

18^{ème} commission

Equality of Parties before International
Investment Tribunals

*Egalité des parties devant les tribunaux
internationaux d'investissements*

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Introductory Note

Following a decision of the *Commission des travaux* taken at the 77th Session of the *Institut* in Tallinn in August 2015, the Eighteenth Commission was reconstituted and charged with the mandate to examine ‘The equality of parties before international investment tribunals.’

The members of the Commission are: Mr Alexandrov, Ms Boisson de Chazournes, Messrs Crawford, d’Argent, Gaja, Giardina, Greenwood, Kazazi, Kohen, McLachlan (Rapporteur), Mikulka, Reinisch, Mrs Stern, Messrs Treves, Rao, Vinuesa.

The Commission commenced its work in earnest in 2017, with the preparation of a detailed *rapport préliminaire* (with questionnaire attached) which was circulated to members in August 2017, prior to the 78th Session of the *Institut* in Hyderabad.

The Commission held its first meeting in Hyderabad on 3 September 2017 at which it agreed its programme of work. Members sent their replies to the questionnaire by 31 December 2017.

In light of these replies, and also taking into consideration further developments in the field, the Rapporteur extensively revised his report and circulated a *rapport provisoire* to members on 8 October 2018, together with his *avant-projet* for a resolution. He invited members’ comments on both draft documents.

On 21 November 2018, the Rapporteur submitted to members a final text of the report (*rapport définitif*) together with a revised draft of the Resolution and an explanatory note. He invited further comments on the draft Resolution.

On 9 December 2018, the Rapporteur finalised the draft Resolution as a Commission consensus draft.

The documents that are now presented for consideration of the members of the *Institut* as a whole are as follows:

- (1) The final Report (*rapport définitif*) in English, together with a French *sommaire*;
- (2) The draft Resolution (Commission final consensus draft) in English and French;
- (3) The following *travaux préparatoires*:
 - (a) The questionnaire, with the replies received from each member consolidated under each question;
 - (b) The Rapporteur’s first *avant-projet* for the Resolution dated 8 October 2018;

- (c) A note of Mr Kohen dated 5 November 2018;
- (d) A note from the Rapporteur, which summarises comments received from members on the draft;
- (e) Revision 1 of the draft Resolution dated 21 November 2018;
- (f) A note of Mr Kazazi dated 5 December 2018;
- (g) A note from the Rapporteur dated 9 December 2018.

The *rapport préliminaire* and the *rapport provisoire* have not been printed in the *Annuaire* in view of their length. In each case, these reports consist of earlier versions of the *rapport définitif*, so the substance of the earlier work is reflected in the final document.

The Rapporteur is greatly indebted to the members of the Commission, who, in addition to their invaluable insights in response to the questionnaire, which greatly assisted the Rapporteur in preparing the *rapport provisoire*, also reviewed the successive drafts of the Resolution. The majority of their comments on the draft Resolution were given by way of edited annotations on the draft, with a view to finalising the Commission consensus draft now presented to the *Institut* as a whole, and have not therefore been reproduced here. The extensive amendments to the Resolution resulting from these comments may be traced through the drafts of 8 October 2018 and 21 November 2018 to the final agreed draft text of 9 December 2018.

The Rapporteur gratefully acknowledges a grant from the New Zealand Law Foundation, which supported this research and the research assistance of Eve Bain. He is also grateful for the generous hospitality of the Law Faculties of Humboldt Universität zu Berlin, the Freie Universität Berlin and the members of the Berlin-Potsdam Kollegforschungsgruppe 'International Rule of Law: Rise or Decline?' where the Report and Resolution were finalised.

C A McLachlan
Rapporteur
Berlin
10 December 2018

Résumé du Rapport (traduction)

La fonction du principe d'égalité

- 1 Le principe d'égalité des parties est un élément fondamental d'un règlement juridictionnel juste. En tant que tel, il est applicable à l'arbitrage international en matière d'investissement. Un des objectifs poursuivis par les Etats en développant cette forme de règlement des différends était de porter un litige opposant deux parties distinctes et asymétriques – un investisseur privé et un Etat – devant un tribunal international où chacune serait traitée sur un pied d'égalité.
- 2 Cependant, l'application du principe d'égalité à cette forme particulière de règlement des différends internationaux a, ces dernières années, suscité un débat qui se situe à deux niveaux :
 - (1) Au niveau *procédural*, pour ce qui concerne les décisions en matière de compétence et de recevabilité des demandes et des demandes reconventionnelles, l'administration de la preuve et la sauvegarde du processus arbitral contre les conduites répréhensibles ; et,
 - (2) Au niveau *constitutionnel*, comme facteur déterminant dans la prise en compte de la forme et des moyens les plus opportuns d'instituer un tribunal, et notamment dans le cadre des débats visant à déterminer quel forum, entre l'arbitrage ou un tribunal international permanent, serait le plus juste et le plus équitable pour le règlement de ces différends.
- 3 Le champ du présent rapport est défini, à deux égards importants, par le mandat de la Commission :
 - (1) Il se limite à l'application du principe d'égalité au *mode* de règlement des différends internationaux en matière d'investissements. Il ne traite des questions de droit matériel.
 - (2) Il examine l'application du principe d'égalité à tous les types de tribunaux internationaux d'investissement, y compris ceux qui sont institués comme tribunaux arbitraux *ad hoc* et tout tribunal international permanent d'investissement, existant ou envisagé.
- 4 Le rapport considère l'égalité des parties tant comme droit humain fondamental que comme principe général du droit applicable à la procédure des cours et tribunaux internationaux. Le principe s'applique aux contextes tels que l'arbitrage d'investissement, les commissions mixtes de réclamations et les tribunaux internationaux en matière de droits de l'homme, ce, en dépit de la position asymétrique des parties. Il s'agissait en effet d'une préoccupation importante lors de la création du système de règlement des différends institué par la Convention CIRDI de

1965, lequel système a été conçu pour être accessible aussi bien aux Etats qu'aux investisseurs privés.

La création du tribunal

5 La Troisième Partie du Rapport examine le rôle joué par le principe d'égalité dans la création d'un tribunal international d'investissement. Il en étudie la position *de lege lata* en lien notamment avec le système institué par la Convention CIRDI. Il étudie également la marge potentielle de développement progressif *de lege ferenda*, aussi bien en lien avec les possibles améliorations du système arbitral qu'avec les propositions actuelles visant à l'établissement d'un tribunal international d'investissement permanent.

6 Le Rapport évalue si les limites posées à l'accès au tribunal pour un investisseur d'un autre Etat, une condition d'ordre juridictionnel fondamentale dans l'arbitrage d'investissement, porte atteinte au principe d'égalité, dans la mesure où ladite condition implique la mise en œuvre d'une forme distincte de règlement des différends fondée sur d'autres standards que ceux applicables aux investisseurs nationaux. Le Rapport arrive à la conclusion selon laquelle ces limites ne portent pas atteinte au principe d'égalité d'accès du fait qu'elles sont en rapport direct avec l'objet des traités d'investissements, lequel est de promouvoir et protéger les investissements étrangers et les droits des ressortissants étrangers, tout en respectant le droit souverain de l'Etat d'encadrer, dans l'intérêt public, les activités d'investissement sur son territoire. Ce genre de protection est également disponible, dans le cadre des protections prévues par le traité d'investissement, pour les investisseurs de chaque Etat lorsqu'ils investissent sur le territoire d'un autre Etat.

7 *Création.* Le Rapport examine deux aspects de la création d'un tribunal international d'investissement où le principe d'égalité peut trouver à s'appliquer :

- (1) *Impartialité* : le tribunal doit traiter chaque partie sur un pied d'égalité lors de l'examen des demandes sur lesquelles il lui est demandé de statuer ;
- (2) *Nomination* : le rôle des parties dans la nomination des membres du tribunal.

8 Au sujet de l'impartialité, le Rapport conclut notamment que l'article 58 de la Convention CIRDI devrait être révisé afin de s'assurer que toutes les contestations visant l'impartialité d'un arbitre soient examinées par un tiers décisionnaire indépendant et externe au tribunal.

9 Au sujet de la nomination, le Rapport établit une distinction entre les tribunaux arbitraux *ad hoc* et un tribunal international permanent. Il conclut que le fait que les parties jouent un rôle égal dans la procédure de

nomination demeure un élément important et valable lors de l'établissement d'un tribunal arbitral, à condition que chaque membre du tribunal satisfasse au standard d'impartialité.

- 10 Dans le cas d'un tribunal international permanent, le principe d'égalité n'implique pas que les parties jouent un rôle dans la sélection du tribunal, à condition que ses membres soient désignés moyennant un processus transparent et qu'il représente équitablement les principaux systèmes juridiques du monde.
- 11 En ce qui concerne la composition de la cour ou de la chambre d'un tel tribunal permanent appelé à statuer sur un différend spécifique, le Rapport conclut que les Etats auront à choisir entre (a) exclure tout juge ayant la nationalité d'une des parties ou (b) s'assurer d'une représentation égale en prévoyant la nomination de juges *ad hoc*. Les deux systèmes se retrouvent dans les autres tribunaux internationaux examinés dans le Rapport.

La procédure du tribunal

- 12 Le Rapport s'intéresse ensuite, dans sa Quatrième Partie, aux applications du principe d'égalité à la procédure d'un tribunal d'investissement. C'est un contexte qui a généré une pratique jurisprudentielle fournie. La Quatrième Partie considère quatre questions spécifiques : (a) les demandes et les parties ; (b) le calendrier procédural ; (c) l'administration de la preuve ; (d) la mise en œuvre par l'État de ses prérogatives en matière d'enquête criminelle ; et (e) les frais de procédure et l'égalité matérielle des moyens.
- 13 *Demandes et parties*. La section A de la Quatrième Partie analyse l'égalité dans le cadre de quatre contextes spécifiques en lien avec l'introduction d'une action et la capacité à ester des parties : (a) introduction des demandes ; (b) demandes reconventionnelles ; (c) demandeurs multiples ; et (d) observations présentées par des tiers.
- 14 Le Rapport relève que l'arbitrage d'investissement est en principe accessible de la même manière aux Etats et aux investisseurs. Cependant, les conditions en vertu desquelles recours peut y être fait dépendent du champ d'application de l'acte d'engagement, lequel peut être formulé largement ou restrictivement.
- 15 Une importance particulière est accordée à l'existence d'un mécanisme de demandes reconventionnelles comme moyen d'assurer l'égalité entre les parties, que ce soit en matière procédurale ou constitutionnelle.
- 16 Le Rapport conclut qu'une demande reconventionnelle doit, pour être recevable :

- (1) relever de la compétence du tribunal, laquelle doit être déterminée sur la base de l'acte d'engagement et ne saurait être limitée par la base de compétence invoquée par le demandeur ;
 - (2) découler directement de l'objet du différend, en ce qu'elle a trait au même investissement (mais sans qu'elle ait à reposer sur le même acte juridique ou sur un motif invoqué par le demandeur) ; et,
 - (3) porter sur un objet susceptible d'être soumis à l'arbitrage.
- 17 Le Rapport souligne également l'importance de garantir le maintien de l'égalité entre les parties lors de l'examen par le tribunal de la recevabilité, dans le cadre d'une action unique, de demandes introduites par des demandeurs multiples, ou de la prise en compte d'observations présentées en leur qualité d'*amicus curiae* par des tiers.
- 18 *Calendrier procédural*. Dans la Section B de la Quatrième Partie, le Rapport met en œuvre l'aspect du principe d'égalité qui assure un traitement réciproque des parties : l'exigence en vertu de laquelle chaque partie a le droit d'être entendue et de jouir d'une opportunité raisonnable de répondre aux allégations formulées par l'autre partie – *audi alteram partem* ;
- 19 *Preuve*. La Section C de la Quatrième Partie passe à l'égalité dans le traitement des questions de preuve, et identifie le principe en action dans la pratique des tribunaux internationaux en lien avec (a) la présentation de pièces écrites ; (b) leur recevabilité ; (c) l'exclusion de la preuve sur la base de la confidentialité, y compris le secret d'Etat ; (d) le contre-examen de témoins à l'audience ; et (e) l'évaluation de la preuve fournie.
- 20 Le Rapport élabore des propositions spécifiques (figurant dans le Projet de résolution) conçues en vue de permettre un examen approprié, en toute égalité, des demandes invoquant la confidentialité, y compris le secret d'état.
- 21 La Section D de la Quatrième Partie analyse les questions complexes qui se posent aux tribunaux lorsque des témoins ont fait l'objet de mesures d'intimidation ou lorsque les prérogatives en matière pénale ont été utilisées de manière abusive en vue d'obtenir des éléments de preuve présentés au cours de la procédure internationale.
- 22 Pour finir, la Cinquième Partie examine l'égalité d'un point de vue matériel, et non plus seulement formel. Le Rapport souligne l'importance de garantir l'accès aux tribunaux internationaux d'investissement aux petites et moyennes entreprises et aux Etats en développement. Le Rapport étudie le rôle que jouent les dépens et les cautionnements pour dépens dans le fait de garantir que les parties soient traitées sur un pied d'égalité.

REPORT

I. INTRODUCTION

A. *Equality as a constitutional and a procedural principle*

- 1 The equality of the parties is a fundamental element of a fair system of adjudication, whether within a national legal system or at international law. The International Court of Justice has observed that ‘The principle of equality of the parties follows from the requirements of good administration of justice.’¹
- 2 One of the objectives that States sought to achieve through their development of international investment arbitration by treaty was ‘the transformation of a relationship from one of disequilibrium ... to equilibrium.’² Investment arbitration aims to do this by placing disputes between two parties of a different and asymmetrical character—a private investor and a State—before an international arbitral tribunal before whom each party is in principle to be treated equally.
- 3 The fundamental character of the equality principle in investment arbitration was recognised from the outset of the development of the ICSID Convention.³ In one of the earliest decisions to construe the scope of annulment of an award for ‘a serious departure from a fundamental rule of procedure’ an *ad hoc* Committee stated: ‘a clear example of such a fundamental rule is to be found in Article 18 of the UNCITRAL Model Law on International Commercial Arbitration which provides: “The parties shall be treated with equality and each party shall be given full opportunity of presenting his case.”’⁴

¹ *Judgments of the Administrative Tribunal of the ILO upon complaints made against UNESCO* (Advisory Opinion) [1956] ICJ Rep 77, 86.

² Franck ‘Fairness in the international legal and institutional system’ (1993) 240 *Recueil des Cours* 9, 452.

³ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (‘ICSID Convention’) (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159. On this point, see International Centre for the Settlement of Investment Disputes *Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (‘History’) (1969) II, 480 (Broches).

⁴ *Maritime International Nominees Establishment (MINE) v Guinea* (Decision on Annulment) ICSID Case No ARB/84/4 (1989) 4 ICSID Rep 87 (Sucharitkul P, Broches & Mbaye), [5.06].

- 4 Yet, as the International Court has also had cause to observe, the concept of equality in its actual application to the procedure of courts and tribunals has developed over time.⁵
- 5 Experience with investment arbitration, especially over the last two decades in which it has been most actively utilised, has given rise to debate as to the application of the equality principle in this distinctive form of international dispute resolution. The debate has engaged at two levels: *procedural* and *constitutional*.
- 6 *At a procedural level*, arbitral tribunals and institutions have had to consider the implications of the equality of the parties for jurisdiction and admissibility of claims and counterclaims; as well as for the production of evidence and the protection of the arbitral process from abusive conduct. These issues have arisen in the practice of arbitral decision-making. They form part of a larger enquiry into the fundamental elements of the procedure of international courts and tribunals.⁶
- 7 *At the constitutional level*, there has been an increasing controversy over whether arbitration is in fact the most appropriate forum for the resolution of investment disputes. A debate amongst scholars and in civil society has led to a number of initiatives to examine different dispute settlement mechanisms. Most notable amongst these is the European Commission proposal for an Investment Court, with a standing Tribunal and Appeal Tribunal—a proposal that has already resulted in the inclusion of such arrangements in the draft text of two free trade agreements.⁷ At its Fiftieth Session in July 2017, and following a preparatory study prepared by the Geneva Center for International Dispute Settlement ('CIDS'),⁸ UNCITRAL decided to include 'Reforms of investor-state

⁵ *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization ('ILOAT') upon a Complaint filed against the International Fund for Agricultural Development ('IFAD')* (Advisory Opinion) [2012] ICJ Rep 10, [39].

⁶ A Sarvarian, F Fontanelli, R Baker & V Tzevelekos *Procedural Fairness in International Courts and Tribunals* (British Institute of International and Comparative Law, 2015) ('Sarvarian *Procedural Fairness*'); C Kotuby & L Sobota *General Principles of Law and International Due Process* (Oxford UP, 2017).

⁷ Art 8.27, Canada–EU Comprehensive Economic and Trade Agreement (CETA) (signed 30 October 2016, entered into force provisionally 21 September 2017); Ch 3, arts 3.38–3.57, Final Text of EU–Vietnam Investment Protection Agreement (not yet signed) available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> (last accessed 6 October 2018).

⁸ Kaufmann-Kohler & Potestà 'Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?' (2016) ('CIDS Report').

dispute settlement’ on its future work programme.⁹ The CIDS Report is an important scientific contribution to the current debate, which addresses the legal issues that would arise in the design of an International Tribunal for Investments in the event that States were to decide to pursue the establishment of such a Tribunal. On 20 March 2018, the Council of the European Union endorsed the European Commission’s proposal to create a Multilateral Investment Court and conferred a negotiating mandate upon the Commission.¹⁰ These negotiations will take place in the first instance through UNCITRAL Working Group III (Investor-State Dispute Settlement Reform).¹¹

- 8 In the course of the policy debate, one of the criticisms of investment arbitration that has been made concerns whether *constitutionally* arbitration is capable of offering a fair and balanced method for the resolution of international investment disputes.¹² Other prominent scholars argue that investment arbitration does provide a fair system for the resolution of investment disputes and should not be abandoned or replaced, precisely because it offers the best means of balancing the interests of both parties.¹³

⁹ UNCITRAL ‘Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS) Note by the Secretariat’ (UN Doc A/CN.9/917, 20 April 2017) (‘UNCITRAL Report 2017’).

¹⁰ EU Council, ‘Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes’ (20 March 2018), 12981/17 ADD 1 DCL 1.

¹¹ Ibid, [4]; UNCITRAL, ‘Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23-27 April 2018)’ UN Doc A/CN.9/935. For an analysis of States’ preliminary positions see Roberts ‘Incremental, systemic, and paradigmatic reform of investor-State arbitration’ (2018) 112 AJIL 410.

¹² See eg ‘Public Statement on the International Investment Regime–31 August 2010’ available at: <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/> (last accessed 7 October 2018); C Malmström (European Commissioner for Trade) ‘Reforming investment dispute settlement’ (27 February 2017) available at: http://trade.ec.europa.eu/doclib/docs/2017/february/tradoc_155393.pdf (last accessed 7 October 2018); Al-Khasawneh ‘Foreword’ in Sarvarian *Procedural Fairness*, ix, xiii-xv.

¹³ See eg ‘An open letter about investor-state dispute settlement’ (20 April 2015) available at: <https://www.mcgill.ca/fortier-chair/isds-open-letter> (last accessed 7 October 2018); S Schwebel, ‘The proposals of the European Commission for investment protection and an investment court system’ (17 May 2016) available at: http://isdsblog.com/wp-content/uploads/sites/2/2016/05/THEPROPOSAL_SOFTHETHEEUROPEANCOMMISSION.pdf (last accessed 7 October 2018); European Federation for Investment Law and Arbitration, ‘A response to the criticism against ISDS (17 May 2015) available at: http://efila.org/wp-content/uploads/2015/05/EFILA_in_

B. Prior work of the Institut

- 9 The *Institut* has considered issues of arbitral procedure in both public and private international law since its foundation. It considered the general aspects of arbitral procedure in public international law at its session in The Hague in 1875, returning to this subject in Lausanne in 1927. It addressed arbitration in private international law at its Amsterdam session in 1957 and dealt with more specific aspects of arbitral settlement of disputes in 1999¹⁴ and 2003.¹⁵
- 10 *The previous contributions of the Eighteenth Commission.* The Eighteenth Commission has previously dealt with arbitration between States and foreign investors in two phases of its work:
 - (1) Between 1984-1989, the Commission (Rapporteurs E Jiménez de Arechaga and R von Mehren) addressed the topic of 'Arbitration and Foreign Enterprises'.
 - (2) Between 2009-2013, the Commission (Rapporteur A Giardina) took up legal aspects of recourse to arbitration by an investor against the authorities of the host State under inter-state treaties.
- 11 In each case, the research of the Commission resulted in a Resolution that was adopted by the *Institut* after debate in Plenary Session. These Resolutions provide both the background to the work of the Commission and contribute some relevant elements to the issue with which the present Commission is charged.
- 12 *Arbitration between States and foreign enterprises.* The *Institut* adopted a Resolution on 'Arbitration between States, State Enterprises, or State Entities and Foreign Enterprises' at its Santiago de Compostela session in 1989.¹⁶ At that stage, the Eighteenth Commission's work and the resulting Resolution were primarily concerned with arbitrations pursuant to specific individual contractual agreements between States and foreign

response_to_the-criticism_of_ISDS_final_draft.pdf ('EFILA Report 2017') (last accessed 7 October 2018); Bernadini 'Reforming investor-state dispute settlement: the need to balance both parties' interests' (2017) 32 ICSID Review-FILJ 38. On the issues generally: Bonnitcho, Poulsen & Waibel *The Political Economy of the Investment Treaty Regime* (Oxford UP, 2017), Ch 9 ('Bonnitcho, Poulsen & Waibel 2017').

¹⁴ 'Judicial and Arbitral Settlement of International Disputes involving more than two States' (Berlin 1999).

¹⁵ 'Arbitral settlement of international disputes other than between States involving more than two parties' (Bruges 2003).

¹⁶ (1989) 63 *Annuaire* Pt I, 31-204 (preparatory work), Pt II, 121-222 (deliberations of the *Institut*), 324-331 (Resolution as adopted).

enterprises. The Rapporteurs considered that the treaty-based arbitrations raised quite different problems,¹⁷ the Preamble '[n]oting that this Resolution is without prejudice to the applicable provisions of international treaties.'

- 13 The preparation of this Report and Resolution occasioned an extended debate in the *Institut* about the specific issues arising in arbitrations between States and foreign enterprises. In its Resolution, the *Institut* accepted that the issues arising in such arbitrations are 'a subject of great practical as well as theoretical importance' and require a 'statement of a coherent body of principle regarding the arbitrator's role and obligations in such arbitrations [which] will clarify certain fundamental questions and contribute to legal security.'¹⁸
- 14 Its operative provisions lay primary emphasis upon the parties' agreement for arbitration as the basis for the arbitrators' authority and powers (Art 1). It seeks to uphold such agreements 'guided in every case by the principle *in favorem validitatis*' (Art 4), and specifically excluding objections to the tribunal's jurisdiction based upon a State's incapacity to arbitrate (Art 5) or sovereign status (Art 9). It emphasises the autonomy of the parties to choose the applicable procedural as well as substantive rules, enjoining the tribunal in the absence of such choice to supply the necessary rules and principles, choosing from a wide array of potential legal sources (Art 6).
- 15 The *Institut* did not regard the parties' autonomy to control the procedure as unlimited. Article 1 imposes a duty on the arbitrator to 'exercise his functions impartially and independently'. Article 2 adds that '[i]n no case shall an arbitrator violate principles of international public policy as to which a broad consensus has emerged in the international community.' A working draft introduced by the Rapporteurs in the course of the plenary session would have specifically referred in this context to 'the principles of due process.'¹⁹ Although this express statement did not survive in the final text, this was not because members expressed any doubt that due process is a principle of international public policy. Rather, the Plenary decided that it did not wish to limit the principles of international public policy to procedural matters. It rather wished to embrace a more

¹⁷ (1989) 63 *Annuaire* Pt I, 43-4.

¹⁸ Preamble (1989) 63 *Annuaire* II, 324.

¹⁹ (1989) 63 *Annuaire* II, 160.

capacious conception of international public policy to include substantive policies.²⁰

- 16 *Investment treaty arbitration*. Most recently the Eighteenth Commission (Rapporteur A Giardina) has addressed a broad range of topics of current importance concerning legal aspects of recourse to arbitration by an investor against the authorities of the host State under inter-state treaties, following a general outline of work adopted at the Naples session in 2009. This work culminated in a Resolution adopted in Tokyo in 2013 on 'Legal aspects of recourse to arbitration by an investor against the authorities of the host State under inter-state treaties.'²¹
- 17 This Resolution endorses 'the need to ensure a balanced protection of the interests of the involved parties'. It deals with general and substantive law issues. Apart from the matters dealt with under 'General Issues', this Resolution does not cover procedural issues.²² The Commission decided to exclude procedural topics, since otherwise it would not have been possible for it to complete its mandate. In the Preamble to the Resolution, the *Institut* reserved such 'more specific matters for further discussion' on the basis that 'certain recurring problems call for the elaboration of principles enjoying wide support.'
- 18 In summary, the *Institut* has recognised that party autonomy in arbitrations between States and foreign enterprises is subject to the limits imposed by international public policy, which concept it considered undoubtedly includes the requirements of due process. It has not yet given detailed consideration to what might be the content of procedural principles of international public policy. It has reserved matters of procedure within the context of investment treaty arbitration for subsequent consideration in its search for principles enjoying wide support. It is against this background that the present reconstituted Eighteenth Commission is invited by the *Commission des travaux* to study the application of the principle of the equality of parties before international investment tribunals.

C. Scope of the present study

- 19 The topic as framed by the *Commission des travaux* links two elements. The *subject* of study is the equality of parties as a procedural principle. Its

²⁰ Ibid, 173 (Lalive), 174 (concurring views), 180 (Goldman revised text), 182 (vote).

²¹ (2013) 75 *Annuaire* 1; Giardina (2014) 29 ICSID Review-FILJ 701.

²² Giardina (2014) 29 ICSID Review-FILJ 709, 710.

object is the forum constituted by international investment tribunals. Some preliminary elucidation of each element is required.

- 20 In the first place, and in order not to duplicate the prior work already undertaken by the Eighteenth Commission, the present research is limited to the application of the principle of the equality of the parties in the *process* by which international investment disputes are resolved. It will not examine the substantive principles enshrined in investment treaties.²³
- 21 In the second place, the object of study refers generally to ‘international investment tribunals.’ This expression is apt to include both arbitral tribunals and standing international tribunals with competence in the investment field. The latter category could include both extant tribunals, such as the Iran-US Claims Tribunal (which has extensive relevant practice on this topic) and those that are not yet in force (such as the standing tribunals now incorporated in some European Union bilateral treaties or the proposed international investment tribunal).²⁴
- 22 The question of the most appropriate forum and procedures for the resolution of investment disputes raises a much wider set of issues than the equality principle. Ultimately the question whether a new standing tribunal is to be created is a policy question for States. Even if such a tribunal is established, it is unlikely to replace arbitration, which would continue to apply in cases not covered by any new arrangements or where States and investors agreed to resolve their dispute by arbitration instead of resorting to the standing tribunal. In any event an elucidation by the *Institut* of the equality principle and an examination of the problems that have arisen in practice in its application will assist in the progressive development of fair procedures for the resolution of international investment disputes, whether by arbitration or within a standing international tribunal.

²³ The substantive assurance of equality of treatment forms an important part of the standards of fair and equitable treatment, national treatment and most favoured nation treatment commonly found in investment treaties: UNCTAD *Fair and Equitable Treatment: A Sequel* (UNCTAD Series on Issues in International Investment Agreements II, 2012) 81; UNCTAD *Most-Favoured-Nation Treatment* UNCTAD/DIAE/IA/2010/1, 27; C McLachlan, L Shore, M Weiniger *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford UP, 2017) [7.214]-[7.223]; R Dolzer & C Schreuer *Principles of International Investment Law* (2nd edn, Oxford UP, 2012), Chs 18-20.

²⁴ The current proposals for this Tribunal envisage in any event that it may properly be treated as a form of arbitration, whose decisions will be enforceable as awards: arts 8.23 & 8.41 CETA; CIDS Report, [91]-[99].

23 This Report²⁵ addresses four main research questions:

- (1) What is the function of the equality principle?
- (2) What are the implications of the establishment of investment arbitration, especially under its leading constitutive instrument, the ICSID Convention, for the equality of the parties?
- (3) What specific procedural issues have arisen in the actual conduct of investment arbitration cases that have engaged the principle?
- (4) What measures might the Commission propose by way of progressive development that would further contribute to the application of the equality of the parties in investment disputes?

D. Work of the Eighteenth Commission on the topic

- 24 The Commission first met in Hyderabad on Sunday 3 September 2017 on the occasion of the 78th Session of the *Institut*.²⁶
- 25 The Members of the Commission had before them a detailed *Rapport Préliminaire* prepared by the Rapporteur and circulated to them on 20 August 2017, which provided background research on the issues that are the subject of the present Report.
- 26 The Rapporteur had also included in that Report a Questionnaire to Members on the issues of law and legal policy arising from his research on the issues, as to which he sought the guidance of the Commission's Members. Members furnished full responses to the Questionnaire.²⁷
- 27 These responses revealed a large measure of consensus amongst Commission Members on many of the issues raised.
- 28 In light of Members' responses, the Rapporteur revised the *Rapport Préliminaire* and circulated Members in October 2018 with a draft of the *Rapport Provisoire*, which also included reference to a number of material contributions to State practice, doctrine and jurisprudence in the year to 30 September 2018. At the same time, he prepared a draft *avant-projet* for a Resolution that might be presented to the Plenary.
- 29 The Report and draft Resolution were revised in light of the comments of Members of the Commission.

²⁵ Art 4(1) Rules of the Institute of International Law.

²⁶ Members present were: Messrs McLachlan, Alexandrov, d'Argent, Greenwood, Kazazi, Kohen, Mrs Stern and Messrs Treves and Vinuesa.

²⁷ Member Responses to Questionnaire *infra*. As an aid to the reader, these responses are collated under each Question and in alphabetical order by Member.

II. FUNCTION OF EQUALITY IN INVESTMENT ARBITRATION

30 The equality principle in investment arbitration is derived from a more general recognition of the fundamental character of ensuring the equality of the parties to a dispute in general international law. It is first necessary to outline the source and nature of the principle as it has been applied generally, before turning to consider its application in investment arbitration.

A. *Equality of the parties in general international law*

31 The principle that a fair hearing requires equality of treatment of the parties is so closely connected with the concept of justice itself that it may be said to be inherent in the concept of a judicial or arbitral procedure. As Cheng put it: ‘there are two cardinal aspects of a judicial process, the impartiality of the tribunal and its corollary, the juridical equality between the parties in their capacity as litigants.’²⁸

32 The principle of equality is an integral element of the rule of law. As it was put in the UN Secretary-General’s Report, *The Rule of Law at the National and International Levels*:

The United Nations defines the rule of law as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, *equality before the law*, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.²⁹

1. Equality of the parties as a human right

33 The principle of equality is so fundamental that it finds expression in the major international human rights instruments. Such provisions ‘are

²⁸ B Cheng *General Principles of Law as Applied by International Courts and Tribunals* (Stevens, 1953) 290.

²⁹ UN Secretary-General, ‘Delivering justice: programme of action to strengthen the rule of law at the national and international levels’ UN Doc A/66/749 (16 March 2012), [2], emphasis added and internal references omitted.

relevant to the interpretation of the concept of a fundamental rule of procedure as used in Article 52(1)(d) of the ICSID Convention.³⁰

34 Article 10 of the Universal Declaration of Human Rights provides: 'Everyone is entitled *in full equality* to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'³¹ Article 14(1) of the International Covenant on Civil and Political Rights 1966 ('ICCPR') opens: '*All persons shall be equal before the courts and tribunals.*'³²

35 The Human Rights Committee in its General Comment No 32 (adopted 23 August 2007) gives important guidance as to the proper interpretation of Article 14.³³ Although the focus of Article 14(1) and the General Comment is on the obligations of States to ensure equality before their national courts and tribunals, the commentary provides useful insights as to the nature of the equality principle that may also assist in the interpretation of the principle of equality before international tribunals.

36 The Committee observes that: '[t]he right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection *and serves as a procedural means to safeguard the rule of law.*'³⁴

37 The Committee makes the following pertinent points specific to the first limb of the paragraph that protects the right to equality:

- (1) The right applies 'regardless of the nature of proceedings.'³⁵ It comprises equal access, equality of arms, treatment without discrimination and equality of proceedings.
- (2) *Equal access* ensures that 'no individual is deprived, in procedural terms, of his/her right to claim justice.'³⁶ In the context of domestic proceedings, this means that a State may not discriminate as regards access to its courts and tribunals on grounds of nationality

³⁰ *Tulip Real Estate Investment and Development Netherlands BV v Turkey* (Decision on Annulment) ICSID Case No ARB/11/28 IIC 756 (2015) (Tomka P, Booth & Schreuer), [92].

³¹ Universal Declaration of Human Rights 1948 UNGA Res 217A(III), art 10, emphasis added.

³² Art 14, International Covenant on Civil and Political Rights (ICCPR) (signed 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

³³ UN Human Rights Committee, 'General Comment No 32 Article 14: Right to equality before courts and tribunals and to a fair trial' UN Doc CCPR/C/GC/32 (23 August 2007).

³⁴ *Ibid*, [2].

³⁵ *Ibid*, [3].

³⁶ *Ibid*, [9].

or otherwise. It ‘prohibits any distinctions that are not based on law and cannot be justified on objective and reasonable grounds.’³⁷ While the obligations of States parties vis-à-vis legal aid apply specifically only to criminal proceedings, equal access to other kinds of proceedings can be materially affected by such aid, since ‘[t]he availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.’³⁸

(3) *Equality of arms* ‘means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage...’³⁹ In civil proceedings, equality of arms ‘demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.’⁴⁰

(4) *Equality of proceedings*. Finally, ‘[e]quality before courts and tribunals also requires that similar cases are dealt with in similar proceedings.’⁴¹

38 That equal treatment ‘includes avoidance of any kind of illegitimate discrimination, particularly on the basis of nationality or residence’ is supported by the ALI/UNIDROIT Principles of Transnational Civil Procedure.⁴²

39 The fundamental character of the principle of ‘equality of arms’ is such that, even where it is not expressly mentioned, it has been found to be an inherent component of the right to a fair hearing. So, for example, Article 6 of the European Convention on Human Rights, which guarantees a fair hearing, does not explicitly mention the equality of the parties.⁴³ Nevertheless, the European Commission on Human Rights held at any

³⁷ Idem.

³⁸ Ibid, [10]

³⁹ Ibid, [13].

⁴⁰ Idem.

⁴¹ Ibid, [14].

⁴² Principle 3.2, ALI/UNIDROIT, *Principles of Transnational Civil Procedure* (Cambridge UP, 2004) 20-1.

⁴³ Art 6, Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

early stage that the principle is part of the right to a fair hearing,⁴⁴ a finding that was endorsed by the Court.⁴⁵

2. Jurisprudence of the International Court of Justice

- 40 The International Court has also considered and applied the principle of the equality of the parties in a number of its decisions.⁴⁶ The principle is expressly recognised in relation to States that are not parties to the Statute, the conditions for the admission of which shall in no case 'place the parties in a position of inequality before the Court.'⁴⁷ The Court has repeatedly affirmed that 'the equality of the parties to the dispute must remain the basic principle for the Court.'⁴⁸ In the case of its contentious jurisdiction, it is 'derived from the principle of the sovereign equality of States, which is one of the fundamental principles of the international legal order and is reflected in Article 2, paragraph 1 of the Charter of the United Nations. More specifically, equality of the parties must be preserved when they are involved, pursuant to Article 2, paragraph 3 of the Charter, in the process of settling an international dispute by peaceful means.'⁴⁹
- 41 The Court has referred with approval to the interpretation of the right to equality of the parties applied by the Human Rights Committee to Article 14 ICCPR in its General Comment No 32 and applied considerations set out in that Comment to its own procedures.⁵⁰
- 42 The Court has had to confront the application of the equality principle in particular in a series of cases brought as requests by UN organs or

⁴⁴ *X v Austria* no. 1747/62 (13 December 1963); *Neumeister v Austria* no. 1936/63 (6 July 1964) 7 YB 224.

⁴⁵ *Neumeister v Austria* (1968) ECHR Ser A no 8, 39, [22]; W Schabas *The European Convention on Human Rights: A Commentary* (Oxford UP, 2015), 288.

⁴⁶ R Kolb *The International Court of Justice* (Hart, 2013), 1119-1127; Pellet 'Judicial Settlement of International Disputes' *Max Planck Encyclopaedia of Public International Law* ('MPEPIL') (Oxford UP, 2012), [29]-[32]. The principle of equality of the parties has also been frequently invoked in Separate and Dissenting Opinions of Judges of the Court. In the interests of brevity, the present analysis is confined to Judgments and Orders of the Court.

⁴⁷ Art 35(2), Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 59 Stat. 1055, UKTS 67.

⁴⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Judgment-Merits) [1986] ICJ Rep 14, [31]

⁴⁹ *Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (Provisional Measures) [2014] ICJ Rep 147, [27].

⁵⁰ *Judgment No 2867 of the ILOAT upon a Complaint filed against the IFAD* (Advisory Opinion) [2012] ICJ Rep 10, [39].

affiliated agencies under its advisory opinion jurisdiction in relation to decisions of international administrative tribunals. The issue that the Court had to address in these cases was the inequality potentially arising from the fact that, under its Statute, only States or (in the case of advisory opinions) international organisations have standing to bring proceedings and to be heard by the Court.⁵¹ The complainant in the underlying administrative proceedings—the officer or employee of the relevant agency—has no corresponding *locus standi*. The Court has had to seek to balance its duty to exercise the jurisdiction conferred on it by UN agencies to provide advisory opinions and the limitation imposed on it by its constituent Statute with the general principle of equality.

- 43 In its first Opinion on this issue, delivered in 1956 under the then terms of the Statute of the ILO Administrative Tribunal ('ILOAT')⁵² the Court sought to distinguish the inequality of the Parties in terms of access to the Court by stating that such inequality 'does not in fact constitute an inequality before the Court. It is antecedent to the examination of the question by the Court. It does not affect the manner in which the Court undertakes that examination.'⁵³
- 44 It nevertheless accepted that the question of equality also arises in connection with the procedure itself, since UNESCO's challenge to the result of the proceedings before the ILOAT would affect the rights of the individuals to the benefit of the judgment of that Tribunal. It recognised that '[t]he judicial character of the Court requires that both sides directly affected by these proceedings should be in a position to submit their views and their arguments to the Court.'⁵⁴ It found this requirement to be sufficiently addressed in the case before it, because UNESCO had delivered a statement on behalf of the officials to the Court and there had been no oral proceedings. In reaching this conclusion, the Court was motivated by the principle that a 'nominal absence of equality' ought not

⁵¹ Art 34 (Competence of the Court in its contentious jurisdiction); Arts 65-66 (Advisory opinions).

⁵² *Judgments of the Administrative Tribunal of the ILO upon Complaints made against UNESCO* (Advisory Opinion) [1956] ICJ Rep 77 (Gross (1958) 52 AJIL 16). Article XII of the Statute of the ILOAT then provided that a participating international organization that 'challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed' might submit 'the question of the validity of the decision' to the ICJ for an advisory opinion. This provision was withdrawn by amendment on 7 June 2016.

⁵³ *Ibid*, 85.

⁵⁴ *Ibid*, 86.

to be allowed to defeat the object of 'a régime established by the Statute of the Administrative Tribunal for the judicial protection of officials.'⁵⁵

- 45 The Court adopted the same approach in subsequent proceedings in 1973, receiving written submissions from both the Organization and the affected officials and rejecting a submission that it was required to afford an oral hearing.⁵⁶ In 1982, it adhered again to the same approach, finding that, in the exercise of its advisory opinion jurisdiction in such cases, 'actual equality should be ensured by practical measures.'⁵⁷ At the same time, it observed that such measures 'would need most careful reappraisal were the Court called upon to function as an appeal court in respect of the contentious case itself.'⁵⁸
- 46 The Court revisited the whole question in 2012.⁵⁹ It concluded that 'questions may now properly be asked whether the system established in 1946 meets the present-day principle of equality of access to courts and tribunals. While the Court is not in a position to reform this system, it can attempt to ensure, so far as possible, that there is equality in the proceedings before it.'⁶⁰ Following this decision, the provisions in the Statutes of both the United Nations Administrative Tribunal ('UNAT') and the ILOAT providing for a one-sided right of review by an international organization to the Court from judgments of the administrative tribunal have now been withdrawn. In the case of the UNAT, they have been replaced by a two-tier judicial system, with a right of appeal open to both parties.⁶¹
- 47 One of the arguments that the Court considered in its 2012 decision was a parallel alleged on behalf of the Organization, the International Fund for Agricultural Development ('the Fund') with investor-State arbitration. The Court distinguished the two processes in the following way:

⁵⁵ *Idem*.

⁵⁶ *Judgment No 158 of the United Nations Administrative Tribunal* (Advisory Opinion) [1973] ICJ Rep 166, [36].

⁵⁷ *Judgment No 273 of the United Nations Administrative Tribunal* (Advisory Opinion) [1982] ICJ Rep 325, [29] (noted Gomula (1991) 13 Mich JIL 83).

⁵⁸ *Ibid*, [59].

⁵⁹ *Judgment No 2867 of the ILOAT upon a Complaint filed against IFAD* (Advisory Opinion) ('*Judgment No 2867*') [2012] ICJ Rep 10 (noted de Brabandere (2012) 11 LPICT 253; Vidal-Léon (2014) 5 JIDS 406).

⁶⁰ *Ibid*, [44].

⁶¹ Statute of the United Nations Appeals Tribunal, adopted UNGA Res A/RES/63/253 (24 December 2008) as amended; Reinisch & Knahr (2008) 12 Max Planck UNYB 447.

In replying to the question about equality of access, the Fund emphasized what it saw as a parallel with investor-State arbitration. First, it pointed out that in such arbitrations, it is only the investor that may initiate the dispute settlement process. But that process is initiated in response to the conduct of the host State, alleged to be in breach of the investor's rights, and is a first instance process. It is comparable to the proceeding brought in the ILOAT by the staff member against the agency. In the case of investment arbitrations brought under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (United Nations Treaty Series (UNTS), Vol. 575, p. 159), both parties – and not just one – are able to seek interpretation, revision or annulment of the award: it is that situation which is analogous to the present one. The Fund, secondly, refers to a number of provisions in bilateral free trade and investment treaties which enable the State parties to those treaties, by joint decision, at the request of one of them, to declare their interpretation of a provision of the treaty. That interpretation is binding on the tribunal hearing an investment dispute including those brought by the investor. That situation bears little resemblance to the present one: parties to treaties are in general free to agree on their interpretation, while in the present case the Court is concerned with the initiation of a review process to be carried out by an independent tribunal.⁶²

- 48 In these comments, the Court emphasises the central importance of the principle of equality to the design of the investment arbitration system under the ICSID Convention.
- 49 What more conclusions of potential relevance to the present specific topic may be drawn from general international law? The principle of equality may be treated as a general principle of law governing the Court's procedures that is 'not solely a structural one, connected to the respective positions of the parties; it is also a substantive one, connected to the objectives of the procedure and the values of substantive justice.'⁶³ For this reason it applies generally to all judicial or arbitral proceedings. But this does not imply inflexibility, since the principle must be applied in numerous practical contexts in which the court or tribunal is called upon to apply a fair procedure.

⁶² *Judgment No 2867*, [43].

