issues an award against a respondent state, and the investor seeks to execute the award in the territory of a state party to the New York Convention, the default rule is that the New York Convention will compel courts in that country to enforce the award. The respondent state may only resist enforcement by arguing to the relevant court that one of the New York Convention's seven grounds for rejecting the arbitral award applies. This process is relevant for awards issued under all arbitration rules examined here (UNCITRAL, SCC, ICC, ICSID Additional Facility Rules, etc.) except those under the ICSID Convention.

States' rights to challenge awards under the ICSID Convention are even more limited than under the New York Convention. Additionally, the ICSID Convention limits the involvement of domestic courts, even more than the New York Convention because ICSID arbitral awards cannot be resisted or appealed before national courts: When a victorious claimant seeks to enforce an award against a losing respondent state, the ICSID Convention requires every state party to that treaty to enforce the award as if it were a final domestic judgment. The only way for a losing respondent state to challenge an ICSID award is to ask for the constitution of another ICSID arbitral tribunal to review and annul all or part of the award. That new tribunal, however, is not an appellate instance with broad powers of review. Pursuant to the ICSID Convention, the tribunal, or, more specifically, the "annulment committee," can only annul an award on five grounds: (1) if the tribunal was improperly constituted; (2) if the tribunal manifestly exceeded its powers; (3) if there was corruption on the part of the tribunal; (4) if there was serious departure from a fundamental rule of procedure; and (5) if the award failed to state the reasons on which it was based. Annulment committees have declared that even if an award is based on manifest errors of law or fact, the award must nevertheless stand because such errors are not a ground for annulment under the ICSID Convention. Moreover, unlike under the New York Convention, being inconsistent with public policy is not a permissible ground for annulment.

As evidenced by the number of investor-state cases initiated under ICSID Rules, investors appear to prefer ICSID over other alternatives available to investors. A quick review of disputes appears to indicate that most of the cases not brought under ICSID involve instances in which either the home or the host state or both are not party to the ICSID Convention.<sup>32</sup> The limited review possibility and the strong status of ICSID awards as national judgments are arguably the single most determining factor for this preference. This demonstrates the importance for a state to decide (1) whether or not to sign or ratify the ICSID Convention (South Africa and India, for instance, have not done so to date) and (2) whether or not to refer to the ICSID Convention in investment treaties and domestic laws.

In terms of reform opportunities, given that ICSID already has a kind of internal review process in the form of annulment, ICSID might be most open and best-placed for a discussion of other types of review. States might therefore consider initiating a discussion within ICSID for the expansion of the annulment process to a proper appeals or similar process.<sup>33</sup> Should states prefer deeper reform of dispute settlement in the area of investment, however, the idea of an appeals process might better be discussed outside any pre-existing arbitration framework, especially if they wished to move away from an arbitration-based system to a more judicial type of dispute settlement.

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<sup>32</sup> For instance, in more than half of the disputes conducted under UNCITRAL Rules, the home or host state had either not signed (e.g. India, Mexico and Poland) or not ratified the ICSID Convention (e.g. Canada, Dominican Republic and the Russian Federation).

<sup>33</sup> Indeed, the possibility of an ICSID Appeals Facility was discussed in 2004 with the involvement of the ICSID Secretariat. See ICSID Secretariat (2004) and Mann, Cosbey, Peterson, & von Moltke (2004).

## 5.0 *Opportunities to Reform Arbitral Rules and Processes*

Reform processes at arbitral institutions can complement—but not replace—a broad reform of international investment law and policy. While the former is limited to institutional and procedural issues, the latter may bring about substantive changes and improvements to the laws and instruments under which arbitration is taking place. However, from a procedural or institutional reform perspective, focusing on arbitral rules and processes may be more effective than focusing on individual investment treaties, especially given the number of treaties already in effect and currently under negotiation, and given that it is the investment arbitration element in investment treaties that has been the most criticized as flawed. Since treaties typically build on and refer to existing rules and frameworks such as those under ICSID or UNCITRAL, reform to these rules can affect some 3,000 treaties at once.

The possible types of reform to arbitral rules and institutions range from relatively modest reform to rules (such as disallowing investment arbitrators from also acting as counsel in concurrent investment cases) to completely new rules (such as the UNCITRAL Transparency Rules that were recently adopted) or even to new institutional and procedural structures, which could fundamentally transform the arbitral system into something different (for example a system with tenured “judges” and an appeals mechanism), though some of these more fundamental changes might better take place outside pre-existing structures altogether.

The impact of reforms in ICSID or UNCITRAL would be greatest due to their wide use under investment treaties. However, the role of the other institutions and processes should not be underestimated. The PCA’s activity in the field of investment arbitration is increasing, and as some countries become weary of bodies like ICSID they turn to institutions like the ICC, SCC or others. It cannot be excluded that the use of arbitral rules and institutions will shift from one to another pursuant to reform in one but not the other institution. This is partly due to the fact that treaties typically allow the investor to choose the applicable rules, allowing the investor to circumvent the application of newly reformed rules, for example, by bringing claims under other procedures and venues.

It is advisable for state respondents to weigh carefully whether or not to agree to submit a given dispute to institutions that are traditionally focused on commercial arbitration and are industry-led, such as the ICC Court or other arbitration bodies. Here, states have virtually no role in elaborating rules and guidelines, nor their implementation, including with respect to arbitrator appointment and arbitrator challenges. Since the composition of arbitrators is arguably one of the most important factors for the outcome of cases, this needs to be kept in mind. States should also be mindful of the governing structures of institutions such as the PCA, where the President of the Administrative Council and the Secretary-General are, respectively, the Dutch foreign minister and traditionally a high-ranking Dutch diplomat. In order for states, and particularly developing states, to regain control over how investment arbitration is conducted and managed, the governing structure, including in the intergovernmental arbitration institutions, may have to be overhauled in addition to the applicable arbitration rules and procedures.

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