⁶³ See R Kolb *The International Court of Justice* (Hart, 2013), 1119 for an illuminating analysis.

50 Equality may be seen as having three dimensions: (a) as a constitutional principle; (b) as a principle of reciprocity; and (c) as a procedural principle.⁶⁴

- (1) *As a constitutional principle*, equality must be treated as superior to other procedural rules in light of its fundamental character. This was the conclusion that the Court adopted in its decisions on the anomalous use of its advisory opinion jurisdiction by international organizations to seek review of administrative tribunal judgments, reviewed above. The Court proactively limited the availability of oral argument and ensured that the officials had an equal opportunity to submit a written submission. In the end, its criticisms contributed to the withdrawal of the objectionable procedure.
- (2) *As a principle of reciprocity*, equality operates generally to ensure that treatment accorded to one party (for example in the granting of extensions of time or the admission of new evidence or submissions) is also accorded in substance to the other. In this regard, equality is closely linked to the principle of *audi alteram partem*: that the court or tribunal should always hear both sides, such that, if new evidence or explanations are admitted from one party, the other should equally have an opportunity to comment.⁶⁵ This principle is specifically enshrined in the Rules of the Court.⁶⁶ As Cheng observed, *audi alteram partem* 'may be regarded as a general principle of law translating into practice the fundamental requirement of equality between the parties in judicial proceedings.'⁶⁷
- (3) *As a procedural principle*, in ensuring substantial equality of treatment of the parties in the exercise of their procedural rights. As the Permanent Court observed, 'the Parties must have an equal

⁶⁴ Ibid, 1123-7.

⁶⁵ *Nuclear Tests (Australia v France, New Zealand v France)* [1974] ICJ Rep 253, [33]; *Legal Status of Eastern Greenland Case (Denmark v Norway)* (1933) PCIJ Rep, Ser A/B No 53, 25-6; *Chorzów Factory Case (Germany v Poland)* (Judgment on Jurisdiction) (1928) PCIJ Rep, Ser A No 17, 7, where the Permanent Court afforded a party a further opportunity to be heard on new evidence or submissions submitted by its opponent.

⁶⁶ Arts 56(3) & 72 Rules of Court.

⁶⁷ Cheng *General Principles of Law*, 291; accord V S Mani *International Adjudication: Procedural Aspects* (Nijhoff, 1980), 16.

opportunity reciprocally to discuss their respective contentions.’⁶⁸ The Court has frequently been called upon to apply considerations of equality to the procedures applied in specific cases. Its experience in this regard suggests that the principle cannot be applied rigidly. Flexibility must be preserved, having regard to the many different procedural postures that can arise in litigation before it. What is important is that substantial equality is maintained.

3. Relation to other aspects of a fair hearing

- 51 The equality principle in general international law is closely linked to other fundamental elements of a fair hearing, notably the requirement, enshrined in Article 14(1) ICCPR (second sentence) of ‘a competent, independent and impartial tribunal.’
- 52 This principle, which is equally important, has been the subject of recent elaboration at the international level, including in a Resolution of the *Institut*.⁶⁹ The two principles are especially closely linked through the element of judicial impartiality. This requires that the judge ‘must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one party to the detriment of the other.’⁷⁰
- 53 The present Report will not seek to duplicate this work, which addresses many other aspects of the appointment and tenure of international judges and arbitrators. It will consider the requirement of impartiality to the extent that it is connected with the equality of the parties in the constitutional design of an international investment tribunal.⁷¹

⁶⁸ *International Commission on the River Oder* (Order) (1929) PCIJ Rep, Ser A No 23, 45.

⁶⁹ Institut de Droit international, ‘The Position of the International Judge’ (Sixth Commission, G Guillaume Rapporteur, 9 September 2011) (2011) 74 *Annuaire* 3, 124; International Law Association, Study Group on the Practice and Procedure of International Courts and Tribunals, ‘Burgh House Principles on the Independence of the International Judiciary’ (P Sands & C McLachlan, Co-Chairs) (2005) 4 LPICT 247; International Bar Association, ‘IBA Guidelines on Conflicts of Interest in International Arbitration’ (rev edn, adopted 23 October 2014); and see art 8.30 CETA.

⁷⁰ UN Human Rights Committee, ‘General Comment No 32 Article 14: Right to equality before courts and tribunals and to a fair trial’ UN Doc CCPR/C/GC/32 (23 August 2007), [21].

⁷¹ Part III C below.

B. Application in international arbitration

54 The principle of the equality of the parties is also fundamental to the conduct of international arbitration, as it has been developed for both inter-state disputes and international commercial disputes.

1. Public international arbitration

55 The Preamble to the International Law Commission's Model Rules on Arbitral Procedure states that: 'The undertaking to arbitrate is based on the following fundamental rules: ... (5) The parties shall be equal in all proceedings before the arbitral tribunal.'⁷²

56 In explaining the basis for this rule, the Secretariat stated in its Commentary:

This article expresses a fundamental norm of procedure the observance of which is essential to the proper functioning of the tribunal. Implicit in the article is the principle that the treatment of the parties during the conduct of a case before the tribunal must be fully impartial. Yet something more than the notion of impartiality is involved; there is in addition the notion that there are certain basic principles of procedure which are indispensable conditions of the exercise by the tribunal of its jurisdiction. Thus a State is entitled to rely upon certain fundamental procedural rights in any international arbitration, of which no State would consent to be deprived. The procedural rights involved must, however, be fundamental in the sense that the interests of a party are materially affected, so as to go to the very root of the award.⁷³

57 International arbitral practice in inter-state cases supports the proposition that an award may be invalid in cases of a serious departure from such a fundamental rule.⁷⁴ The ILC Model Rules provide that the validity of an award may be challenged if there has been 'a serious departure from a fundamental rule of procedure.'⁷⁵ The Secretariat Commentary identifies the '[r]ight of parties to equal and impartial treatment' and '[t]he right to be heard' as such fundamental rules of procedure.⁷⁶

⁷² International Law Commission, Model Rules on Arbitral Procedure [1958] 2 YB ILC 83.

⁷³ International Law Commission 'Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session, prepared by the Secretariat' (1955) UN Doc A/CN.4/92, 55.

⁷⁴ *La Constancia, Good Return and Medea (United States v Colombia)* (1866) 2 Moore 1396; K Carlston *The Process of International Arbitration* (Columbia UP, 1946), 39.

⁷⁵ Art 35(c), ILC Model Rules.

⁷⁶ ILC Commentary on the Draft Convention on Arbitral Procedure, 110.

2. International commercial arbitration

58 In international commercial arbitration, the equality principle is non-derogable. It qualifies the general rule that gives the tribunal broad power to conduct the arbitration as it considers appropriate. So, Article 17(1) (first sentence) of the UNCITRAL Rules 2010 (formerly Article 15(1) of the 1976 Rules) states:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, *provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case.*⁷⁷

59 This provision is mirrored in Article 18 of the UNCITRAL Model Law, which provides that ‘The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.’⁷⁸

60 The Tribunal in *Methanex v USA* underscored the importance of this rule holding:

This provision [art 15(1) 1976 Rules] constitutes one of the essential ‘hallmarks’ of an international arbitration under the UNCITRAL Arbitration Rules, according to the *travaux préparatoires*. Article 15 has also been described as the ‘heart’ of the UNCITRAL Rules; and its terms have since been adopted in Articles 18 and 19(2) of the UNCITRAL Model Law on International Commercial Arbitration, where these provisions were considered as the procedural ‘*Magna Carta*’ of international commercial arbitration.⁷⁹

61 A fundamental breach of the equality principle constitutes a basis on which recognition and enforcement of an award may be refused on the ground provided in Article V(1)(b) of the New York Convention that: ‘The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings

⁷⁷ Art 17(1), UNCITRAL Arbitration Rules as revised in 2010, adopted by UNGA Res 65/22 (6 December 2010) (emphasis added). The equivalent provision of the 1976 Rules, art 15(1) is to the same effect, save that ‘at an appropriate stage’ previously read ‘at any stage.’ See: D Caron & L Caplan *The UNCITRAL Arbitration Rules: A Commentary* (2nd edn, Oxford UP, 2013); (‘Caron’); C Croft, C Kee & J Waincymer *A Guide to the UNCITRAL Arbitration Rules* (‘Croft’) (Cambridge UP, 2013), 173.

⁷⁸ Art 18, UNCITRAL Model Law on International Commercial Arbitration (adopted 21 June 1985, amended 7 July 2006) UN Docs A/40/17, annex I and A/61/17, annex I.

⁷⁹ *Methanex Corp v USA* (Decision on Amici Curiae Interveners) (2001) 7 ICSID Rep 208 (NAFTA, Veeder P, Christopher & Rowley), [26].

or was otherwise unable to present his case.’⁸⁰ This provision permits a challenge to an award for ‘a denial of procedural fairness, equality of treatment, or natural justice.’⁸¹

C. Are the equality issues raised by investment arbitration unique?

62 In light of the entrenched status of the equality principle in both public international law and international commercial arbitration, it is necessary to address the question whether, and if so, in what respects, the particular characteristics of investment arbitration pose unique challenges in its application. Can it be said that the asymmetrical character of such arbitration, which brings a private party and a State before the same tribunal, is inherently unequal or requires special adjustments to assure equality?

63 In order to address this question, it is necessary to examine in outline the position in the context of two related systems of international adjudication: (a) diplomatic protection and the development of claims commissions and tribunals; and (b) international human rights commissions and tribunals.

1. Diplomatic protection and claims commissions

64 The contemporary system under which an individual investor may pursue his or her claim directly against a State was developed in part as a response to perceived shortcomings in the remedy of diplomatic protection that is otherwise open to the investor’s home State in the event that its national suffers a wrong at the hands of the host State that constitutes a breach of international law.⁸²

65 The equality principle was invoked by arbitral tribunals determining diplomatic protection claims. But the nature of such a claim is that it substitutes the claim of the State for that of its national vis-à-vis the State whose international responsibility is said to have been engaged.⁸³ As a result, the tribunal has before it two State parties, each of which is the juridical equal of the other.

⁸⁰ Art V(1)(b), Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (signed 10 June 1958, entered into force 7 June 1959) 330 UNTS 38.

⁸¹ G Born *International Commercial Arbitration* (2nd edn, Kluwer, 2014), 3494.

⁸² Broches (1972) 136 *Recueil des Cours* 331, 344.

⁸³ Art 1, International Law Commission, Draft Articles on Diplomatic Protection [2006] 2(2) YB ILC 23.

- 66 Nevertheless international law has developed procedures enabling an individual to pursue a claim directly against a host State outside the specific context of investment arbitration.
- 67 Prior to World War I, there were only isolated instances of claims procedures where the direct intervention of the affected individual had been permitted.⁸⁴ The position changed in the inter-War period, where there was increasing (but not uniform) recognition that the individual might enjoy direct rights under an international treaty, including the right to seek compensation before an international tribunal from a State for breach of treaty rights.⁸⁵ For example, the Upper Silesian Mixed Commission and Arbitral Tribunal recognised that the individual had, pursuant to the treaties establishing them, full procedural capacity to pursue his or her claims against a State.⁸⁶
- 68 The most salient example of a standing tribunal with jurisdiction to determine individual claims against a State created in the post-World War II period is the Iran-US Claims Tribunal, which has consistently rejected the suggestion that it is determining diplomatic protection claims or inter-state disputes and insisted that it is a new forum in which individual claimants vindicate their own rights.⁸⁷ As the Tribunal adopted (in modified form) the UNCITRAL Arbitration Rules, its decisions form an important source of jurisprudence on the interpretation and application of the equality principle.⁸⁸
- 69 The Tribunal has particularly had cause to invoke the equality principle in its character as the *principe de la contradiction*, or right of each party to respond to the submissions of its opponent:

Article 15 of the Tribunal Rules requires that the Tribunal treat the parties equally. This is a fundamental principle of justice. In the circumstances of these cases, the delicate balance of equality would be tipped if one party were to be permitted to present an extensive Memorial and additional exhibits, without providing an opportunity for the other party to file a memorial in response.⁸⁹

⁸⁴ K Parlett *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge UP, 2011), Ch 2.

⁸⁵ *Ibid*, 71-77.

⁸⁶ Kaackenbeeck (1946) 243 *Annals AAPSS* 129.

⁸⁷ *Esphahanian v Bank Tejarat* (1983) 2 Iran-USCTR 157, 165.

⁸⁸ See Caron and Croft above n 77.

⁸⁹ *Foremost Tehran Inc v Iran* (1983) 2 Iran-USCTR 361, 362.

- 70 The important point for present purposes is that the ability of individual claimants to assert claims before the Tribunal has not proved to be fundamentally inconsistent with an assurance of equality of the parties.

2. International human rights tribunals

- 71 The international legal system has also accommodated an asymmetrical form of adjudication in the field of human rights.⁹⁰ Both the Inter-American and the European systems admit a right of individual petition against State action as 'a key component of the machinery for protecting the rights and freedoms set forth in the Convention.'⁹¹ In the Inter-American system,⁹² and originally in the European system, this application had first to be made to a Commission.
- 72 In the case of the European Convention, the right of individual petition to the Commission was originally dependent upon the State party making a declaration that it accepted this right.⁹³ In 1990 the Committee of Ministers adopted Protocol No 9, which provided for direct individual access to the Court. One of the reasons advanced for this amendment was that limiting access to the Court to the Commission and to States Parties, and excluding a right of direct individual petition, was incompatible with the norms enshrined in the Convention, being a denial of equality of arms.⁹⁴ Ultimately, by Protocol No 11, which entered into force in 1998,⁹⁵ the Commission was abolished and the right of individual direct access to the Court was enshrined in Article 34 of the Convention as revised.
- 73 In interpreting Article 34, the Court has held that bodies exercising public functions are not entitled to bring an individual application 'as a person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention.' The Court explained that 'the idea behind this principle is to prevent a Contracting Party acting as both an applicant and a respondent party before the Court.'⁹⁶ The key distinction is not

⁹⁰ Lixinski in Sarvarian (ed), *Procedural Fairness*, Ch 18.

⁹¹ *Mamatkulov v Turkey*, nos. 46827/99 and 46951/99 (Merits and Just Satisfaction) [2005] ECHR 64, (2005) 41 EHRR 25 (6 February 2003), [122]; art 34 ECHR.

⁹² Arts 44 & 61 American Convention on Human Rights (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

⁹³ Schabas *The European Convention on Human Rights*, 735.

⁹⁴ Explanatory Report on Protocol No 9, [12], cited in Schabas *ibid*, 28.

⁹⁵ Protocol No 11, ETS 155.

⁹⁶ *Islamic Republic of Iran Shipping Lines v Turkey* no 40998/98 [2007] V ECHR, [81].

whether the applicant is publicly owned, but whether the body exercises public functions or is instead independent from the State.⁹⁷

- 74 As a result, the right of individual petition is designed as an asymmetrical system for the adjudication of the claims of private individuals against the State. Although the Convention contained from the outset Article 33, which entitles States to enforce the provisions of the Convention *erga omnes partes*, in practice that procedure has long been eclipsed in practical significance by the volume of individual complaints.⁹⁸
- 75 In deciding individual complaints, the human rights tribunals accept that they must themselves accord procedural equality. In the Inter-American system, the Court considered the compliance of the Inter-American Commission with due process requirements in an advisory opinion. It held: ‘The processing of individual petitions is regulated by guarantees that ensure each party the exercise of the right of defense in the proceedings. These guarantees [include] ... procedural equality.’⁹⁹

III. EQUALITY IN THE CONSTITUTION OF ICSID ARBITRATION

- 76 The ICSID Convention 1965, currently ratified by 154 States,¹⁰⁰ constitutes a unique, self-contained system for the arbitration of investment disputes between ‘Contracting States and nationals of other Contracting States.’¹⁰¹ Although investment disputes may also be arbitrated *ad hoc* or under the auspices of other arbitration institutions,¹⁰² the special character and wide acceptance of the ICSID Convention as a dispute resolution system mean that its own treatment of the equality principle is of particular importance to the present study.

⁹⁷ *The Holy Monasteries v Greece* (Admissibility and Merits) (9 December 1994) Ser A No. 301-A, (1995) 20 EHRR 1, [49].

⁹⁸ Schabas *The European Convention on Human Rights*, 723-730.

⁹⁹ *Control of Legality in the Practice of Authorities of the Inter-American Commission of Human Rights* (Advisory Opinion) OC-19/05 IACtHR (28 November 2005) Ser A No 19, [27].

¹⁰⁰ ‘Database of ICSID Member States’, World Bank, <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> (last accessed 28 September 2018).

¹⁰¹ Preamble alinéa 4, ICSID Convention.

¹⁰² For the division between ICSID and non-ICSID cases see: UNCTAD ‘IIA Issues Note’ (May 2017) available at: http://unctad.org/en/PublicationsLibrary/diaepcb2017d1_en.pdf (last accessed 7 October 2018).

77 The purpose of this section is to examine the respects in which the constitution of the arbitration system under the ICSID Convention seeks to reflect the equality principle: (a) as an underlying principle; (b) in terms of access to this form of dispute resolution; and (c) in the basic structure of the arbitral process. It notes under each of these heads points at which objection has been taken as to the extent to which the system affords equality at a constitutional level.

A. Equality as an underlying principle

78 The Convention does not mention the equality principle expressly. Nevertheless, the equality of the parties was an important guiding principle in its framing. Broches, General Counsel to the Bank and the driving force behind the creation of the Convention identified one of its most distinctive features as being the creation of facilities for arbitration 'to which the host country and the foreign investors would be parties on an equal procedural footing.'¹⁰³ The Executive Directors emphasised that, 'since the Convention permits the institution of proceedings by host States as well as by investors' they 'have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases.'¹⁰⁴

79 That said, the availability of international investment arbitration to address the claims of both investors and host States is limited by the decisions of States as to the circumstances in which they are prepared to confer jurisdiction upon the Centre, since 'no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.'¹⁰⁵ The consequence is that the State's consent must always be given in writing in a separate instrument, which will determine the scope of the disputes submitted to arbitration.¹⁰⁶

80 Where the State's consent is given in a contract between it and the foreign investor, the synallagmatic character of the rights and duties contained in the contract will of their nature be equally open to

¹⁰³ Broches (1972) 136 *Recueil des Cours* 331, 344.

¹⁰⁴ ICSID, 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States' (1965), [13].

¹⁰⁵ Preamble, paragraph 7 ICSID Convention.

¹⁰⁶ Art 25(1) ICSID Convention.

vindication at the suit of the investor or the State according to the law applicable to that contract.¹⁰⁷

81 Where, however, the State's consent is given in an investment treaty, there are two possibilities:

- (1) The arbitration agreement in the treaty may provide that any dispute between an investor and the State concerning the investment may be submitted by either party to arbitration.¹⁰⁸ In this event, the scope of the submission to arbitration is fully bilateral and the source of the legal obligations to be invoked is not prescribed by the terms of the consent, but rather is limited by the subject matter, namely the investment.
- (2) In a second scenario, which typifies the current structure of many investment treaties,¹⁰⁹ States have chosen to give their consent to the arbitration of disputes solely at the suit of the investor and normally only for the vindication of the rights protected by the treaty.

82 It is this second category of investment treaties that has given rise to the majority of investment claims. The legal character of such claims is of its nature unilateral, since the purpose of the protections contained in such treaties is to maintain a certain level of 'external control over the actions of host States in light of obligations that it assumes on the international level that it cannot change unilaterally. Such obligations and external control are consented by the host State in order to attract foreign investment and depoliticize potential disputes that could otherwise be

¹⁰⁷ Art 42 ICSID Convention.

¹⁰⁸ See, e.g. Art 8 France Model BIT, App 10 McLachlan, Shore & Weiniger; Art X(1) US–Argentina BIT (signed 14 November 1991, entered into force 20 October 1994) Senate Treaty Doc 103-02, considered in *Urbaser SA v Argentina* (Award) ICSID Case No ARB/07/26 (2016, Bucher P, Martínez-Fraga & McLachlan), [1143].

¹⁰⁹ For example: art 1120 North American Free Trade Agreement (NAFTA) (adopted 17 December 1992, entered into force 1 January 1994) 107 Stat. 2057; art 26(2) Energy Charter Treaty (ECT) (signed 17 December 1994, entered into force 16 April 1998) 2080 UNTS 100; art 32 ASEAN Comprehensive Investment Agreement (signed 26 February 2009, entered into force 29 March 2012); art 24 US Revised Model BIT 2012, McLachlan, Shore & Weiniger, App 6; art 10 Germany Model BIT, *ibid* App 7. Some other BITs provide an equal right to investors and states to submit claims: art 8 UK Model BIT 2008, *ibid* App 4; art 8 France Model BIT, *ibid* App 10.

channelled through diplomatic protection claims initiated by the investor's State.¹¹⁰

- 83 **In conclusion**, the legal character of this type of claim does not engage or imperil the equality of the parties. It is the result of the deliberate choices that States have made in the design of the remedy that they have agreed to provide. In this respect, international investment arbitration is similar to international human rights adjudication, which is alike concerned with securing some external control over the actions of States in respect of obligations from which they may not derogate at international law. Indeed, this form of investment treaty is designed to secure a measure of equality between the parties in circumstances where the State otherwise has the sovereign power to enforce its own law and adjudicate its claims against investors for breach of its laws before its own courts.
- 84 Nevertheless, such a limitation of claims and of access is a matter of the choices made by States in treaty design. States may, if they so choose, agree to impose obligations upon each other's investors as a condition of investment. Increasing attention is being given to this possibility in the literature.¹¹¹ To date, however, there have been only limited attempts to define the substantive content and procedural consequences of such an approach in the treaty practice of States.¹¹²

B. Access to ICSID arbitration

- 85 Equality of access to investment arbitration under the ICSID Convention falls to be considered at two levels: (a) as between the investor and the State in the institution of a claim; and (b) equality and the condition of nationality.

1. Equality in the institution of a claim

- 86 The equality principle is applied in the Convention's provisions for access to arbitration. A request for arbitration under the Convention may

¹¹⁰ Confrère d'Argent, Reply to Rapporteur's Question 1 *infra*; and see, to like effect, Stern 'Are some legal issues too political to be arbitrable?' (2009) 24 ICSID Rev-FILJ 90, 96-7.

¹¹¹ Boisson de Chazournes 'Changes in the balance of rights and obligations: towards investor responsabilization' in El Ghadban, Mazuy and Senegacnik (eds) *La Protection des investissements étrangers, vers une réaffirmation de l'Etat? Actes du colloque du 2 juin 2017* (Pedone, Paris, 2018); J Amado, J Kern & M Rodríguez *Arbitrating the Conduct of International Investors* (Cambridge UP, Cambridge, 2018)

¹¹² See notably the Draft Pan-African Investment Code (adopted 21-23 November 2016, not yet in force) Ch.4; on which see: Mbengue & Schacherer 'Africa and the Rethinking of International Investment Law: About the Elaboration of the Pan-African Investment Code' in Roberts et al (eds) *Comparative International Law* (Oxford UP, New York, 2018) 547

be addressed to the Secretary-General *either* by a Contracting State *or* by a national of a Contracting State.¹¹³ In other words, the Convention may be asymmetric, but it is not—at least in its design—one-sided. Broches emphasised that the wide enforceability of awards in the territories of other Contracting States ‘was inserted primarily with the needs of host States in mind.’¹¹⁴

- 87 In practice, however, this ambition of the framers has not been realised. States have made almost no use of the Convention as original claimants against investors.¹¹⁵
- 88 State-owned enterprises have sued as claimants. But they have done so in their capacity as commercial investors against host States. Tribunals have generally accepted this, provided that the claimant is bringing suit in respect of activities that are essentially commercial rather than governmental in nature.¹¹⁶ The extent to which the admission of such claims is permissible (in view of the fact that the Convention is concerned solely with ‘private international investment’¹¹⁷ and implicitly excludes inter-state claims) is a matter of some controversy.¹¹⁸
- 89 **In conclusion**, the decision of States not to use the Convention as claimants, save where they are themselves investors, is because States have generally preferred to use the rights and remedies provided by their own national legal systems in order to pursue claims against investors and to do so in their own courts. Save in the case of contractual disputes (where submission to international arbitration continues to be

¹¹³ Art 36(1) ICSID Convention.

¹¹⁴ Art 54; Broches, 349.

¹¹⁵ C Schreuer et al *The ICSID Convention: A Commentary* (2nd edn, Cambridge UP, 2009) (‘Schreuer’), 458. An attempt on the part of a provincial government to invoke ICSID jurisdiction against the investor on a contract claim failed on grounds of lack of consent and standing to represent the State under art 25 of the ICSID Convention: *Government of the Province of East Kalimantan v PT Kaltim Prima Coal* (Award on Jurisdiction) ICSID Case No ARB/07/3 (2009, Kaufmann-Kohler P, Hwang & van den Berg). The scope of host States’ ability to pursue counterclaims will be considered below in section IV(A).

¹¹⁶ *Ceskoslovenska Obchodni Banka AS v Slovakia* (Decision on Jurisdiction) ICSID Case No ARB/97/4, 5 ICSID Rep 330 (1999, Buergenthal P, Bernardini & Bucher), [17]; Schreuer, 161-2.

¹¹⁷ Preamble, paragraph 1, ICSID Convention.

¹¹⁸ Poulsen ‘States as foreign investors: diplomatic disputes and legal fictions’ (2016) 31 ICSID Rev–FILJ 12; Chaise & Sejko ‘Investor-State arbitration distorted: when the claimant is a state’ in L Choukroune (ed), *Judging the State in International Trade and Investment Law* (Springer 2016) Ch 5.

common¹¹⁹) and counterclaims (considered further in section IV A 2 below) a decision to refer such disputes to international arbitration rather than the national courts of the host State might itself raise significant sovereignty implications. It might suggest that the State itself had a lack of confidence in its own courts and might also be seen as enabling foreign investors to escape responsibility for their own actions before local courts. In principle States have a responsibility to use their domestic legal system to ensure accountability of private persons, including business enterprises.¹²⁰

- 90 Nevertheless, there remain sound practical reasons why a State might wish to consider submitting its claim against an investor to international arbitration. The foreign investor (as distinct from its local investment vehicle) may well have no presence within the jurisdiction of the host State. The States Parties to the ICSID Convention have assumed an obligation to 'recognize an award as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court of that State.'¹²¹ The international enforceability of an ICSID arbitral award far exceeds the enforceability of the judgment of any national court.

2. Equality and the condition of nationality

- 91 The Convention is deliberately designed to limit the availability of its procedures to a particular class of individuals, namely 'national[s] of another Contracting State.'¹²² This is inherent in the whole structure of the Convention, finding expression in its title and in its operative jurisdictional provisions. It reflects the Convention's origins as a new form of dispute resolution to address an existing category of obligations of States under international law in the treatment of aliens and their property.¹²³

¹¹⁹ Brower & Kumar 'Investomercial arbitration: whence cometh it? What is it? Whither goeth it? (2015 30 ICSID Rev-FILJ 35; ICC Commission Report, 'States, state entities and ICC arbitration' (2012).

¹²⁰ See, e.g. Principle 1, United Nations, 'Guiding Principles on Business and Human Rights' (the Ruggie Commission) (2011) UN Doc HR/PUB/11/04 ('States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication').

¹²¹ Art 43(1) ICSID Convention.

¹²² Art 25 ICSID Convention.

¹²³ R Jennings & A Watts (eds) *Oppenheim's International Law* (9th edn, 1992) vol 1, 924-5.

- 92 Access is not open to nationals of the host State. In the framing of the Convention, ‘there was a widespread recognition that it was unrealistic to expect a State to submit to an international jurisdiction with respect to its own national.’¹²⁴ As a result, Article 25(2)(a) specifically states that the national of another Contracting State ‘does not include any person who...also had the nationality of the Contracting State party to the dispute.’
- 93 The Report of the Executive Directors is categorical about this limitation:
[A] natural person who was a national of the State party to the dispute would not be eligible to be a party in proceedings under the auspices of the Centre, even if at the same time he had the nationality of another State. This ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent.¹²⁵
- 94 Article 25(2)(b) contains a limited extension in the case of juridical persons that are nationals of the home State. This does not affect the underlying principle. The extension only applies to such person that ‘because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purpose of the Convention.’¹²⁶
- 95 At this constitutional level, investment arbitration operates on a quite different basis to international human right protections that apply regardless of nationality. So, for example, Article 2(1) of the ICCPR (adopted in 1966, the year following the conclusion of the ICSID Convention) provides:
Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other state.
- 96 Where an international human rights tribunal has been endowed with jurisdiction to determine individual complaints, it will be competent to hear cases brought by a national of the respondent State. Such cases may include claims by host State nationals for breaches of the right to a fair hearing and for the protection of private property that are in substance

¹²⁴ Schreuer, 271.

¹²⁵ ICSID, ‘Report of the Executive Directors’, [29].

¹²⁶ For discussion see: McLachlan, Shore & Weiniger, [5.134]-[5.153].

closely related to the rights enshrined in investment treaties for the protection of foreign nationals only.¹²⁷

- 97 The Human Rights Committee regards equal access to a tribunal without discrimination and equality of proceedings as elements of the right to a fair trial.¹²⁸
- 98 The limitations on access to foreign nationals contained in the ICSID Convention may be explained by the Convention's origins as an attempt to address specific problems that had otherwise been encountered in the protection of foreign private investment and the resolution of disputes on a level playing field between foreign investors and States arising from such investment.¹²⁹ In other words, it was seen as an attempt to apply the equality principle as between the State and the foreign investor to this class of disputes.
- 99 The Convention does so by creating a specific forum that is available only with the consent of the State as an alternative to other fora for the resolution of a dispute between a foreign investor and the State.¹³⁰ ICSID arbitration operates, where such consent is given, in substitution for, and to the exclusion of, national remedies in the host State.¹³¹ Unless the host State has expressly so stated as a condition of its consent, there is no requirement to exhaust local remedies.¹³² It also excludes the exercise of the home State's right to espouse an international claim by way of diplomatic protection, a right that is of its nature limited by the bond of nationality.¹³³
- 100 One of the grounds of academic and public opposition to investment arbitration has been its differential access for foreign investors. For example, the Toronto Declaration states: 'All investors, regardless of nationality, should have access to an open and independent judicial system for the resolution of disputes, including disputes with

¹²⁷ Art 6 & First Protocol, Art 1 ECHR; see e.g. *OAO Neftyanaya Kompaniya Yukos v Russia* ECtHR App No 14902/04 (Admissibility) 29 January 2009, (Merits) 20 September 2011 [516]-[526], (Just satisfaction) 24 June 2014.

¹²⁸ General Comment No 32, [9], [14], cited above [33].

¹²⁹ Broches (1972) 136 *Recueil des Cours* 331, 343-4.

¹³⁰ Art 25(1).

¹³¹ Art 26.

¹³² *Idem*.

¹³³ Art 27(1).

government.¹³⁴ The Declaration adds that private individuals, local communities and civil society organisations should have a ‘full and equal participation...alongside the investor where their interests are affected.’

- 101 Although this argument takes a number of different forms, it is more usually expressed as an objection *in limine* to the ability of foreign investors to circumvent national courts through resort to international arbitration.¹³⁵
- 102 The reform proposals currently being advanced at the international level do not at present address this objection.¹³⁶ They do not propose to extend access to an international investment tribunal beyond the category of disputes between States and nationals of other States.¹³⁷ Nor do they propose to endow national courts with competence to enforce rights under investment treaties.¹³⁸ Nor do they propose to replace this system with one of inter-state claims, whether by way of diplomatic protection or the vindication of the direct rights of States.¹³⁹ Rather, they presume a continued role for an international tribunal to resolve specifically

¹³⁴ ‘Public statement on the international investment regime’ (31 August 2010), above n 12. The Declaration nevertheless continues to accept a role for contract-based arbitration of investment contracts.

¹³⁵ European Commission ‘Report: Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)’ (13 January 2015) available at: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf (last accessed 7 October 2018), 34, 133.

¹³⁶ Roberts ‘Incremental, systemic, and paradigmatic reform of investor-State arbitration’ (2018) 112 AJIL 410, 417.

¹³⁷ Kaufmann-Kohler & Potestà, CIDS Report (2016); UNCITRAL Report 2017.

¹³⁸ Current EU treaty practice limits such competence at present: Semertzi ‘The preclusion of direct effect in the recently concluded EU free trade agreements’ (2014) 51 CMLR 1125; Bronckers ‘Is investor-state dispute settlement (ISDS) superior to litigation before domestic courts?’ (2015) 18 JIEL 655.

¹³⁹ Cf. the (currently limited) position of investment within the WTO system: Agreement on Trade-Related Investment Measures (TRIMS) (signed 15 April 1994), Annex 1A to Marrakesh Agreement establishing the World Trade Organisation 1868 UNTS 186. But see now: WTO ‘Deepening Africa’s Integration in the Global Economy through Trade and Investment Facilitation for Development: Abuja Statement’ (7 November 2017) WT/MIN(17)/4 WT/GC/186, [1.4]–[1.6] which states that ‘trade and investment are inseparable’, ‘highlighted the importance of advancing regional and international co-operation to create a more transparent, efficient, and predictable environment for investment and trade’ and ‘urged WTO Members to undertake more focused discussions aimed at developing a multilateral framework to facilitate investment for development.’

international disputes on the international plane between on the one hand a State and on the other hand the nationals of another State.

- 103 This fundamental aspect of the constitutional design of an investment court has not gone unchallenged. It has been the subject of constitutional challenges to the ratification of the Canada–EU Comprehensive Economic and Trade Agreement ('CETA') within the European Union and its Member States. The provisions of Chapter 8, which establish the Investment Court System, will not be provisionally applied and will not enter into force until ratified by all Member States.¹⁴⁰
- 104 In *France*, the *Conseil Constitutionnel* addressed whether the inclusion in CETA of provision for an international investment tribunal open only to foreign investors and not to domestic investors was contrary to Article 6 of the Declaration of 1789, which requires that the law '*doit être la même pour tous, soit qu'elle protège, soit qu'elle punisse*.'¹⁴¹
- 105 The Council held that the equality principle is not infringed by such a system. In an important passage it held that the Treaty has as its substantive object an assurance of the provision of the same treatment for foreign investors as for nationals. The limitation of the international forum to foreign investors has a direct connection with the object of the treaty to promote investment exchanges between the parties and operates on the basis of reciprocity, being equally open to French nationals investing in Canada.¹⁴²

35. ... Le principe d'égalité ne s'oppose ni à ce que le législateur règle de façon différente des situations différentes ni à ce qu'il déroge à l'égalité pour des raisons d'intérêt général, pourvu que, dans l'un et l'autre cas, la différence de traitement qui en résulte soit en rapport direct avec l'objet de la loi qui l'établit.

36. En premier lieu, les stipulations du chapitre 8 de l'accord comportent, en faveur des investisseurs non ressortissants de l'État d'accueil de l'investissement, des prescriptions touchant à certains droits substantiels. Celles-ci, qui sont relatives en particulier au traitement national, au traitement de la nation la plus favorisée, au traitement juste et équitable et à la protection contre les expropriations directes ou indirectes, ont pour seul objet d'assurer à ces investisseurs des droits dont bénéficient les investisseurs nationaux. Ainsi, le a du paragraphe 6 de l'instrument

¹⁴⁰ Art 1(1)(a) Council Decision (EU) 2017/38 (28 October 2016) OJ L 11/1080 (14 January 2017)

¹⁴¹ CC 31 July 2017 no 2017-749 DC.

¹⁴² *Ibid*, [35]–[40].

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interprétatif commun prévoit que l'accord « *ne conduira pas à accorder un traitement plus favorable aux investisseurs étrangers qu'aux investisseurs nationaux* ». Dès lors, les stipulations du chapitre 8 ne créent sur ce point aucune différence de traitement.

37. En second lieu, en revanche, la section F du chapitre 8 crée une différence de traitement entre les personnes investissant en France en réservant l'accès aux tribunaux qu'elle institue aux seuls investisseurs canadiens.

38. Cette différence de traitement entre les investisseurs canadiens et les autres investisseurs étrangers en France répond toutefois au double motif d'intérêt général tenant, d'un côté, à créer, de manière réciproque, un cadre protecteur pour les investisseurs français au Canada et, de l'autre, à attirer les investissements canadiens en France.

39. Ce motif d'intérêt général étant en rapport direct avec l'objet de l'accord, qui est de favoriser les échanges entre les parties, les stipulations du chapitre 8 pouvaient donc instituer un mécanisme procédural de règlement des différends susceptible de s'appliquer, s'agissant d'investissements réalisés en France, aux seuls investisseurs canadiens.

40. Il résulte de ce qui précède que les stipulations du chapitre 8 de l'accord ne méconnaissent pas le principe d'égalité devant la loi.

106 In *Germany*, the *Bundesverfassungsgericht* is currently seised of a similar question in the context of a reference on the compatibility of the investor-State provisions in CETA with the German Constitution.¹⁴³

107 In *Belgium*, the Federal Government has requested an Opinion from the Court of Justice of the European Union on the compatibility of the proposed Investment Court System with the European Treaties.¹⁴⁴ One of the issues on which the Court's Opinion is sought is whether such a system is compatible with the general principle of equality.¹⁴⁵

¹⁴³ 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1482/16, 2 BvE 3/16 (pending). The Court rejected an application for a preliminary injunction to restraint the Federal Government from voting in favour of the adoption of CETA in the European Council on 13 October 2016: ECLI:DE:BVerfG:2016:rs20161013.2bvr136816.

¹⁴⁴ Opinion 1/17 OJ 2017/C/369/2. The Court held a hearing on 26 June 2018. At the time of finalisation of this Report (20 November 2018) the Opinion of Bot A-G had not yet been published.

¹⁴⁵ 'CETA: Belgian Request for an Opinion from the European Court of Justice,' (6 September 2017) 2, available at: https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf (last accessed 25 September 2018). In Case C-284/16 *Slovak Republic v Achmea*, the European Court was asked whether the investor-State mechanism in an intra-EU BIT was contrary to EU law inter alia because it afforded a right to the nationals of one member State that was not available to the nationals of other member States.

- 108 **In conclusion**, the limitation of access to foreign investors that is a cardinal feature of international investment arbitration does not implicate or infringe the equality principle. It bears a direct relationship to the object of investment treaties, which is to promote and protect *foreign* investment. Such protection is equally available to the investors of each State when they make an investment within the scope of the treaty protections: by investing in the territory of the other State.
- 109 States have constantly insisted on the nationality requirement in investment arbitration in order to resist the possibility of claims by domestic investors.¹⁴⁶ They have also crafted treaty provisions, notably denial of benefits clauses, that are designed to protect against abuses of the nationality requirement by corporate claimants.¹⁴⁷ Much of that drafting work has been concerned with ensuring that the nationality requirement is strictly policed in substance and not only in form, rather than with its relaxation.
- 110 It would in theory be possible to extend the investment arbitration mechanism to domestic as well as international investors, in the same way as has been the case with international human rights complaints mechanisms. But this would have very wide policy implications for the integrity of States' domestic legal systems: much wider implications than the existing system of limited protections for foreign investment. Such a protection is directly connected to a basic function of international law, namely the protection of aliens against the abuse of power by States other than their home State.
- 111 The availability of a direct right of action on the part of investors is a procedural means of securing that purpose.

C. Constitutional aspects of ICSID arbitral procedure

- 112 The requirement on tribunals to observe equality of the parties as a procedural matter is a fundamental rule of ICSID arbitral procedure. It is

Wathelet A-G expressed the Opinion (19 September 2017, EU:C:2017:699) that 'there is no discrimination prohibited by EU law' inherent in such a provision: [65]. It was inherent in the bilateral nature of the BIT and such distinctions had been accepted by the Court in the context of double-tax treaties. The CJEU did not then express a view on this question, as it found the intra-EU BIT to be incompatible with EU law on other grounds: (6 March 2018, EU:C:2018:158) [2018] 4 WLR 87.

¹⁴⁶ For a full analysis of the authorities see: McLachlan, Shore & Weiniger, Ch.5.

¹⁴⁷ See e.g. art.17(2) US Model BIT 2012, App.6 McLachlan, Shore & Weiniger; art.9.15(2) Comprehensive and Progressive Trans-Pacific Partnership Agreement (signed 8 March 2018, not yet in force) 'CPTPP'.

given effect in the structure of the arbitral procedure contemplated by the ICSID Convention and implemented by the Arbitration Rules. Its content has been elaborated in particular in the decisions of *ad hoc* annulment committees charged with determining whether ‘there has been a serious departure from a fundamental rule of procedure.’

- 113 By its 2018 Proposals for Amendment of the ICSID Rules, the Secretariat proposes to make explicit that which was previously implicit by adding a new Rule 11(1), which states: ‘The Tribunal shall treat the parties equally and provide each part with a reasonable opportunity to present its case.’¹⁴⁸ The accompanying Working Paper explains that this addition is confirmatory and adopts wording similar to Article 17(1) of the UNCITRAL Rules 2010.¹⁴⁹

1. Specific applications of equality in the ICSID Arbitration Rules

- 114 The Arbitration Rules reflect particular applications of the equality principle in a number of elements. Five deserve particular mention: (a) constitution of the Tribunal; (b) arbitral independence; (c) counter-claims; (d) pleadings; and (e) rights of recourse.
- 115 *Constitution of the Tribunal.* Article 37(2)(b) of the Convention provides that, save where the parties otherwise agree, ‘the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.’¹⁵⁰
- 116 In this situation, each party has an equal and generally unfettered right to nominate its own arbitrator (subject only to the right of the other party to propose disqualification under Article 57 for a ‘manifest lack of the qualities’ required for his or her appointment). They also each have an equal right to participate in reaching agreement on the presiding arbitrator. These rules are subject to the autonomy of the parties, acting together, to agree an alternative form or method of composition of the Tribunal. The Convention also ensures that one party cannot frustrate the constitution of the Tribunal by refusing to appoint an arbitrator by

¹⁴⁸ ICSID Secretariat, ‘Proposals for Amendment of the ICSID Rules—Consolidated Draft Rules’ (2 August 2018) vol 2, 26.

¹⁴⁹ ICSID Secretariat, ‘Proposals for Amendment of the ICSID Rules—Working Paper’ (2 August 2018), [108].

¹⁵⁰ The procedural implementation is set forth in ICSID Arbitration Rules 2-4.

conferring default powers on the Chairman of the Centre's Board.¹⁵¹ The autonomy of the parties is otherwise limited only by the requirement that the number of arbitrators must be uneven¹⁵² and by restrictions on the nationality of the arbitrators in order to ensure that (save where the parties agree) a majority of the tribunal is not formed of arbitrators that are nationals of the host state.¹⁵³

- 117 *Arbitral independence*. Rule 6 requires each arbitrator to sign a declaration confirming inter alia that he or she 'shall judge fairly as between the parties', disclosing 'any other circumstance that may cause [his or her] reliability for independent judgment to be questioned by a party.' Article 57 of the Convention provides that the appointment of an arbitrator may be challenged for 'manifest lack of the qualities required by paragraph (1) of Article 14, which include that the person 'may be relied upon to exercise independent judgment.'
- 118 *Counterclaims*. Rule 40(1), following Article 46 of the Convention, permits *either* party to present a counterclaim 'arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.'
- 119 *Pleadings*. The specific provisions of the Rules for the written and oral procedures contemplate a sequence of written pleadings that gives an equal number of opportunities to each party (Rule 31) and the hearing of both parties in the oral phase (Rule 32).
- 120 *Rights of recourse*. The rights to seek the interpretation, revision or annulment of an award are accorded to 'either party,'¹⁵⁴ a provision that, as the International Court of Justice has pointed out, ensures procedural equality in the correction of or challenge to any award.¹⁵⁵
- 121 In the context of the debate about the proposed establishment of an international investment court, this default procedural framework has given rise to two particular issues about the implications of the equality principle:

¹⁵¹ Art 38, ICSID Convention.

¹⁵² Art 37(2)(a).

¹⁵³ Art 39.

¹⁵⁴ Art 50(1) (interpretation); art 51(1) (revision); art 52(1) (annulment).

¹⁵⁵ *Judgment No 2867 of the ILOAT upon a Complaint filed against IFAD* (Advisory Opinion) [2012] ICJ Rep 10, [43], cited above [5].

- (1) The balance between the first two elements: the right of the parties to participate in the constitution of the tribunal and the requirement of arbitral independence (elements (a) and (b)); and,
- (2) The scope of the ability to assert counterclaims (element (c)).

122 The first issue requires further elaboration in this Part as it goes to the constitutional aspects of an international investment tribunal. The second issue will be considered as a procedural matter in Part IV below. Before turning to the first issue, it is necessary to complete the constitutional elements of the equality principle in ICSID arbitration by analysing the content given to the equality principle through the method by which it is enforced, namely annulment.

2. Serious departure from equality as a ground for annulment

123 The framers of the ICSID Convention ensured the application of the equality principle by providing that one ground for the annulment of an award is ‘that there has been a serious departure from a fundamental rule of procedure.’¹⁵⁶ This provision adopts the language of the ILC Model Rules.¹⁵⁷ The *travaux préparatoires* indicate that the fundamental rules of procedure that the drafters had in mind were to be restricted to the principles of natural justice, including that both parties must be heard with adequate opportunity for rebuttal.¹⁵⁸

124 Early decisions on the interpretation of this provision confirmed that equality of treatment of the parties and the impartiality of the arbitral tribunal vis-à-vis the parties are such fundamental rules.¹⁵⁹ As the Annulment Committee in *Wena Hotels* put it, this provision:

... refers to a set of minimum standards of procedure to be respected as a matter of international law. It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to state its claim or its defence and to produce all arguments and evidence in support of it. This fundamental right has to be ensured on an equal level, in a way that

¹⁵⁶ Art 52(1)(d) ICSID Convention.

¹⁵⁷ Above [67]; Schreuer, 898.

¹⁵⁸ History II, 480.

¹⁵⁹ *Maritime International Nominees Establishment (MINE) v Guinea* (Decision on Annulment) ICSID Case No ARB/84/4 (1989) 4 ICSID Rep 87 (Sucharitkul P, Broches & Mbaye), [5.06]; *Amco Asia Corp v Indonesia* (Decision on Annulment) ICSID Case No ARB/81/1 (1986) 1 ICSID Rep 509 (Seidl-Hohenveldern P, Feliciano & Giardina), [88].

allows each party to respond adequately to the arguments and evidence presented by the other...¹⁶⁰

- 125 The central importance of the equality of the parties in the conception of 'a fundamental rule of procedure' was emphasised by the Annulment Committee in *Fraport*.¹⁶¹ The Committee considered submissions as to three principles, each of which was said to be a fundamental rule of procedure. The first two, *nullum crimen sine lege* and *in dubio pro reo* were alleged by the claimant to have been violated by the Arbitral Tribunal when it construed a host State statute in its consideration of whether the investment had been admitted in accordance with host State law. The third was the right to be heard where the Tribunal had permitted one party to adduce additional documentary evidence after the hearing, without giving the other party the opportunity to comment on it.
- 126 The Committee rejected the submission that the first two principles were to be treated as fundamental rules of procedure for the purpose of the ICSID Convention, but accepted the third. The essential ground of distinction in its analysis was an application of the equality principle.
- 127 It held that the *nullum crimen* principle is a fundamental human rights principle in the context of criminal law, but that 'it would be a distortion of the important function of the principle to consider it applicable in the present context as a fundamental rule of procedure.'¹⁶² It found that it was not procedural in character, but applies to the determination of the scope of the substantive law.
- 128 The Committee rejected the application of the principle *in dubio pro reo* on the ground that:

[S]uch a principle cannot be applied in the context of international arbitral proceedings instituted by an investor against a state. *Indeed, the application of such a presumption could itself, in the context of ICSID proceedings, amount to a failure of due process since it may unbalance the essential equality between the parties.* The principle *in dubio* has proper application as a right of the defence in criminal proceedings, because it counterbalances the coercive power of the state. It cannot, however, be transposed into the context of international arbitral

¹⁶⁰ *Wena Hotels Ltd v Egypt* (Decision on Annulment) ICSID Case No ARB/98/4 (2002) 6 ICSID Rep 129 (Kerameus P, Bucher & Orrego Vicuña), [57].

¹⁶¹ *Fraport AG Frankfurt Airport Services Worldwide v The Philippines* (Decision on Annulment) ICSID Case No ARB/03/25 (2010, Tomka P, Hascher & McLachlan).

¹⁶² *Ibid*, [191].

proceedings, because to do so would be inconsistent with the principle of equality of the parties.¹⁶³

129 By contrast, the right to be heard on additional evidence is, in the view of the Committee, a part of the right to present one's case, which is 'an essential element of the requirement to afford a fair hearing.'¹⁶⁴ This 'requires both equality of arms and the proper participation of the contending parties in the procedure, these being separate but related fundamental elements of a fair trial.'¹⁶⁵

3. Equality of the parties and the impartiality of tribunal members

130 The final issue to be considered within the rubric of the constitutional application of the equality principle is the manner in which it is given effect in the appointment to and design of an international investment tribunal. Here equality can connote two different ideas:

- (1) *Equality of treatment*—that the members appointed to a tribunal must be impartial, treating each party equally in their consideration of the claims placed before them for adjudication; and
- (2) *Equality of appointment*—that the parties should have an equal right to participate in the appointment of tribunal members.

Equality of treatment and impartiality will be discussed in this section. The application of the equality principle in the context of the appointment of the tribunal, though it logically arises first, will be dealt with in section 4 below, as it gives rise to larger issues concerning the composition of any permanent tribunal as compared with arbitral tribunals.

131 *Equality of treatment* is an indispensable requirement of any fair system of adjudication, whether by arbitral tribunals or standing courts and tribunals. The issues that have arisen under this head in investment arbitration have focused on (a) the definition of what conduct is capable of giving rise to a conflict of interest that might justifiably cause the impartiality of an arbitrator to be called into question; and (b) the most appropriate process by which challenges to impartiality are to be determined.

¹⁶³ Ibid, [193], emphasis added.

¹⁶⁴ Ibid, [202].

¹⁶⁵ Idem.

- 132 The most commonly applied reference point for the substantive content of conduct giving rise to a conflict of interest is the IBA Guidelines on Conflicts of Interest in International Arbitration. These were revised in 2014. They expressly confirm that they 'apply to international commercial arbitration *and investment arbitration*.'¹⁶⁶
- 133 The ICSID Secretariat Note on the current text of Arbitration Rule 6 conforms the test for disclosure in ICSID proceedings to that applicable under the UNCITRAL Rules and in the IBA Guidelines on Conflicts of Interest in International Arbitration 2014,¹⁶⁷ namely that the facts are 'likely to give rise to justifiable doubts' as to the arbitrator's impartiality or independence.¹⁶⁸
- 134 The review standard provided under Article 57 of the ICSID Convention in the event of a challenge to an arbitrator requires that the arbitrator's lack of the requisite qualities must be 'manifest.' The question whether this mandates a higher test to the 'justifiable doubts' test applicable in arbitration generally (including in investment arbitration outside the ICSID Convention) has been a matter of some doubt in the jurisprudence.¹⁶⁹
- 135 It is submitted that this qualification is designed to ensure that the *evidence* for lack of impartiality must be clear; it does not suggest that lack of impartiality can be a matter of degree.¹⁷⁰ In principle a single coherent standard is essential to the sound administration of justice.
- 136 At the same time, the fact that a matter is disclosed or not disclosed cannot be determinative of whether a lack of impartiality is in fact established, since, as the comments to the IBA Guidelines themselves state, 'disclosure does not imply the existence of a conflict of interest'

¹⁶⁶ International Bar Association, 'IBA Guidelines on Conflicts of Interest in International Arbitration' (rev edn, adopted 23 October 2014), Introduction, [5] emphasis added ('IBA Guidelines'). Art 8.30(1) CETA incorporates these Guidelines until the Committee on Services and Investment adopts a code of conduct for Tribunal Members under art 8.44(2). Annex II EU TTIP Proposal 2015 contains a proposed code of conduct.

¹⁶⁷ IBA Guidelines.

¹⁶⁸ ICSID Working Paper 'Suggested Changes to the ICSID Rules and Regulations' (May 12, 2005), 12; cf. art 12 UNCITRAL Arbitration Rules (16 December 2013) UN Doc. A/Res/31/98; General Standard 2, IBA Guidelines.

¹⁶⁹ Luttrell 'Testing the ICSID framework for arbitrator challenges' (2016) 31 ICSID Rev-FILJ 597.

¹⁷⁰ Crawford 'Challenges to Arbitrators in ICSID Arbitration' in D Caron et al (eds) *Practising Virtue: Inside International Arbitration* (Oxford University Press, Oxford, 2015) 598.

and furthermore ‘a failure to disclose certain facts and circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence, does not necessarily mean that a conflict of interest exists, or that a disqualification should ensue.’¹⁷¹

- 137 The challenge procedure under Article 58 of the ICSID Convention provides that, in the case of a challenge to one arbitrator of a three-person tribunal, the question is first to be referred to the other two Members of the Tribunal. Only if the two Members cannot agree does the Convention provide for a reference to the Chairman of the Administrative Council. This process has been criticised as failing to provide sufficient independence in the making of the disqualification decision.
- 138 By contrast, the UNCITRAL Rules provide that a challenge to an arbitrator will, if not otherwise accepted, be referred for decision to the appointing authority.¹⁷²
- 139 There is some recent treaty practice pursuant to which States have explored other methods for the resolution of challenges. For example, Article 8.30(2) of CETA provides for challenges to a Member of the Tribunal to be referred to the President of the International Court of Justice for decision.
- 140 In its proposals for revision of the ICSID Rules, the ICSID Secretariat proposes that:
 - (1) The Declaration and Disclosure Form for Arbitrators specifically require a confirmation of impartiality as well as independence.¹⁷³ The draft Rules do not provide a Code of Conduct for Arbitrators. Rather, ICSID states that it is working on such a Code in conjunction with UNCITRAL Working Group III.¹⁷⁴ Such an approach ‘has the potential to memorialize a uniform set of ethical expectations for ISDS generally.’¹⁷⁵
 - (2) The ability of the remaining members of the Tribunal to refer a challenge to the Secretary-General for decision under Article 58 of the

¹⁷¹ IBA Guidelines, Explanation to General Standard 3(c).

¹⁷² Art 13(4) UNCITRAL Rules. Under art 6(2), in the absence of agreement between the Parties, the Secretary-General of the PCA designates the Appointing Authority.

¹⁷³ Draft Arbitration Rule 26(3)(b).

¹⁷⁴ ‘Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session’ (14 May 2018) A/CN.9/935, [64].

¹⁷⁵ ICSID ‘Proposals for Amendment of the ICSID Rules–Working Paper’ (2 August 2018), [298].

Convention be capable of exercise 'for any reason.'¹⁷⁶ The Working Paper notes that 'the Centre received numerous comments from States and the public that favoured repeal of the portion of Article 58 of the Convention conferring a decision on a challenge to co-arbitrators unless they are equally divided.'¹⁷⁷ This would require an amendment to the Convention itself and could not be achieved by a rule amendment. The rule amendment that is proposed simply clarifies that the remaining members of the tribunal need not be divided on the merits of the challenge.¹⁷⁸

141 In conclusion:

- (1) The impartiality of the members of an international investment tribunal is an indispensable prerequisite to the equality of the parties as it is for any tribunal (international or otherwise).
- (2) The substantive standards applicable to the determination of any question relating to the impartiality of a person appointed to an international arbitral tribunal should be uniform and transparent.
- (3) The IBA Guidelines on Conflicts of Interest in International Arbitration 2014 provide a generally satisfactory framework of substantive rules within which to analyse questions that may arise as to the impartiality of the members of an investment arbitral tribunal when such questions arise.
- (4) As a procedural matter, challenges to the impartiality of an arbitrator should be determined by an independent and neutral third party decision-maker external to the tribunal.

142 As a consequence, Member States of the ICSID Convention should be encouraged to agree to amend Article 58 so as to provide for an external determination of challenge applications.

143 Impartiality is alike an indispensable requirement for the members of any permanent international tribunal. It has been an important feature of the proposals for the establishment of a Permanent Multilateral Investment Tribunal.¹⁷⁹ The assumption of full-time judicial office may nevertheless give rise to distinct considerations. The applicable principles in this

¹⁷⁶ Draft Arbitration Rule 30(2)(a).

¹⁷⁷ ICSID 'Proposals for Amendment of the ICSID Rules-Working Paper' (2 August 2018), [333].

¹⁷⁸ Ibid, [336].

¹⁷⁹ European Union Council, 'Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes' (20 March 2018), 12981/17 ADD 1 DCL 1, [11].

context were the subject of detailed consideration by a Study Group of the International Law Association, which adopted the Burgh House Principles on the Independence of the International Judiciary in 2004.¹⁸⁰

4. The role of equality of the parties in tribunal composition

- 144 *Equality of appointment* is commonly cited as an important advantage of arbitration as contrasted with adjudication.¹⁸¹ It holds in balance two inter-linked principles: party autonomy and the equality of the parties: the parties are free to choose their arbitrators, but they must be accorded equality in so doing. The most common method of giving effect to these two principles is for the tribunal to be constituted by arbitrators appointed by the parties in equal number, with a presiding arbitrator who is jointly appointed.
- 145 Article 37 of the ICSID Convention adopts precisely this model for the constitution of the Tribunal, save where the parties agree otherwise.
- 146 Article 38 adds that, where the Tribunal has not been constituted under Article 37, arbitrators appointed by the Chairman of the Administrative Council ‘shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.’
- 147 If the parties are to have a role in the appointment of a particular tribunal to decide their case, such a role must be exercised in accordance with equality. But the question of constitutional principle is whether the observance of party appointment might, as those who favour reform argue, imperil the impartiality of the tribunal¹⁸² or alternatively whether, as those who support the current system submit, party appointment is

¹⁸⁰ International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals ‘Burgh House Principles on the Independence of the International Judiciary’ (P Sands & C McLachlan, Co-Chairs) (2005) 4 LPICT 247

¹⁸¹ Born *International Commercial Arbitration* (2014), 1640.

¹⁸² Malmström ‘Proposing an investment court system’ (16 September 2015) available at https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/proposing-investment-court-system_en (last accessed 7 October 2018); European Commission & Government of Canada, ‘The case for creating a multilateral investment dispute settlement mechanism’ (Informal ministerial meeting, World Economic Forum, Davos, 20 January 2017) (‘EU/Canada Paper 2017’).

important to ensure equality of participation by both investors and States in the system.¹⁸³

- 148 Any system for the resolution of disputes between investors and States in relation to investments must, in the interests of the parties and in the view of the wider public interests that are engaged in such cases, be demonstrably impartial. This is a basic condition for the legitimacy of any system for the binding determination of disputes according to law, as much applicable to the resolution of international investment disputes as any other.
- 149 Equality as an attribute of the universally recognised right to a fair trial does not include, as an essential component, a right to appoint members of the tribunal. This is not a requirement of standing courts and tribunals, whether at the national or at the international level.¹⁸⁴ The claim that, of its nature, a move from party appointment to a standing tribunal ‘may undermine the very foundations of arbitration (and of justice): the equality of arms between the parties’¹⁸⁵ is an overstatement, though it does serve to highlight an important difference between the resolution of such disputes by an arbitral tribunal established *ad hoc* by the parties and by a standing court or tribunal. The issue is one of the proper design of the constitution of such a tribunal, not the fact of its creation.
- 150 Ensuring impartiality in the design of a system for the settlement of investment disputes is not a matter of making a once-and-for-all binary choice between arbitration and a standing tribunal for at least the following five reasons.
- 151 *First*, the design of international dispute settlement mechanisms is not immutable. The ICSID Convention and the very widespread voluntary adoption by States of investor-State arbitration pursuant to investment treaties were themselves in part a reaction to perceived shortcomings in other means of dispute settlement, including resort to diplomatic protection as a means of protecting foreign investment. The ICSID Convention has very wide acceptance by the majority of States, which is itself a strong indication of States’ acceptance in principle of the method

¹⁸³ Bernadini, ‘Reforming investor-state dispute settlement: the need to balance both parties’ interests’ (2017) 32 ICSID Review–FILJ 38; Kho et al ‘The EU TTIP Investment Court Proposal and the WTO Dispute Settlement System’ (2017) 32 ICSID Review–FILJ 326.

¹⁸⁴ But cf. art 31 Statute of the International Court of Justice, providing for the appointment of a judge *ad hoc* in cases in which the Bench does not include a judge of the nationality of the disputing state.

¹⁸⁵ EFILA Report 2017, [5.4].

for the settlement of investment disputes that the Convention offers. States may always choose to reform this mechanism by agreement, whether within the framework of the Convention or by subsequent separate agreement.

- 152 The adoption of the Dispute Settlement Understanding ('DSU') in the World Trade Organisation in 1994 illustrates the capacity of States in a cognate field of international law to decide to move from a system more akin to arbitration to one that includes more institutional elements.¹⁸⁶ The DSU provides for a first instance system of *ad hoc* panels constituted on the proposal of the Secretariat (and *excluding* citizens of the disputing States unless the parties otherwise agree), but admitting the right of a disputing party to oppose a proposed appointment for compelling reasons.¹⁸⁷ The Appellate Body is, by contrast, a standing tribunal.¹⁸⁸
- 153 *Second*, arbitration is, of its nature, a form of dispute resolution to which parties choose to resort as an alternative to other forms of dispute resolution. Resort to arbitration always depends upon the consent of the parties. This is, as the Directors of the World Bank observed at the outset 'the cornerstone of the jurisdiction of the Centre.'¹⁸⁹ It is only where the parties have so given their consent that the Convention excludes any other remedy.¹⁹⁰ The Convention does not seek to supplant other mechanisms for the resolution of investment disputes, whether at the national or the international level, save where such consent has been given. Such mechanisms may either continue to exist (as in the case of diplomatic protection) or be created in parallel with arbitration.
- 154 International law does not generally prescribe a single method for the resolution of disputes. Rather, it encourages States to resort to a range of different methods for the pacific settlement of disputes, including 'negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement...or other peaceful means of their own choice.'¹⁹¹ After the establishment of the Permanent Court of Justice, States continued to maintain in force the 1899 and 1907 Hague Conventions establishing the

¹⁸⁶ Dispute Settlement Understanding (signed 15 April 1994) 1869 UNTS 401, Annex 2 to Marrakesh Agreement establishing the World Trade Organisation 1868 UNTS 186.

¹⁸⁷ Ibid, Art 8.

¹⁸⁸ Ibid, Art 17.

¹⁸⁹ Report of the Executive Directors on the ICSID Convention, [23].

¹⁹⁰ Art 26, ICSID Convention.

¹⁹¹ Art 33, Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 59 Stat. 1031.

Permanent Court of Arbitration,¹⁹² under whose aegis States and private parties now frequently consent to submit disputes to arbitration rather than litigation.

155 *Third*, party appointment is not an invariable element of all systems of arbitration. There are currently a number of prominent examples of international arbitral systems that provide for institutional appointment of arbitrators.¹⁹³ The question whether party or institutional appointment of arbitrators is preferable in international commercial arbitration has also been recently debated.¹⁹⁴

156 *Fourth*, the process of appointment or election of judges to standing international courts and tribunals has itself raised difficult challenges, a matter considered by the *Institut* in its work on the position of the international judge.¹⁹⁵ In view of the indispensable security of tenure of an international judge, appointments to a standing court or tribunal have of their nature longer-term effects.

157 The International Court of Justice itself, though a standing court, also incorporates an element of party appointment within its procedure:

- (1) Judges of the nationality of each of the parties retain their right to sit in the case before the Court; but,
- (2) If the Court does not include on its Bench a judge of the nationality of one or both of the disputing parties, that party may choose a person to sit on the Court as a judge *ad hoc*.¹⁹⁶

158 Every judge must make the same declaration 'that he will exercise his powers impartially and conscientiously.'¹⁹⁷ Judges *ad hoc* 'shall take part in the decision in complete equality with their colleagues.'¹⁹⁸

¹⁹² Convention for the Pacific Settlement of International Disputes (signed 29 July 1899) 187 Con TS 410; Convention for the Pacific Settlement of International Disputes (signed 18 October 1907).

¹⁹³ The CIDS Report gives the examples at [96] of the Court of Arbitration for Sport and other sporting arbitral bodies.

¹⁹⁴ J Paulsson *The Idea of Arbitration* (Oxford UP, 2013), 162; cf. Brower & Rosenberg (2013) 29 *Arbitration International* 7.

¹⁹⁵ Institut de Droit international, 'The Position of the International Judge' (Sixth Commission, G Guillaume Rapporteur, 9 September 2011) (2011) 74 *Annuaire* 3, 124; and see: R Mackenzie et al, *Selecting International Judges: Principle, Process and Politics* (Oxford UP, 2010).

¹⁹⁶ Art 31 Statute of the International Court of Justice.

¹⁹⁷ Art 17(2).

¹⁹⁸ Art 31(6).

159 The addition of this provision was considered important in the framing of the Statute so as to maintain a balance between States' confidence and participation in the system while at the same time ensuring the equality of the parties. It would have been possible to secure equality by excluding any judge of the same nationality as either party, but only at the expense of confidence and participation.¹⁹⁹ Lord Phillimore observed:

... it would be preferable to give a national representative to both parties, not only to protect their interests but to enable the Court to understand certain questions which require highly specialised knowledge and relate to the differences between the various legal systems.²⁰⁰

Far from becoming obsolete, the institution of the judge *ad hoc* has proved to be an enduring feature of the Court's procedure.²⁰¹

160 The appointment of national judges may be found in standing bilateral tribunals in the investment field:

- (1) The Iran-US Claims Tribunal provides the most direct example of an existing standing international tribunal to resolve investor-State claims, albeit that it applies only as between two States. It consists of nine members: three appointed by each of the States, while the remaining three members (including the President) are to be selected by agreement between the States.²⁰² Absent

¹⁹⁹ [31.1] (Kooijmans) in Zimmermann, Tomuschat, Oellers-Frahm & Tams *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford UP, 2012), 531-2.

²⁰⁰ Advisory Committee of Jurists *Procès Verbaux* (1920) 528-9. For cogent early criticism of this aspect of the procedure of the PCIJ see: H Lauterpacht, *The Function of Law in the International Community* (Oxford UP, 1933, rev edn. 2011), 236-244.

²⁰¹ Schwebel 'National judges and judges ad hoc of the International Court of Justice' (1999) 48 ICLQ 889. The *Institut* considered the question in 1954 within the framework of the 22nd Commission (Rapporteur: Huber): (1954) 45 *Annuaire* vol I, 407 at 427-430, session: vol II at 84-90. The Members of the Commission were divided on whether to recommend the retention or abolition of the institution of the judge *ad hoc*. The Report acknowledged (at 429) that 'l'idée de la parité or égalité totale des parties au litige a une grande force psychologique. L'introduction du juge *ad hoc* s'explique donc très naturellement ainsi que les fortes résistances probables contre l'abolition de ce système.' The Resolution (vol II, 296 at 298) recommended in art 5 that: 'If the system of *ad hoc* judges cannot be abandoned, it is as a minimum highly desirable that the appointment of such judges should be subject to guarantees as nearly as possible equivalent to those governing the election of titular judges.'

²⁰² Art III(1) Declaration of the Democratic and Popular Government of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration) 19 January 1981 (1983) 1 Iran-USCTR 9

agreement, the default provisions of the UNCITRAL Rules apply, with the effect that the Secretary-General of the Permanent Court of Arbitration ('PCA') may designate an Appointing Authority.²⁰³ The provisions for the appointment of members to a three-member tribunal are to like effect.²⁰⁴

- (2) The CETA Tribunal follows a similar approach. It is also to be constituted on the basis of nationals drawn equally from Canada and the European Union (five members from each), with five further members required to be nationals of third States.²⁰⁵ The members are all to be designated by the CETA Joint Committee, an executive body comprising representatives of Canada and the EU.²⁰⁶ The President of the Tribunal must be a national of a third State.²⁰⁷ The provisions of the final text of the EU–Vietnam Investment Protection Agreement are to like effect, save that the three-way division of members is, like the Iran-US Claims Tribunal, limited to three members in each category rather than five.²⁰⁸

161 Some international human rights courts adopt a solution similar to that of the International Court of Justice:

- (1) The European Convention on Human Rights also provides that judges appointed by the Contracting State concerned in the case are entitled to sit in any Chamber or Grand Chamber constituted to hear the matter. If there is none, the President of the Court shall appoint a judge *ad hoc*.²⁰⁹
- (2) The Pact of San José establishing the Inter-American Court of Human Rights contains similar provisions ensuring the representation on the Court of judges of the State engaged in the case.²¹⁰

²⁰³ Art III(2) Claims Settlement Declaration.

²⁰⁴ Art 7 Iran-USCT Rules of Procedure.

²⁰⁵ Art 8.27(2) CETA.

²⁰⁶ Art 26(1).

²⁰⁷ Art 8.27(8).

²⁰⁸ Art 3.38(2) Final text of EU–Vietnam Investment Protection Agreement.

²⁰⁹ Art 26 Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 222, as amended.

²¹⁰ Art 55 American Convention on Human Rights, 'Pact of San José, Costa Rica' (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

- 162 By contrast, the Protocol establishing the African Court of Human Rights does not contemplate that all Member States shall have a judge of their nationality on the Court. On the contrary, Article 22 provides that ‘[i]f a judge is a national of any State which is a party to a case submitted to the Court, that judge shall not hear the case.’²¹¹
- 163 A key objective of the establishment of a specialised system for the resolution of international investment disputes has from the outset been—and continues to be—to depoliticise such disputes.²¹² Any process for the appointment of judges to a standing international investment tribunal would, to be legitimate, have to address how to ensure that such a process did not itself become politicised.²¹³ Such a process is as susceptible of giving rise to equality and impartiality concerns as appointment to individual arbitral tribunals if it were to lack integrity. Indeed the problem of ensuring that the parties retain confidence in the impartiality of the tribunal is likely, as Lauterpacht observed as long ago as 1933, to arise principally in the context of a permanent tribunal with a fixed body of judges, for the very reason that the parties cannot play an equal role in its constitution.²¹⁴
- 164 *Fifth*, either form of tribunal requires clear and consistent guidelines to determine what is to be treated as a conflict of interest giving rise to justifiable doubts as to impartiality on the part of a tribunal member in a particular case.²¹⁵ Both institutional forms also need a procedure to deal with a party’s challenge to the impartiality of a tribunal member in a particular case that is fair to the parties and to the tribunal.
- 165 The particular issues that have arisen in this debate include:

²¹¹ Art 22 Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (adopted 10 June 1998, entered into force 25 January 2004).

²¹² Broches (1972) 136 *Recueil des Cours* 331, 344; UNCITRAL Report 2017, [9].

²¹³ CIDS Report, [167]; UNCITRAL Report 2017, [34]; CIDS ‘Supplemental Report: The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards’ (15 November 2017).

²¹⁴ Lauterpacht, *The Function of Law in the International Community* (Oxford UP, 1933, new edn 2011) 236. As noted above, Lauterpacht did not consider that the inclusion of judges *ad hoc* provided any solution to this problem. On the contrary, he deprecated such a solution as likely to imperil the impartiality of the tribunal.

²¹⁵ International Law Association, Study Group on the Practice and Procedure of International Courts and Tribunals, ‘Burgh House Principles on the Independence of the International Judiciary’ (P Sands & C McLachlan, Co-Chairs) (2005) 4 LPICT 247; International Bar Association, ‘IBA Guidelines on Conflicts of Interest in International Arbitration’ (rev edn, adopted 23 October 2014).

- (1) Whether enabling parties to individually choose their arbitrators can affect the objectivity of the decision-making process, if it encourages each party to appoint individuals who are sympathetic to their position, a selection process that has the potential to give rise to a moral hazard or to lead to the dependence of particular arbitrators on particular appointing parties or categories of parties (whether investors or States);²¹⁶
- (2) Whether, conversely, a system of party appointment promotes legitimacy through ensuring that both the private party claimant and the State have an equal stake in the constitution of the tribunal that will decide their dispute, which in turn promotes engagement and compliance;
- (3) If a standing tribunal is established, how to ensure that the selection process for its members is impartial; in particular, if all the tribunal members are appointed by States, how to ensure that it does not or is not perceived by its composition as institutionally favouring States; and whether that risk, if it exists, could be mitigated by the incorporation into the system of some involvement of groups representing the investment community.²¹⁷

166 The implications for the equality of the parties of a transition from an arbitration model to a permanent tribunal are developed in the second report of the Geneva Center for International Dispute Settlement:

Transitioning from an *ad hoc* system that allows virtually complete control over composition by the disputing parties to a permanent or semi-permanent system necessarily reduces the role for disputing parties and conversely increases that of the treaty parties... Such dilution of powers concerns all disputing parties, including respondent States who lose the “right” to influence the composition of the body as disputing parties. However, in practice, it will be perceived as affecting the investor-party more heavily, as States will be able to contribute to the composition of the body in their capacity as treaty parties. In other words, in an asymmetric setting such as investor-State dispute settlement, the shift from an *ad hoc* to a permanent setting means that one category of disputing parties loses control over the selection process, which remains entirely in the hands of the other because the latter is at the same time a treaty party.²¹⁸

²¹⁶ EU/Canada Paper 2017, [11]; Bonnitcha, Poulsen & Waibel 2017.

²¹⁷ UNCITRAL Report 2017, [36].

²¹⁸ CIDS ‘Supplemental Report: The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards’ (15 November 2017), [14].

167 It might be possible to address this asymmetry through the design of a permanent tribunal that includes a specific role in the election or appointment process for the investment community. However, the great majority of the Members of the Commission²¹⁹ did not favour this course on a number of grounds:

- (1) A permanent tribunal would constitute an exercise of public authority, whose members ought themselves to be appointed by public authorities;
- (2) Regional human rights courts (and national constitutional courts) have shown themselves capable of determining cases in favour of individual claimants, despite being comprised of judges appointed only by States;
- (3) The investment community is not homogeneous and does not speak with one voice. It is not clear who would be entitled to represent it in this process;
- (4) If the appointment of judges were to involve interests beyond those of the States, it is not clear why this should be limited to investors, since there are other groups in civil society that also claim to represent other interests in the determination of investment disputes.

168 On the other hand, a key element in the design of a permanent tribunal will be how it ensures appropriate diversity of its members. There are many dimensions of this issue that go beyond the remit of this Report, which is focused on the equality of the parties.²²⁰

169 In light of the nature of investment disputes, it would seem necessary for the power of appointment of any permanent tribunal to reflect fairly the perspectives of capital-exporting and capital-importing States. These categories are not fixed. Many States both export and import capital. This balance may, in the case of particular States, change over time. But a power of appointment to a tribunal that was perceived as too heavily weighted in one direction or the other might well affect the extent to

²¹⁹ Note however the comment of Consœur Boisson de Chazournes that ‘It is therefore necessary to involve non-state parties in the establishment of a standing tribunal if its attractiveness is to be maintained.’ Member Responses to Questionnaire, *infra*.

²²⁰ CIDS Supplemental Report, above n 218, section III B 3, discussing diversity in general and including geographical diversity and gender diversity.

which the tribunal was perceived as fully capable of respecting the equality of the parties.²²¹

170 A further dimension of the equality principle would arise when a Bench or Chamber is appointed to hear a particular dispute. Here, the nationality of the individual members of the Bench may become a particular consideration. The equality principle would preclude the constitution of a Bench that included a judge of the nationality of only one of the parties. Here, comparative reference to the constitution of other international courts provides two alternative models by way of response:

- (1) A provision to ensure that a judge of the nationality of (or appointed by) each Party must sit on the Bench (ICJ, ECtHR, IACtHR, Iran-USCT); or,
- (2) The exclusion of a judge of either nationality from the Bench (WTO, ACtHR).

171 The first model conceives the permanent tribunal as a hybrid that continues to import from arbitration an element of party appointment. The second conceives the permanent tribunal as fully detached from connections with either of the disputing parties. The choice between these two models involves wider considerations than the equality principle. It engages the question of the most appropriate conditions in the present state of international society for the submission of States to international adjudication. For the purpose of the present study, it is necessary only to elucidate the necessary consequences of the equality of the parties for the design of this aspect of any permanent tribunal.

172 **In conclusion:**

- (1) The appointment and composition of any international investment tribunal must be constituted in such a way as to ensure that the parties to any dispute heard by that tribunal are treated with equality.
- (2) This is so whether the tribunal is constituted as an arbitral tribunal *ad hoc* or is established as a permanent international tribunal. If such a permanent tribunal is established, both methods of dispute resolution will continue to exist in parallel. Both must respect equality in their composition; but the different legal character of arbitration and a standing judicial body dictate a different application of the principle in each case:

²²¹ Ibid, [59].

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- (a) The arbitration of investment disputes by a tribunal constituted for the purpose and composed of members appointed equally by the parties, with the president appointed by agreement (or, failing that appointment by an appointing authority) respects the principle of the equality of the parties, provided also that each member meets the same requirements of impartiality.
- (b) In the case of a permanent international tribunal, the principle of the equality of the parties does not require that each party retain the ability to appoint a judge. The overriding consideration is the independence and impartiality of the judicial body.
- (3) A permanent tribunal should be so constituted as to represent an equitable balance between judges drawn from capital-exporting and capital-importing States. It is not necessary or appropriate to provide for designations from representatives of commercial interests.
- (4) In the resolution of a specific dispute within the framework of a permanent tribunal, in order to respect the equality principle the composition of the particular Bench or Chamber should either:
 - (a) Exclude judges having the nationality of either the State party to the dispute or of the home State of the foreign investor; *or*,
 - (b) Ensure that both such States have the opportunity to appoint a judge of their own choice.

IV. PROCEDURAL APPLICATIONS OF THE EQUALITY PRINCIPLE

173 Part IV moves from the constitutional level to applications of the principle of the equality of the parties in the procedure adopted before an international investment tribunal. In practice, equal treatment issues have arisen in five specific contexts:

- (1) Claims and parties;
- (2) The procedural timetable;
- (3) The production of evidence;
- (4) The use of the State's criminal law powers; and,
- (5) Costs and the substantive equality of arms.

174 This Part examines the evidence from practice on each of these five issues and identifies potential areas where either codification or progressive development may be warranted.

A. Claims and Parties

175 Section A considers the application of the equality of the parties principle in four specific contexts relating to the pursuit of claims and the standing of parties:

- (1) Institution of claims;
- (2) Counterclaims;
- (3) Multiple claimants; and,
- (4) Third person submissions—the *amicus curiae*.

1. Institution of claims

176 As noted in section III B above, the text of the ICSID Convention provides for equality of access to the Centre's dispute resolution procedures for both States and nationals of other States. Nevertheless, in practice States have not chosen to utilise the Convention's arbitration mechanism as original claimants.

177 Arbitration is a remedy that is alternative to other forms of relief. In many instances in which States themselves have a claim against an investor, they may choose to pursue that claim before their national courts. That course is not generally precluded by the Convention.²²²

178 It is a foundational principle of the Convention that 'no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.'²²³ The jurisdiction of the Centre exists only in respect of a dispute 'which the parties to the dispute consent in writing to submit to the Centre.'²²⁴ As a result, resort to arbitration under the Convention requires both the consent of the State and the consent of the investor.

179 Where the instrument of consent is a contractual arbitration agreement between the parties this requirement is met in the same written provision, which may be equally invoked by either the State or the investor depending upon the nature of the claim. Where, however, the parties' consent is formed by the State's standing consent by treaty and the investor's consent given on submission of the claim, the arbitration

²²² Save to the extent that it conflicts with the concurrent pursuit by the investor of a parallel claim before ICSID once instituted, in light of the assurance of exclusivity of remedy that States give when they consent to arbitration pursuant to Article 26: Schreuer, 351.

²²³ Recital 7 Preamble, ICSID Convention.

²²⁴ Art 25(1) ICSID Convention.

agreement in the treaty will determine the permissible extent of the investor's claim.

180 At the same time, in drafting the treaty, States themselves may also decide whether in principle this is a forum to which they themselves wish to be able to resort.

181 The dispute settlement clause is separable from the substantive provisions of the investment treaty in which it is contained.²²⁵ Dispute settlement clauses in investment treaties fall broadly into two categories:

- (1) *A general bilateral disputes clause* by which each Contracting Party agrees to submit 'any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party...'²²⁶
- (2) *A one-way clause* providing only for the submission of disputes 'which concern an alleged breach of an obligation' of the Contracting Party under the Treaty.' In such an event, each Contracting Party gives its consent so that 'the Investor party to the dispute may choose to submit it for resolution...to international arbitration.'²²⁷

182 The current forms of dispute settlement clauses in those treaties or drafts that contemplate the establishment of a standing investment tribunal are one-way clauses. CETA limits access to its dispute resolution procedures to cases in which 'an investor of the Party' submits 'a claim that the other Party has breached an obligation' under the Treaty 'where the investor claims to have suffered loss or damage as a result of the alleged breach.'²²⁸

183 The general bilateral disputes clause provides equally for resort to dispute resolution by either the State or the investor. The consent of the investor is also necessary to complete the arbitration agreement. But the consent of the State is not limited either to disputes in respect of obligations under

²²⁵ *Elf Aquitaine Iran v National Iranian Oil Co* (Preliminary Award) XI YB Comm Arb 97 (1982), [256]; Schreuer 260, [25.622]; *Duke Energy International Peru Investments No 1 Ltd v Peru* (Decision on Annulment) ICSID Case No ARB/03/28 (2011, McLachlan P, Hascher & Tomka), [131].

²²⁶ Art 9, Netherlands Model BIT, McLachlan, Shore & Weiniger App 8.

²²⁷ Art 26, ECT.

²²⁸ Art 8.18, CETA; see also to like effect art 6(1) EU TTIP Proposal 2015 available at: http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (last accessed 7 October 2018).

the treaty or to disputes instituted by investors. The one-way clause is, by contrast, limited in both of these respects. As will be seen below, this choice of consent clause affects the extent to which the State may pursue a counterclaim.

2. Counterclaims

- 184 *Relation to equality principle.* The ability of a State against whom a claim has been brought to institute a counterclaim may serve the equality principle in both its procedural and its constitutional dimensions.
- 185 Procedural equality is served by the availability of a right to counterclaim. By allowing the respondent to raise its counter complaints in the same proceeding, the tribunal ensures that it gives even handed consideration to the respective claims of both parties arising out of the same dispute. At the same time, procedural equality requires a close connection between claim and counterclaim. If the respondent were able to pursue claims that were unconnected with the claim, the counterclaim procedure may become an instrument by which valid claims could be suppressed and consent disregarded. The institution of the counterclaim also serves other purposes connected to the good administration of justice. It promotes judicial efficiency and avoids excessive adjudicatory fragmentation by ensuring that closely related claims brought by the respective parties can be adjudicated within the framework of the same proceeding on the same evidentiary basis.
- 186 The counterclaim can also be said to promote equality of the parties in its constitutional aspect. International investment tribunals are established in order to provide a neutral forum in which the claims of investors against host States can be determined. The ability of the State to assert a counterclaim rebalances the asymmetry that otherwise applies where the claimant is always an investor.²²⁹
- 187 Yet at the same time, the availability *vel non* of an international arbitral forum for the vindication of a State's counterclaim is not of itself indicative of a structural lack of balance within the system:

²²⁹ Toral & Schultz 'The State, a perpetual respondent in investment arbitration?' in M Waibel et al (eds) *The Backlash against Investment Arbitration* (Kluwer, 2010) 577; Bubrowski 'Balancing IIA Arbitration through the Use of Counterclaims' in A de Mestral and C Lévesque (eds) *Improving International Investment Agreements* (Routledge, 2013) 212.

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- (1) The scope of the tribunal's jurisdiction is a result of the deliberate choices that States make in framing the arbitration agreements in investment treaties.²³⁰
- (2) The State retains its remedies against the investor before national courts. Investment arbitration only substitutes for national adjudication to the extent that the parties consent, but not otherwise.

The decision of a tribunal that it does not have jurisdiction over a counterclaim is not therefore a denial of justice. It is a reflection of the limitations imposed upon its jurisdiction by the scope of the parties' agreement.

188 Nevertheless, in view of its potentially valuable role in ensuring the equality of the parties, it is necessary to examine the extent to which the requirements for the institution of a counterclaim in investment arbitration have worked in practice to afford equality in the context of treaty disputes.²³¹ The point is significant in practical terms. Very few counterclaims in ICSID proceedings have succeeded.²³²

189 *Conditions for acceptance.* Article 46 of the ICSID Convention provides:

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

190 This formulation imposes three requirements for a counterclaim. It must be:

²³⁰ For example, the most recent multilateral investment treaty, the CPTPP, limits the availability of counterclaims to those connected to an investment agreement or licence and to exclude this possibility in respect of claims of breach of treaty: Art 9.19(2). This operation of this paragraph is currently suspended under art 2, as are the paragraphs providing for the corresponding claims under investment agreements and authorisations, until the Parties agree otherwise.

²³¹ See generally De Nanteuil 'Counterclaims in Investment Arbitration: Old Questions, New Answers?' (2018) 17 LPICT 374; Sharpe and Jacob 'Counterclaims and State Claims' in Beharry (ed) *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration* (Brill Nijhoff, Leiden, 2018) 347

²³² For recent important exceptions see: *Perenco Ecuador Ltd v Ecuador* (Interim Decision on the Environmental Counterclaim) ICSD Case No ARB/08/6 (2015, Tomka P, Kaplan & Thomas) and *Burlington Resources Inc v Ecuador* (Decision on Counterclaims) ICSID Case No ARB/08/5 (2017, Kaufmann-Kohler P, Stern & Drymer) where the Parties consented to the Tribunal's jurisdiction over the counterclaim by *compromis*.

- (1) 'within the scope of the consent of the parties';
- (2) 'otherwise within the jurisdiction of the Centre'; and
- (3) 'arising directly out of the subject-matter of the dispute.'

191 The first two of these elements go to jurisdiction. They both relate to essential elements of the jurisdictional requirements of the Convention in Article 25. The third element—connection with the subject matter—is not one of jurisdiction: it is not found in the part of the Convention that deals with jurisdiction; appearing instead in the section dealing with the powers and functions of the Tribunal. It is properly to be regarded as a requirement of admissibility.²³³ the counterclaim that does not meet this requirement is not precluded from being heard by the Centre; it simply cannot be entertained within the framework of the particular proceeding.²³⁴

192 Article 21(3) of the revised text of the UNCITRAL Rules 2010 provides that 'the respondent may make a counter-claim...provided that the arbitral tribunal has jurisdiction over it.' This revision was specifically intended to ensure that the counterclaim rule could apply equally to investment arbitration as to commercial arbitration.²³⁵ The Commission left the test of sufficiency of connection for tribunals to determine on a case-by-case basis.

193 Before the International Court of Justice a counterclaim, in order to be admissible, must meet two requirements: (a) it must come within the jurisdiction of the Court and (b) it must be 'directly connected with the subject-matter of the claim of the other party.'²³⁶ They are 'autonomous legal acts the object of which is to submit new claims to the Court which are, at the same time, linked to the principal claims, in so far as they are formulated as "counter" claims that react to those principal claims.'²³⁷

194 *Jurisdiction—consent*. The first requirement—the scope of the consent of the parties—is determined, in the case of an investment treaty dispute, by

²³³ Schreuer, 751.

²³⁴ Atanansova, Benoit & Ostransky 'Legal Framework for Counterclaims in Investment Treaty Arbitration' (2014) 31 J Int'l Arb 357, 378-380.

²³⁵ Paulson & Petrochilos *Revision of the UNCITRAL Rules: A Report* (2006), [174] available at https://www.uncitral.org/pdf/english/news/arbrules_report.pdf (last accessed 7 October 2018).

²³⁶ Art 80 ICJ Rules of Court.

²³⁷ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Counterclaims Order of 15 November 2017) [2017] ICJ Rep 289, [18].

the scope of the arbitration clause in the treaty. It is not limited by the scope of the investor's request for arbitration.²³⁸

- 195 The second requirement—that the counterclaim be otherwise within the jurisdiction of the Centre—refers to the outer boundaries set by Article 25 of the ICSID Convention: its requirement that the dispute ‘arise directly out of an investment’ and that it be ‘between a Contracting State...and a national of another Contracting State.’²³⁹
- 196 Where the arbitration agreement is a general bilateral clause referring to all disputes concerning an investment then, (subject to Article 25) the jurisdictional requirements of Article 46 will enable the pursuit of a counterclaim.²⁴⁰ This flows from the general principle that the agreement to arbitrate is autonomous and is separable from the substantive obligations to which it applies.²⁴¹
- 197 In this situation, the jurisdiction of the tribunal may extend to claims that are founded on legal rights outside the specific substantive terms of the treaty, either in host State law or (provided always that there is a legal basis for the claim) in international law.²⁴² An international investment tribunal is empowered to decide a dispute applying both host State law and international law.²⁴³
- 198 Where the treaty framers have used a one-way clause, the position is more difficult. Tribunals have considered:
- (1) Whether such a clause limits the jurisdiction of the Tribunal to considering only claims brought by investors about the

²³⁸ *Saluka Investments BV v Czech Republic* (Decision on Jurisdiction over the Czech Republic's Counterclaim) UNCITRAL (2004, Watts C, Behrens & Fortier), [39]; Z Douglas, *The International Law of Investment Claims* (Cambridge UP, 2009), [491].

²³⁹ McLachlan, Shore & Weiniger 2017, Chs 5 & 6.

²⁴⁰ *SGS Société Générale de Surveillance SA v Philippines* (Decision on Jurisdiction) ICSID Case No ARB/02/6, 8 ICSID Rep 515 (2004, El-Kosheri P, Crawford & Crivellaro (dissenting)), [131]; *Goetz v Burundi* (Award) ICSID Case No ARB/01/2 (2012, Guillaume P, Bredin & El-Kosheri), [278].

²⁴¹ *Elf Aquitaine Iran v National Iranian Oil Co* (Preliminary Award) XI YB Comm Arb 97 (14 January 1982) [256]; *Duke Energy International Peru Investments No 1 Ltd v Peru* (Decision on Annulment) ICSID Case No ARB/03/28 (2011, McLachlan P, Hascher & Tomka), [131].

²⁴² *Urbaser SA v Argentina* (Award) ICSID Case No ARB/07/26 (2016, Bucher P, Martinez-Fraga & McLachlan), [1143], [1187]; *Al Warraq v Indonesia* (Award) (2014, Cremades P, Hwang & Nariman), [659]-[667].

²⁴³ Art 42(1) ICSID Convention.

obligations of the host State and excludes jurisdiction over counterclaims;²⁴⁴ or

(2) Whether the investor, when electing to submit their claim to arbitration under the ICSID Convention must be taken to have given its consent to the institution of related counterclaims in the same proceeding, thereby conferring jurisdiction on the tribunal to hear such a counterclaim that it might not otherwise have had.²⁴⁵

- 199 The former construction is more consonant with the terms of such a treaty.²⁴⁶ It is also consistent with the *travaux* of the ICSID Convention, which suggests that Article 46 was 'in no way intended to extend the jurisdiction of the arbitral tribunal', such that 'in all cases there must be a specific undertaking to admit the question to arbitration.'²⁴⁷
- 200 Nevertheless acceptance of too narrow a construction could undermine an important procedural aspect of the equality of the parties, by excluding any possibility of the international investment tribunal having jurisdiction to entertain a counterclaim, however closely related to the principal claim it may be. This could lead to real injustice in outcome. In private international law, the court has jurisdiction to entertain a counterclaim against a person who submits to the jurisdiction of the court, even if it would not otherwise have had jurisdiction.²⁴⁸
- 201 States have it in their power to avoid such a result through their choice of language for the dispute settlement clause.
- 202 *Requisite connection.* Where the tribunal does have jurisdiction, it must still additionally consider whether the counterclaim arises directly out of the subject matter of the claim such that it is admissible in the same proceeding. This requirement is also connected to the equality principle. A balanced application of the requirement of connection ensures that each party's claims arising out of the same dispute can be equally

²⁴⁴ *Roussalis v Romania* (Award) ICSID Case No ARB/06/1 (2011, Hanotiau P, Giardina & Reisman (dissenting on this point), [869]-[871].

²⁴⁵ *Ibid*, Declaration, Reisman (dissenting); approved *Goetz v Burundi* (Award) ICSID Case No ARB/01/2 (2012, Guillaume P, Bredin & El-Koshery), [279].

²⁴⁶ Atanansova, Benoit & Ostransky 'Legal Framework for Counterclaims in Investment Treaty Arbitration' (2014) 31 J Int'l Arb 357, 365-9.

²⁴⁷ *History*, II, 422 (Broches), 573 (Chairman's Report).

²⁴⁸ Art 26(1) Brussels I Regulation (recast) Reg No 1215/2012 (12 December 2012); Lord Collins et al (eds) *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, 2012) Rule 32.

considered together: including such claims whether brought by investor or State, but excluding claims that are extraneous to the dispute.

- 203 The question of the appropriate test for sufficiency of connection has also arisen in the procedure of other international courts and tribunals. It has been controversial in the practice of the International Court of Justice.²⁴⁹ The jurisprudence of the Iran-US Claims Tribunal on the matter has been circumscribed by the specific terms of the Algiers Accords, which require that a counterclaim must ‘arise out of the same contract, transaction or occurrence.’²⁵⁰ So the test for the purposes of that Tribunal is the extent of equivalence or symmetry between the counterclaim and the claim: does it arise out of the same contract, transaction or occurrence? For this reason, that Tribunal has not accepted counterclaims between the same parties that are derived from different legal rights and duties, including those arising under generally applicable domestic law.
- 204 The subject matter under the ICSID Convention, which falls to be tested to determine whether the requisite connection exists, is the existence of a dispute concerning an investment. This is essentially a matter of factual connection: a question of whether the two claims arise out of the same factual matrix.²⁵¹
- 205 So a tribunal has accepted that a State’s counterclaim against an investor for failure to abide by the terms of its investment licence is admissible in a case in which the investor’s claim was itself premised on the alleged unlawfulness of the suspension of the same licence.²⁵²
- 206 May a State bring a counterclaim derived from obligations alleged to be owed by the investor under the general law of the host State?
- 207 On one view, the host State’s claims under general law cannot be admitted by way of counterclaim as they do not invoke ‘obligations which share with the primary claim “a common origin, identical sources, and an operational unity”’.²⁵³ This view has subsequently been followed

²⁴⁹ Art 80, ICJ Rules of Court was revised in 2000 with effect from 1 February 2001; Antonopoulos *Counterclaims before the International Court of Justice* (TMC Asser Press, 2011).

²⁵⁰ Art II(1), Claims Settlement Declaration 19 January 1981 (1983) 1 Iran-USCTR 9.

²⁵¹ ICSID Secretariat, Note B(a) to Arbitration Rule 40 of 1968, 1 ICSID Rep 100.

²⁵² *Goetz v Burundi* (Award) ICSID Case No ARB/01/2 (2012, Guillaume P, Bredin & El-Kosheri), [285].

²⁵³ *Saluka Investments BV v Czech Republic* (Decision on Jurisdiction over the Czech Republic’s Counterclaim) UNCITRAL (2004, Watts C, Behrens & Fortier), [79]; citing

on the basis that public law claims fall within the exclusive jurisdiction of the host State courts and cannot be considered as an indivisible part of the claims based on the BIT.²⁵⁴

208 The alternative view is that, provided that the Tribunal otherwise has jurisdiction, and the two claims arise factually out of the same investment dispute, there is no reason in principle to exclude *a priori* all claims under the general law of the host State, which is otherwise an applicable source of law for an ICSID Tribunal under Article 42(1) of the Convention.

209 As Judge Higgins observed in her Separate Opinion in *Oil Platforms*:

In both civil and common law domestic systems, as in the Rules of the Court, a defendant seeking to bring a counter-claim must show the Court has jurisdiction to pronounce upon them. But it is not essential that the basis of jurisdiction in the claim and in the counter-claim be identical. It is sufficient that there is jurisdiction. (Indeed, were it otherwise, counter-claims in, for example, tort could never be brought, as they routinely are, to actions initiated in contract).²⁵⁵

210 This approach would still require a close subject matter connection between claim and counterclaim. It would not operate so as to enable the State to bring a counterclaim against the investor for a cause of action that is not capable of arbitration. A claim for the enforcement of taxes would, for example, be inadmissible as concerned with the enforcement of sovereign power.²⁵⁶

211 At the same time, it would not exclude a counterclaim *a priori* on the basis that claims under the domestic law of the host State are of their nature inadmissible.²⁵⁷ The environmental counterclaims considered in the recent *Ecuador* cases (which were admitted by the consent of both parties) illustrate the capacity of an international arbitral tribunal to consider and rule upon claims founded upon domestic principles of

Klöckner Industrie-Anlagen GmbH v Cameroon (Award) ICSID Case No ARB/81/2 (1983) 2 ICSID Rep 9.

²⁵⁴ *Paushok v Mongolia* (Award) UNCITRAL (2011, Lalonde P, Grigera Naón & Stern).

²⁵⁵ *Oil Platforms (Iran v United States of America)* (Order on Counter-claim) [1998] ICJ Rep 190, Separate Opinion of Judge Higgins 217, 218.

²⁵⁶ *Computer Sciences Corp v Iran* (1986) 10 Iran-USCTR 269, 315.

²⁵⁷ Accord: Z Douglas *The International Law of Investment Claims* (Cambridge UP, 2009), Rule 26.

constitutional law that in turn established a regime of liability, compensation and remediation.²⁵⁸

212 In conclusion:

- (1) The ability of a respondent to assert a counterclaim before an international investment tribunal is an important assurance of the procedural equality of the parties.
- (2) In order to be admissible, such a counter-claim must:
 - (a) Be within the jurisdiction of the tribunal; and,
 - (b) Arise directly out of the subject matter of the dispute.
- (3) The jurisdictional requirement is met when, by virtue of the instrument of consent invoked by the respondent, the tribunal would have had jurisdiction over the counterclaim had it been asserted as a primary claim. It does not depend upon the ground of jurisdiction relied upon by the claimant for its claim, nor is the tribunal's jurisdiction limited by the scope of the dispute as framed by the claimant in its Request for Arbitration.
- (4) Where the arbitration agreement in an investment treaty refers generally to disputes arising between a State Party and an investor of the other Party in connection with an investment, the jurisdiction of the tribunal is not limited to claims under the treaty, since the arbitration agreement is an autonomous agreement between the parties and must be construed in accordance with its terms.
- (5) Where the dispute is submitted to arbitration under the ICSID Convention, the requirement that the counterclaim must also be 'otherwise within the jurisdiction of the Centre' means that it must fall within the criteria of Article 25 of the Convention by 'arising directly out of an investment, between a Contracting State...and a national of another Contracting State.'
- (6) The requirement of sufficiency of connection with the subject matter of the dispute will be met where the counterclaim concerns the same investment that gave rise to the claim. It does

²⁵⁸ *Perenco Ecuador Ltd v Ecuador* (Interim Decision on the Environmental Counterclaim) ICSID Case No ARB/08/6 (2015, Tomka P, Kaplan & Thomas) and *Burlington Resources Inc v Ecuador* (Decision on Counterclaims) ICSID Case No ARB/08/5 (2017, Kaufmann-Kohler P, Stern & Drymer).

not require that the cause of action be founded upon the same legal instrument or cause of action asserted by the claimant.

- (7) The tribunal may in principle find a counterclaim to be admissible, whether it is founded upon international law or host State law, provided also that it concerns a subject matter that is capable of submission to arbitration.

3. Multiple claimants

- 213 A third issue in the practical application of the equality principle arises where there are multiple claimants. This question has arisen in particular in cases of multiple claimants bringing joint suit on similar but distinct legal instruments.²⁵⁹
- 214 In such a situation, the claims of each claimant remain distinct and the tribunal must satisfy itself as to jurisdiction and the merits of each claimant's claim.²⁶⁰ But the question remains: what are the limits, if any, on the aggregation of such claims in a single proceeding? To what extent may the number of claimants disturb the equilibrium between the parties, depriving the respondent State of its ability to defend itself?
- 215 One approach would be to require evidence of secondary consent to multi-party arbitration.²⁶¹ This approach has been adopted (by majority) in US Supreme Court decisions that limit the aggregation of claims into class action arbitrations in consumer cases.²⁶² Such an approach may lead to unnecessarily fragmented proceedings and potentially a denial of justice for individual claimants.²⁶³

²⁵⁹ *Abaclat and Others v Argentina* (Decision on Jurisdiction and Admissibility) ICSID Case No ARB/07/5, IIC 504 (2011, Tercier P, van den Berg & Abi-Saab (dissenting)); *Ambiente Ufficio SpA. and Ors v Argentina* (Decision on Jurisdiction and Admissibility) ICSID Case No ARB/08/09, IIC 576 (2013, Simma P, Böckstiegel & Torres Bernárdez (dissenting)); *Alemanni and Ors v Argentina* (Decision on Jurisdiction and Admissibility) ICSID Case No ARB/07/8, IIC 666 (2014, Bermann P, Böckstiegel & Thomas (concurring)).

²⁶⁰ H van Houtte and B McAsey, 'Case Comment, *Abaclat and Ors v Argentina*: ICSID, the BIT and Mass Claims' (2012) 27 ICSID Rev-FILJ 231; *Ambiente* [114]–[122].

²⁶¹ *Abaclat* (Abi-Saab dissent) [146]–[175]; *Ambiente* (Torres Bernárdez dissent) [99]–[105].

²⁶² *Abaclat* (Abi-Saab dissent) [150]–[152], citing *Stolt-Nielsen SA v Animal Feeds International Corp* 130 S Ct 1758 (2010); *AT&T Mobility LLC v Conception* 131 S Ct 1740 (2011).

²⁶³ G Born, 'The US Supreme Court and class action arbitration: a tragedy of errors' (1 July 2011) www.kluwerarbitrationblog.com (last accessed 7 October 2018). For a detailed study of the issues see SI Strong, *Class, Mass and Collective Arbitration in National and International Law* (2013).

- 216 Article 25(1) of the ICSID Convention requires the existence of a ‘legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State.’ This test contemplates a *single dispute*. While it is possible that such a dispute may involve more than one party on each side, ‘the interest represented on each side of the dispute has to be in all essential respects identical for all of those involved on that side of the dispute.’²⁶⁴ The Tribunal considered that this required the claimants to adduce sufficient evidence to enable it to determine whether there was in substance a single dispute.²⁶⁵
- 217 This test would require claimants to establish identity of *interest* between them. This is a distinct concept, of potentially wider reach, to that of identity of parties. It enables the efficient aggregation of claims whilst at the same time maintaining the equality of the parties by ensuring that the respondent is not prejudiced by having to defend itself from claims that differ materially in the interest to be vindicated.
- 218 Even where such a requirement is met, an international investment tribunal hearing the claim of multiple claimants against a single respondent must still be astute to ensure that its processes ensure equality of arms, since, as one Tribunal observed:

[I]f it did find that the inherent circumstances of the case stood in the way of preserving the equality between the Parties or risked denying either one side or the other a full and ample opportunity to present its case, then it would have to give serious consideration to whether it could allow the arbitration to proceed, or to proceed in its present form. This is because – and quite irrespective of the fact that Article 52 of the ICSID Convention specifically includes ‘a serious departure from a fundamental rule of procedure’ among the grounds for annulment – both the principle of equality of arms and the right to be heard are fundamental to the judicial process.²⁶⁶

219 In conclusion:

- (1) Where several claimants seek to institute claims in a single international arbitral proceeding against the same State, the international investment tribunal must ensure, in its determination of jurisdiction and admissibility and in its procedural directions, that the parties are treated with equality.

²⁶⁴ *Alemanni* [292].

²⁶⁵ *Ibid* [294].

²⁶⁶ *Alemanni v Argentina* (Decision on Jurisdiction and Admissibility) ICSID ARB/07/8 IIC 666 (2014, Berman P, Böckstiegel & Thomas), [323].

- (2) In the context of establishing its jurisdiction, this means that the tribunal must be satisfied that:
 - (a) Each claimant separately satisfies the jurisdictional requirements (both of the instrument of consent and, where applicable, Article 25 of the ICSID Convention) in order to bring their claim; and
 - (b) The claim as a whole advances a single dispute, in the sense that the interest represented on each side of that dispute is in all respects identical, so that the respondent is not prejudiced by having to defend itself from claims that differ materially in the interest to be vindicated.
- (3) The tribunal may find such a claim inadmissible if it finds that the manner in which the claim is constituted would adversely affect its ability to ensure that both sides of the dispute were treated with the equality in the presentation of their case or in their defence against the claims.

4. Third person submissions—the *amicus curiae*

220 An important procedural innovation in the practice of international investment tribunals in the last decade has been the admission of submissions from persons other than the disputing parties, often referred to as *amici curiae*.

221 Tribunals themselves initiated this practice.²⁶⁷ States rapidly accepted and codified the practice at the regional level²⁶⁸ and then internationally:

²⁶⁷ Alexandrov & Carlson ‘The Opportunity to Be Heard: Accommodating Amicus Curiae Participation in Investment Treaty Arbitration’ in D Arias & M Fernández-Ballesteros (eds) *Liber Amicorum: Bernardo Cremades* (La Ley, 2010) 49; Boisson de Chazournes ‘Making the proceedings public and allowing third-party interventions: Are the new generation bilateral investment treaties (US, Canada) bifurcating investment arbitration from international commercial arbitration?’ (2005) 6 *Journal of World Investment and Trade* 105; Boisson de Chazournes ‘Transparency and “amicus curiae” briefs’ (2004) 5 *JWIT* 333; *Methanex Corp v United States of America* (Decision on Petitions from Third Persons to Intervene as *Amici Curiae*) 7 ICSID Rep 224, IIC 165 (NAFTA/UNCITRAL, 2001, Veeder C, Rowley & Christopher); *United Parcel Service of America Inc v Canada* (Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*) (NAFTA/UNCITRAL, 2001, Keith C, Fortier & Cass); *Aguas Argentinas SA, Suez Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina* (Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*) ICSID Case No ARB/03/19 (2005, Salacuse P, Kaufmann-Kohler & Nikken).

- (1) In 2006, the ICSID Administrative Council adopted ICSID Arbitration Rule 37(2) which provides for the Tribunal to allow a non-disputing party to file a written submission;
- (2) In 2013, UNCITRAL finalised its Rules on Transparency in Treaty-based Investor-State Arbitration,²⁶⁹ Article 4 of which provides for submissions by third persons, while Article 5 provides for submissions by States Parties to a Treaty that are not parties to the particular dispute;
- (3) In 2014, the UN General Assembly adopted the United Nations Convention on Transparency in Investor-State Arbitration ('the Mauritius Convention'), which enables States to agree to apply the UNCITRAL Rules to arbitrations under treaties already in force.²⁷⁰
- (4) In 2018, the ICSID Secretariat proposed a further elaboration of the provisions of the Rules dealing with non-disputing parties.²⁷¹ In addition, it proposes a separate rule providing that a non-disputing Treaty Party has the right to file a written submission on the application or interpretation of a treaty at issue in the dispute, with a concomitant right on the part of the parties to make observations on such submission.²⁷²

222 There have been cognate developments in the practice of some other international tribunals, in particular under the WTO DSU.²⁷³

²⁶⁸ NAFTA Free Trade Commission (FTC), *Statement of the Free Trade Commission on Non-Disputing Party Participation* (2004) <<http://www.naftaclaims.com/commissionfiles/Non-disputing-en.pdf>> accessed 7 October 2018.

²⁶⁹ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ('UNCITRAL Transparency Rules'), UN Doc A/RES/69/116, art 1(2).

²⁷⁰ United Nations Convention on Transparency in Investor-State Arbitration (adopted by UNGA Res 69/116, 10 December 2014, entry into force 18 October 2017), on which see: Boisson de Chazournes 'Transparency in investor-state arbitration: An incremental approach' (2015) 2 BCDR Int'l Arb Rev 59.

²⁷¹ Draft Arbitration Rule 48, and see ICSID Secretariat 'Schedule 8: Transparency – Access to Documents, Access to Hearings, and Non-Disputing Party Participating in ICSID Proceedings' in *Proposals for Amendment of the ICSID Rules: Working Paper* (vol 3) (2 August 2018).

²⁷² Ibid, Draft Arbitration Rule 49.

²⁷³ Stern 'The Intervention of Private Entities and States as "Friends of the Court" in WTO Dispute Settlement Proceedings' in Macrory, Appleton & Plummer (eds) *The World Trade Organization: Legal, Economic and Political Analysis Vol 1* (Springer, New York, 2005); Boisson de Chazournes & Mbengue 'The Amici Curiae and the WTO Dispute Settlement System: The Doors are Open' (2003) 2 LPICT 205.

- 223 The admission in investment arbitration of such submissions has developed in part to meet an equality concern at the constitutional level, where equality is broadly conceived as the maintenance of a balance between public and private interest, so that civil society organisations should be heard before the tribunal where public interests are affected.²⁷⁴ At the same time, the tribunal must ensure that participation of such third persons does not unfairly prejudice either of the disputing parties in their conduct of the case.
- 224 The legislative framework that has now been developed for the admission of third person submissions does not seek to place such persons in the same position as the disputing parties from the point of view of their participation in the procedure. Rather it recognises that such persons may have a different perspective that nevertheless constitutes a significant interest. So, the UNCITRAL Transparency Rules require the tribunal to evaluate:
- (1) Whether the third person has a significant interest in the arbitral proceedings; and
 - (2) The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.²⁷⁵
- 225 The UNCITRAL Transparency Rules incorporate a number of features that are designed to ensure that the equality of arms as between the disputing Parties is not prejudiced:
- (1) The third person must disclose 'any connection, direct or indirect, which the third person has with any disputing party';²⁷⁶
 - (2) 'The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party';²⁷⁷

²⁷⁴ 'Public statement on the international investment regime' (31 August 2010) above n 12, maintaining that: 'Private citizens, local communities and civil society organizations should be afforded a right to participate in decision-making that affects their rights and interests, including in the context of investor-state dispute settlement or contract renegotiation. The international investment regime, by not allowing for full and equal participation of such parties alongside the investor where their interests are affected, fails to satisfy this basic requirement of procedural fairness.'

²⁷⁵ Art 4(3)(a) & (b), UNCITRAL Transparency Rules; Rule 37(2) ICSID Arbitration Rules is to like effect.

²⁷⁶ Ibid art 4(2)(b).

- (3) ‘The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the third person.’²⁷⁸

226 Claimants have on occasion expressed concern that the burden of responding to third person submissions often falls disproportionately on their side.²⁷⁹ Where satisfied that the third person submission otherwise meets the criteria, tribunals have tended to address this concern by crafting appropriate procedural directions to limit any undue burden and ensure that both parties have a reasonable opportunity to address the submissions.²⁸⁰

227 **In conclusion**, the ability of an international investment tribunal to admit submissions from third persons may valuably assist it to determine the dispute, by bringing a perspective that is different from the disputing parties. In order to respect the equality of the parties, the Commission endorses the approach in the UNCITRAL Transparency Rules to the effect that:

- (1) The third person must disclose any connection, direct or indirect, which the third person has with either of the disputing parties;
- (2) The tribunal must ensure that the disputing parties are given a reasonable opportunity to present their observations on any third person submission; and,
- (3) The tribunal must otherwise ensure that any such submission does not unfairly prejudice either disputing party.

B. Equality as reciprocity—*audi alteram partem*

228 A second procedural context in which the equality principle is commonly invoked before international investment tribunals is that of ensuring the equality of arms in orders relating to the procedural timetable and the admission into the record of pleadings and evidence. In this context, the equality principle serves two interrelated purposes. It applies to ensure that there is reciprocal treatment of the two parties; it also ensures that each party is given an opportunity to be heard on the submissions of the

²⁷⁷ Ibid art 4(5); to like effect: ICSID Arbitration Rule 37(2).

²⁷⁸ Ibid art 4(6); to like effect: ICSID Arbitration Rule 37(2).

²⁷⁹ *Bear Creek Mining Corporation v Peru* (Procedural Order No 5) ICSID ARB/14/21 (2016) Böckstiegel P, Pryles & Sands, [24].

²⁸⁰ *Biwater Gauff (Tanzania) Ltd v Tanzania* (Procedural Order No 5 Amicus Curiae) ICSID ARB/05/22, IIC 32 (2007) Hanotiau P, Born & Landau; *Lilly and Co v Canada* (Procedural Order No 6) UNCT/14/2 (2016) van den Berg P, Bethlehem & Born.

other—*audi alteram partem*.²⁸¹ This application of the equality principle is a general principle of law applicable to the conduct of proceedings before international courts and tribunals generally.²⁸²

229 Here the principle is not in doubt. But its practical application not infrequently gives rise to difficulty as tribunals seek to manage the orderly conduct of the proceedings. As the ICSID Secretariat notes, its Draft Arbitration Rules ‘have been carefully drafted to address efficiency while maintaining the parties’ due process rights and equality of treatment. *These are equally important principles*.’²⁸³

230 The two principles are not necessarily antipathetic. One party’s request for latitude in a previously agreed or ordered timetable may in fact result not only in inefficiency but also in unequal treatment to the other party, which has organised its own pleadings according to the original schedule. This prejudice cannot always be compensated by corresponding adjustments for the other party. The enforcement of a previously agreed or ordered procedural timetable may itself be an important vindication of the equality principle, depending upon the circumstances. As a result, the tribunal must decide whether the first party’s request is actually necessary to afford that party due process *and* the effect on the equality of treatment of the other party. These considerations are borne out in a review of the pertinent tribunal practice.

231 Three contexts deserve particular mention:

- (1) The late submission of new evidence or arguments after the close of written pleadings;
- (2) The allocation of time at the hearing itself; and
- (3) The submission of evidence after the hearing.

²⁸¹ See generally: della Cananea ‘*Audi alteram partem*’ in *Due Process of Law Beyond the State* (Oxford UP, 2016) Ch 3.

²⁸² Cheng *General Principles of Law as Applied by International Courts and Tribunals* (1952), 295.

²⁸³ ICSID Secretariat ‘Schedule 9: Addressing Time and Cost in ICSID Arbitration’ in *Proposals for Amendment of the ICSID Rules: Working Paper* (vol 3) (2 August 2018), [33], emphasis added. For the difficulties of maintaining efficiency whilst at the same time respecting due process that can be encountered in practice see: Berger and Jensen ‘Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators’ (2016) 32 *Arb Int* 415; Reed ‘Ab(use) of due process: sword vs shield’ (2017) 33 *Arb Int* 361

1. Late submission

- 232 When new evidence or arguments are introduced late in proceedings, the tribunal must balance equally the rights of both the party that seeks to introduce the new material and the right of the other party to have a fair opportunity to contest it.²⁸⁴
- 233 Depending upon the circumstances, application of the equality principle can result in the exclusion of late and unauthorised submissions or evidence if the tribunal is otherwise unable to afford the other party an adequate opportunity for contradiction.²⁸⁵ As the Iran-US Claims Tribunal put it:

Article 15 of the Tribunal Rules requires that the Tribunal treat the parties equally. This is a fundamental principle of justice. In the circumstances of these cases, the delicate balance of equality would be tipped if one party were to be permitted to present an extensive Memorial and additional exhibits, without providing an opportunity for the other party to file a memorial in response. While the filing by Claimants of their Memorial on the Merits prior to the Hearing may be an advantage to the Respondents in that it informs them in detail of Claimants' contentions and arguments and may be of assistance to the Tribunal in analyzing the case, nevertheless it cannot be accepted without providing the Respondents an equal opportunity to make a written submission.²⁸⁶

²⁸⁴ See *Grand River Enterprises Six Nations Ltd v United States of America* (Decision on Jurisdiction) ICSID NAFTA/UNICTRAL 15 ICSID Rep 503 IIC 128 (2006, Nariman P, Anaya & Crook), [95]-[102]; *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Ltd ("Bapex")* (Procedural Order No 11) ICSID ARB/10/11 & ARB/10/18 (2015, Schneider P, McLachlan & Paulsson); *South American Silver Ltd v Bolivia* (Procedural Order No 22) PCA 2013-15 (2016, Zuleta Jaramillo P, César Guglielmino & Orrego Vicuña), [32]-[33]; *Von Pezold and Border Timbers Ltd v Zimbabwe* (Procedural Order No 7) ICSID ARB/10/15 and ARB/10/25 (2014, Fortier P, Hwang & Williams), [57].

²⁸⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, [54]. See also *Avena (Mexico v United States)* (Judgment) [2004] ICJ Rep 12, [7]-[8]; *Indus Waters Kishenganga Arbitration (Pakistan v India)* (Partial Award) PCA (2013), [113]-[117]; *Craig v Ministry of Energy of Iran* (Award) (1983) 3 Iran-US CTR 280; *Dames and Moore v Iran* (Award) (1983) 4 Iran-US CTR 212; *Morrison-Knudsen Pacific Ltd v Iran* (1986) 7 Iran-US CTR 70; *MEMCCO v Iran* (Award) (1986) 9 Iran-US CTR 340; *Futura Trading Inc v National Iranian Oil Company* (Award) (1986) 13 Iran-US CTR 99, 101.

²⁸⁶ *Foremost Tehran Inc v Iran* (Order) (1983) 3 Iran-US CTR 362; and see: *Iran v United States (Cases Nos A3, A8, A9, A14 and B61)* (Order) (2005) 38 Iran-US CTR 153, [9]-[10].

234 More commonly, the tribunal will only admit the new material on condition that it can adjust the timetable so as to give the other party an adequate right to be heard on it, whether by submitting a further pleading or piece of evidence.

235 The Iran-US Claims Tribunal has summarised the applicable principles in terms of more general application:

First, Articles 22 and 23 of the Rules provide authority for the Tribunal to establish deadlines for the submission of written submissions. In establishing such deadlines, however, the Tribunal must be mindful of Article 15, which requires that both Parties be treated with equality. ... Taken together, these rules provide authority for the Tribunal to make and to enforce deadlines for the filing of written submissions, provided that the Parties are treated with equality. This limitation is important. Equality, a “fundamental principle of justice”, implies that the Parties must have equal opportunity to make written submissions and to respond to each other’s submissions. ... In determining whether to admit a late submission, the Tribunal has frequently referred to these fundamental requirements of equality between, and fairness to, the Parties, and the possible prejudice to either Party. Further, the orderly conduct of the proceedings also requires that time limits be established and enforced. In applying these principles to the specific facts of a case, however, the Tribunal considers the character and contents of late-filed documents and the length and cause of the delay. These factors affect the probability of prejudice, the equality of treatment of the Parties, and the disruption of the arbitral process by the delay.²⁸⁷

2. Allocation of hearing time

236 In principle, time is allocated equally between the parties at the hearing. However exceptions are justified where the number of witnesses and experts called by one party substantially exceeds the number of witnesses and experts called by the other, as a strict application of the principle of equal division of time may impair a party’s opportunity to cross-examine the witnesses and experts it designated.

237 The principle of equal division of time has to be applied with a certain flexibility to take into account an unequal number of witnesses and experts and the overall fair and efficient conduct of the proceedings.²⁸⁸

²⁸⁷ *Harris Int’l Telecommunications Inc v Iran* (Award) (1987) 17 Iran-US CTR 31, [58]-[62].

²⁸⁸ *Abacat v Argentina* (Procedural Order No 28) ICSID ARB/07/5 (2014, Tercier P, van den Berg, & Torres Bernárdez (dissenting)), 6; Ulmer ‘The cost conundrum’ (2010) 26 *Arb Int* 221, 243-4: ‘in certain cases, a chess-clock system can inhibit fair and proper administration of the case in favour of a rigid false “equality” between the parties.’

3. Submission of new evidence after the hearing

238 Particular problems in ensuring the equality of the parties may arise where one party seeks to adduce new evidence after the hearing. In this situation, affording the other party a proper opportunity to exercise its right of contradiction may pose particular difficulties. The witnesses will already have given their evidence and been tested on it. The new material may not be capable of being tested in the same way. It may affect the way in which the other party wishes to plead its case. The tribunal has a power to reopen a proceeding ‘on the ground that new evidence is forthcoming, or that there is a vital need for clarification on certain specific points,’²⁸⁹ but this must always be exceptional.

239 If a tribunal does decide exceptionally to admit new evidence after the hearing, particular attention in this regard must be paid to the equality principle. An *ad hoc* ICSID Annulment Committee has observed that:²⁹⁰

The right to present one’s case, or “principe de la contradiction,”²⁹¹ in arbitral proceedings includes the right of each party to make submissions on evidence presented by its opponent.²⁹² If an arbitral tribunal fails to accord such a right, then its award will be subject to annulment.²⁹³ One example of this principle being applied in the international commercial arbitration context is where the arbitral tribunal has permitted one of the parties to adduce additional documentary evidence after the oral hearing, without giving the other party the opportunity to comment on it.²⁹⁴

240 The same approach has been applied in other international courts and tribunals.²⁹⁵ It has also been upheld under international human rights instruments.²⁹⁶

²⁸⁹ ICSID Arbitration Rule 38(2).

²⁹⁰ *Fraport AG Frankfurt Airport Services Worldwide v The Philippines* (Decision on Annulment) ICSID Case No ARB/03/25 (2010) Tomka P, Hascher & McLachlan, [200], internal citation included.

²⁹¹ Gaillard & Savage (eds) *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999), 947-948, [1638]; Poudret & Besson *Comparative Law of International Commercial Arbitration* (2 ed, Sweet & Maxwell, trans. Berti & Ponti, 2007), [546]-[554].

²⁹² Born *International Arbitration* (2009), 2582-3.

²⁹³ *Ibid.*, and the numerous authorities there cited.

²⁹⁴ See, e.g., *Rice Trading (Guyana) Ltd v Nidera Handelscompagnie BV* (Hague Court of Appeal) (28 April 1998) (1998) XXIII Ybk Comm Arb 731.

²⁹⁵ Citing Cheng *General Principles of Law as Applied by International Courts and Tribunals* (1952), 295; *Legal Status of Eastern Greenland (Denmark v Norway)* (1933) PCIJ Rep, Ser A/B No 53, 25-6; *Chorzów Factory (Germany v Poland)* (1928) PCIJ Rep, Ser A No 17, 7, where the Permanent Court afforded a party a further opportunity to be

241 In conclusion:

- (1) The equality of the parties before an international investment tribunal includes the equality of arms, namely that:
 - (a) Each party shall have the right to be heard on the submissions of the other: *audi alteram partem*; and,
 - (b) Each party shall enjoy reciprocal treatment to the other in the procedural timetable and in matters of pleading and evidence.
- (2) In its conduct of the case procedure, the tribunal is entitled to make and enforce a procedural timetable, which promotes both efficiency and equality of the parties.
- (3) Where, exceptionally, a party is able to establish a compelling due process case for the admission of late evidence or pleading, the tribunal must be satisfied that, in so doing, it is able to afford the other party equality of treatment, including an effective right to be heard on the new material.
- (4) Equality of treatment in a hearing requires that each party be allocated substantial equality of time to plead and present its evidence; subject always to the tribunal's overall authority to ensure the fair and efficient conduct of the hearing, taking into account the number of witnesses and its own mandate to hear and test the evidence and arguments of the parties.

C. Evidence

242 One procedural context in which international investment tribunals have frequently had to apply considerations of the equality of the parties is in their treatment of evidentiary issues. A highly practical application of the principle, its satisfactory application in this context also has wider implications. As Kazazi has observed:

The intervention of international tribunals in matters of evidence is to take place impartially and with due regard to the fundamental principles of equality of parties and the necessity of providing parties with a full opportunity to present their claims and defences. The misapplication of this delicate task, which is usually fulfilled satisfactorily by

heard on new evidence or submissions submitted by its opposing party. Specific recognition of this principle in relation to submissions made, or evidence produced, after the closure of written and oral proceedings, is given in the Rules of Court of the International Court of Justice, Articles 56 and 72.

²⁹⁶ *Feldbrugge Case* (29 May 1986) ECHR Ser A, No 99, 8 EHRR 425, [44] and see above Part II A 1.

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knowledgeable and experienced judges and arbitrators, is not only prejudicial to the rights of parties in a particular case but harmful to the regime of international judicial and arbitral settlement of disputes as a whole.²⁹⁷

243 Investment tribunals are endowed with a broad discretion on questions of evidence. ICSID Arbitration Rule 34(1) provides that: ‘The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.’ The consequence is that:

As a tribunal enjoys discretion on matters of evidence and the burden of proof, its assessment can only constitute a deviation from a fundamental rule of procedure if it violates the integrity of the procedure and the basic requirement of equal treatment and the right to be heard.²⁹⁸

244 Parties and Tribunals in investment disputes now commonly agree to refer to the IBA Rules on the Taking of Evidence in International Arbitration 2010 (‘IBA Rules 2010’) as guidance. These Rules also confirm that: ‘The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.’²⁹⁹ At the same time, they reflect underlying considerations of equality, confirming as general principles ‘that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact of merits determination, the evidence on which the other Parties rely.’³⁰⁰ The Rules expressly enjoin tribunals to consider the equality of the Parties in making any determination to exclude evidence.³⁰¹

245 Tribunals have had to consider the practical application of the equality principle at each stage in the evidentiary process:

- (1) The production of documentary evidence;
- (2) Its admissibility;
- (3) The exclusion of evidence on grounds of privilege, including State secrecy;
- (4) The cross-examination of witnesses at the hearing; and,
- (5) The evaluation of evidence that has been adduced.

²⁹⁷ M Kazazi *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* (Kluwer, 1995), 155.

²⁹⁸ *Micula v Romania* (Decision on Annulment) ICSID ARB/05/20 IIC 772 (2016, von Wobeser P, Cremades Yusuf), [265].

²⁹⁹ Art 9(1).

³⁰⁰ Preamble (3).

³⁰¹ Arts 9(2)(g) & 9(3)(e).

246 The exclusion of evidence on grounds of State secrecy gives rise to problems that, while not unique to investment disputes, frequently arise in this context, since such disputes are of their nature concerned with challenges to the international legality of the decisions of organs of the State. The particular issues in the application of the equality principle to which this gives rise will be examined in sub-section 2. The admissibility of evidence that has been unlawfully obtained or through the use of a State's powers of criminal investigation also requires separate treatment in Section D.

247 It is first necessary to chart generally the other ways in which the equality principle has been applied to the evidentiary process.

1. Equality in the evidentiary process

248 *Production*. A party is generally obliged to produce to its opponent documents on which it relies since 'it is contrary to the principle of the equality of arms that one party has access to and can rely on documents to which the other party has no access.'³⁰²

249 Inequality does not arise simply from the fact that a request for production by one party is allowed while a request by another party is denied, or from the fact that one party has to produce a large number of documents and the other none or very few. Each request by each party must be considered and determined by the tribunal on its own individual merits. It is only where it can be shown that a tribunal has applied inconsistent standards in the way that it has treated the requests of the different parties that there can be said to be inequality of treatment.³⁰³

250 Application of the equality principle to the production phase does not preclude tribunals from showing some flexibility as to the timing of production in recognition of the administrative challenges faced by States—in particular in developing countries—in locating and producing relevant documents from across its civil service.³⁰⁴ This must be balanced

³⁰² *Standard Chartered Bank (Hong Kong) Ltd v Tanzania Electric Supply Company Ltd* (Procedural Order No 6) ICSID ARB/10/20 (2012, McRae P, Douglas & Stern), [13].

³⁰³ *Azurix Corp v Argentina* (Decision on Annulment) ICSID ARB/01/02, IIC 388 (2009) (Griffith P, Ajibola & Hwang), [233]; *Pey Casado and Président Allende Foundation v Chile* (Decision on Annulment) ICSID ARB/98/2 IIC 569 (2012, Fortier P, Bernardini & El-Kosheri), [325].

³⁰⁴ *Amco Asia Corp v Indonesia* (Decision on Annulment) (1986) 1 ICSID Rep 509 (Seidl-Hohenveldern P, Feliciano & Giardina), [90]; *SARL Benvenuti & Bonfant v Congo* (Award) (1980) 1 ICSID Rep 335 (Trolle P, Bystricky & Razafindralambo), [1.29], [1.33]; *Railroad Development Corporation v Guatemala* (Decision on Provisional Measures)

with ensuring that the claimant has an adequate opportunity within the timetable to respond to the documents so produced.

- 251 The arbitral process itself places limits on how far a tribunal can go to assure equality of information, particularly in cases in which one party, whether claimant or respondent, is a repeat litigant and has wider experience arising from other cases. As one tribunal observed in relation to the case before it:

Evidently the Respondent and its legal advisers have a synoptic view of the various disputes related to the oil industry in Ecuador which may be denied to the Claimant and its legal advisers. But that is a natural inequality as between private companies and a host State, one which arises from their respective status and roles and which cannot be reversed *en tant que tel*.³⁰⁵

- 252 At the same time, the tribunal must be astute to consider equality in the production of evidence in substance and not simply in form:

- (1) The State party is answerable before an international tribunal in respect of ‘any State organ ... whatever position it holds in the organization of the State, and whatever its character as an organ ... of the State.’³⁰⁶ In its practical application to production of documents, this can require a very wide search.
- (2) In the case of an investor, while respecting separate corporate personality, a tribunal must also strive to ensure that this does not operate to limit searches for probative evidence where in fact the party appearing before it has the practical ability to seek and obtain relevant documents from its parent or sister companies within the same group or with the same ultimate beneficial owner. ‘[G]ood faith also imposes a duty of best efforts to obtain documents that are in the possession of entities or persons with whom or with which the party the subject of the request has a

ICSID ARB/07/23 IIC 352 (2008, Rigo Sureda P, Crawford & Eizenstat), [15], [33]; T Wälde ‘Chapter 8: “Equality of Arms” in Investment Arbitration: Procedural Challenges’ in K Yannaca-Small (ed) *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford UP, 2010) 161, 181.

³⁰⁵ *EnCana Corp v Ecuador* (Partial Award on Jurisdiction) LCIA Case No UN3481, UNCITRAL (2004) 12 ICSID Rep 413 (Crawford P, Barrera Sweeney & Grigera Naón), [43].

³⁰⁶ Art 4(2) International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts 2001.

relevant relationship.³⁰⁷ This can in some circumstances apply to a claimant company's shareholders.

253 *Admissibility*. In considering whether to admit evidence, a tribunal must also be guided by the equality principle. It may decide to exclude evidence if it finds that this basic condition has not been, or cannot be, met:

Generally, international tribunals take a liberal approach to the admissibility of evidence. The Tribunal is of the view, however, that such discretion is not absolute. In the Tribunal's judgment, there are limits to its discretion derived from principles of general application in international arbitration, whether pursuant to the Washington Convention or under other forms of international arbitration. Good faith and procedural fairness being among such principles, the Tribunal should refuse to admit evidence into the proceedings if, depending on the circumstances under which it was obtained and tendered to the other Party and the Tribunal, there are good reasons to believe that those principles of good faith and procedural fairness have not been respected. The foregoing finds confirmation in the IBA Rules on the Taking of Evidence, to which reference may be made as guidelines. Article 9(1) states: 'The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.' Article 9(2)(g) of the Rules provides that evidence may be excluded in the presence of '*considerations of fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling*.'³⁰⁸

254 Evidence has been declared inadmissible where a claimant initially withheld evidence and then sought to admit it on the eve of the hearing.³⁰⁹ So too where a respondent sought to adduce testimony of expert witnesses given in a prior proceeding to which the respondent, but not the claimant, had been party. In this instance, the Tribunal considered that the material should be excluded since there was an unavoidable risk of use of the prior testimony out of its original context 'against which Claimants would have no equal means of defence.'³¹⁰ A tribunal may also decide to order the production of material from an earlier case to which only one

³⁰⁷ *Gallo v Canada* (UNCITRAL, PCA Case No. 2008-02) Procedural Order No. 2 (10 February 2009), [8].

³⁰⁸ *EDF (Services) Ltd v Romania* (Procedural Order No 3) ICSID ARB/05/13 IIC 394 (2008, Bernardini P, Derains and Rovine), [47], emphasis in original.

³⁰⁹ *Ibid*, [48].

³¹⁰ *Beccara v Argentina* (Procedural Order No 3) ICSID ARB/07/5, IIC 418 (2010, Tercier P, Abi-Saab & van den Berg), [147]; see also *Abaclat v Argentina* (Procedural Order No 11) ICSID ARB/07/5, IIC 809 (2012, van den Berg P, Tercier & Torres Bernárdez), [33]-[34].

party was privy, in order to ensure an equal knowledge of all elements of the case before it.

255 *Cross-examination.* The ICSID Arbitration Rules provide for the examination of witnesses before the Tribunal,³¹¹ but also permit the Tribunal to admit evidence by way of written deposition only.³¹²

256 The IBA Rules nevertheless provide that if a witness whose appearance has been requested by a party fails without a valid reason to appear for testimony at the hearing ‘the Arbitral Tribunal *shall* disregard any Witness Statement related to that Evidentiary Hearing by that witness, unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.’³¹³

257 An important rationale for this rule is to preserve the equality of the parties. Where party does not produce its witnesses and experts designated or ordered to appear for cross-examination at the hearing, the tribunal cannot rely on their statements ‘without breaching the procedural equilibrium that should exist between the parties.’³¹⁴

258 For the same reason, a party’s withdrawal of its designation of a witness for cross-examination may also provoke inequality where it ‘would lead to a prejudicial imbalance and would prevent a comparative assessment of the credibility of the key witnesses’. Thus a tribunal may reject a party’s request to withdraw witnesses from cross-examination ‘in order to ensure that the Arbitral Tribunal will receive a balanced picture on key issues and to guarantee equal treatment of the Parties.’³¹⁵

259 The Tribunal has the power to call upon the parties to produce witnesses and experts.³¹⁶ One reason for the exercise of that power may be for the purpose of ‘ensuring equality of arms and holding the ring between the parties,’³¹⁷ by providing for the availability of a witness whose testimony

³¹¹ Rule 35(1).

³¹² Rule 36(a).

³¹³ Art 4(7) IBA Rules 2010, emphasis added.

³¹⁴ *Metalpar SA and Buen Aire SA v Argentina* (Award) ICSID ARB/03/5 IIC 326 (2008, Oreamuno P, Cameron & Chabaneix), [153]-[155].

³¹⁵ *Abaclat v Argentina* (Procedural Order No 28) ICSID ARB/07/5 (2014, van den Berg P, Tercier & Torres Bernárdez (dissenting)), 4.

³¹⁶ Rule 34(2)(a).

³¹⁷ *Tulip Real Estate Investment and Development Netherlands BV v Turkey* (Decision on Annulment) ICSID Case No ARB/11/28 IIC 756 (2015) (Tomka P, Booth & Schreuer), [147].

is within the power of one party and which the other party considers relevant to the issues in the case.

260 *Evaluation.* The position at the stage when, having heard the parties, the tribunal turns to its own evaluation of the evidence is quite different. Since the evaluation of evidence is within the discretion of the tribunal 'an applicant's dissatisfaction with the way a tribunal has exercised its discretion in evaluating evidence cannot be a basis for a finding that there has been unequal treatment and hence a violation of a fundamental rule of procedure necessitating annulment.'³¹⁸

261 **In conclusion:**

- (1) The equality principle requires that each party produce to the other the documents on which it relies, since one party may not have access to and rely upon documents, which the other party has not seen.
- (2) Where a party requests production of specific documents from the other party, equality of treatment requires that the same standards are applied to adjudge the requests of both parties. The IBA Rules 2010 provide a generally satisfactory framework for such determinations.
- (3) In ordering a timetable for production, the tribunal should take into account the particular challenges faced by States, especially developing States, in locating and producing documents. This must be balanced against ensuring that the other party has an adequate opportunity to consider the documents within the procedural timetable.
- (4) Where the claimant is part of a group of companies, the principles of equality and good faith require that it should make reasonable efforts to obtain relevant documents that are held by its parent or affiliated companies or shareholders.
- (5) The equality principle is an important consideration in a tribunal's determination of the admissibility of evidence. The tribunal may refuse to admit evidence if it cannot ensure that the other party's right to respond and defend itself can be equally protected.
- (6) Where a party has requested the attendance of a witness for cross-examination at the hearing and the party fails without a valid

³¹⁸ Ibid [84]-[85].

reason to produce that person, the tribunal should (save in exceptional circumstances) disregard that evidence in order to preserve the procedural equilibrium between the parties.

2. Privilege and confidentiality

- 262 The exclusion of evidence from production on grounds of privilege from disclosure may have particular implications for the equality of the parties.³¹⁹ Upholding a claim to privilege prevents a party from having access to otherwise relevant material that may enable it to prosecute its claim or defence. At the same time, where a ground of privilege from disclosure is found to apply, the tribunal must take care to apply it in an equal manner as between the parties.
- 263 For this reason, the IBA Rules 2010 expressly enjoin tribunals to consider the equality of the parties in making any determination to exclude evidence.³²⁰ The Commentary to the Rules suggests that the need to protect fairness and equality particularly arises where different approaches to privilege from disclosure may apply in the home jurisdictions of the respective disputing parties. It indicates that the tribunal may be justified in excluding documents that may be privileged from production in one country but not in the other.³²¹
- 264 Investment tribunals have taken the same approach, deciding that in order to avoid ‘a clear imbalance in the treatment of the parties in the proceedings...the Parties should be bound by the standard that affords the broadest protection and that protects the expectations of both parties in international arbitration.’³²²
- 265 *Legal professional privilege*. A plea of legal professional privilege is equally available to States as to private parties. Its application is a matter of law not discretion.³²³ It rests upon the same interest in protecting the

³¹⁹ See generally Sheppard ‘The approach of investment treaty tribunals to evidentiary privileges’ (2016) 31 ICSID Rev–FILJ 670.

³²⁰ Arts 9(2)(g) & 9(3)(e).

³²¹ IBA ‘Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration’ available at: https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last accessed 7 October 2018) (‘IBA Commentary’), 25–26.

³²² *Poštová banka, a.s and Istrokapital SE v Greece* (Procedural Order No 6) ICSID ARB/13/8 (2014, Zuleta P, Stern & Townsend), [14]–[16].

³²³ Art 9(2)(b) IBA Rules 2010; *Niko Resources Bangladesh Ltd v Bangladesh Petroleum Exploration & Production Co Ltd* (Procedural Order No 22) ICSID Case Nos ARB/10/11 & 10/18 (2017, Schneider P, McLachlan & Paulsson), [22].

confidential communication of legal advice, whether given by external or internal counsel. In the government context, the privilege is not defeated by circulation beyond the attorney and the particular official requesting or providing the information, provided such confidentiality is maintained.³²⁴

266 *State secret privilege*. Different considerations apply where the grounds alleged for exclusion are State secrecy. This category is accepted in the IBA Rules 2010 as:

[G]rounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling.³²⁵

This ground was introduced with equality considerations in mind, in order ‘to put such special political or institutional sensitivity on an equal footing with commercial or technical confidentiality.’³²⁶

267 In investment cases it is likely to have a particular application. Such cases of their nature concern the international legality of a State measure. Some internal documents produced in the course of the decision to impose such a measure may be privileged from disclosure under the internal law of the State. Yet documents relating to such a process may be highly germane to the claimant’s claim. If a State were permitted to deploy its own national law to avoid its obligation to produce all such documents, this would create an imbalance between the parties. A ‘self-judging blanket exclusion’ would be unacceptable to ‘one of the most fundamental principles of international arbitration that the parties should be treated with equality.’³²⁷ Claims of this kind must therefore be determined by reference to general principles of law commonly applied by international tribunals, rather than the national law of the State concerned.

268 The imbalance cannot be resolved by simply extending the privilege to the claimant as it will not necessarily be relevant to claimants’ evidence and may not be matched by commercial confidentiality considerations on

³²⁴ *Glamis Gold Ltd v United States of America* (Decision on Document Production - Privilege) UNCITRAL IIC 126 (2005, Young P, Caron & Hubbard), [21]-[24].

³²⁵ Art 9(2)(f).

³²⁶ IBA Commentary, 26.

³²⁷ *Biwater Gauff (Tanzania) Ltd v Tanzania* (Procedural Order No 2) ICSID ARB/05/22 IIC 82 (2006, Hanotiau P, Born & Landau), 8-9; and see: Wälde “Equality of Arms” in Investment Arbitration: Procedural Challenges’ in K Yannaca-Small (ed) *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford UP, 2010) 161, 174.

the part of the claimant. An overly broad application of State secrecy as a basis for excluding evidence from production could therefore undermine the fundamental objective of equality between the parties that motivated the establishment of international tribunals as an independent forum for the resolution of investment disputes.

- 269 In light of these considerations, this ground for exclusion—in contrast to legal professional privilege—is not absolute. The tribunal ‘must take into account Claimant’s interest in the production of said documents in order to determine whether [Respondent’s] interests in withholding the documents are outweighed.’³²⁸ The tribunal must also find the grounds for exclusion to be ‘compelling’.³²⁹
- 270 The respondent State that invokes State secrecy as a ground for the exclusion of documents must go beyond assertion and provide sufficient information to the tribunal in order to enable it to identify the documents with particularity and to understand the nature of the secrecy interest alleged.³³⁰ As one tribunal put it: ‘The principle of equality in the treatment of the parties laid down by Article 15 of the UNCITRAL Arbitration Rules governing these proceedings also requires that such privileges be clearly explained so as to allow the Investor the opportunity to provide informed comments on the matter.’³³¹ The same approach applies in the case of the assertion by a claimant of commercial or technical confidentiality.³³²
- 271 The responsible official asserting such a privilege on behalf of the State should first assess whether the documents in question fall within a category that may justify the claim of privilege and then weigh whether

³²⁸ *Gallo v Canada* (Procedural Order No 3) NAFTA/UNCITRAL (2009, Fernández-Armesto P, Castel & Thomas), [53].

³²⁹ Art 9(2)(f), IBA Rules 2010.

³³⁰ *Pope and Talbot Inc v Canada* (Ruling on Claim of Crown Privilege) (2000) 7 ICSID Rep 99, [1.4]–[1.5]; see also *SD Myers Inc v Canada* (Explanatory Note to Procedural Order No 10) (1999) 8 ICSID Rep 13 (Hunter P, Chiasson & Schwartz), [5], following *WTO Canada—Measures affecting the export of civilian aircraft* (Panel Report) (14 April 1999) WT/DS70/R.

³³¹ *Merrill & Ring Forestry LP v Canada* (Decision on Document Production) NAFTA (2008, Orrego Vicuña P, Dam & Rowley), [18]–[21].

³³² *South American Silver Ltd v Bolivia* (Procedural Order No 7- Document Production) PCA Case No 2013-15 (2015, Zuleta Jaramillo P, Guglielmino & Orrego Vicuña), [21].

the public interest in withholding disclosure outweighs the public interest in the fair administration of justice that is promoted by disclosure.³³³

272 Where the ground of privilege relates to the government's deliberative process itself, especially at Executive or Cabinet level, tribunals have generally required that the material is sufficiently segregated and identified so that the tribunal is in a position to evaluate the assertions of the officials who request the privilege.³³⁴

273 In some circumstances, tribunals have appointed an independent person to review documents over which a claim to privilege from production is asserted and to report to the tribunal.³³⁵

274 Documents that have been exchanged between the States Parties to the treaty (but are not in the public domain) fall into a category that particularly requires production. They may be relevant to the interpretation of the relevant objections under the provisions of Articles 31-2 of the Vienna Convention on the Law of Treaties and both disputing parties should be equally entitled to advance submissions on the basis of the same record. As one NAFTA Tribunal observed:

[H]ad the dispute arisen between any of the NAFTA Parties rather than between one of the NAFTA Parties and a private party, the parties to the arbitration would have had equal access to the negotiating history of the Agreement as well as equal opportunity to resort to those documents. In this context, the Tribunal finds it consistent with the principle of equality that the parties to this arbitration are given the same opportunity to present their case, including the opportunity for the private party to access existing documents of the types specified above which are freely available to the government party, irrespective of

³³³ *United Parcel Service of America Inc v Canada* (Decision on Canada's Claim of Cabinet Privilege) UNCITRAL IIC 267 (2004, Keith P, Cass & Fortier), [9], citing common law authorities on public interest immunity (for a current statement of which see now *Al-Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531, [145] per Lord Clarke (dissenting but not on this point)).

³³⁴ *Glamis Gold Ltd v United States of America* (Decision on Document Production - Privilege) UNCITRAL (2005, Young P, Caron & Hubbard), [36]; *Merrill & Ring Forestry LP v Canada* (Decision on Document Production) NAFTA (2008, Orrego Vicuña P, Dam & Rowley), [19].

³³⁵ *Foresti et al v South Africa* (Award) ICSID ARB(AF)/07/1 (2010, Lowe P, Brower & Matthews), [14]; *Guyana v Suriname* (Procedural Order No 1) UNCLOS/PCA (2005), [4]-[5].

whether such documents are ultimately conclusive as to any issue in dispute.³³⁶

275 In conclusion:

- (1) The tribunal must apply the equality principle in making decisions with regard to pleas of privilege from disclosure, considering in particular that the applicable standards may differ within the national law of the respective parties and the tribunal should strive to apply a standard that operates equally for both parties.
- (2) The parties may also raise objections to disclosure with regard to documents on grounds of, respectively, commercial confidentiality or State secrecy. The tribunal should strive to secure a balance of treatment between the parties so as to ensure that each party has the ability to obtain evidence that is relevant and material to the issues in dispute, whilst at the same time respecting the wider interests of each party beyond the instant case.
- (3) In the case of a plea of State secrecy, the tribunal must balance the public interest in the administration of justice in disclosure against the public interests underlying the confidentiality of many governmental communications.
- (4) In so doing, it may invite the parties to agree on protocols for the protection of confidentiality or secrecy in documents or parts thereof.
- (5) In a case in which an objection to production is maintained:
 - (a) The plea must be justified with sufficient specificity in order to enable the opposing party to contest it and the objection to be determined;
 - (b) The tribunal has discretion whether to accept the plea, balancing the public interests involved;
 - (c) The tribunal will apply general principles recognised in international law to the determination of the plea rather than internal law;

³³⁶ *Canfor Corp v United States of America* (Procedural Order No 5) UNCITRAL (2004, Gaillard P, Harper & Weiler), [22].

- (d) The tribunal should, in appropriate cases, consider with the parties appointing an independent third party expert to decide contested objections to production.

D. Effect of the State's criminal law powers on the tribunal's process

276 A further context in which investment arbitral tribunals have invoked the principle of the equality of the parties has been in the deployment by a party of bad faith tactics in the collection or suppression of evidence.³³⁷

277 This principle applies equally to both parties. In *Methanex Corporation v United States of America*, the Tribunal held, excluding evidence unlawfully obtained by the Claimant:

[T]he Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith during these arbitral proceedings and to respect the equality of arms between them, the principles of 'equal treatment' and procedural fairness being also required by Article 15(1) of the UNCITRAL Rules. As a general principle, therefore, just as it would be wrong for the USA ex hypothesi to misuse its intelligence assets to spy on Methanex (and its witnesses) and to introduce into evidence the resulting materials into this arbitration, so too would it be wrong for Methanex to introduce evidential materials obtained by Methanex unlawfully."³³⁸

278 Nevertheless, the State has at its disposal a range of criminal law powers that are not available to private litigants. Abuse of such powers in order to seek to affect the balance of the evidence in an investment arbitration would also breach the equality principle and also the duty to arbitrate in good faith.

279 Particular issues that have arisen in this context are:

- (1) The intimidation of witnesses and party representatives in order to discourage them from giving evidence or assisting in the claim, including through the pursuit of criminal proceedings,³³⁹ and,

³³⁷ See Blair and Gojković 'WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence' (2018) 33 ICSID Rev-FILJ 235

³³⁸ *Methanex Corporation v United States of America* (Final Award) NAFTA/UNCITRAL 44 ILM 1345 IIC 167 (2005, Veeder P, Reisman & Rowley), Part II Ch 1, [54].

³³⁹ T Wälde "Equality of Arms" in Investment Arbitration: Procedural Challenges' in K Yannaca-Small (ed) *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010) 161, Ch 8; A Kolo 'Witness Intimidation, Tampering and Other Related Abuses of Process in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal' (2010) 26 Arbitration International 43; Blair

- (2) The use of criminal enforcement powers to obtain evidence by illegitimate means.

280 ‘Illegitimate’ denotes that the particular coercive act is not being employed for its proper purpose. For example, a police investigation being used not to detect crime, but rather as a means of obtaining discovery for use in the arbitration. At the same time, tribunals must give appropriate deference to the sovereign prerogative to investigate and prosecute crime in the public interest.

281 In cases in which such conduct is found, tribunals must also address the scope of their powers to order an appropriate remedy, whether by way of provisional measures or in the effect on the parties’ pursuit of their substantive claims and defences.

282 The following two sub-sections examine the reported jurisprudence on these aspects of misuse of power that may lead to inequality between the parties in the arbitral process.

1. Intimidation and prosecution

283 An ICSID tribunal has power to recommend provisional measures under the conditions of Article 47 of the Convention in order to protect the integrity of its process and prevent the aggravation of the dispute. By ratifying the Convention, a State accepts that the tribunal may do so in an appropriate case even if that may entail some interference with a State’s sovereign powers and enforcement duties.³⁴⁰

284 This power may be used in order to protect the integrity of parties, witnesses or legal representatives. But the Tribunal will not act where the alleged risk is merely potential or hypothetical. It must be imminent.³⁴¹

285 The Tribunal must balance the duties on the parties of good faith and the objective of the non-aggravation of the dispute whilst bearing in mind the need to minimise any intervention in the right of the State to act in the public interest:

[A]ny party to an arbitration should adhere to some procedural duties, including to conduct itself in good faith; moreover, one can expect from

and Gojković ‘WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence’ (2018) 33 ICSID Rev–FILJ 235; Stoyanov et al ‘Procedural interplay between investment arbitration and criminal proceedings in the context of corruption allegations’ (2018) Belgian Review of Arbitration 7.

³⁴⁰ *Burlington Resources Oriente Ltd v Ecuador* (Procedural Order No 1) ICSID Case No ARB/08/5 IIC 379 (2009, Kaufmann-Kohler P, Orrego Vicuña & Stern), [66].

³⁴¹ *Ibid* [45].

a State to adhere in that very capacity, to at least the same principles and standards, in particular to desist from any conduct in this Arbitration that would be incompatible with the Parties' duty of good faith, to respect equality and not to aggravate the dispute. But this Tribunal must be mindful when issuing provisional measures not to unduly encroach on the State's sovereignty and activities serving public interests.³⁴²

286 In exceptional cases, investment tribunals have recommended provisional measures to restrain the pursuit of criminal investigations or prosecutions.³⁴³ There must be a close link between the criminal proceedings and the fair conduct of the arbitration.³⁴⁴

287 Moreover a 'particularly high threshold must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a state.'³⁴⁵ A State has a sovereign right to police breaches of its own criminal law within its territory through its own criminal procedures.

288 The institution of criminal proceedings does not in itself threaten the exclusivity of ICSID proceedings:

Criminal proceedings deal with criminal liability and not with investment disputes, and fall by definition outside the scope of the Centre's jurisdiction and the competence of this Tribunal. Neither the ICSID Convention nor the BIT contain any rule enjoining the State from exercising criminal jurisdiction, nor do they exempt suspected criminals from prosecution by virtue of their being investors.³⁴⁶

289 In order to obtain provisional measures, the claimant has to establish that the respondent's investigations were preventing them from asserting their rights in the arbitration, causing them irreparable and imminent harm requiring urgent relief. The claimant must also establish 'that there is no

³⁴² *Caratube International Oil Co LLP v Kazakhstan (Caratube II)* (Decision on Provisional Measures) ICSID ARB/13/13 (2014, Lévy P, Aynès & Salès), [121] (internal citation omitted).

³⁴³ *City Oriente Limited v Ecuador* (Decision on Provisional Measures) ICSID ARB/06/21 IIC 309 (2007 Fernández-Armesto P, Grigera Naón & Thomas).

³⁴⁴ *Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (Provisional Measures) [2014] ICJ Rep 147, 152, [23]; *Quiborax SA v Bolivia* (Decision on Provisional Measures) ICSID ARB/06/2 IIC 422 (2010, Kaufmann-Kohler P, Lalonde & Stern), [120]–[121].

³⁴⁵ *Caratube International Oil Co LLP v Kazakhstan (Caratube I)* (Decision on Provisional Measures) ICSID ARB/08/12 (2009, Böckstiegel P, Griffith & Hossain), [137]; *Teinver SA v Argentina* (Decision on Provisional Measures) ICSID Case No ARB/09/1 (2016, Buergenthal P, Alvarez & Hossain).

³⁴⁶ *Quiborax*, [129].

higher or equivalent public interest of the State to be a party to the criminal proceedings.³⁴⁷

290 Such instances will always be exceptional. In one case, the claimant submitted that the respondent was ‘using the process of the criminal law to obtain an unfair advantage in the arbitration proceedings over the claimant, aggravating the inequality of arms between the parties.’ The Tribunal granted the application, noting that the respondent’s full-scale criminal investigation launched shortly before the merits hearing in the arbitration, would be highly disruptive of the claimant’s ability to prepare and present its case.³⁴⁸

291 In another case, the Tribunal found that criminal proceedings appeared to be part of a defence strategy adopted by the State for the purpose of the arbitration.³⁴⁹ The Tribunal found there was a threat to the procedural integrity of the proceedings, in particular with respect to their right to access to evidence through potential witnesses.³⁵⁰ It held that, regardless of whether the criminal proceedings had a legitimate basis or not, the direct relationship between the criminal proceedings and the arbitration was preventing the claimants from accessing witnesses that could be essential to their case. The harm that such a stay would cause to the respondent was proportionately less than the harm caused to claimants if the criminal proceedings were to continue their course. Once the arbitration had concluded, the respondent would be free to continue the criminal proceedings.³⁵¹

292 The high threshold that applies before a tribunal will recommend any measures in relation to criminal proceedings means that the application will not succeed unless it is supported by concrete instances of intimidation or harassment.³⁵²

293 The tribunal retains the inherent power to maintain the equality of the parties by ensuring that a State does not obtain an unfair advantage by

³⁴⁷ *Caratube II*, [135]; *Hydro Srl v Albania* (Order on Provisional Measures) ICSID Case No ARB/15/28 (2016, Pryles P, Glick & Poncet).

³⁴⁸ *Lao Holdings NV v Laos* (Decision on Provisional Measures) ICSID ARB(AF)/12/6 IIC 646 (2014, Binnie P, Hanotiau & Stern), [39]-[40].

³⁴⁹ *Quiborax*, [122].

³⁵⁰ *Ibid.*, [148].

³⁵¹ *Ibid.*, [163]-[165].

³⁵² *Churchill Mining PLC and Planet Mining Pty Ltd v Indonesia* (Procedural Order No 14 Provisional Measures) ICSID ARB/12/14 and 12/40 (2014, Kaufmann-Kohler P, Hwang & van den Berg), [72].

gathering evidence through use of its police power. It may therefore require a respondent to make application to the tribunal before deploying any evidence obtained in the course of a criminal investigation in the arbitration. In this way, the claimant is afforded the opportunity to be heard on any objections that it may have before the evidence is introduced.³⁵³

2. Surveillance and obtaining evidence by illegitimate means

294 The International Court of Justice has held that its power to indicate provisional measures may apply to a situation in which a State uses its criminal enforcement powers to seize documents relating to the dispute held by the other Party.³⁵⁴ '[E]quality of the parties must be preserved when they are involved...in the process of settling an international dispute by peaceful means.'³⁵⁵ Such a party 'would expect to undertake these arbitration proceedings or negotiations without interference by the other party in the preparation and conduct of its case.'³⁵⁶

295 International investment tribunals also have power to recommend provisional measures in a situation in which the State uses its criminal enforcement powers to obtain evidence, including where it places witnesses under surveillance or intercepts the communications of counsel or witnesses.³⁵⁷ Such actions may imperil basic procedural fairness as between the parties. The principle is that:

[P]arties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with: this principle applies in all arbitration, including investment arbitration, and to all parties, including States (even in the exercise of their sovereign powers).³⁵⁸

296 These basic procedural duties constitute obligations of States in international law, which engage the responsibility of the State for the acts of all of its organs and institutions.³⁵⁹ In this context, a Tribunal has emphasised 'the particular importance of procedural equality between the

³⁵³ Ibid, [81]-[82].

³⁵⁴ *Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (Provisional Measures) [2014] ICJ Rep 147.

³⁵⁵ Ibid, 153, [27].

³⁵⁶ Idem.

³⁵⁷ *Libananco Holdings Co Limited v Turkey* (Decision on Preliminary Issues) ICSID ARB/06/8 IIC 327 (2008, Hwang P, Álvarez & Berman).

³⁵⁸ Ibid, [78].

³⁵⁹ *Caratube I*, [118].

parties in an arbitration proceeding and that all parties can use and rely on the same evidence.³⁶⁰

297 The appropriate remedy where such actions are found will depend upon the nature of the State's actions, the material obtained and its consequences vis-à-vis the maintenance of the integrity of the tribunal's process.

298 So far as documentary evidence is concerned:

- (1) Where the material consists of confidential and privileged communications, it will be excluded from the proceedings; its confidentiality may also need to be protected by an undertaking or placed under seal.³⁶¹
- (2) Where the State has obtained documents that would otherwise be admissible in the proceedings, it may be possible to deal with the matter by way of an undertaking to preserve all such evidence and make it available to both parties.³⁶²

299 In relation to witness evidence:

- (1) Where a witness has been under surveillance, tribunals have accepted undertakings to cease and not to use any of the material so obtained in the arbitration.³⁶³
- (2) Where the State has demanded that a witness produce evidence under threat of prosecution, a tribunal ordered the State to take no further action on its demand.³⁶⁴
- (3) Where a witness had submitted a statement voluntarily, but was unable to attend the hearing in view of a local court injunction subsequently issued on the application of the respondent, an annulment committee found that the tribunal was entitled to

³⁶⁰ Ibid, [100].

³⁶¹ *Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (Provisional Measures) [2014] ICJ Rep 147, 160, [51].

³⁶² *Caratube I*, [100].

³⁶³ *Europe Cement Investment & Trade SA Claimant v Turkey* (Award) ICSID ARB(AF)/07/2) IIC 385 (2009, McRae P, Lévy & Lew), [35]; and see also: *Cementownia 'Nowa Huta' SA v Turkey* (Award) ICSID ARB(AF)/06/2 IIC 390 (2009, Tercier P, Lalonde & Thomas), [44].

³⁶⁴ *von Pezold v Zimbabwe* (Provisional Measures Directions) ICSID ARB10/15 and ARB10/25, IIC 549 (2012, Fortier P, Chen & Williams), [8].

receive and consider the statement and did not thereby commit any breach of the principle of the equality of the parties.³⁶⁵

- (4) Where witnesses declined to appear following the respondent's pursuit of a criminal complaint against them shortly before the hearing, the Tribunal admitted their written statements onto the record (whilst noting the impact that this would have on the weight that could be accorded to their testimony).³⁶⁶
- (5) Where a claimant alleged that one of its experts had withdrawn from the proceedings following intimidation by the respondent and the respondent, denying this allegation, sought a declaration that the relevant portion of the expert report be declared inadmissible, the Tribunal decided that the PCA would request the expert to appear.³⁶⁷

300 In conclusion:

- (1) Both parties owe a duty to each other and to the tribunal to conduct themselves in the proceedings in good faith and to respect the equality of arms between them.
- (2) While the exclusion of relevant evidence will always be exceptional, the tribunal retains the power to do so where it is satisfied that these principles have not been respected.
- (3) Criminal proceedings generally fall outside the scope of international investment law. They remain the prerogative of the State.
- (4) Exceptionally, the international investment tribunal may be required to adopt measures limited to the effect of the exercise of the State's powers of criminal investigation and prosecution upon the fairness of its own procedure and the preservation of the equality of the parties.
- (5) In such a case, the tribunal will only act on the basis of clear evidence of conduct that is aimed at obtaining an unfair advantage in the international proceedings.

³⁶⁵ *Enron Creditors Recovery Corp v Argentina* (Decision on Annulment) ICSID ARB/01/3, IIC 441 (2010, Griffith P, Robinson & Tresselt), [176]-[178].

³⁶⁶ *Ruby Roz Agricol LLP v Kazakhstan* (Award on Jurisdiction) UNCITRAL IIC 602 (2013) (Redfern P, Boesch & Neuhaus), [136].

³⁶⁷ *Guaracachi America Inc and Rurelec Plc v Bolivia* (Procedural Order No 16) PCA 2011-17 (2013, Miguel Júdece P, Conthe & Vinuesa), [7]-[8].

E. Substantive equality of arms

- 301 The final aspect of the equality principle to be considered in this Report concerns the circumstances in which an international investment tribunal may properly recognise the fact that the parties' right to equality of arms may be materially affected by an inequality of financial resources available to devote to the pursuit or defence of the claim.³⁶⁸
- 302 This consideration may, depending upon the circumstances, apply both to claimants and to respondents:
- (1) One valuable attribute of arbitration pursuant to the standing consent of a State given by treaty is that it opens access to a neutral forum for the resolution of investment dispute to all investors—small as well as large—irrespective of whether they might otherwise have been able to negotiate a concession contract with the State containing an arbitration agreement. '[I]t was not the intent of the drafters of the ICSID Convention to exclude claimants advancing claims of minor financial dimension.'³⁶⁹ In practice, there is evidence of concern 'that the accessibility to the ISDS mechanism remains *de facto* a prerogative mainly of large-scale firms, as its costs and complexity make it difficult for small private investors to resort to it.'³⁷⁰
 - (2) At the same time, many large claimants may have access to resources in the pursuit of their claims that outweigh those of States—especially small or least developed States. A significant impetus to reform of the current system has been the concern of

³⁶⁸ Wälde 'Introduction: International Investment Law Emerging from the Dynamics of Direct Investor-State Arbitration' in P Kahn & T Wälde (eds) *New Aspects of International Investment Law* Hague Academy of International Law (Martinus Nijhoff, 2007) 43, 54; Treves 'Equality of arms and inequality of resources' in A Sarvarian, F Fontanelli, R Baker & V Tzevelekos (eds), *Procedural Fairness in International Courts and Tribunals* (British Institute of International and Comparative Law, 2015), Ch. 8; Bain 'When Some Are More Equal than Others: The Need for a More Substantive Conception of "Equality of the Parties" in Investment Arbitration' in [2015-6] *Yearbook on International Investment Law and Policy*, 291.

³⁶⁹ *Malaysian Historical Salvors Sdn Bhd v Malaysia* (Decision on Annulment) ICSID Case No ARB/05/10 IIC 372 (2009, Schwebel P, Tomka & Shahabuddeen (dissenting)), [82].

³⁷⁰ European Commission 'Report: Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)' (13 January 2015), 16; European Union Council, 'Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes' (20 March 2018), 12981/17 ADD 1 DCL 1, [17].

States at excessively burdensome costs incurred in defending such cases, especially for the poorest States.³⁷¹

- 303 The requirement of equality of treatment does not preclude the tribunal from taking into account objective factors that may affect the ability of a party to participate equally in the proceeding. So far as possible, it is mandated to secure equality in substance, not merely in form. This consideration may apply in particular to small and medium-sized enterprise claimants and to developing States, particularly least developed States. ICSID tribunals have taken such considerations into account in their procedural orders.³⁷² These considerations are also an important feature of the negotiations for a Multilateral Investment Court.³⁷³ Some consideration is being given to the possibility of establishing an advisory centre for investment claims, on the analogy of the Advisory Centre on WTO Law.³⁷⁴
- 304 In practice, the different economic position of the parties most commonly arises for consideration by tribunals in the context of their exercise of their powers to award costs, together with the related questions of third party funding and the possibility of making orders for security for costs. It is to these questions that the remainder of this section will now be devoted.

³⁷¹ UNCTAD 'Reform of investor-state dispute settlement: in search of a road-map' (26 June 2013), 4; European Union Council, 'Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes' (20 March 2018), 12981/17 ADD 1 DCL 1, [16];

³⁷² *Amco Asia Corp v Indonesia* (Decision on Annulment) (1986) 1 ICSID Rep 509 (Seidl-Hohenveldern P, Feliciano & Giardina), [90]; *SARL Benvenuti & Bonfant v Congo* (Award) (1980) 1 ICSID Rep 335 (Trolle P, Bystricky & Razafindralambo), [1.29], [1.33]; *Zhinvali Development Ltd v Georgia* (Award) ICSID ARB/00/1, 10 ICSID Rep 3 (2003, Robinson P, Rubin & Jacovides), [30]–[33]. Cf. WTO DSU, where recognition of the equality of the parties did not preclude the adoption of special and differential treatment for developing country members: arts 3(12) (different procedure available to developing country complainants), 4(10) (special attention to the needs of developing country Members during consultations), 8(10) (ability to request one panellist for a developing country), and art 12(10) (longer time periods for consultation and sufficient time to prepare case), and art 27 (assistance to developing country Members by the Secretariat in preparing their case).

³⁷³ EU Council, 'Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes' (20 March 2018), 12981/17 ADD 1 DCL 1, [16]–[17];

³⁷⁴ Schwieder 'Legal Aid and Investment Treaty Disputes: Lessons Learned from the Advisory Centre on WTO Law and Investment Experiences' (2018) 19 JWIT 628

1. Costs

305 The most significant element in the parties' costs is the fees incurred for legal representation.³⁷⁵ The parties have the freedom to appoint counsel of their choice.

306 The principal mechanism available to a tribunal to mitigate any costs burden is through its allocation of costs, either through an interim decision³⁷⁶ or in its final award. For this latter purpose, an ICSID tribunal is obliged to assess the parties' expenses and has wide discretion to 'decide how and by whom those expenses ... shall be paid.'³⁷⁷

307 In practice, in the absence of specific reasons to decide otherwise, ICSID tribunals and annulment committees have frequently (though not invariably) divided the fees and expenses of the Tribunal and the charges for the use of the Centre equally and have left each party to bear its own legal fees.³⁷⁸ This approach can 'discourage if not debar small claims.'³⁷⁹ By the same token, the absence of a risk that a claimant might have to bear the respondent's costs as well as its own if unsuccessful can also encourage unmeritorious actions.³⁸⁰

308 The UNCITRAL Rules start from the position that the loser should pay, providing:

The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.³⁸¹

309 The same position (limited to recovery of 'reasonable costs') is now adopted in the EU model for an International Investment Tribunal.³⁸²

2. Security for costs and third party funding

310 An award of costs at the conclusion of the proceedings may prove inadequate either to enable the small or impecunious claimant to pursue a meritorious claim or to ensure that a respondent is not vexed by the costs of an unmeritorious claim for which it is unable ultimately to secure recovery.

³⁷⁵ *Idem*.

³⁷⁶ ICSID Arbitration Rule 28(1).

³⁷⁷ Art 61(2)

³⁷⁸ Schreuer, 1236.

³⁷⁹ *Malaysian Historical Salvors*, [82].

³⁸⁰ Schreuer, 1229.

³⁸¹ Art 42(1), UNCITRAL Rules 2010.

³⁸² Art 28(4), EU TTIP Proposal 2015; art 8.39(5) CETA.

311 Two potential responses to these respective problems have emerged:

- (1) The provision of third party litigation funding,³⁸³ and,
- (2) The provision of security for costs.³⁸⁴

312 These two mechanisms can be related. If the claimant is impecunious and supported by a third party funder, another possible route to control costs has been the development of a power of tribunals to order such a funder to meet the respondent's costs if the claim is not successful.³⁸⁵ Yet the Convention provides no equivalent provision enabling a claimant to obtain provisional measures to secure eventual payment on an award.³⁸⁶ In some cases the terms of funding may include litigation insurance that would cover an adverse award of costs.³⁸⁷

313 Resort to third party funding can also have implications for arbitrator impartiality. This issue of potential conflicts of interest has now been widely acknowledged by the arbitration community and has recently been addressed in the 2014 revisions of the IBA Guidelines on Conflicts of Interest. The IBA Guidelines on Conflicts of Interest 2014 now specifically provide that a funder may be considered the 'equivalent of the party' for conflicts. Standard 6(b) provides that: 'If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party.'³⁸⁸

³⁸³ De Brabandere & Lepeltak 'Third-party funding in international investment arbitration' (2012) 27 ICSID Rev-FILJ 379; International Council for Commercial Arbitration *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (ICCA Report No 4, April 2018), Ch.8.

³⁸⁴ *RSM Production Corp v Saint Lucia* (Decision on Security for Costs) ICSID Case No ARB/12/10 (2014, Elsing P, Griffith & Nottingham).

³⁸⁵ Honlet 'Recent decisions on third-party funding in investment arbitration' (2015) 30 ICSID Rev-FILJ 699.

³⁸⁶ *Eskosol SPA in Liquidazione v Italy* (Decision on Respondent's Request for Provisional Measures) ICSID No ARB/15/50 (2017, Kalicki P, Stern, Santiago Tawil), [35], citing *Burimi SRL & Eagle Games SHA v Albania* (Procedural Order No 2) ICSID No ARB/11/18 (2012, Price P, Cremades & Fadlallah), [49]: 'The Tribunal acknowledges that non-payment of awards of damages or costs by respondents and claimants poses a systemic risk to the arbitration of international investment disputes.'

³⁸⁷ *Eskosol* ibid, [37].

³⁸⁸ See: *Çap & Sehil İnşaat Endustri ve Ticaret Ltd Sti v Turkmenistan* (Procedural Order No 3) ICSID No ARB/12/6 (2015, Lew P, Boisson de Chazournes & Hanotiau), [9]; Darwazeh & Leleu 'Disclosure and Security for Costs or How to Address Imbalances

314 The 2018 draft amendments to the ICSID Arbitration Rules propose mandatory disclosure of the identity of a third party funder. The draft Rule defines third party funding as:

... the provision of funds or other material support for the pursuit or defense of a proceeding, by a natural or juridical person that is not a party to the dispute (“third-party funder”), to a party to the proceeding, an affiliate of that party, or a law firm representing that party. Such funds or material support may be provided:

- (a) through a donation or grant; or
- (b) in return for a premium or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding.³⁸⁹

315 A similar provision is already included in several recently concluded EU investment treaties.³⁹⁰ Rule amendments adopted by other arbitral institutions confer an express power on the tribunal to order disclosure of a third party funder.³⁹¹

316 The ICSID draft amendments then address separately the questions of security for costs and liability for costs in the following manner:

- (1) A new rule is proposed making express provision for the power of tribunal to order security for costs. This would require the tribunal to consider a party’s ability to comply with an adverse order as to costs and any other relevant circumstances.³⁹² The Report notes that one of the arguments in favour of a power to order security is that it may balance the position of the parties both in the pursuit of the claim and in the enforceability of an award. On the other hand, care must be taken not to allow the provision of security to deter meritorious claims.³⁹³ The existence of third party funding is a factor that a tribunal may take into account when assessing whether to order a party to put up security for costs, but is not on its own dispositive.³⁹⁴

Created by Third-Party Funding’ (2016) 33 J Int’l Arb 125, 132-3; Frignati ‘Ethical Implications of Third-Party Funding in International Arbitration’ (2016) 32 Arb Int’l 505.

³⁸⁹ Draft Arbitration Rule 21, ICSID ‘Proposals for the Amendment of the ICSID Rules’ (2 August 2018) vol 3, 129.

³⁹⁰ E.g. CETA art 8.26; EU-Vietnam Investment Protection Agreement, Ch 3, art 3.37.

³⁹¹ r. 24 SIAC Investment Arbitration Rules 2017; art 27 CIETAC International Investment Arbitration Rules 2017.

³⁹² Draft Arbitration Rule 51(3).

³⁹³ ICSID ‘Proposals for the Amendment of the ICSID Rules’ (2 August 2018) vol. 3, 230, [497]-[498].

³⁹⁴ Ibid, 137, [267].

- (2) The making of an award of costs is to remain in the discretion of the tribunal. It is now expressly enjoined to consider the outcome of any part of the proceeding or overall, together with the parties' conduct during the proceeding, the complexity of the issues and the reasonableness of the costs claimed.³⁹⁵

317 In conclusion:

- (1) The equality of arms has a substantive as well as a procedural dimension. The ability of parties, whether investors or States, to pursue or defend claims before an international investment tribunal should not be determined on grounds of cost. Particular regard should be paid in this context to the position of small and medium-sized enterprises and to that of least developed States.
- (2) Where a party's pursuit of its claim or defence is supported by third party funding, that party shall disclose the name of the third party funder, so that its identity can be considered by the other party and the tribunal in determining whether any member of the tribunal may have a conflict of interest.
- (3) Where on the application of a party, the tribunal is satisfied that the party pursuing a claim may be unable to pay an award of costs in the event that its claim is unsuccessful, the tribunal has discretion to order security for costs where it is satisfied that the provision of security is necessary to preserve the equilibrium of the parties.

V. CONCLUSION

318 The conclusions reached in the Report, which have been summarised in an interim manner at the conclusion of each section, may now be brought together into a single consolidated statement, which may form the subject of a resolution.

319 The draft Resolution, which was finalised as a consensus draft of the Commission on 9 December 2018 following consultation with its members is reproduced immediately following this Report.

* * * *

Campbell McLachlan
Rapporteur
10 December 2018

³⁹⁵ Draft Arbitration Rule 19(4).

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Equality of Parties before International Investment Tribunals

DRAFT RESOLUTION

Commission Consensus Draft, 9 December 2018

The Institute of International Law,

Considering that the principle of the equality of the parties is a fundamental element of the rule of law that ensures a fair system of adjudication and as such is a general principle of law applicable to the procedure of international courts and tribunals,

Observing that the equality of the parties is also a fundamental human right recognised by Article 10 of the Universal Declaration of Human Rights 1948 and Article 14(1) of the International Covenant on Civil and Political Rights 1966,

Recalling that the Eighteenth Commission, in its Report to the Tokyo Session in 2013, had reserved for further consideration the principles applicable to the procedure of investment arbitration,

Acknowledging the contribution made by the United Nations Commission on International Trade Law ('UNCITRAL') and by the International Bar Association ('IBA') to the elaboration of important aspects of the principle in its application to international arbitration generally,

Mindful that the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 ('ICSID Convention') provides a framework for the resolution of investment disputes that has to date found wide acceptance amongst States and that the International Centre for the Settlement of Investment Disputes ('ICSID') is currently conducting a review of its Rules of Procedure for Arbitration Proceedings ('ICSID Arbitration Rules'),

Recognising that States resolved at the Fiftieth Session of UNCITRAL in 2017 to take up the topic of reform of investor-State dispute settlement, including consideration of the possibility of the establishment of a permanent International Tribunal for Investments, and that the application of the principle of the equality of the parties is one of the matters under consideration in that context,

Resolving that the application of the equality principle requires specific consideration in light of the particular characteristics of international investment disputes, in which the tribunal has before it two parties of a different juridical character: a private investor and a State, whose function it is to represent the public interest,

Determining that its consideration of this question should consider the position of both arbitral tribunals, which are appointed *ad hoc* to decide a particular case ('arbitral tribunal') and any standing tribunal that is constituted now or in the future to decide investment disputes ('permanent tribunal'),

Adopts the following Resolution:

PART ONE

APPLICATION TO THE ESTABLISHMENT OF THE TRIBUNAL

CHAPTER I

FORUM

Article 1

Legal character

- (1) The ability of the national of one State ('the investor') to bring a claim against another State ('the State') in respect of an investment results from the latter's consent to submit to the jurisdiction of an international investment tribunal ('the tribunal') for the resolution of disputes concerning that investment. Submission of such a dispute to the tribunal engages the principle of the equality of the parties.
- (2) Such a forum is designed to secure equality between the parties in circumstances where the State has the sovereign power to enforce its own law and adjudicate its claims against investors for breach of its laws before its own courts.

Article 2

Access

- (1) Both the State and the investor are equally entitled to submit a claim in relation to an investment to a tribunal, subject to the terms of the instrument of consent.
- (2) No State is obliged to submit its claim against an investor to a tribunal, unless it gives its consent and elects to do so. Otherwise, a State remains entitled to use the rights and remedies provided by its own national legal system in order to pursue such a claim before its own courts.
- (3) The limitation of access to the investor of another State bears a direct relationship to the object of investment treaties, which is to promote and protect foreign investment and the rights of foreign nationals, while also respecting the State's sovereign right to regulate investment activities within its jurisdiction in the public interest. It does not infringe the principle of equality of access. Such protection is equally available to the investors of each State when they make an investment within the scope of the treaty protections by investing in the territory of the other State.

CHAPTER 2
TRIBUNAL

Article 3

Impartiality

- (1) The impartiality of all members of a tribunal is an indispensable prerequisite to the equality of the parties.
- (2) The substantive standards applicable to the determination of any question relating to the impartiality of a member of an arbitral tribunal should be uniform and transparent.
- (3) The IBA Guidelines on Conflicts of Interest in International Arbitration 2014 provide a useful framework of substantive rules within which to analyse questions that may arise as to the impartiality of a member of an arbitral tribunal constituted to decide an investment dispute.
- (4) Challenges to the impartiality of a member of an arbitral tribunal should be determined by an independent third party decision-maker external to the tribunal.
- (5) As a consequence States parties to the ICSID Convention are encouraged to amend Article 58 so as to refer the determination of challenge applications to an independent third party decision-maker in all cases.

Article 4

Composition

- (1) The composition of a tribunal shall be determined through a process of appointment that ensures that the parties to any dispute heard by that tribunal are treated with equality.
- (2) This is so whether the tribunal is constituted as an arbitral tribunal or is established as a permanent tribunal. The composition of both kinds of tribunal must respect the equality of the parties; but the different legal character of arbitration and a permanent judicial body dictate a different application of the principle in each case:
 - (a) The resolution of investment disputes by an arbitral tribunal composed of members appointed equally by the parties, with the president appointed by agreement (or, failing agreement, designated by an appointing authority) respects the principle of the equality of the parties, provided also that each member meets the same requirements of impartiality.
 - (b) In the case of a permanent tribunal, the principle of the equality of the parties does not require that each party retain the ability to

appoint a judge. The overriding consideration is the independence and impartiality of the tribunal as a whole.

- (3) A permanent tribunal should comprise a body of independent judges of recognized competence in international law that, as a whole, equitably represents the principal legal systems of the world, elected through a transparent process.
- (4) In the resolution of a specific dispute within the framework of a permanent tribunal, in order to respect the equality principle the composition of the particular Bench or Chamber should either:
 - (a) Exclude judges having the nationality of either the State party to the dispute or of the home State of the foreign investor; *or*,
 - (b) Ensure that judges from both such States are appointed, if necessary by making provision for the appointment of a judge *ad hoc*.

PART TWO

APPLICATION TO THE PROCEDURE OF THE TRIBUNAL

CHAPTER I

PARTIES

Article 5

Multiple claimants

- (1) Where several investors seek to institute their claims in a single arbitral proceeding against the same State, the tribunal shall ensure, in its determination of jurisdiction and admissibility and in its procedural directions, that the parties are treated with equality.
- (2) In the establishment of its jurisdiction, the tribunal must be satisfied that:
 - (a) Each claimant individually satisfies the jurisdictional requirements (both of the instrument of consent and, where applicable, Article 25 of the ICSID Convention) in order to bring its claim; and
 - (b) The claim as a whole advances a single dispute, in that the interest represented by the claimants is in all respects identical, so that the respondent is not prejudiced by having to defend itself against claims that differ materially in the interest to be vindicated.
- (3) The tribunal may hold a claim brought by multiple claimants to be inadmissible if it finds that the manner in which the claim is brought would adversely affect the tribunal's ability to ensure that both sides of the dispute are treated with equality in the presentation of their case or in their defence of the claims.

Article 6
Counterclaims

- (1) The ability of a respondent to assert a counterclaim that is admissible before a tribunal is an important assurance of the procedural equality of the parties.
- (2) In order to be admissible, such a counterclaim must:
 - (a) Be within the jurisdiction of the tribunal; and,
 - (b) Arise directly out of the subject matter of the investment.
- (3) The jurisdictional requirement is met when, by virtue of the instrument of consent invoked by the respondent, the tribunal would have had jurisdiction over the counterclaim had it been asserted as a primary claim. Whether or not the tribunal has jurisdiction over a counterclaim does not depend upon the respondent invoking the same ground of jurisdiction as that relied upon by the claimant for its claim, nor is the tribunal's jurisdiction limited by the scope of the dispute as framed by the claimant in its Request for Arbitration.
- (4) Where the dispute is submitted to arbitration under the ICSID Convention, the requirement in Article 46 that the counterclaim must also be 'otherwise within the jurisdiction of the Centre' means that it must fall within the criteria of Article 25(1) of the Convention by being a 'legal dispute arising directly out of an investment, between a Contracting State...and a national of another Contracting State.'
- (5) The requirement of sufficiency of connection with the subject matter of the dispute is met where the counterclaim concerns the same investment that gave rise to the claim. It does not require that the counterclaim be founded upon the same legal instrument or cause of action asserted by the claimant.
- (6) The tribunal may find a counterclaim to be admissible, whether it is founded upon international law or host State law, provided that it fulfils the other requirements set out in this Article and concerns a subject matter that is capable of submission to arbitration.

Article 7
Third person submissions

- (1) Third person submissions may valuably assist a tribunal to determine the dispute, where they bring a perspective, knowledge or insight that is different from that of the disputing parties.
- (2) In order to protect the equality of the parties, in accordance with the UNCITRAL Rules on the Transparency in Treaty-based Investor-State Arbitration 2014:

- (a) The third person shall disclose any connection, direct or indirect, which it has with either of the disputing parties, their counsel or members of the tribunal or the subject-matter of the dispute;
- (b) The tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any third person submission; and,
- (c) The tribunal shall otherwise ensure that any such submission does not unfairly prejudice either disputing party.

CHAPTER 2
PLEADING AND EVIDENCE

Article 8

Equality of arms

- (1) The equality of the parties includes the principle of the equality of arms, namely that:
 - (a) Each party shall have the right to be heard on the submissions of the other: *audi alteram partem*; and,
 - (b) Each party shall enjoy reciprocal treatment in the procedural timetable and in matters of pleading and evidence.
- (2) The tribunal should order and enforce a procedural timetable, which promotes both efficiency and equality of the parties.
- (3) Where, exceptionally, a party is able to establish a compelling case for the admission of late evidence or pleading, the tribunal must be satisfied that, if it admits the evidence or pleading, it is able to afford the other party equality of treatment, including an effective right to be heard on the new material.
- (4) Equality of treatment in a hearing requires that each party be allocated substantial equality of time to plead and present its evidence; subject always to the tribunal's overall authority to ensure the fair and efficient conduct of the hearing, taking into account the number of witnesses and its own mandate to hear and test the evidence and arguments of the parties.

Article 9

Evidence

- (1) During the written phase, each party shall produce to the other the evidence on which it relies, so that the other party has a reasonable opportunity to respond.
- (2) The same standards shall be applied to adjudge the requests of both parties for the production of specific documents. The IBA Rules on

the Taking of Evidence in International Arbitration 2010 provide a useful general framework for such determinations.

- (3) In ordering a timetable for production, the tribunal should take into account the particular challenges faced by States, especially developing States, in locating and producing documents. This must be balanced against ensuring that the other party has an adequate opportunity to consider and respond to the documents within the procedural timetable.
- (4) Where the investor is part of a group of companies, the principles of equality and good faith require that it should make reasonable efforts to obtain relevant documents that are held by its parent or affiliated companies or shareholders, when the respondent State so requests and the tribunal so directs.
- (5) Where a party has requested the attendance of a witness for cross-examination at the hearing and the party relying on the evidence of that witness fails without a valid reason to produce that witness, the tribunal may (save in exceptional circumstances) disregard that evidence in order to preserve the procedural equilibrium between the parties.

Article 10

Objections to production

- (1) The tribunal shall apply the equality principle in making decisions with regard to pleas of privilege from disclosure, in light of the fact that the applicable standards may differ between the national laws of the parties. The tribunal should strive to apply a standard that operates equally for both parties.
- (2) Where the parties raise objections to disclosure with regard to documents on grounds of, respectively, commercial confidentiality or State secrecy, the tribunal should strive to secure a balance of treatment between the parties so as to ensure that each party has the ability to obtain evidence that is relevant and material to the issues in dispute, whilst at the same time respecting the wider interests of each party beyond the instant case and relevant policy considerations.
- (3) In the case of a plea of State secrecy, the tribunal shall balance the public interest in the administration of justice which supports disclosure against the public interest underlying the confidentiality of governmental communications.

- (4) In so doing, it should invite the parties to agree protocols for the protection of confidentiality or secrecy in documents or parts thereof applicable in the case before the tribunal.
- (5) In a case in which an objection to production is raised:
 - (a) The objection must be justified with sufficient specificity in order to enable the opposing party to contest it and the objection to be determined;
 - (b) The tribunal has discretion whether to accept the objection, balancing the public interests involved;
 - (c) The tribunal shall apply international law to its decision on the objection;
 - (d) The tribunal should, in appropriate cases, consider, in consultation with the parties, appointing an independent third party expert to review the documents and decide contested objections to production.

Article 11

Improper means

- (1) Both parties owe a duty to each other and to the tribunal to conduct themselves in the proceedings in good faith.
- (2) The tribunal has the power to exclude evidence where it is satisfied that it has been obtained in violation of the principle of good faith and that it is essential to do so in order to preserve the equality of the parties.
- (3) Exceptionally, in order to protect the fairness of its own procedure and the equality of the parties, the tribunal may recommend measures concerning the effect of the exercise of the State's powers of criminal investigation and prosecution upon the tribunal's own process.
- (4) In such a case, the tribunal will only act on the basis of clear evidence of conduct that is aimed at obtaining an unfair advantage in the proceedings before it or otherwise imperils the fair conduct of those proceedings.

CHAPTER 3

SUBSTANTIVE EQUALITY OF ARMS

Article 12

Costs

- (1) The ability of parties, whether investors or States, to pursue or defend claims before a tribunal should not be determined on grounds of cost. Particular regard should be paid in this context to the

position of small and medium-sized enterprises and to that of developing States.

- (2) Where a party's pursuit of its claim or defence is supported by third party funding, that party shall disclose the identity of the third party funder, so that inter alia the tribunal may consider any possible implications for the maintenance of the impartiality of the tribunal.
- (3) Where on application the tribunal is satisfied that a claimant may be unable to pay an award of costs in the event that its claim is unsuccessful and that the provision of security is necessary to preserve the equal protection of the parties, the tribunal has discretion to order security for costs.

* * *

**L'égalité des Parties devant les tribunaux internationaux
d'investissement**

PROJET DE RESOLUTION (traduction)

L'Institut de Droit international,

Considérant que le principe d'égalité des parties est un élément fondamental de l'état de droit qui garantit un règlement juridictionnel juste et, à ce titre, constitue un principe général de droit de la procédure des cours et tribunaux internationaux,

Constatant que l'égalité des parties est aussi un droit humain fondamental reconnu à l'article 10 de la Déclaration universelle des droits de l'homme de 1948 et à l'article 14(1) du Pacte international relatif aux droits civils et politiques de 1966,

Rappelant que la 18ème Commission, dans son rapport à la Session de Tokyo de 2013, avait renvoyé le sujet des principes applicables à la procédure en matière d'arbitrage d'investissement à un examen ultérieur,

Reconnaissant la contribution faite par la Commission des Nations Unies pour le droit commercial international (« CNUDCI »), et par l'International Bar Association - IBA à l'élaboration d'importants aspects du principe dans son application en matière d'arbitrage international en général,

Conscient que la Convention internationale pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats de 1965 (« Convention CIRDI ») fournit un cadre pour la résolution des différends en matière d'investissements qui a, à ce jour, été adopté par de nombreux Etats et que le Centre international pour le règlement des différends relatifs aux investissements (« CIRDI ») révisé

actuellement son Règlement de procédure relatif aux instances d'arbitrage (« Règlement d'arbitrage CIRDI »),

Notant que les Etats ont décidé, lors de la cinquantième session de la CNUDCI en 2017, de se saisir du sujet de la réforme du règlement des différends investisseur-Etat, y compris la possibilité de la création d'un Tribunal international permanent des investissements, et que l'application du principe d'égalité des parties est une des questions examinées dans ce contexte,

Estimant que l'application du principe d'égalité requiert un examen spécifique au vu des caractéristiques particulières des différends en matière d'investissements internationaux, lesquels opposent deux parties de natures juridiques distinctes : un investisseur privé et un Etat, le rôle de ce dernier étant de représenter l'intérêt public,

Déterminant que son examen de la question devra s'intéresser aux deux types de tribunaux arbitraux, qu'ils soient institués de manière *ad hoc* pour trancher un litige précis (tribunal arbitral) ou qu'ils soient permanents, c'est-à-dire déjà constitués ou à constituer en vue de trancher des différends d'investissement (tribunal d'arbitrage permanent),

Adopte la résolution suivante :

**PREMIÈRE PARTIE
APPLICATION DU PRINCIPE D'EGALITE
À LA CRÉATION DU TRIBUNAL**

**CHAPITRE I
FORUM**

Article 1

Caractère juridique

- (1) La capacité d'un ressortissant d'un Etat (« l'investisseur ») à intenter une action contre un autre Etat (« l'État ») en matière d'investissement découle du consentement que ce dernier a donné à la juridiction d'un tribunal international d'investissement (« le tribunal ») en vue de régler les différends relatifs à cet investissement. La soumission de ce différend au tribunal implique l'application du principe d'égalité des parties.
- (2) Un tel for a pour but de garantir l'égalité des parties dans une situation où l'État peut souverainement faire appliquer son propre droit et faire instruire, par ses propres juridictions, les actions qu'il a introduites contre des investisseurs du fait de la violation de sa législation.

Article 2

Accès au tribunal

- (1) Sous réserve des termes de l'acte exprimant le consentement, l'État et l'investisseur sont tous deux fondés à introduire, devant un tribunal, une action en rapport à un investissement.
- (2) À moins d'y consentir et de le choisir, aucun Etat n'est tenu d'introduire une action contre un investisseur devant un tribunal. Si tel n'est pas le cas, l'État reste fondé à faire usage des droits et recours prévus par son ordre juridique national en vue de faire valoir ses droits devant ses propres juridictions.
- (3) Les limites posées à l'accès au tribunal pour un investisseur d'un autre Etat sont directement liées à l'objet même des traités d'investissement, lesquels visent à promouvoir et protéger les investissements étrangers et les droits des ressortissants étrangers, tout en respectant le droit souverain de l'État à encadrer, dans l'intérêt public, les activités d'investissement sur son territoire. Ces limites ne portent pas atteinte au principe d'égalité. Une telle protection est accessible sur pied d'égalité aux investisseurs de chaque Etat lorsqu'ils font un investissement couvert par le traité dans l'autre Etat.

CHAPITRE 2
LE TRIBUNAL

Article 3

Impartialité

- (1) L'impartialité de tous les membres du tribunal est un prérequis indispensable à l'égalité des parties.
- (2) Les standards matériels applicables à la détermination de toute question relative à l'impartialité d'un membre du tribunal arbitral devraient être uniformes et transparents.
- (3) Les Directives sur les conflits d'intérêts en arbitrage international adoptées par l'IBA en 2014 fournissent un cadre de règles matérielles utiles pour analyser les questions qui peuvent être soulevées quant à l'impartialité d'un membre du tribunal arbitral constitué pour trancher un litige d'investissement.
- (4) Toute contestation visant l'impartialité d'un membre du tribunal arbitral devrait être examinée par une instance tierce indépendante et externe au tribunal.
- (5) Dès lors, les Etats parties à la Convention CIRDI sont invités à amender l'article 58 de manière à ce que l'examen des demandes en

récusation soient soumis, dans tous les cas, à une instance tierce indépendante et externe au tribunal.

Article 4

Composition du tribunal

- (1) La composition du tribunal doit résulter d'un processus de désignation assurant un traitement égalitaire des parties à tout différend soumis à ce tribunal.
- (2) Il en est ainsi que le tribunal soit constitué comme tribunal arbitral ou comme tribunal permanent. La composition de ces deux types de tribunaux doit respecter l'égalité des parties ; néanmoins, la différence de nature juridique entre l'arbitrage et un organe judiciaire permanent requiert une application différenciée du principe d'égalité, adaptée à chaque cas :
 - (a) Le règlement des différends d'investissement par un tribunal arbitral composé de membres nommés à part égale par les parties, et pour le président, par accord entre elles (ou, en l'absence d'accord, désigné par une autorité investie du pouvoir de nomination) respecte le principe d'égalité des parties, pour autant que chaque membre du tribunal satisfasse aux mêmes conditions d'impartialité.
 - (b) Dans le cas d'un tribunal permanent, le principe d'égalité des parties n'exige pas que chaque partie conserve la capacité de nommer un juge. Priorité est donnée à l'indépendance et à l'impartialité du tribunal dans son ensemble.
- (3) Un tribunal permanent devrait être composé d'un corps de juges indépendants dont la compétence en droit international est reconnue et qui, dans son ensemble, représente équitablement les principaux systèmes juridiques du monde, et qui sont élus moyennant un processus transparent.
- (4) Afin de respecter le principe d'égalité dans le cadre du règlement d'un différend spécifique par un tribunal permanent, le siège ou la chambre compétente devrait être composé de manière à :
 - (a) exclure tout juge ayant la nationalité de l'État partie au différend ou de l'État d'origine de l'investisseur étranger ; *ou*,
 - (b) s'assurer que des juges de ces deux États sont nommés, si nécessaire en prévoyant la nomination d'un juge *ad hoc*.

**DEUXIEME PARTIE
APPLICATION DU PRINCIPE D'EGALITE
À LA PROCEDURE DU TRIBUNAL**

**CHAPITRE I
PARTIES**

Article 5

Demandeurs multiples

- (1) Dans le cas où plusieurs investisseurs souhaitent introduire une action dans le cadre d'une procédure arbitrale unique contre le même Etat, le tribunal devra s'assurer, lors de l'examen de sa compétence et de la recevabilité des demandes, ainsi que lors de l'adoption des directives procédurales, que les parties sont traitées sur un pied d'égalité.
- (2) Lors de l'établissement de sa compétence, le tribunal doit s'assurer que :
 - (a) chaque demandeur satisfait aux critères de compétence (de l'acte exprimant le consentement à l'arbitrage et, le cas échéant, de l'article 25 de la Convention CIRDI) lui permettant d'introduire sa demande; et que,
 - (b) la demande dans son ensemble constitue un différend unique, en ce que les intérêts présentés par les demandeurs sont à tous égards identiques, de telle manière à ce que le défendeur ne soit pas lésé du fait de devoir se défendre contre des demandes qui diffèrent matériellement dans les intérêts qu'elles présentent.
- (3) Le tribunal peut déclarer irrecevable une demande introduite par plusieurs demandeurs s'il estime que la manière dont la demande a été introduite aura une incidence négative sur sa capacité à assurer un traitement égalitaire des parties quant à la présentation ou la défense de leurs prétentions respectives.

Article 6

Demandes reconventionnelles

- (1) La capacité du défendeur à présenter une demande reconventionnelle recevable devant le tribunal constitue une garantie importante de l'égalité procédurale des parties.
- (2) Afin d'être déclarée recevable, une telle demande reconventionnelle doit :
 - (a) relever de la compétence du tribunal ; et
 - (b) découler directement de l'objet de l'investissement.

- (3) Le critère de compétence est rempli lorsque, en vertu de l'acte exprimant le consentement juridictionnel invoqué par le défendeur, le tribunal aurait eu compétence pour connaître de la demande reconventionnelle si elle avait été introduite à titre principal. La compétence pour connaître d'une demande reconventionnelle ne dépend pas du fait que le défendeur s'appuie sur la même base de compétence que celle sur laquelle se fonde le demandeur pour sa demande, pas plus qu'elle n'est limitée par l'étendue du différend telle que formulée par le demandeur dans sa Demande d'arbitrage.
- (4) Dans le cas où le différend est soumis à l'arbitrage en vertu de la Convention CIRDI, l'exigence posée à l'article 46 selon laquelle la demande reconventionnelle doit relever « par ailleurs de la compétence du Centre » signifie qu'elle doit satisfaire au critère de l'article 25(1) de la Convention en étant un « différend[] d'ordre juridique entre un Etat contractant...et le ressortissant d'un autre Etat contractant qui [est] en relation directe avec un investissement ».
- (5) L'exigence d'un lien suffisant avec l'objet du différend est remplie lorsque la demande reconventionnelle porte sur l'investissement qui a donné lieu à la demande. Il n'est pas nécessaire que la demande reconventionnelle repose sur le même acte juridique ou sur la même cause que ceux invoqués par le demandeur.
- (6) Le tribunal peut déclarer une demande reconventionnelle recevable, qu'elle soit fondée en droit international ou en droit national de l'Etat d'accueil, pourvu qu'elle satisfasse aux autres exigences du présent article et porte sur un objet susceptible d'être soumis à l'arbitrage.

Article 7

Observations présentées par des tiers

- (1) Les observations présentées par des tiers peuvent utilement assister le tribunal dans son examen du différend, lorsqu'elles offrent une perspective, des informations ou encore des éléments différents de ce que les parties au litige ont soumis.
- (2) En vue de protéger l'égalité des parties, et conformément au Règlement de la CNUDCI sur la transparence dans l'arbitrage entre investisseurs et Etats fondé sur des traités de 2014 :
 - (a) un tiers devra déclarer tout lien, direct ou indirect, qu'il a avec toute partie au litige, leurs conseils ou les membres du tribunal ou l'objet du différend ;

- (b) le tribunal s'assure que les parties au litige ont une possibilité raisonnable de présenter leurs observations sur toute observation présentée par un tiers ; et,
- (c) le tribunal s'assure par ailleurs qu'aucune observations de tiers ne cause de préjudice injustifié à l'une des parties au litige.

CHAPITRE 2 PLAIDOIRIE ET PREUVE

Article 8

Egalité des moyens

- (1) L'égalité des parties comprend le principe de l'égalité des moyens, à savoir :
 - (a) chaque partie a le droit d'être entendue au sujet des présentations faites par l'autre partie : *audi alteram partem* ; et,
 - (b) chaque partie doit jouir d'une égalité de traitement s'agissant du calendrier procédural, ainsi qu'en matière de plaidoiries et de preuve.
- (2) Le tribunal devrait prescrire et faire respecter un calendrier procédural favorisant l'efficacité et l'égalité des parties.
- (3) Dans le cas exceptionnel où une partie présente des arguments convaincants afin de soumettre des éléments de preuve ou des pièces de procédure tardifs, le tribunal doit s'assurer, s'il fait droit à la demande, que l'autre partie sera traitée sur pied d'égalité, y compris qu'elle pourra répondre à ces nouveaux éléments.
- (4) L'égalité de traitement lors des audiences exige que chaque partie se voit allouer une durée de temps réelle identique pour plaider et présenter ses moyens de preuve ; ceci, toujours sous réserve de l'exercice par le tribunal de son autorité en vue d'assurer une conduite équitable et efficace des audiences, compte tenu du nombre de témoins et de l'obligation qu'il a d'entendre et d'évaluer les moyens de preuve et les arguments des parties.

Article 9

Preuve

- (1) Durant la phase écrite, chaque partie présente ses moyens de preuve à l'autre de telle manière à offrir à cette dernière une opportunité raisonnable d'y répondre.
- (2) Les mêmes standards sont applicables à l'évaluation par le tribunal des demandes faites par les parties en vue de la production de pièces spécifiques. Les Règles sur l'administration de la preuve en arbitrage

international adoptées par l'IBA en 2010 offrent un cadre utile à ce type d'évaluations.

- (3) Lorsqu'il prescrit un calendrier de production des pièces écrites, le tribunal devrait tenir compte des difficultés particulières rencontrées par les Etats, notamment les Etats en développement, pour localiser et produire lesdites pièces. Un équilibre doit être trouvé par le tribunal afin de garantir à l'autre partie une possibilité adéquate de prendre connaissance et répondre aux pièces dans le cadre du calendrier procédural.
- (4) Lorsque l'investisseur appartient à un groupe de sociétés, les principes d'égalité et de bonne foi exigent qu'il s'efforce raisonnablement d'obtenir les pièces pertinentes qui sont détenues par les sociétés-mères ou affiliées ou par les actionnaires, si l'Etat défendeur en fait la demande et que le tribunal y fait droit.
- (5) Lorsqu'une partie a requis la présence d'un témoin à l'audience en vue de son contre-examen et que la partie qui s'appuie sur la preuve apportée par ce témoin omet, sans raison valable, de le présenter, le tribunal peut (sauf circonstance exceptionnelle) écarter le moyen de preuve concerné afin de préserver l'équilibre procédural entre les parties.

Article 10

Objections à la production de la preuve

- (1) Le tribunal doit appliquer le principe d'égalité lorsqu'il statue sur des demandes de non-divulgence au titre d'information protégée, en tenant compte du fait que les standards applicables peuvent varier selon les droits nationaux des parties. Le tribunal devrait s'attacher à appliquer un standard qui fonctionne de manière égale pour les deux parties.
- (2) Lorsqu'une partie soulève des objections à la divulgation de documents en raison, respectivement, du secret des affaires ou du secret d'Etat, le tribunal devrait s'attacher à trouver un équilibre dans le traitement des parties afin que leur capacité à se procurer des moyens de preuve qui soient pertinents et qui se rapportent aux questions en litige soit garantie, tout en respectant les intérêts de chaque partie dépassant le cas d'espèce ainsi que toute considération de politique générale pertinente.
- (3) En cas d'invocation du secret d'Etat, le tribunal doit mettre en balance l'intérêt public dans l'administration de la justice, lequel justifie la divulgation des documents, avec l'intérêt public sous-tendant la confidentialité des communications intergouvernementales.

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- (4) Ce faisant, le tribunal devrait inviter les parties à conclure des protocoles en matière de protection de la confidentialité ou du secret des documents, ou de parties de ceux-ci, qui soient applicables au cas d'espèce.
- (5) Lorsqu'une objection à la production d'un document est soulevée :
 - (a) l'objection doit être motivée de manière suffisamment spécifique afin que la partie adverse puisse la contester et que le tribunal puisse statuer sur l'objection;
 - (b) le tribunal peut, dans l'exercice de son pouvoir d'appréciation et en mettant en balance les intérêts publics en cause, retenir l'objection ;
 - (c) le tribunal devra fonder sa décision sur l'objection en droit international ;
 - (d) dans les cas qui s'y prêtent, le tribunal devrait envisager, en consultation avec les parties, la nomination d'un expert indépendant qui examine les documents et tranche les objections contestées.

Article 11

Moyens illicites

- (1) Tout au long de la procédure, les parties ont le devoir de se comporter de bonne foi l'une envers l'autre et envers le tribunal.
- (2) Le tribunal a le pouvoir d'exclure tout moyen de preuve qu'il estime avoir été obtenu en violation du principe de bonne foi et qu'une telle décision est nécessaire pour préserver l'égalité entre les parties.
- (3) Exceptionnellement, et en vue de protéger le caractère équitable de sa propre procédure ainsi que l'égalité entre les parties, le tribunal peut recommander la prise de mesures relatives à l'exercice par l'État de ses prérogatives en matière d'enquête criminelle et de poursuites relativement à la procédure du tribunal.
- (4) Dans un tel cas, le tribunal n'agit que sur la base d'une preuve manifeste d'un comportement visant à obtenir un avantage indu dans la procédure devant lui ou nuisant à sa conduite équitable de ladite procédure.

CHAPITRE 3

EGALITE MATERIELLE DES MOYENS

Article 12

Frais de procédure

- (1) La capacité des parties, qu'elles soient des investisseurs ou des Etats, à intenter une action ou à défendre ses droits devant un tribunal ne devrait pas être décidée sur la base des coûts. Dans ce contexte, il

convient de porter une attention particulière à la situation des petites et moyennes entreprises ainsi qu'à celle des Etats en développement.

- (2) Lorsque l'introduction d'une action ou la défense des droits d'une partie est financée par un tiers, cette partie doit en divulguer l'identité afin que le tribunal puisse notamment examiner toute incidence que ce financement peut avoir sur le maintien de l'impartialité du tribunal.
- (3) Dans le cas où le tribunal estime, après examen de la demande d'une partie, que celle-ci pourrait ne pas être en mesure de s'acquitter des frais de la procédure dans l'éventualité où elle n'obtiendrait pas gain de cause et qu'il est d'avis que la constitution d'une garantie est nécessaire pour préserver l'égle protection des parties, le tribunal peut, dans l'exercice de son pouvoir d'appréciation, ordonner le cautionnement des dépens.

* * *

Travaux préparatoires

QUESTIONNAIRE WITH MEMBERS' REPLIES

- (1) *Resort by States.* The ICSID Convention provides equally for resort to its arbitration mechanisms by investors and by States, yet States have made almost no recourse to international arbitration for the settlement of investment disputes.**
- (a) Why not? What are the wider implications of this, if any?**
- (b) To what extent should arbitration agreements in investment treaties apply bilaterally, rather than being limited to claims by investors?**
- (c) If so, how may such agreements take effect?**

Stanimir Alexandrov

In the case of a clause in favour of ICSID arbitration in a contract between an investor and a State, the investor and the State have equal access to ICSID. To answer the question why States have rarely resorted to contractual ICSID arbitration requires, in my view, a detailed survey of such contracts with ICSID clauses. I am not sure how popular ICSID arbitration clauses in contracts are these days. I note that, in my experience, States and/or State-owned entities are not opposed as a matter of principle to resorting to ICSID arbitration in a contractual setting. I have represented a State in ICSID cases for a number of years and that State (and its agencies) have seriously considered initiating ICSID arbitration against foreign investor for non-compliance with contractual obligations. In several cases, we actually initiated such arbitration.

The situation is different in the context of investment treaties (ITs). There are two scenarios. The first is when the dispute settlement provision in the relevant IT covers disputes relating only to violations of rights under the treaty. Given the nature of ITs (protecting rights of investors), it is hard to conceive of a dispute relating to the investor's violation of a right of the State under an IT. For that reason, it is hard to see how a State would initiate arbitration against an investor under a treaty that limits the scope of disputes to violations of treaty rights.

The second scenario involves dispute settlement provisions that cover a broad category of disputes between investors and States (such as a provision allowing the recourse to arbitration with respect to "any dispute"). Arguably, "any dispute" includes not only a dispute for violation of treaty rights but also a dispute about violation of contractual rights, domestic law, customary international law (after all, "any" dispute means any dispute). In that scenario, States and investors have equal

access to ICSID arbitration. It is quite possible that States rarely, if ever, submit such disputes to ICSID arbitration because they find it easier, more practical, less expensive etc. to submit such disputes to domestic courts (which, as we know, is always an option under ITs). The question then becomes why States prefer their domestic courts while investors prefer ICSID arbitration. I believe the answer is that many investors – rightly or wrongly – have more confidence in the ICSID system than in the domestic courts of the host State.

Laurence Boisson de Chazournes

When ICSID was established, the disputes contemplated were primarily contractual investment disputes, with both parties being able to invoke violations of the investment contract. The balance of rights and obligations between States and investors was thus different from that encountered when treaty claims entered into the realms of ICSID. At that time and thereafter, the balance of rights and obligations turned towards investor protection. This situation is changing. There is an emerging trend in investment treaties providing for obligations for investors.¹ When this is the case, the question arises as to their implementation. The use of counterclaims by respondent States is a possible means.

James Crawford

Congratulations on the report, which is very detailed and well researched. My main point relates to your question 'To what extent should arbitration agreements in investment treaties apply bilaterally, rather than being limited to claims by investors?'

I think the Report does not sufficiently credit the special character of BIT arbitration, which is inherently unilateral. (A partial exception concerns umbrella clause cases, but even there the consent to arbitrate given in the BIT is still unilateral.) In this respect it is like human rights adjudication. Human rights are rights against the state; the procedural principle of equality of the parties does not require that the respondent state be able to bring counterclaims.

The core point is that private parties are not bound by human rights treaties, any more than they are bound by substantive stipulations in

¹ Laurence Boisson de Chazournes, "Changes in the Balance of Rights and Obligations: Towards Investor Responsabilization", in El Ghadban, Mazuy and Senegacnik (eds) *La protection des investissements étrangers, vers une réaffirmation de l'Etat? Actes du colloque du 2 juin 2017*, Pedone, Paris, 2018.

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BITs. As to such rights and stipulations, there is no basis *ratione materiae* for a counterclaim, and the procedural principle of equality of arms is irrelevant.

Of course there is a debate about horizontal application of human rights, largely conducted under the rubric of corporate social responsibility. But that is not determined by the procedural principle of equality of arms. Furthermore the suggestion of access to local claimants is made by those who are opposed root and branch to BITs. Investment tribunals are not, generally speaking, a substitute for local courts, as the 'two-way' theory would make them.

It seems to me that some of your sentences overstate the position, notably in terms of the procedural principle of equality e.g. 'International investment tribunals are established in order to provide a neutral forum in which the respective claims of investors and States can be determined.' One might equally say that international investment tribunals are established in order to provide a neutral forum in which the claims of investors against host States can be determined. Another example: 'the fundamental objective of equality between the parties that motivated the establishment of international tribunals as an independent forum for the resolution of investment disputes.' But they were investment disputes *against* host states.

Just a few thoughts re your proposal (3) below. I broadly agree with the others.

Pierre d'Argent

In essence, international investment arbitration is about external control over the host State's actions in light of certain obligations that it cannot change unilaterally. Such obligations and external control are consented by the host State in order to attract foreign investment and depoliticize potential disputes that could otherwise be channelled through diplomatic protection claims initiated by the investor's State.

Of course, and this should not come as a surprise, such de-politicization at the international level implies a re-politicization of the issue at the domestic level, as we have seen recently. This is because affording foreign investors with the possibility of presenting their claims against the State to an international tribunal is perceived (rightly or wrongly) as an undue privilege.

Part of the current critique addressed to international investment arbitration is based on a perceived inequality between investors and States when it comes to initiating arbitration: it is said that the system is unequal because investors only resort to international arbitration. Such

statistical truth is sometimes enshrined in law (see the unilateral character of CETA).

Such critique fails to see that, similarly to international human rights adjudication, international investment adjudication is about external control over the State, rather than about external control over the foreign investor. Indeed, external control over the foreign investor does not seem required in order to attract foreign investors. Investors rarely pretend to be above local courts when it comes to their own acts; however, the fact that domestic proceedings instituted by the host State against them could later lay the ground for external control through investment arbitration is seen as an essential element in their protection.

In my view, quite a dramatic loss of sovereignty would ensue if States were forced (or even encouraged) to bring their claims against foreign investors before international tribunals, rather than before their domestic courts, in order to enforce the investors' obligations (whether contractual obligations, domestic law obligations or international obligations owed by investors). I do not see States willing to consent to such abandonment when their own courts are available to adjudicate at their request against foreign investors. It would be an additional undue privilege for investors if they were certain to escape domestic courts as respondents, and the political backlash could be worse. Additionally, and assuming that the jurisdictional basis exists for that purpose, States may not be inclined to resort to investment arbitration as claimants for reasons of cost.

Giorgio Gaja

Bilateral investment treaties are often interpreted as implying consent to arbitration of investment disputes on the part of host States while offering investors the opportunity to resort to international arbitration if they so wish. Even if host States are generally reluctant to submit their disputes with investors to arbitration, one-way dispute settlement clauses, which give investors, but not host States, the option to seize an arbitration tribunal, are not consistent with the principle of equality between the parties to disputes. This is even more so when one-way clauses, by restricting the jurisdiction of the tribunal to disputes concerning investors' rights, do not allow host States to raise counterclaims before the arbitration tribunals seized by investors.

Andrea Giardina

It seems appropriate to recall that the lack of equality as to the starting of the arbitration is basically due to the developments in the case law concerning investment arbitration. It was only in 1990 that an arbitral tribunal in the ICSID Case *A.A.P.L. v. Sri Lanka*² based its jurisdiction on a BIT, alleging that the treaty contained a standing offer by the State to the foreign investors to arbitrate their investment disputes. Such offer was considered as accepted by the investors with the filing of their request for arbitration to the ICSID Secretariat.

Such construction, notwithstanding its uncertain foundation, was immediately and consistently followed by other tribunals, so that at present it appears consolidated and capable to being modified only by clearly different Treaty clauses inserted in a relevant BIT or Multilateral Agreements.

Obviously, it remains clearly established that equality as to the arbitration initiative is assured when the arbitral clause is inserted and directly agreed by the parties in their investment contract.

Mojtaba Kazazi

Why States have not made recourse to international arbitration for the settlement of investment disputes? This is generally due to concerns on sovereignty grounds and that States would normally prefer, or may be legally bound to prefer, their national courts to other fora. At the same time, it seems there is a technical reason as well: arbitration is by consent. There are probably not many instruments in existence in which investors have provided advance consent to ICISD arbitration. On the other hand, consent of states can be found in numerous treaties and laws, which the investors can invoke.

Marcelo Kohen

Le fait que la Convention CIRDI prévoit la possibilité d'accès à l'arbitrage tant pour l'Etat que pour l'investisseur étranger a essentiellement de l'importance au point de vue pratique pour la possibilité d'avancer des demandes reconventionnelles de la part de l'Etat. Les situations concrètes dans lesquelles l'Etat aura intérêt à introduire une instance arbitrale contre un investisseur étranger sont

² *Asian Agricultural Products Ltd v Sri Lanka* (Award) ICSID Case No ARB/87/3, 4 ICSID Rep 245 (1990).

vraiment exceptionnelles, comme le démontre la pratique. L'Etat dispose d'autres moyens, notamment en droit interne, pour faire valoir ses droits. Il les privilégiera car il n'a aucune des raisons qui, au contraire, pousseraient un investisseur étranger à privilégier l'arbitrage international plutôt que les instances juridictionnelles internes. Même en étant exceptionnelle et en pratique rare, il est cependant convenable que la possibilité pour l'Etat de se servir de l'arbitrage international de la même manière que l'investisseur étranger soit présente dans d'autres traités multilatéraux ou bilatéraux relatifs aux investissements étrangers, ce qui n'est pas le cas dans bon nombre d'instruments actuellement en vigueur, comme le rapport le mentionne. La raison principale est celle d'asseoir de manière claire et indiscutable la possibilité pour l'Etat de soulever des demandes reconventionnelles. Pour ce faire, les traités en question ne devraient pas se cantonner à mentionner uniquement des droits des investisseurs, mais aussi des obligations auxquelles ils sont contraints. Cela peut se faire par des clauses de portée très générale qui reconnaissent les compétences souveraines de l'Etat.

Vaclav Mikulka

Discrepancy in the frequency of resort to arbitration mechanism by investors and by States may be explained by several factors, starting with the nature of investment treaties, which focus on the protection of investors' rights. States whose rights are primarily protected by their internal laws, have an easier, less costly and more convenient resort to their domestic judicial and other mechanisms. The fact that the States rarely make recourse to international arbitration for the settlement of investment disputes, in my view, is not indicative of inequality of parties in arbitral proceedings.

P. S. Rao

The fact that the States rarely make recourse to international arbitration for the settlement of investment disputes is not an issue for balancing equality of parties to the dispute. It is essentially a factor of the terms of the treaty and the obligations undertaken by the State seeking investments to protect them. In fact developing States in the early 90s when pushing forward to receive FDIs did not envisage that a foreign investor would directly bring any cases of complaint against the State when it is not directly a party to the term governing specific investment. The use and abuse of the MFN clause is another issue that has some impact on the growth of the new well-accepted feature termed as investor-State arbitration.

August Reinisch

That States do not resort to arbitration pursuant to investment treaties is a consequence of their structure. I do not think that it reflects a problem with regard to “equality of the parties” because investment treaty arbitration is a system created in order to counterbalance the structural inequality between an investor and a host country. An investor is subject to host State law and the host country has all the means of a sovereign to adjudicate and enforce its own law with regard to foreign investments. It is in these situations where a misuse of power may take place that the protection standards contained in investment treaties serve to provide remedies against such abuse. They provide for a protection system aimed at counterbalancing the inequality between private parties and States.

The possible fields where measures by States against foreign investors are sometimes considered, such as environmental or human rights encroachments can normally be addressed in the domestic legal order. This has also been made clear in the Ruggie Principles as the duty of States to protect against human rights violations by companies.³

Brigitte Stern

The fact that the States rarely use international arbitration results, in my view from a “*faisceau de facteurs*.”

First of all, it should be remembered that the initial idea was to “depoliticise” the disputes between investor and States, and give the investor a neutral forum, as I have explained in an article published in *ICSID Review*:

The first remark is that the ICSID Convention has been adopted precisely in order to “depoliticize” disputes between States and foreign investors, by granting to the latter a direct cause of action against a State which has interfered with their investments. Formerly, when a dispute arose between a foreign investor and the host State of its investment, there were mainly two possibilities for solving it: either the case was to be settled in the realm of the host State’s legal order, and the foreign investor had to try to have his rights enforced in the courts of the host State (and everyone sees here the political dimension resulting from the

³ Guiding Principles on Business and Human Rights, Principle 1 (“States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”).

State being at the same time judge and party); or the case could be settled on the international level through an action brought by the investor's national State exercising its right of diplomatic protection against the host State (again in the latter case, political aspects were predominant, as the decision to exercise diplomatic protection is entirely discretionary and usually based more on the political considerations underlying the relations between the two States concerned than on the objective merits of the investor's case).

Of course, in order to get out of this dilemma between Scylla and Charybdis, there was the possibility to choose arbitration – “traditional” arbitration based on an arbitration clause inserted in a contract (*clause compromissoire*) or in an arbitration agreement (*compromis d'arbitrage*). But this was a case-by-case solution which was not generalized. So, in order to circumvent both internal politics and international politics, the idea behind the ICSID Convention was to create an arbitral institution giving the foreign investor a direct action against the host State ...⁴

Second, States do not need international arbitration, as they have at their disposal all the institutional organisation of the State, and mainly the courts to enforce their laws against a foreign investor, which would not respect them.

Third, in my view, the investment tribunals should protect the rights granted in the multilateral or bilateral treaties of protection of investments (and this also, in my view, when the treaties refer to « all disputes » BITs are not there to enforce the whole body of international law). For the moment, but this could be changed, there are no rights granted to the States, only obligations.

Tullio Treves

States have not made recourse to arbitration against investors, especially because, independently of the dispute being envisioned under a “General bilateral disputes clause” or under a “one-way clause”, the usefulness for the State of resorting to arbitration under a treaty is limited by the scope of the Treaty's provisions as in most cases these provisions concern exclusively, or mostly, obligations of the host State. Moreover, States have at their disposal all the means provided by their domestic system. The very mechanism permitting the investor to trigger arbitration against

⁴ B Stern, ‘Are Some Issues too Political to be Arbitrable?’ (2009) 24 *ICSID Rev-FILJ* 90, 96-7.

the host State should be seen as a means to counterbalance on the international plane the imbalance in favour of the host State on the domestic plane.

Raúl E. Vinuesa

Investment Treaties have been designed to protect investor's rights: ITs rarely imposed obligations over investors. It seems that if a State has a claim against a foreign investor, it will resort to its own domestic remedies. There is no reason to think that States would argue that they do not trust their own domestic judicial systems. Even though, in particular cases, States have agreed on contractual basis, to resort to international arbitration as the only means to settle their foreign investment's disputes. After all, it is up to States to decide to solve their claims against foreign investors through international arbitration. Lack of States' interest to claim against foreign investors through international arbitration does not have any impact on the equality of parties before international investment tribunals.

(2) Access on grounds of nationality. Access to international investment tribunals is limited to investors of foreign nationality or control. This is so whether the forum is arbitral or a standing international tribunal. This flows from the origins of the development of such tribunals as a limited alternative agreed by treaty for the nationals of other States, offered by the consent of States, to domestic remedies and, where these are exhausted, the State's right to espousal of diplomatic protection. An objection that is now commonly voiced to investment arbitration is that it is unfair because access to its remedies discriminates between foreign and domestic investors:

- (a) On what grounds may the nationality condition be justified as consistent with the principle of equality of access?**
- (b) What is the basis for this distinction, as compared to other fora for the resolution for investment disputes at the national and international levels?**

Stanimir Alexandrov

The *raison d'être* of the ICSID system (and of ITs, for that matter) is to promote and protect foreign investments. This is why the system is designed to cover foreign nationals only. Given the expansion of international commerce and the advance of globalization, where the nationality of a company is more and more difficult to establish and where domestic companies often operate through foreign affiliates (and *vice versa*), I see no reason why the ICSID system could not be extended to

cover a State's own nationals. It is a question of the political will of States to do so.

I would add that, in my experience as counsel and arbitrator, and even more so in my experience as treaty negotiator and advisor to States about investment laws and incentives, I have observed that the protections extended to foreigners benefit domestic commercial actors as well. It happens that the rights and protections extended to foreigners under ITs are initially greater than those that the State grants to domestic actors; in such cases, soon enough a powerful constituency of domestic commercial actors puts pressure on the government to grant similar rights and protections to local businesses. Thus, in a way, ITs have also contributed to the expansion (through domestic law) of property rights and protections vis-à-vis domestic actors where such protections have been deficient.

Laurence Boisson de Chazournes

This question raises some difficult issues about access to dispute resolution mechanisms. At first glance, the limitation of investor-state dispute settlement mechanisms to non-nationals may seem unfair. On the other hand, allowing nationals direct access to such mechanisms would raise interesting questions about States' confidence in their judicial systems. In this context of equality of access, a measure could be to establish certain preconditions before allowing nationals to resort to investment tribunals. This being said, it might be difficult to provide for access of nationals to investment arbitration, when most of the international investment agreements deal only with foreign investment, i.e. promotion and protection of foreign investment. During the negotiations of the Pan-African Investment Code (PAIC), the possibility to grant access of domestic investors to the investor-state dispute settlement mechanism was thoroughly discussed and equality of access was raised as a concern. The idea was then abandoned because of the scope of the PAIC, being limited to the regulation of foreign investment in the territory of each Member State of the African Union.

Pierre d'Argent

In my view, the nationality requirement entails three discrimination inequality issues:

Inequality between national investors and foreign investors, in favour of the latter: this is a matter of domestic law, to be decided by each State (the current critique of investment arbitration is based on denouncing an undue jurisdictional privilege). Even in EU law, it is not forbidden to discriminate in favour of nationals of other Member States; only

discrimination resulting in a treatment less favourable than the one benefitting nationals is forbidden.

Inequality between foreign investors, in favour of those having a certain nationality: in his opinion delivered on 19 September 2017 in the *Achmea* case (C-284/16), Advocate General Wathelet addresses the nationality requirement under BITs and its compatibility with EU law in that sense (see paras. 59-83). Even if the future Court's judgment may depart from the conclusion of the Advocate General according to which intra-BITs do not breach the EU prohibition of discrimination on the basis of nationality, it is interesting to note that the AG underscored that "the fact that the reciprocal rights and obligations created by the BIT apply only to investors from one of the two Contracting Member States is a consequence inherent in the bilateral nature of BITs" (para. 75). In other words, the discrimination between different foreigners is inherent in the reciprocal nature of BITs. This is not going to change when FTAs including investment protection and adjudication concluded by the EU and its Member States on the one hand, and third States on the other hand, will replace existing BITs: the protection offered will unlikely be extended to nationals of non-contracting States.

Inequality between foreign investors of the same nationality: while individuals cannot change nationality easily, corporate entities may adjust their corporate structure in order to try to meet a jurisdictional nationality requirement. In other words, foreign natural persons and foreign legal persons are not equal in light of the nationality requirement. Maybe such inequality issue should also be addressed.

Andrea Giardina

The objection that investment arbitration is unfair because access to its remedies discriminates between foreign and domestic investors appears well grounded in the constitutional law of various States and in EU law. That has already now, and will have in the future, a great impact on the development of arbitration in general.

Mojtaba Kazazi

The fact that access to international investment tribunals is limited to investors of foreign nationality or control is in line with international law. The origins of the development of investment tribunals as a limited alternative agreed by treaty for the nationals of other States is well explained in the *Rapport Préliminaire*. The international investment treaties are to encourage foreign investment and to assure foreign investors that there will be no discriminatory measures against them. They are not meant to privilege the foreign investors beyond the rights of

the nationals of the host country. If in some cases the national investors envy the foreign investors in this regard, there is obviously a problem to be addressed and to ensure that the national investors have access to an independent judicial system, but the nationals cannot be allowed to appear in an international tribunal against their state of nationality.

Even in case of a *bona fide* dual national, it will be difficult to make an exception. In determining their dominant and effective nationality, which will be required as a jurisdictional matter, the location of their investment and presumably the use of the local nationality to facilitate the contracting and implementation of their investment projects will favour the host country nationality. Therefore, the current approach of ICSID on this matter, in generally excluding dual nationals, seems appropriate.

Finally, I do not see the lack of access by domestic investors to international investment tribunals having a negative impact on the principle of equality of access. Equality of access is for the parties who are qualified for access.

Marcelo Kohen

Certainement, le fait que les investisseurs étrangers disposent de la possibilité de recourir à l'arbitrage met ceux-ci en situation d'avantage à l'égard des investisseurs nationaux. Ces avantages sont en particulier 1) le poids égal que les investisseurs étrangers ont avec l'Etat dans la constitution du tribunal destiné à régler le différend, 2) le fait que ce tribunal soit constitué *ex post facto* et uniquement pour connaître du différend qu'ils ont avec l'Etat et 3) la possibilité –fruit d'une certaine pratique arbitrale dont je vais me référer ultérieurement – de demander la production de preuves documentaires étatiques d'une manière beaucoup plus large que celle dont un citoyen de l'Etat peut normalement exiger sur le plan interne. Si cette inégalité est flagrante, la question qui en découle ne devrait pas être dans un seul sens : la solution ne serait pas nécessairement celle de placer les investisseurs nationaux dans la possibilité de faire recours à l'arbitrage international. Cela s'avérerait d'une part impraticable (sauf à établir de nouvelles inégalités de traitement entre les investisseurs nationaux, permettant seulement à certains d'entre eux d'avoir cette possibilité), et d'autre part déraisonnable. En effet, les Etats doivent organiser leur pouvoir judiciaire de manière à garantir la primauté du droit et la justice. Permettre à leurs citoyens de passer outre leurs tribunaux équivaut à nier cette caractéristique des tribunaux internes, ou à pousser l'Etat à ne pas attribuer une importance fondamentale à leur maintien et à leur perfectionnement. Par ailleurs, des mécanismes de protection des droits humains existent sur les plans régional et universel. Certaines des griefs

faits par les investisseurs étrangers tombent sous le coup de certains droits garantis et protégés par ces mécanismes (p. ex le déni de justice). Les instruments y relatifs imposent systématiquement l'épuisement des voies de recours internes comme condition indispensable pour aller à l'instance internationale. Il serait inconcevable d'imaginer que la protection des intérêts économiques puisse disposer de recours moins contraignants que ceux instaurés par des instruments de protection des droits humains. Imposer cette éventuelle condition d'épuisement pour la saisine de l'instance internationale en matière d'investissement ne serait pas raisonnable non plus. Cela rendrait par ailleurs les différends relatifs à l'investissement interminables. Donc, il ne paraît ni approprié ni juste d'imposer à l'Etat une instance internationale pour régler des différends comme ceux liés à l'investissement à l'égard de ses propres ressortissants.

Par contre, une question qui se rattache au problème de la relation entre l'égalité et la nationalité est celle de la situation des investisseurs étrangers qui obtiennent une autre nationalité en vue de pouvoir saisir un tribunal arbitral (des sociétés qui établissent des subsidiaires dans des Etats ayant conclu un TBI avec l'Etat hôte, alors que leur Etat n'a pas de TBI en vigueur avec l'Etat hôte, dans le seul but de tirer parti du TBI, par exemple). Cette nationalité d'emprunt met les investisseurs étrangers qui n'ont pas procédé à ce type d'acquisition de nationalité intéressée dans une situation de flagrante inégalité.

A mon avis, les tribunaux devraient examiner la question de la sincérité de la nationalité des investisseurs en tenant davantage compte du contrôle et du lieu d'exercice de l'activité des personnes morales et ce, même *proprio motu*. Il s'agit d'une question qui relève de la compétence *ratione personae*. Cette proposition a son pendant dans la situation de la Cour internationale de Justice, qui doit faire de même lorsqu'il s'agit d'établir si les parties au différend pour lequel elle a été saisie sont des Etats pouvant ester devant elle.

Vaclav Mikulka

Access on ground of nationality – The question whether the fact that the access to international investment tribunals is limited to investors of foreign nationality or control is unfair or discriminatory towards national investors (or – in other words - whether the resort to international investment tribunals should be available also to domestic investors) is a problem of quite different nature from that of *equality of parties before international investment tribunals*. It seems to me that the answer to this question is primarily a matter of policy choice.

The answer to the question whether domestic investors should have the access to international investment tribunals can't be simply deduced from a general legal principle, including the principle of equality of parties before international judicial bodies. In the absence of an international legal regulation of substantive rights of national investors opposable to their own States, it seems to me that the question to be asked is rather that *on which grounds* one could justify an exception from the jurisdiction of a State concerning the solution of investment disputes between this State and its national investors.

P. S. Rao

The question whether the resort to international investment tribunals should be available also to domestic investors is, as Confrère Mikulka well notes, a problem of quite different nature from that of *equality of parties before international investment tribunals*. As other colleagues also noted it is something that could be considered as a matter of policy but under strict conditions, which need to be identified.

August Reinisch

This point appears to me to be one of the most interesting issues of the current design of the international investment law regime. Of course, the system grew out of the diplomatic protection paradigm which implies that access is limited to nationals of parties that have agreed to a system of direct access to investor-State arbitration. However, as developments in other fields, in particular in human rights law, have shown there is no intrinsic necessity to limit such access only to nationals of certain other countries. It appears that States are perfectly free to extend recourse to investor-State arbitration/dispute settlement to all foreign and even to domestic investors. In both respects, EU Law may be quite instructive. While it demands equal treatment with respect to all foreign EU nationals it is silent in regard to how EU member States treat their own nationals. The phenomenon of "reverse discrimination" means that EU law does not prevent member States to sometimes provide for less favourable treatment to their own nationals compared to other EU nationals.

A related, but different issue is the alleged incompatibility of intra-EU BITs with EU law.

The EU Commission often raises the argument that the fact that some EU nationals are treated better than others as a result of their privileged access to investor-State arbitration under intra-EU BITs constitutes discrimination. From a conceptual point of view, the discussion could be greatly enriched by considering whether EU demands for equality of access investor-State arbitration should rather imply that all EU nationals

have access and not only some (upward harmonisation). Of course, the current thinking of the EU Commission appears to go in a different direction, suggesting that the access of some EU nationals to investor-State arbitration should be terminated, resulting in no access for any EU nationals to investor-State arbitration against EU member States (downward harmonisation).

Brigitte Stern

This is indeed an important debate and is linked with a bigger issue, which is whether persons and companies are subject of international law in the absence of a precise agreement to that effect. It is true that in human rights, it has been felt necessary to protect also nationals against dictatorial powers, which do not respect the rights of their own citizens. I am not clear whether the same rationale should be applied concerning economic rights, but it must not be excluded on the level of principle.

This issue is also linked with the question of double nationals; which are expressly excluded from ICSID arbitration, precisely based on the idea that a national should not be able to sue its own State on the international level. The question of course is whether the same applies in non-ICSID international arbitration, which is not a settled issue.

Tullio Treves

I agree with the RP's analysis of the causes of the requirement excluding nationals of the host State from access to international investment tribunals. It would, however, seem to me that to question this exclusion would be an appropriate task for the Institut. Equality of parties should be seen not only as between the opposing parties to a dispute, but also as between potential investor parties. The precedent of Human Rights Courts could be invoked. Perhaps a distinction *ratione materiae* could be envisaged so that access of nationals to international investment arbitration could be admitted only for alleged most egregious violations – which could be seen as similar to human rights violations. To pursue such approach, in my view, would be difficult in a bilateral framework, but possible in a multilateral one.

Raúl E. Vinuesa

The very basis of ITs is the promotion and protection of foreign investments.

That is why, as it stands today, international arbitration for the settlement of investment disputes is a restricted optional right, granted by ITs in favour of each Party's national investors when investing in other State Party to the same IT.

Domestic investors do not have access, through ITs to international arbitration. In the same situation are foreign investors that are not nationals of a State that has agreed an IT with the host State. Present diversities between domestic and foreign investors rights depends upon the political will of States. Recent IT negotiations evidenced that States are not inclined to expand foreign investors' rights to domestic investors. On the same line, States have constantly challenged arbitration tribunals' jurisdiction on the basis of lack of a protected nationality.

Discrimination against domestic, *vis-à-vis* foreign investors seems to have distinctive implications from discrimination under international human rights law: This is an area in which further discussions within the 18th Commission could be relevant.

(3) *Impartiality*. The members of an investment tribunal must treat the parties impartially. The need to ensure this basic requirement of equality of treatment has led to development of guidelines on conflicts of interest for both arbitrators and the international judiciary:

- (a) What particular considerations (if any) apply in the context of investment disputes that may require further elaboration?**
- (b) What is the appropriate legal standard to apply to a challenge to the appointment of the member of an international investment tribunal on the ground of his or her partiality?**
- (c) Who should decide on such a challenge and under what procedure?**

Stanimir Alexandrov

The IBA Guidelines on Conflicts of Interest are very helpful and provide a strong and reliable basis (and offer reasonable and widely acceptable legal standards) for deciding challenges. The procedures are set out in the relevant arbitration rules and are also workable and sufficiently detailed. The debate whether a challenge should be decided by the co-arbitrators or the appointing authority does not bear on equality. Whatever rule applies in the specific setting of a case applies equally to the State-appointed and the investor-appointed arbitrator.

Laurence Boisson de Chazournes

Impartiality is central to the equality of the parties. While there is always room for improvement of the substantive rules, I believe that the nub of the problem lies in the challenge procedure. The ICSID system of asking the remaining arbitrators to rule on a challenge to a fellow arbitrator is inadequate. This puts the remaining arbitrators in a difficult position.

Therefore, it may be questioned whether recourse to a third institution would not be more appropriate by making the whole process more neutral. This would save the remaining arbitrators from being judge and jury.

Pierre d'Argent

Briefly on c): like most *confrères* and *consœurs* that have responded so far to the questionnaire, I do not see the current situation where the other members of the tribunal decide on a challenge as ideal. Besides, having one same set of impartiality rules (e.g., IBA rules) applied differently by different authorities is not desirable.

As noted in the Preliminary Report, Article 8.30 (2) of CETA establishes the President of the International Court of Justice as the authority to decide on challenges of Members of the standing Tribunal.

Andrea Giardina

It seems that, in addition to the habitual requirements and standards usually applied in the investment arbitration, special attention should be reserved to a possible characteristic conflict, which may be incurred by arbitrators who also act as counsel. The so-called 'double hatting' frequently practised may determine a conflict because, for instance, an investor could raise justified objection to the appointment by the State of person who usually act as counsel appointed by States. Correspondingly, a State could raise justified objections to appointment by an investor of an arbitrator who is usually appointed by investors. *Global Arbitration Review* has recently published (4 June, 2017) the result of an enquiry by the Oslo University concerning double hatting in investment arbitration.

The standards to apply should take into consideration the possible conflict mentioned above and the mechanism chosen should be technically competent and fair in respect to the Parties. In this regard, it is admitted that the mechanism provided by ICSID (leaving in general the decision on the conflict or challenge to the other to members of the Tribunal), may be not so efficient and appropriate. This is so because in several cases the arbitrators, having many different links among themselves (academic, professional etc.) could be hesitant to recognise conflicts and to uphold challenges.

Mojtaba Kazazi

(a) On the impartiality and conflict of interest issues, investment disputes are generally not different from other international claims. Therefore, the best guidelines and practices in this regard should apply to members of an investment tribunal to ensure their impartiality. Counsel, arbitrator, and expert are distinct functions and mutually-exclusive;

combining them, even indirectly, may lead to conflict of interest or at minimum the appearance of bias.

(b) Appearance, or perception, of bias, is the appropriate legal standard to apply to a challenge to the appointment of the member of an international investment tribunal on the ground of his or her partiality. It is not a question of what the reality is, but how things look *prima facie* and from the outside, and whether there are circumstances giving rise to justifiable doubts.

(c) An independent, preferably pre-determined, third party, including an arbitration institution or a court, should decide on such a challenge, through a fair procedure with equal rights for both sides. Referring the challenge to the rest of the tribunal whose member is challenged, even as a first instance, as Article 58 of the ICSID Convention (and its implementing provisions in Arbitration Rule 9) provides, is problematic and should be avoided, where possible.

Marcelo Kohen

Par définition, les arbitres doivent être impartiaux, peu importe qui les a nommés. L'impartialité impose aux arbitres de traiter les parties sur un pied d'exacte égalité. Une certaine pratique qui met une partie en contact avec l'arbitre qu'elle a choisi en vue de débattre le nom du président du tribunal est contraire à cette égalité de traitement et doit être absolument écartée. La pratique des personnes qui agissent à la fois comme conseils et comme arbitres dans des affaires portant sur la protection des investissements étrangers doit être découragée. Sans préjuger de leur impartialité, ce n'est pas conforme à une bonne administration de la justice que la même personne qui plaide devant un arbitre siège plus tard avec ce même arbitre dans un autre tribunal, pour ne citer qu'un exemple.

On constate en matière d'arbitrage d'investissements beaucoup plus de récusations que dans d'autres instances. Le standard à être utilisé devrait être celui suivi par les juges de la Cour internationale de Justice lorsqu'ils/elles s'excusent de siéger. Par ailleurs, il n'est pas sain que, dans les cas des récusations, se soient les autres membres du tribunal d'arbitrage qui en décident. Si cette pratique est compréhensible dans le cas de la Cour internationale de Justice, il n'en va pas de même en matière d'arbitrage, où il existe des instances autres qui peuvent décider (CIRDI, CPA, Président de la Cour internationale de Justice ou autres).

Vaclav Mikulka

The impartiality of the members of an investment tribunal is an indispensable prerequisite of equality of the treatment of the parties, which deserves special attention. In view of commonly positive

appreciation of IBA Guidelines, seeking for answers to questions 3 (a) – (c) might require an empirical approach, namely review of reasons invoked by the parties (if disclosed) to justify their challenges of members' impartiality. Concerning question 3 (c), I share the view that leaving the decision in the hands of a "third party" of recognised competence would be an appropriate solution.

P. S. Rao

On the matter of impartiality, I agree with Confrère Reinsch that the "establishment of proper rules to develop the avoidance of conflicts of interest is a general problem and certainly the standards in regards to challenges can be improved". In this regard, I also support the suggestion made in the Preliminary Report to leave the decisions concerning challenges in the hands of a third party.

August Reinisch

The impartiality of adjudicatory bodies is indeed crucial to the question of equal treatment in dispute settlement, but it does not appear to be a particular or special problem in investment arbitration. The establishment of proper rules to develop the avoidance of conflicts of interest is a general problem and certainly the standards in regards to challenges can be improved. It seems that the current default rules contained in the IBA Rules on Conflicts of Interest provide for an adequate body of substantive rules on impartiality and independence. Concerns may rather stem from some of the procedural rules ensuring the application of the former. Here, a combination of best practices whereby it is a third institution to decide on challenges and where this third institution provides reasoned opinions would appear most appropriate, as has been identified in the Preliminary Report.

Brigitte Stern

Impartiality can be seen as linked to equality, because it means that you have to have an equal ear towards both parties, but I wonder if it is not a topic in itself. There are already so many things to deal with under the more restricted concept of "equality".

This being said, if the Report deals with it, I think it should denounce the present procedure for who decides the challenge under the ICSID rules. It is not "healthy" that two colleagues are entrusted with that task. And it can even have perverse effect, as has been seen very recently when the whole tribunal was challenged after two members had refused to challenge the third one.

Tullio Treves

This is a key issue to ensure the equality of parties in investment disputes. While the substantive requirements set out in the IBA Guidelines seem adequate, attention should be paid to the polarization, in the investment disputes field, between “pro-investor” and “pro-State” arbitrators. As regards who should decide on challenges, and select the substitute arbitrators, in my view it should be avoided that this task falls to the non-challenged members of the arbitral Tribunal. To give this task to an external authority seems to be the right solution, but it is not devoid of difficulties. It would seem necessary that the person entrusted with the task has a full knowledge of the relevant rules and of qualities and past record of the challenged and of the possible substitute arbitrators. This can be presumed of the President of the ICJ, but not of President of the Administrative Council of the World Bank. In the case of the latter the task will probably be assumed in fact by staff members who may be, and normally are, experienced and impartial, but they remain unknown so that the process lacks transparency.

Raúl E. Vinuesa

The IBA Guidelines on Conflict of Interest have already proved to be an adequate set of rules to inspire fair solutions for challenges to arbitrators.

Decisions on challenges to arbitrators’ conflict of interest, seems on principle to be more reliable if taken by an appointing authority than by the co-arbitrators.

(4) *Equality in the constitution of an international investment tribunal.* The issue is whether, and if so, how and to what extent, party appointment of tribunal members serves to promote or to imperil the equality of the parties. The particular questions that arise in this context are:

- (a) Whether enabling parties to choose their arbitrators can affect the objectivity of the decision-making process, if it encourages each party to appoint individuals who are sympathetic to their position, a selection process that has the potential to create a moral hazard or to lead to the dependence of particular arbitrators on particular appointing parties or categories of parties (whether investors or States);**
- (b) Whether, conversely, a system of party appointment promotes legitimacy through ensuring that both the private party claimant and the State have an equal stake in the constitution of the tribunal that will decide their dispute, which in turn promotes engagement and compliance;**

- (c) If a standing tribunal is established, how to ensure that the selection process for its members is impartial;**
- (d) In particular, if all the Tribunal members are appointed by States, how to ensure that it does not or is not perceived by its composition as institutionally favouring States;**
- (e) Whether that risk (if it exists) could be mitigated by the incorporation into the system of some involvement of groups representing the investment community.**

Stanimir Alexandrov

The autonomy of the parties, including the right to appoint their arbitrators and agree on the presiding arbitrator (or on a procedure of appointing the presiding arbitrator), is one of the basic tenets of arbitration (it is, of course, not particular to investor-State arbitration). The argument that the current method of constituting arbitration tribunals does not ensure equality is tantamount to an argument that arbitration as such, as a method for dispute resolution, does not ensure equality.

The more relevant question relates to the line between a neutral adjudicator and an arbitrator who is essentially an advocate for a party's position. In that sense, to paraphrase a famous saying, arbitration is perhaps far from ideal but by far better than the alternatives.

A permanent adjudicative body will not resolve that problem. If its members are appointed by the States, that would create inequality. Incorporating groups that speak for the business community is an interesting idea but hard to implement in practice. The business community doesn't speak with a unified voice. Moreover, too many groups claim to speak for the interests of the business community. It is difficult to see who and how would determine which is the real voice of the business community.

An interesting alternative to consider is appointments of arbitrators by the institution, e.g., ICSID. Part of the problem is that ICSID must appoint from the roster, which of course is comprised of State nominees. If the option of ICSID-appointed tribunals (all three arbitrators) is to be seriously considered, the current 10-member Chairman's list should be expanded very significantly. That would allow ICSID (rather than States) to place potential arbitrators on a much larger roster and thus have a much larger pool to choose from if called to make all appointments itself.

Laurence Boisson de Chazournes

The questions surrounding the constitution of a tribunal relate more to the issue of party autonomy than equality. This said, I don't necessarily

regard party appointment as a problem as all arbitrators are bound by the same obligations.

While at first glance a standing tribunal may appear to reinforce the neutrality of arbitrators, it carries the inherent risk of creating an imbalance between the parties by depriving non-state parties of their right to appointment. States, on the other hand, would retain this power, not necessarily in specific cases, but when establishing a roster. It is therefore necessary to involve non-state parties in the establishment of a standing tribunal if its attractiveness is to be maintained.

Pierre d'Argent

Any system where parties are entitled to have a say in the authority making the decision necessarily results in conferring power to the parties, which in turn will lead each party to limit the risk of an adverse decision by carefully selecting their arbitrator. The fairness of the process stems from the equality of the parties in that regard, in the sense that one could think that the perceived sympathies of each party appointed arbitrator cancel each other, deferring outcome uncertainties to the presiding arbitrator. If arbitration is by definition a system where parties choose their judge, it seems inevitable that, in investment arbitration (compared to commercial arbitration), such choice has resulted in classifying arbitrators in categories (sometimes against their own will or intention), because of the nature of the obligations that serve as reference to adjudicate the claims.

Having a system of party appointment certainly promotes engagement of the parties in the adjudication process, giving them a sense of control over it, but I am not sure it is a factor for better compliance. It might be a factor for further contestation at the annulment stage, while compliance will often require enforcement.

I am not in favour of having the investment community involved in the selection of Tribunal members appointed by States (or other public authorities like the EU). Standing tribunals would need to be staffed by members appointed by public authorities. In CETA, each side may appoint one-third of judges of their own nationality, the last third being made of non-EU and non-Canadians who serve as presiding members: it is not difficult to see that such system essentially entrusts third nationals with the power to make the decision.

One way to ensure independence vis-à-vis the appointing public authorities and increase trust in the Tribunal from the investment community is for judges to be appointed for one long term and to prohibit reappointment.

EQUALITY OF PARTIES BEFORE INTERNATIONAL INVESTMENT TRIBUNALS

Needless to say, institutionalization has a bearing on interpretation over time and how cases are argued; therefore, the first appointments are of a particular importance.

Andrea Giardina

(a) Ok on the suggestion that enabling the parties to choose their arbitrators may cause the dependence of particular arbitrators from their appointing party.

(b) In general, party appointment promotes legitimacy, engagement and compliance and this is even more true if the President is selected by the two party appointed arbitrators.

(d) This problem manifestly exists also before constitutional or superior courts. Judges are usually appointed and paid by the State; nevertheless they remain impartial also in disputes where a public authority is a party.

Mojtaba Kazazi

(a) Arguably, there are sometimes problems with the system of party appointment of arbitrators. Nevertheless, it should be recalled that the appointment of arbitrators by the parties is indeed the corner stone of arbitration and its main distinction with a court system. The appointment of arbitrators by arbitral institutions is not a deviation of this as it is done with the consent or at the request of and delegation from the parties, and where the parties cannot agree on arbitrators. Similarly, Iran-US Claims Tribunal judges are appointed by the governments since this is a diplomatic protection situation, is one tribunal and treaty based.

(b) Generally, this is a matter whose impact goes beyond the issue of equality of parties. If a standing tribunal is established, the selection of the tribunal members by States will not necessarily lead to impartiality of the members or to conflicts of interest. While additional measures and controls may be built into the system to hedge against possible impartiality or such a perception, as is done for instance in CETA, I am not sure that involvement of groups representing the investment community is the best solution. Such a measure would require careful consideration and formulation as to its scope, limits and conditions before it can be implemented, and even so it may lead to further complications as it could cause expectation from civil society organisations to be involved as well on the ground of public interests.

Marcelo Kohen

L'un des traits essentiels de l'arbitrage est la possibilité pour les parties au différend de nommer un (ou plusieurs) arbitres. Enlever cette possibilité implique abandonner l'arbitrage et être en présence d'un autre

système de règlement juridictionnel des différends, par exemple, une cour ou un tribunal permanent. Cette dernière possibilité est actuellement proposée et envisagée (cf. Gabrielle Kaufmann-Koller et Michelle Potesta, “Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap (CIDS Report)” (2016) et “The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards (*CIDS Supplemental Report*)” (2017)). Si une Cour ou un tribunal permanent devrait être créée, sa composition devrait être assurée par des conditions strictes liées aux compétences des personnes proposées comme candidates. Par définition, un tel organe juridictionnel permanent ne peut être qu’une création interétatique par le truchement d’un traité. Sa composition ne peut être que sur la base des propositions et de l’élection par les Etats parties au traité. Le fait que des investisseurs ne participent pas à cette procédure de constitution ne porte pas atteinte à l’indépendance et à l’impartialité de la cour ou du tribunal permanent, comme le montrent les Cours des droits humains existantes sur le plan régional.

Vaclav Mikulka

A system of parties’ appointment of tribunal members, does not seem to me as representing a risk to the objectivity of the decision-making process, and certainly nor to the equality of the parties. Enabling parties to choose their arbitrators is in fact an example of application of the principle of equality of parties.

Creation of a standing tribunal would not necessarily make moot the question of parties’ appointment of arbitrators. Practice in dispute settlement before international courts reveals that States rarely miss the opportunity to appoint ad hoc Judges in these litigations. It would not be surprising if a tendency to preserve some room for the parties in the choice of arbitrators would continue even in the context of discussions concerning establishment of a standing investment tribunal.

August Reinisch

As outlined, I agree that the arbitration paradigm which gives both parties the opportunity to appoint an equal number of arbitrators may serve the equality of the parties before the tribunal but it also has its intricacies.

In many respects, a standing tribunal could decrease the problem of arbitrators feeling compelled to serve “their” parties. Unilateral appointment powers of States, however, carry the inherent danger of

appointing pro-State arbitrators to an extent that may render the system no longer attractive for those for which it was intended to work, foreign investors. Whether that will be adequately counterbalanced by State appointments of adjudicators who may also sufficiently take investor interests into account (being in the long-term interest of home States) remains to be seen.

Brigitte Stern

I do not think that enabling parties to choose their arbitrators can affect the objectivity of the decision-making process, precisely because there is an equal right to participate in the constitution of the tribunal. On the contrary, it is indeed my personal experience as an arbitrator, that the careful selection by the parties as well as the diversity of backgrounds of the arbitrators definitely leads to unbiased and committed panels able to master and decide the most difficult cases through internal discussions within the panel and widely explains the overall success of investor-state arbitration as well as the general support of both investors and States.

Tullio Treves

Enabling parties to choose their arbitrators is a fundamental element of the very notion of arbitration, notwithstanding some exceptions remarked by the *rapport préliminaire*. I think it should be maintained in view of its importance to ensure the equality of parties. Some attenuations could be considered in order to encourage parties to avoid selecting arbitrators identifiable as extreme “pro-State” or “pro-investor”. A right of veto on the other side’s first choice (or first two or three choices) could be considered. In the perspective of a permanent tribunal the key question will be the selection of its members and how to avoid that Governments select automatically pro-State judges/arbitrators. The parties are not involved in the choice of arbitrators, save in the limited sense that, if the bench sitting in a particular case is to be formed from among the members of the permanent tribunal, each party is given the possibility of choosing a member of the bench. Otherwise, equality of the parties (ie equality of treatment of the interests of investors and States) could be ensured only through a transparent system of selection of the members of the permanent tribunal, in which all stakeholders are involved.

Raúl E. Vinuesa

The possibility for Parties to a dispute to choose their arbitrators cannot affect the objectivity of the arbitration process. The essence of the arbitration system relies on the appointment of arbitrators by Parties to a dispute. Basic requirements for the appointment of arbitrators are related to the maintenance of their independence and neutrality.

When there is no Parties' agreement on the presiding arbitrator, transparency on the method to be applied by an appointing authority should be encouraged. Participation of the presiding arbitrator in previous cases involving the same issues or the same parties should also be taken into account.

The appointment by States of members of a permanent international tribunal should preserve a fair equilibrium between States traditionally exporting investments and host States. The incorporation into the members' selection scheme of groups representing the investment community should be discouraged because different groups will have diverse and even contradictory interests. Foreign investors' interests are generally identified and advocated by investment exporting States: They are the ones that eventually could neutralize host States' appointment preferences.

(5) *Counterclaims.* The ability of a respondent to assert a counterclaim serves the equality of the parties by ensuring that the tribunal is able to give even-handed consideration to the claims of both parties arising out of the same subject matter. In investment arbitration, the ability of a State to assert a counterclaim may rebalance the asymmetry that otherwise applies where the claimant is always an investor. The ICSID Convention provides for counterclaims, but to date no such counterclaim has succeeded. Two questions of law arise:

(a) *Consent.* Does a one-way dispute settlement clause in an investment treaty operate to exclude any counterclaim by the State as outside the jurisdiction of the tribunal *or* does the investor's institution of a claim—the means by which it gives it consent—confer jurisdiction on the tribunal for a counterclaim on the same subject matter?

(b) *Admissibility.* What is the test for the requisite connection between claim and counterclaim for the latter to be admissible? Is it sufficient that the two claims arise out of the same investment *or* must they also arise from the same legal source, and, if the latter, why?

Stanimir Alexandrov

There is no reason to bar counterclaims. The ICSID Convention already allows them. They have to be within the scope of the tribunal's jurisdiction, of course, i.e., within the scope of the applicable arbitration clause or agreement. If they are, they must be allowed. In the specific context of an IT, a counterclaim may be outside of the scope of the provision granting jurisdiction if that provision is limited to disputes

relating to a violation of the treaty (because arguably an investor would not be capable of violating a treaty under which it has no obligations). But, as discussed earlier, there are treaties with broader grants of jurisdiction (in relation to “any” dispute or to “disputes” in general) that make counterclaims possible. Moreover, States may negotiate treaties that, in addition to granting investors rights and protections, also impose upon them certain requirements. For example, the requirement that the investment be made in accordance with the law of the host State is already a feature of many treaties. While a failure to meet that requirement is typically invoked as a defense, there is no reason why the State could not invoke it as a counterclaim if it has suffered harm as a result of the investor’s illegal conduct in making the investment.

Laurence Boisson de Chazournes

With regard to counterclaims, particular attention should be paid to the jurisdictional clause in order to avoid any obstacles. Furthermore, in order for a counterclaim to be admissible, it should be made clear that it has to be juridically connected with the principal claim,⁵ even if it is not expressly provided for in the text.⁶

In order to overcome the hurdles that exist with the traditional model of BITs, there is now a tendency to include explicit provisions in recent investment agreements, ensuring that the tribunals have jurisdiction to hear counterclaims sufficiently connected to the dispute.⁷

Pierre d’Argent

Consent: only an explicit, or at least clear, exclusion of counterclaims in the jurisdictional instrument should preclude the respondent State from presenting one. Indeed, counterclaims being a standard form of incidental proceedings in domestic and international law, it can be argued that when consenting to investment arbitration, States understood that they would not be deprived of such possibility, unless they specifically excluded it. It is not too demanding on investors that they proceed on the basis of the same understanding. Equality of the parties also requires that claimant is

⁵ PCIJ, *Factory at Chorzów (Merits)*, Judgment of 13 September 1928, PCIJ series A, no. 17, 3, 38.

⁶ See, for instance, Article 47 of the ICSID Additional Facility Rules.

⁷ See Makane Moïse Mbengue and Stefanie Shacherer, “The ‘Africanization’ of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime”, *The Journal of World Investment & Trade*, 2017, No.3, pp. 444-445.

presumed to accept to face a counterclaim once it begins proceedings and affirms that jurisdiction exists, irrespective of the later termination of the instrument providing jurisdiction for the claim and the counterclaim (since the preliminary report, see ICJ, *Nicaragua v. Columbia*, Order of 15 Nov. 2017).

Admissibility: the principal claim and the counterclaim must at least arise out of the same investment and the connection between the two needs to exist both in fact and in law (see Order of 15 Nov. 2017). The factual connection can only be decided on a case-by-case basis. As far as the legal connection is concerned, it seems too restrictive to require that the same legal source must serve as the basis of the principal claim and the counterclaim that responds to it. Besides, if that were the case, consent and legal connection would most of the time coincide and the issue of admissibility would collapse into a purely factual issue.

Giorgio Gaja

However, when a one-way dispute settlement clause gives an arbitration tribunal jurisdiction to decide more generally on investment disputes, the investor's consent to the jurisdiction of the tribunal, given by seising it with a dispute, also implies consent to the tribunal's jurisdiction with regard to counterclaims concerning the investment dispute submitted to arbitration. Thus, in *Saluka Investments BV v Czech Republic* an arbitration tribunal observed in 2004 that "the jurisdiction conferred to it by Article 8 [of the bilateral investment treaty between the Czech Republic and the Netherlands], particularly when read with Articles 19.3, 19.4 and 21.3 of the UNCITRAL Rules, is in principle wide enough to encompass counterclaims".⁸ The interpretation to the effect that consent to jurisdiction over counterclaims is implied is not necessarily based on the principle of equality, but that principle may be invoked in order to reinforce it.

Andrea Giardina

(a) and (c): the consent to the counter claim should find its legal basis on the clause concerning the arbitration included in the applicable BIT or Multilateral Agreement. Sometimes, the applicable treaty mentions the sole possibility that an investor starts the arbitration and does not mention possible counterclaims by the host State. Thus, the question arises: is the

⁸ *Saluka Investments BV v Czech Republic* (Partial Award) PCA Case No 2001-04, 15 ICSID Rep 274 (2004), [39].

counterclaim by the State implicit in the clause particularly by virtue of the equality principle? Or is the clause be interpreted as it literally stands? Obviously, if the arbitration finds its ground on a specific contract concluded by the foreign investor and the host State the arbitral clause included therein will legitimate both the investor and the host State to file counterclaims.

Mojtaba Kazazi

(a) It is much more preferable, cost and time efficient, and fair if potential counterclaims are reviewed in the same proceedings together with the claims. I fully agree with the Rapport that the *ability of a respondent to assert a counterclaim serves the equality of the parties by ensuring that the tribunal is able to give even-handed consideration to the claims of both parties arising out of the same subject matter*. In my view, filing a claim generally implies consent for a counterclaim on the same subject matter (unless specifically excluded by agreement), and therefore a one-way dispute settlement clause in an investment treaty should not operate to exclude any counterclaim by the State as outside the jurisdiction of the tribunal.

Indeed, while generally speaking a counterclaim in ICSID still has to pass the test of consent of both parties, the claimant investor who invokes a BIT, which also provides for counterclaims, to bring proceedings against the State could be deemed to have given its consent to any related counterclaim (See, e.g., model BITs of India and SADC.)

(An interesting case with regard to counterclaim is *Urbaser S.A. and CABB v. Argentina* (ICSID Case No. ARB/07/26), Award, 8 December 2016, where the Tribunal accepted jurisdiction on the respondent State counterclaim for the claimants' alleged violation of the international human right to water.)

(b) *Admissibility*. As to the requisite connection between claim and counterclaim for the latter to be admissible, I would favour a wider interpretation and including claims and set-offs arising out of the same investment.

Marcelo Kohen

La possibilité de présenter des demandes reconventionnelles constitue en effet un moyen de balancer la saisine systématique des tribunaux arbitraux par les investisseurs étrangers. Le fait que cette possibilité existe constitue aussi un élément à prendre en considération par le défendeur lorsqu'il introduit une instance arbitrale. Le principe procédural de l'économie des moyens commande aussi d'accepter les demandes reconventionnelles. Je ne me prononcerai pas ici sur le point de

savoir si cette possibilité existe même dans le cas où les instruments de base ne prévoient que la saisine par l'investisseur uniquement. J'estime que dans les situations où on peut soulever des demandes reconventionnelles, les conditions requises par les tribunaux ne doivent pas atteindre le niveau d'exigence établi par la jurisprudence de la Cour internationale de Justice. L'existence de compétence, l'identité des parties et un lien de connexité dont le seuil ne doit pas nécessairement être trop élevé devrait suffire pour déclarer une demande reconventionnelle admissible. Le standard établi dans l'affaire *Goetz c. Burundi* semble approprié.

Vaclav Mikulka

The possibility of counterclaims arising out of the same subject matter is an important aspect of equality of the parties. It also serves the goals of judicial and parties' economy. The issues to be clarified could include, *inter alia*, question whether the counterclaims are subject to the same jurisdictional and admissibility requirements as if they were submitted separately, i.e. as claims (see e.g. the temporal aspect of the origin of the counterclaim).

Whether respondents' ability to assert a counterclaim may rebalance the existing asymmetry where the claimant is always an investor, depends primarily on the factual existence or non-existence of such counterclaims. It can't be assumed that for each claim there is likely a counterclaim. For rebalancing the above-mentioned asymmetry, the mere ability of a respondent (State) to assert a counterclaim should therefore not be overestimated.

August Reinisch

Counterclaims appear to be exceptions to this asymmetrical system of investment treaty arbitration in so far as it serves judicial economy to pool questions that are intrinsically related in one adjudicatory process. The fact that counterclaims are rare is not surprising since, as mentioned under Question 1, States may regulate the conduct of foreign investors within the domestic legal order and thereby pursue most possible legal claims against investors.

For practical purposes, I think it would be advisable if investment treaties contain sufficiently clear language ensuring that counterclaims are admissible and tribunals have jurisdiction to hear counterclaims closely connected to the main claims.

Brigitte Stern

Counterclaims should indeed be accepted, on the condition that they arise from the same subject matter. This is a delicate issue. For example,

if an investor does not pay its taxes, but the case is about a cancellation of a permit of exploitation of a mine because of violation of environmental standard by the investor, is a counterclaim of the State asking the Tribunal to grant to it the amount of unpaid taxes arising from the same subject matter? Is it sufficient that the issues are “related to” the same investment? Or is more needed? These are questions that need quite some elaboration. It can also be reminded here that when Serbia raised a “counterclaim” that they were facing a genocide in the Genocide case between Bosnia and Serbia, in which the claim of Bosnia was that they were facing a genocide, the Court did not consider that these were two distinct issues, but that they emanated from the same global pattern of facts. This illustrates the delicacy of a decision on the admissibility of counterclaims.

Tullio Treves

Counterclaims are useful for judicial economy, and economy of the parties’ resources. Interpretation of the jurisdictional clauses of treaties to the effect that consent to arbitration includes also consent to counterclaims should be encouraged and so should the interpretation that the connection necessary for making the counter-claim admissible may consist in that it is based on the same investment.

Raúl E. Vinuesa

The fact that Investment Treaties do not authorize States to claim against investors through an international arbitration process, does not affect a general principle of law that entitles respondents to introduce counterclaims as long as certain pre-requisites are fulfilled. The institution of a claim by an investor in principle, confers *prima facie* jurisdiction to entertain counterclaims.

Several times over the past, respondent States have introduced counterclaims that disguise independent claims, even claims that were contemporarily dealt by domestic courts: Admissibility of counterclaims requires that they should be directly related to the same investment and dealing with the same subject matter.

(6) Multiple claimants. Resort to an international investment tribunal is designed on the basis of a paradigm case of a bilateral dispute between a single investor and a State. How can the expansion of the process to admit additional parties be accommodated within the equality principle?

(a) To what extent (if at all) does the pursuit of claims by multiple claimants in the same proceeding and against the same respondent State affect the equality of the parties?

(b) Is it necessary that the respondent give its specific consent to a plurality of claimants in a multi-party arbitration *or* does it suffice that each claimant may establish consent to their claim and that the claimants share an identity of interest?

Stanimir Alexandrov

To a certain extent the paradigm case of a single investor submitting a dispute against the State is already superseded by the realities of international commerce. It is hardly questioned, for example, that two entities of the same nationality who are the two shareholders in a local company claimed to have been expropriated do not need to initiate two separate arbitrations. They can be two claimants in the same case – in relation to the same facts, the same investment, the same State measure, the same damages, and under the same IT. Another example: a very large number of ITs allow both the foreign parent and the local subsidiary (if controlled by the foreign parent) to initiate arbitration as co-claimants. This is also expressly allowed by the ICSID Convention. Again: two claimants in the same case – in relation to the same facts, the same investment, the same State measure, the same damages, and under the same IT.

Thus, the question is where the line should be drawn. In the scenarios above, it is the same investment, the same measure, the same IT that come into play. Can multiple unrelated claimants submit multiple disputes, relating to multiple unrelated investments, involving multiple unrelated measures of the host State, under multiple BITs? In other words, can there be multiple claimants in a situation where the only commonality is the host State?

The answer to those questions depends to a large extent on the discussion relating to the constitution of tribunals. One argument of the State against multiple claimants would be that it is entitled to multiple proceedings because it has the right to appoint different arbitrators in each individual proceeding. If the arbitrators are not appointed by the parties and this argument is thus moot, then the question becomes one of efficiency rather than equality.

Laurence Boisson de Chazournes

As with counterclaims, the issue of consent for multiple claimants depends on the interpretation of the jurisdictional clause. In addition, as indicated in the Preliminary Report, the wording of Article 25 of the ICSID Convention deserves further analysis in order to delineate the notion of “the legal dispute” in the context of multiple claimants.

Pierre d'Argent

I have no specific views on this (except that the multiplication of claimants on the same subject matter and claim should not result in an unequal allocation of written and oral pleadings) and look forward to our discussions.

Mojtaba Kazazi

The pursuit of large claims by multiple claimants in the same proceeding and against the same respondent State may create a complicated situation for respondent. It would also require an efficient case management from the tribunal and its secretariat. For the same reason, it seems necessary that the respondent give its specific consent to a plurality of claimants in a multi-party arbitration.

Marcelo Kohen

La possibilité d'introduction d'une instance arbitrale commune par un très grand nombre de demandeurs n'exclut pas l'analyse de toutes les conditions que ceux-ci doivent réunir pour établir la compétence du tribunal et pour que la demande soit déclarée recevable. Le fait d'introduire une demande massivement collective ne donne ni des avantages supplémentaires aux demandeurs ni ne permet un assouplissement des exigences procédurales quant à la démonstration de leur capacité d'ester ou d'autres éléments de l'affaire.

Vaclav Mikulka

Assuring the balance between the requirements of procedural economy, which speak in favour of multiple claims and those aiming at ensuring equality of the parties, including considerations of the risk that one party might be exposed to an unfair burden resulting from multiple claims, is an important matter. While there is no reason to discourage multiple claims in general or to propose rigid requirements in this respect, it is important that the respondent be given the opportunity to express its view on the matter at an earliest possible stage. Any guidance on this matter to the tribunals should remain sufficiently flexible.

August Reinisch

Again it appears to me to be primarily a question of judicial economy to avoid unnecessary multiplication of proceedings if multiple claimants have identical claims against the same State. Being exposed to identical proceedings seems to be more onerous for States than to defend itself in a single consolidated case. As pointed out in the Preliminary Report, it seems crucial to address the concept of “identity of *interest*” extensively.

Brigitte Stern

I think two aspects should be distinguished here. One case is when a mother company and a subsidiary of the same nationality sue a State, which I think is unproblematic. The problem arises with cases like *Abaclat*, which in my view should never have proceeded, as it brings about an entire change of paradigm. The consent of each investor was not really verified etc

Tullio Treves

The presence of multiple claimants may jeopardize the equality of the parties' right to be heard, and of the balance between the parties. In devising tests for determining the admissibility of claims by multiple claimants and the organization of proceedings in such cases, equality of the parties must be the guiding principle – to be balanced with judicial economy.

Raúl E. Vinuesa

Multiple claims should be encouraged as long as there is identity of claims based on same facts and the same applicable law. An evident procedural economy will equally benefit multiple claimants as well as the respondent State.

Investment claims concerning the so-called class actions introduced different problems; most of them related to jurisdictional objections and/or the admissibility of each individual claim (as the recognition of each claimants' nationality, their investors' status under the relevant applicable law and individual issues over *ratione tempore* matters) How those issues could challenge the equality of parties before international investment tribunals, appears to need further discussions within the 18th Commission.

(7) Third person submissions. The admission in investment arbitration of submissions from third persons, or *amicus curiae* submissions, has developed in part to meet an equality concern at the constitutional level: that civil society organisations should be heard before the tribunal where public interests are affected. In the case of plurilateral treaties, tribunals may also be called upon to hear submissions from non-disputing States parties. At the same time, the tribunal must ensure that participation of such non-parties does not unfairly prejudice either party.

(a) To what extent have these two objectives been reconciled in the emerging practice of investment tribunals?

(b) Can any more precise guidance be given?

Stanimir Alexandrov

Perhaps more precise guidance can be given but the existing rules and jurisprudence may well be sufficient and leave further details to the discretion of the tribunals in each specific case. The existing rules and the existing jurisprudence seem to strike the right balance between the two objectives.

Laurence Boisson de Chazournes

The issue of third person submissions is not an equality issue *per se*. This being said, such submissions play an important role in providing the tribunal with another perspective on issues of public interest. At the same time, a tribunal must ensure that the submission does not cause undue hardship to the disputing parties. In addition, when a tribunal accepts such a submission, it should not place an onerous financial burden on the one producing it. Otherwise, there is a risk of discouraging any subsequent submission by third persons. As the Preliminary Report rightly points out, the aim is not to place such persons in the same position as the disputing parties but to provide a different perspective that might be of interest to the tribunal. As a result, the additional costs arising from these submissions should be kept to a minimum and should be included in the costs of the arbitral proceedings.

Pierre d'Argent

I have no specific views on this and look forward to our discussions.

Mojtaba Kazazi

The guidance provided in UNCITRAL Transparency Rules seems sufficient for limiting and controlling the third parties' submissions and for protecting the parties' rights. In any event, as mentioned in the Rapport, *the tribunal must ensure that participation of such non-parties*

does not unfairly prejudice either party, and this requires a case-by-case analysis and decision.

Marcelo Kohen

Je n'ai pas de commentaires à faire sur cette question à présent.

Vaclav Mikulka

One of the requirements should be that the views of parties concerning the admission of third person submissions are duly ascertained and taken into account by *the* tribunal as part of the overall consideration of the acceptability of the said submissions.

August Reinisch

I am convinced that third party submissions serve an important purpose in investment arbitration. It is the main avenue for civil society to be heard where matters of public interest are litigated. Also in regard to practice before other dispute settlement institutions such as the WTO DSB it seems difficult to come up with general rules that are going beyond an authorisation given to tribunals to ensure that the equality of the parties is respected by the admission of *amicus* briefs.

Brigitte Stern

I think that tribunals have been dealing quite well with these kind of issues and the fact that the amicus is restricted as far as subject matter and length of presentation is concerned is a good practice.

Tullio Treves

The possibility for third persons to make submissions as *amici curiae* is now broadly accepted in investment arbitration as a means for making tribunals aware of the perspective of civil society or, in the case of multilateral treaties, of that of other parties. Depending on the content and orientation of these submissions, they may tilt the balance in favour of either party to the dispute. From the perspective of equality of parties, procedural devices, such as those exemplified in *rapport préliminaire*, are necessary and opportune, to avoid submissions whose exclusive purpose is to support one party, and to maintain the good order of the proceedings.

Raúl E. Vinuesa

It has already been experienced that third persons' submissions may be considered *desirable* in order to voice civil society concerns.

Submissions of non-disputing third parties to multilateral treaties are also relevant for tribunals to understand the scope and content of common parties' intentions.

EQUALITY OF PARTIES BEFORE INTERNATIONAL INVESTMENT TRIBUNALS

Any experienced tribunal should be able to detect interested *amicus curiae* presentations as well as non-disputing third parties' submissions that are biased or prejudiced to one side. The above could not interfere with the right to third person submissions as long as the Tribunal maintains its discretion to perceive the real value of such presentations. In no way third person submissions could affect the equality principle before international investment tribunals

(8) Evidence. Ensuring the equality of arms between the parties can give rise to particular issues in an investment tribunal in view of the asymmetric nature of the parties:

- (a) In what circumstances may a State properly invoke state secrecy as a ground to exclude documents from disclosure?**
- (b) In such an event, how can a tribunal ensure equality of arms?**
- (c) By what process and by whom should a decision to exclude such documents from production be made?**
- (d) In what circumstances may an independent review process by a person separately appointed for the purpose by the tribunal be justified?**

Stanimir Alexandrov

Here again the best solution may be to leave the matter to the discretion of the arbitrators in each specific case.

Laurence Boisson de Chazournes

I am not sure whether recourse to an independent review process is appropriate. I tend to believe that tribunals are in the best position to assess the risks and benefits of disclosing certain secret documents. A way of dealing with secret documents could be to use a confidentiality protocol binding the parties and the tribunal. In this way, the risks associated with the disclosure of the sensitive documents would be offset by the commitments under the Protocol.

Pierre d'Argent

I have no specific views on this and look forward to our discussions.

Mojtaba Kazazi

(a) While the state secrecy should be respected, invoking it as a ground to exclude documents from disclosure, should be limited to a minimum, and where manifestly necessary and justified or evidence to that effect is provided. The tribunal can also be more sympathetic on documents that are classified as secret in accordance with the rules of the relevant national law before the start of the arbitration.

(b) In such an event, a tribunal should try to ensure equality of arms by taking proper measures under the circumstances of each case.

(c) The tribunal should decide whether to exclude the requested documents from production and what are the consequences of that for the case. The process would include reviewing of evidence and information provided by the parties, holding a special hearing if justified, and any other measure that the tribunal may find necessary under the circumstances of a given case.

(d) In case of state secrecy, an independent review process may be applied by the tribunal where deciding on a claim of secrecy of documents would require expertise that the tribunal does not possess: for instance knowledge of local law and national legal criteria for state documents, or fluency in the language of the documents. Sometimes the independent review process is used to avoid the inspection by the tribunal of the documents for which confidentiality is being claimed, prior to deciding on their exclusion or production.

Marcelo Kohen

Cette question délicate a généralement été abordée avec un grand laxisme dans la pratique. Le secret ou la confidentialité des documents étatiques est souvent soumise à une législation interne et fait partie des compétences souveraines. Exiger de l'Etat la production des documents considérés par lui comme secrets ou confidentiels – même pour que ce soit le tribunal qui en décide – me paraît aller au-delà des compétences d'un tribunal arbitral d'investissements. Pour ces mêmes raisons, j'estime que déléguer la décision à un organe tiers ne résout pas le problème. Le parallèle lorsque l'investisseur invoque des raisons de confidentialité commerciale doit être mentionné. Il n'y a aucune raison pour que l'investisseur étranger obtienne un droit de consulter une documentation étatique alors qu'un investisseur national serait privé d'en obtenir sur le plan interne. Il appartiendra au tribunal arbitral de tirer ses conclusions sur la base de la preuve existante et des inférences qui lui sont possibles.

Vaclav Mikulka

It might be impossible to define positively all circumstances when the State may properly invoke State secrecy as a ground for exclusion of documents from disclosure. It might also be difficult to define even the situations in which the State should not have the ability to do so. The focus should therefore be mainly on the option of an independent review process suggested under 8(d). However, the purpose of this process should be further specified. Similar consideration should be given to the

situation in which a private party invokes confidentiality of documents to exclude them from disclosure.

August Reinisch

State secrecy as a bar to the availability of evidence is certainly a very difficult problem and one of the central ones stemming from the inequality of the parties in this form of dispute settlement. Further reflection will be required but it appears that the availability of a separate third institution to make the determination whether certain documents should be excluded or not is preferable to having a tribunal assess this question and then proceed with deciding on the dispute even in case of exclusion. Perhaps it is worth considering whether the same third institution deciding on a challenge to the impartiality of an arbitrator could also be consulted with regard to evidentiary matters.

Brigitte Stern

I am not sure this is really a problem of inequality, because if States can indeed invoke secrecy, investors often invoke commercial confidentiality. It should always be a third party deciding on this, because if it is the Tribunal, it cannot be avoided that the tribunal has seen the documents even if it decides that they should not be produced and it might unconsciously be influenced by their content.

Tullio Treves

Secrecy of certain documents is certainly a possible objection that can be raised by defendant States against requests for their production – similarly to possible objections by investors concerning commercial confidentiality of certain documents. Secrecy claims should not be abused and should be regulated by arbitral tribunals having in mind the legitimate role that secrecy plays in State affairs and the equality of parties and proper administration of justice in the specific case. The possibility to appoint a neutral expert to assess the validity of the claim of secrecy and exactly which documents or which parts of documents may be withheld on the basis of a claim to secrecy may be considered. An interesting precedent in a State-to-State arbitration is the *Guyana v. Suriname* award of 17 September 2007 in which the Tribunal appointed an expert whose task was described as follows in the Tribunal's Procedural Order Nr. 1:

5. The expert shall, at the request of the Party producing the file or document, review any proposal by that Party to remove or redact parts of that file or document [as each Party may have a legitimate interest in the non-disclosure of information that does not relate to the present dispute, or

which, for other valid reasons, should be regarded as privileged or confidential].⁹

Raúl E. Vinuesa

Any experienced tribunal will properly address each one of the situations concerning States invoking 'state secrecy' as a ground to exclude documents from disclosure. On the same line, an experienced tribunal will apply its own discretion to deal with Claimants' claims concerning confidentiality as a way to oppose disclosure of their requested documents.

(9) Abuse of police power. A further challenge to the equality of arms can be posed by the abuse of a State's police power. At the same time, an investment tribunal is not a criminal court: its mandate in this regard is limited to ensuring the equality of parties appearing before it for the resolution of the investment dispute:

(a) In what circumstances (if at all) should a tribunal recommend provisional measures in relation to a criminal investigation or prosecution?

(b) What steps should a tribunal take to ensure that evidence is not obtained improperly?

Stanimir Alexandrov

Again, this may be a matter better left to the discretion of a tribunal in light of the specific circumstances of the case.

Pierre d'Argent

I have no specific views on this and look forward to our discussions.

Mojtaba Kazazi

(a) Save for very unusual and exceptional circumstances, an investment tribunal should not recommend provisional measures in relation to a criminal investigation or prosecution.

(b) The steps that a tribunal can take to ensure that evidence is not obtained improperly seems limited, and includes requesting the parties to provide explanations as to how they have obtained the evidence, and an

⁹ This is the text of Procedural order Nr. 1 as set out in the text of the Award, as available at www.pca-cpa.org at para 47; the text of the Order separately reproduced on the PCA website omits the sentence between square brackets.

advance warning of negative impact on admissibility of improperly obtained evidence.

Marcelo Kohen

Comme la question même l'affirme, le mandat du tribunal est de garantir l'égalité procédurale des parties et de régler le différend relatif à l'investissement. Le tribunal arbitral n'a pas de compétences en matière pénale et ne peut s'immiscer dans cette matière, que ce soit par voie des mesures conservatoires ou autrement. En ce qui concerne la production de preuve obtenue par des moyens illicites, celle-ci est inadmissible et le tribunal a le pouvoir de demander des explications quant à la manière dont la preuve a été obtenue.

Vaclav Mikulka

The prevention of the abuse of criminal proceedings is a matter which should be considered solely from the perspective of its possible disruptive impact on the proceedings or proper administration of justice.

August Reinisch

I must say I was a bit struck by the terminology, in particular since in the context of international investment law the notion "police power" is usually regarded as referring to the broad regulatory powers, which are not considered to constitute indirect expropriation. I would rather talk about the State's power to investigate and use its criminal law to do so. I agree that here we have an example of a clear inequality between the parties whereby States are free to use their authority to enforce their own laws against investors and it would seem difficult to generally prohibit them from doing so in justified cases. Thus, any limitation of this power must be very carefully weighed – though, of course, abuse should be prevented.

Brigitte Stern

This is not an issue of "police power" which is a very specific concept in international law. It rather deals with the criminal law of the State. As a general approach, tribunals should not be too keen to stop a criminal investigation, as this is part of the fundamental aspects of sovereignty. However, if the State makes a "*détournement de procédure*" and uses the criminal prosecution to interfere for example with the arbitration the tribunal should prevent that, through provisional measures. See, of course, *Quiborax*.

Tullio Treves

Provisional measures should be used sparingly and with caution to prevent States from abusing their sovereign power of conducting criminal

investigations in their territory. It would seem that the test permitting such intervention by the arbitral Tribunal should be that the police investigations are conducted with the specific purpose of having an impact in the proceedings.

Raúl E. Vinuesa

An experienced tribunal will use its own discretion to solve any situation concerning any abuse of police power. Provisional measures in relation of criminal investigation should be granted if all requirements for the imposition of those measures are present. Investment tribunals could not in principle interfere with States' criminal competences.

(10) Substantive equality and costs. The parties may not enjoy equality of arms in substance if there is a marked imbalance in their ability to pursue their claim or defence. This consideration may equally apply to small and medium-sized claimants as to States, particularly least-developed States:

- (a) What measures may an investment tribunal properly take to protect a party from excessive costs or to compensate it for such costs?**
- (b) In what circumstances (if at all) should a tribunal be prepared to order a claimant to provide security for costs?**
- (c) Where the claim is being maintained by a third party funder, in what circumstances (if at all) should the tribunal order disclosure of the identity of that person and order them to meet the costs of the respondent in the event that the claim is unsuccessful?**

Stanimir Alexandrov

One category is clearly disadvantaged by the way the system of investor-state arbitration currently operates: small and medium-sized investors. The cases are way too expensive for them to handle. Hence the market for third-party funders. I do believe that transparency, including disclosure of the third-party funder, is appropriate. However, I don't think there is a basis to order security for costs automatically in cases where there is third party funding. The need for security for costs should be assessed on a case-by-case basis. The risk of non-payment of costs should be one of the primary considerations. Ordering security for costs every time a third-party funder is involved would in essence amount to an additional filing fee in cases of third party funding.

The critical part of the question is the first part: how to avoid excessive costs. Proceedings these days are replete with unnecessary delays,

frivolous claims, procedural gambits, frivolous challenges. I would favour crafting rules where an order of costs and fees doesn't necessarily follow the winner but takes into account – as the most important consideration – the conduct of the party in the arbitration, including any “contribution” by that party to extending the proceeding and increasing the costs.

Laurence Boisson de Chazournes

The question of the financial resources available to the pursuit or defence of a claim is perhaps one of the most important issues in practice. In particular, the growth of third-party funding in investment arbitration deserves further consideration as it affects arbitral proceedings and respondents. One way to address this issue is through upfront disclosure, possibly including the relevant arrangements subject to confidentiality requirements. Indeed, the interests of the funders and their potential relationships with arbitrators must be known to the other party and the tribunal. This can only be the case if the name or names of third party funders are disclosed. Furthermore, knowing this, a tribunal would be in a better position to grant orders for security for costs where the very strict conditions are met.

Pierre d'Argent

I have no specific views on this and look forward to our discussions.

However, a hidden financial issue seems to me often overlooked: it is whether the claim has been considered as a debt (litigious claim) in claimant's accounts, put in its books and approved by external auditors. Financially, postponing a loss is already making a profit and it should not be excluded that proceedings are kept alive for accounting and financial purposes (a quantitative study on this would be needed). Conversely, it would probably be rather exceptional to see a State make financial provision in its annual budget in order to take into account a potential future adverse award. Tribunals may want to consider those elements when discussing costs.

Andrea Giardina

I agree that third party funding and security forecasts may contribute to overcome possible marked unbalances between the parties. However, third party funding should be disclosed and taken into account by the Tribunal and (afterwards by the controlling institution and/or competent Court) in order to avoid conflicts determined by possible links between the Funder and the selected Law Firm representing the financed Party and/or the selected Arbitrator.

Mojtaba Kazazi

It is true that the parties may not enjoy equality of arms in substance if there is a marked imbalance in their ability to pursue their claim or defence. But unfortunately not all the inequalities could be easily removed. On the other hand, providing financial or other assistance to one party may look like favouring one side, which in itself is against the equality rule. In addition, it would not be easy to justify spending on the taxpayers' account for the litigation costs of a company or a State (no matter the size) in an investment dispute. Therefore, even if ways could be found to assist a party of an investment dispute, this should be limited to exceptional circumstances, and a few cases.

(a) An investment tribunal can protect a party from excessive costs by: deciding on jurisdictional issues upfront; efficient case management and procedures; avoiding unnecessary and repetitive filings; for hearings, if held, arbitrators would be fully prepared and use the occasion to receive more information and to move the case forward; limiting the awards of costs to a reasonable level (as is a practice in some domestic jurisdictions); and apportioning the costs fairly where justified.

(b) Only in exceptional circumstances a tribunal should order a claimant to provide security for costs, such as when the claim is manifestly unfounded or frivolous, or claimant is bankrupt or at imminent risk of bankruptcy.

(c) In all cases where the claim is being maintained by a third party funder, the tribunal should order disclosure of the identity and interest of that person and order them to meet the costs of the respondent in the event that the claim is unsuccessful. This is in fact another example for the situation where a tribunal may consider ordering the claimant to provide security for costs.

Marcelo Kohen

L'inégalité des parties du point de vue du financement de la procédure est un problème sérieux, qui peut très souvent militer pour qu'une partie potentielle à une affaire se désiste de la poursuivre devant le tribunal arbitral. Plusieurs moyens peuvent contribuer à au moins mitiger ce problème. Rendre la procédure moins onéreuse en est un. Le gaspillage démesuré de production de la preuve documentaire et de la reproduction, très souvent inutile des « autorités juridiques », est un problème flagrant et constant dont la mise à l'écart s'avère être une nécessité urgente. Le CIRDI et la CPA peuvent contribuer à cela en établissant au moins des lignes directrices visant à arrêter cette pratique inutile et coûteuse.

La création d'un fond de soutien aux parties aux procédures en matière d'investissements étrangers peut être envisagée, avec le concours des fonds tant publics que privés. Les conditions d'accès devraient être strictes et transparentes. La possibilité de remboursement total ou partiel en cas de succès devrait être envisagée.

L'exigence d'une garantie pour le paiement éventuel des frais de la procédure pose des problèmes délicats en matière d'égalité précisément. Une demande de ce genre devrait être traitée de manière très stricte, si bien qu'elle serait acceptée seulement si des circonstances très particulières permettent au tribunal de considérer que le risque de non-paiement existe.

Vaclav Mikulka

To propose measures aimed at reducing inequality of the parties resulting from a marked imbalance in their ability to pursue their claim or defence is a very challenging task. Similar attempts in respect of several international judicial instances provide a testimony of a rather limited success in this regard. The establishment of various trust funds to support the access of certain categories developing States seems to have rather symbolical than truly substantive impact in the solution of the core problem. The use of the model in the context of foreign investment arbitration would require its adaptation, which would not be a simple exercise, even in the context of a standing tribunal. The focus on issues mentioned under (a) – (c) therefore seem to be the proper way to pursue.

August Reinisch

Even beyond equality in general it appears to me that the question of costs of investment arbitration is one of the most important issues in practice and needs serious thinking to be overcome.

As the Preliminary Report rightly points out, the costs in particular of party representation have sometimes exploded to an extent making access to dispute settlement almost impossible to fund for some investors and also extremely burdensome for some host countries.

Consideration should be given to practical means of avoiding excessive costs. These may lie in increasing the discretion of tribunals to limit excessive and costly requests by the parties for filings, evidence, etc. In regard to third-party funding a high level of transparency seems adequate.

Brigitte Stern

The question of security for costs can arise both on the investor's side and the State's side. I think, whether the one or the other, it should be exceptional.

Tullio Treves

Financial inequality of parties is a major obstacle to the effectiveness of the equality of parties. Tribunals should endeavour to minimize unnecessary expense. Third party funding may be a solution but lack of transparency may be a danger for the equality of parties. So full transparency should be obtained from the beginning of the case. Security for costs should be decided on a case-by-case basis. If a permanent investment tribunal were to be established, it would become possible to consider establishing a mechanism similar to the Trust funds currently existing for the ICJ, ITLOS and PCA.

Raúl E. Vinuesa

A Tribunal order on security of costs should be discouraged on grounds that it may prejudice the final outcome of the case.

If a claimant's case is maintained by a third party funder it seems inevitable that the tribunal should order disclosure of the funder identity in order to assess any conflict of interest with the parties or with members of the tribunal.

I think that further discussions of our 18th Commission should focus on the limited chances that an investment tribunal would have to deal with possible reduction of excessive costs or eventually, adequate compensation for unnecessary or excessive costs.

General Comments

P.S. Rao

On the rest of the questions, I tend to have views similar to those expressed already so well by Professors Stern, Treves, and most recently by Mikulka.

Brigitte Stern

These are some comments flowing from a close reading of the Report and which could not be covered by the mere answers to the questions.

As far as the outline is concerned, I think that a specific point V should address the issue of "Substantive application of the principle of equality" with two rubrics:

1. Bad faith and abuse of power of the police and criminal tribunals
Intimidation and prosecution Surveillance and obtaining evidence by illegitimate means
2. Equality in the interpretation of the law.

On this issue I copy an extract of *El Paso v. Argentina*, Decision on Jurisdiction, 27 April 2006.

The idea that the principle of equality has a multi-dimensional signification is also acknowledged by the citation of Kolb cited in the Report:

“The principle of equality may be treated as a general principle of law governing the Court’s procedures that is ‘not solely a structural one, connected to the respective positions of the parties; **it is also a substantive one, connected to the objectives of the procedure and the values of substantive justice.**’¹⁰ (Emphasis added)

I think it could be best to start with the constitutional issue before the equality issues, as they are more important and also shape the way the procedural issues will be posed and solved. The equality of the parties in the procedure will not necessarily be raised in exactly the same terms, where we speak of the present system or a new International Tribunal for Investment (ITI). In fact, this is how it is announced: “*Equality as a constitutional and a procedural principle*”

The Report writes: “Equality as an attribute of the universally recognised right to a fair trial does not include, as an essential component, a right to appoint members of the tribunal.” Also in the Report, it is stated: “... party appointment is not an essential element of arbitration.” I do not agree.

As a general statement, it is correct, but I am not sure it applies in arbitration. Indeed, the essence of arbitration – as distinguished from court procedures – is precisely the fact that it is a method of settlement of the dispute where the equality of the parties goes as far as entitling them to have an equal say on the constitution of the body that is going to arbitrate their dispute. In my understanding the equal right to appoint a member of the tribunal and to have a say on the choice of the President participates to the essence of arbitration (and by the way, will be lost by the ITI, putting even in question the qualification of what it will be performing as “arbitration”).

The report says that counterclaims “have all been rejected either on grounds of jurisdiction or admissibility or on the merits.” As I think I already mentioned during our preliminary meeting, this is not correct, as counterclaims, which the Tribunal had examined by the consent of both parties were accepted in *Burlington Resources Inc. v.*

¹⁰ See R Kolb *The International Court of Justice* (Hart, 2013), 1119 for an illuminating analysis.

ÉGALITÉ DES PARTIES DEVANT LES TRIBUNAUX INTERNATIONAUX D'INVESTISSEMENTS

Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims, 7 February 2017.

* *

DRAFT RESOLUTION

Avant-Projet of the Rapporteur, 8 October 2018

The Institute of International Law,

Considering that the principle of the equality of the parties is a fundamental element of the rule of law that ensures a fair system of adjudication and is a fundamental human right recognised by Article 10 of the Universal Declaration of Human Rights 1948 and Article 14(1) of the International Covenant on Civil and Political Rights 1966,

Recalling that the Eighteenth Commission, in its Report to the Tokyo Session in 2013, had reserved for further consideration the principles applicable to the procedure of investment arbitration,

Acknowledging the contribution made by the United Nations Commission on International Trade Law ('UNCITRAL') and by the International Bar Association ('IBA') to the elaboration of important aspects of the principle in its application to international arbitration generally,

Mindful that the Convention for the Settlement of Investment Disputes between States and Nationals of Other States 1965 ('ICSID Convention') provides a framework for the resolution of investment disputes that has to date found wide acceptance amongst States and that the International Centre for the Settlement of Investment Disputes ('ICSID') is currently conducting a review of its Arbitration Rules,

Recognising that States resolved at the Fiftieth Session of UNCITRAL in 2017 to take up the topic of reform of investor-State dispute settlement, including consideration of the possibility of the establishment of a permanent International Tribunal for Investments, and the application of the principle of the equality of the parties is one of the matters under consideration,

Considering that the application of the equality principle requires specific consideration in light of the particular characteristics of international investment tribunals, comprising both arbitral tribunals and any permanent tribunal,

Adopts the following Resolution:

**PART ONE
CONSTITUTIONAL APPLICATION**

**CHAPTER I
FORUM**

Article 1

Legal character

- (1) The ability of the national of one State ('the investor') to bring a claim against another State ('the State') in respect of an investment results from the latter's consent (whether by treaty or otherwise) to submit to the jurisdiction of an international investment tribunal ('the tribunal') as a forum to resolve disputes over the actions of the State in respect of obligations from which it may not derogate at international law. It does not engage or imperil the equality of the parties.
- (2) Such a forum is designed to secure equality between the parties in circumstances where the State has the sovereign power to enforce its own law and adjudicate its claims against investors for breach of its laws before its own courts.

Article 2

Access

- (1) Both the State and the investor are equally entitled to submit a claim in relation to an investment to a tribunal, subject to the terms of the instrument of consent.
- (2) No State is obliged to submit any such dispute to a tribunal, unless it gives its consent. Otherwise, a State remains entitled to use the rights and remedies provided by its own national legal system in order to pursue its claim against an investor before its own courts.
- (3) The limitation of access to the investor of another State bears a direct relationship to the object of investment treaties, which is to promote and protect foreign investment and the rights of foreign nationals. It does not infringe the principle of equality of access. Such protection is equally available to the investors of each State when they make an investment within the scope of the treaty protections by investing in the territory of the other State.

**CHAPTER 2
TRIBUNAL**

Article 3

Impartiality

- (1) The impartiality of the members of a tribunal is an indispensable prerequisite to the equality of the parties.

- (2) The substantive standards applicable to the determination of any question relating to the impartiality of a person appointed to an international arbitral tribunal should be uniform and transparent.
- (3) The IBA Guidelines on Conflicts of Interest in International Arbitration 2014 provide a satisfactory framework of substantive rules within which to analyse questions that may arise as to the impartiality of a member of an investment arbitral tribunal.
- (4) As a procedural matter, challenges to the impartiality of an arbitrator should be determined by an independent third party decision-maker external to the tribunal.
- (5) As a consequence Member States of the ICSID Convention are encouraged to amend Article 58 so as to refer the determination of challenge applications to an independent third party decision-maker in all cases.

Article 4
Composition

- (1) The appointment and composition of a tribunal must be constituted in such a way as to ensure that the parties to any dispute heard by that tribunal are treated with equality.
- (2) This is so whether the tribunal is constituted as an arbitral tribunal or is established as a permanent tribunal. If a permanent tribunal is established, both methods of dispute resolution will continue to exist in parallel. Both must respect equality in their composition; but the different legal character of arbitration and a permanent judicial body dictate a different application of the principle in each case:
 - (a) The arbitration of investment disputes by a tribunal constituted for that purpose and composed of members appointed equally by the parties, with the president appointed by agreement (or, failing agreement, designated by an appointing authority) respects the principle of the equality of the parties, provided also that each member meets the same requirements of impartiality.
 - (b) In the case of a permanent tribunal, the principle of the equality of the parties does not require that each party retain the ability to appoint a judge. The overriding consideration is the independence and impartiality of the tribunal as a whole.
- (3) A permanent tribunal should be so constituted as to represent an equitable balance between judges drawn from capital-exporting and capital-importing States. It is not necessary or appropriate to provide for designations from representatives of commercial interests.

- (4) In the resolution of a specific dispute within the framework of a permanent tribunal, in order to respect the equality principle the composition of the particular Bench or Chamber should either:
 - (a) Exclude judges having the nationality of either the State party to the dispute or of the home State of the foreign investor; *or*,
 - (b) Ensure that both such States have the opportunity to appoint a judge of their own choice.

PART TWO
PROCEDURAL APPLICATION

CHAPTER I
PARTIES

Article 5
Counterclaims

- (1) The ability of a respondent to assert a counterclaim that is properly admissible before a tribunal is an important assurance of the procedural equality of the parties.
- (2) In order to be admissible, such a counterclaim must:
 - (a) Be within the jurisdiction of the tribunal; and,
 - (b) Arise directly out of the subject matter of the dispute.
- (3) The jurisdictional requirement is met when, by virtue of the instrument of consent invoked by the respondent, the tribunal would have had jurisdiction over the counterclaim had it been asserted as a primary claim. It does not depend upon the ground of jurisdiction relied upon by the claimant for its claim, nor is the tribunal's jurisdiction limited by the scope of the dispute as framed by the claimant in its Request for Arbitration.
- (4) Where the arbitration agreement in an investment treaty refers generally to disputes arising between a State Party and an investor of the other Party in connection with an investment, the jurisdiction of the tribunal is not limited to claims under the treaty, since the arbitration agreement is an autonomous agreement between the parties and must be construed in accordance with its terms.
- (5) Where the dispute is submitted to arbitration under the ICSID Convention, the requirement that the counterclaim must also be 'otherwise within the jurisdiction of the Centre' means that it must fall within the criteria of Article 25 of the ICSID Convention by 'arising directly out of an investment, between a Contracting State...and a national of another Contracting State.'

EQUALITY OF PARTIES BEFORE INTERNATIONAL INVESTMENT TRIBUNALS

- (6) The requirement of sufficiency of connection with the subject matter of the dispute will be met where the counterclaim concerns the same investment and the State measure that gave rise to the claim. It does not require that the cause of action be founded upon the same legal instrument or cause of action asserted by the claimant.
- (7) The tribunal may find a counterclaim to be admissible, whether it is founded upon international law or host State law, provided that it concerns a subject matter that is capable of submission to arbitration.

Article 6

Multiple claimants

- (1) Where several investors seek to institute their claims in a single international arbitral proceeding against the same State, the tribunal must ensure, in its determination of jurisdiction and admissibility and in its procedural directions, that the parties are treated with equality.
- (2) In the establishment of its jurisdiction, the tribunal must be satisfied that:
 - (a) Each claimant separately satisfies the jurisdictional requirements (both of the instrument of consent and, where applicable, Article 25 of the ICSID Convention) in order to bring its claim; and
 - (b) The claim as a whole advances a single dispute, in that the interest represented on each side of that dispute is in all respects identical, so that the respondent is not prejudiced by having to defend itself from claims that differ materially in the interest to be vindicated.
- (3) The tribunal may find such a claim inadmissible if it finds that the manner in which the claim is constituted would adversely affect its ability to ensure that both sides of the dispute are treated with the equality in the presentation of their case or in their defence of the claims.

Article 7

Third party submissions

The ability of a tribunal to admit submissions from third parties may valuably assist it to determine the dispute, by bringing a perspective that is different from the disputing parties. In order to respect the equality of the parties, in accordance with the UNCITRAL Rules on the Transparency in Investor-State Arbitration 2014:

- (a) The third party must disclose any connection, direct or indirect, which the third person has with either of the disputing parties;

- (b) The tribunal must ensure that the disputing parties are given a reasonable opportunity to present their observations on any third person submission; and,
- (c) The tribunal must otherwise ensure that any such submission does not unfairly prejudice either disputing party.

CHAPTER 2
PLEADING AND EVIDENCE

Article 8

Equality of arms

- (1) The equality of the parties includes the principle of the equality of arms, namely that:
 - (a) Each party shall have the right to be heard on the submissions of the other: *audi alteram partem*; and,
 - (b) Each party shall enjoy reciprocal treatment to the other in the procedural timetable and in matters of pleading and evidence.
- (2) In its conduct of the case procedure, the tribunal is entitled to make and enforce a procedural timetable, which promotes both efficiency and equality of the parties.
- (3) Where, exceptionally, a party is able to establish a compelling case on due process grounds for the admission of late evidence or pleading, the tribunal must be satisfied that, in so doing, it is able to afford the other party equality of treatment, including an effective right to be heard on the new material.
- (4) Equality of treatment in a hearing requires that each party be allocated substantial equality of time to plead and present its evidence; subject always to the tribunal's overall authority to ensure the fair and efficient conduct of the hearing, taking into account the number of witnesses and its own mandate to hear and test the evidence and arguments of the parties.

Article 9

Evidence

- (1) Each party shall produce to the other the documents on which it relies, since one party may not have access to and rely upon documents to which the other party has no access.
- (2) Where a party requests production of specific documents from the other party, the same standards shall be applied to adjudge the requests of both parties. The IBA Rules on the Taking of Evidence in International Arbitration 2010 provide a suitable general framework for such determinations.

- (3) In ordering a timetable for production, the tribunal should take into account the particular challenges faced by States, especially developing States, in locating and producing documents. This must be balanced against ensuring that the other party has an adequate opportunity to consider the documents within the procedural timetable.
- (4) Where the investor is part of a group of companies, the principles of equality and good faith require that it should make reasonable efforts to obtain relevant documents that are held by its parent or affiliated companies or shareholders.
- (5) The equality principle is an important consideration in a tribunal's determination of the admissibility of evidence. The tribunal may refuse to admit evidence if it cannot ensure that the other party's right to respond and defend itself can be equally protected.
- (6) Where a party has requested the attendance of a witness for cross-examination at the hearing and the party fails without a valid reason to produce that person, the tribunal is obliged to disregard that evidence in order to preserve the procedural equilibrium between the parties.

Article 10

Objections to production

- (1) The tribunal must apply the equality principle in making decisions with regard to pleas of privilege from disclosure, considering in particular that the applicable standards may differ within the national law of the respective parties and the tribunal should strive to apply a standard that operates equally for both parties.
- (2) The parties may also raise objections to disclosure with regard to documents on grounds of, respectively, commercial confidentiality or State secrecy. The tribunal should strive to secure a balance of treatment between the parties so as to ensure that each party has the ability to obtain evidence that is relevant and material to the issues in dispute, whilst at the same time respecting the wider interests of each party beyond the instant case.
- (3) In the case of a plea of state secrecy, the tribunal must balance the public interest in the administration of justice in disclosure against the public interest underlying the confidentiality of governmental communications.
- (4) In so doing, it should invite the parties to agree protocols for the protection of confidentiality or secrecy in documents or parts thereof.

- (5) In a case in which an objection to production is maintained:
- (a) The plea must be justified with sufficient specificity in order to enable the opposing party to contest it and the objection to be determined;
 - (b) The tribunal has discretion whether to accept the plea, balancing the public interests involved;
 - (c) The tribunal will apply general principles recognised in international law to the determination of the plea not internal law;
 - (d) The tribunal should, in appropriate cases, consider in consultation with the parties appointing an independent third party expert to decide contested objections to production.

Article 11

Improper means

- (1) Both parties owe a duty to each other and to the tribunal to conduct themselves in the proceedings in good faith and to respect the equality of arms between them.
- (2) While the exclusion of relevant evidence will always be exceptional, the tribunal retains the power to do so where it is satisfied that these principles have not been respected.
- (3) Criminal proceedings fall outside the scope of international investment law. They remain the prerogative of the State.
- (4) Exceptionally, a tribunal may be required to adopt measures limited to the effect of the exercise of the State's powers of criminal investigation and prosecution upon the fairness of its own procedure and the preservation of the equality of the parties.
- (5) In such a case, the tribunal will only act on the basis of clear evidence of conduct that is aimed at obtaining an unfair advantage in the international proceedings.

CHAPTER 3

SUBSTANTIVE EQUALITY OF ARMS

Article 12

Costs

- (1) The equality of arms has a substantive as well as a procedural dimension. The ability of parties, whether investors or States, to pursue or defend claims before a tribunal should not be determined on grounds of cost. Particular regard should be paid in this context to the position of small and medium-sized enterprises and to that of least developed States.

EQUALITY OF PARTIES BEFORE INTERNATIONAL INVESTMENT TRIBUNALS

- (2) Where a party's pursuit of its claim or defence is supported by third party funding, that party shall disclose the name of the third party funder, so that its identity can be considered by the other party and the tribunal in determining whether any member of the tribunal may have a conflict of interest.
- (3) Where on the application of a party, the tribunal is satisfied that the party pursuing a claim may be unable to pay an award of costs in the event that its claim is unsuccessful, the tribunal has discretion to order that party to provide security for costs where it is satisfied that the provision of security is necessary to preserve the equilibrium of the parties.

* * *

Note of M. Kohen, 5 November 2018

**Explanatory Note of the Proposals of Amendment of the Draft
Resolution**

Dear Campbell, cher confrère,

Congratulations for your excellent Provisional Report and Draft Resolution. I am extremely happy that the Institute decided to constitute this Commission and appointed you as Rapporteur. We are in a position to greatly contribute to the current work States, international organizations and academics are performing in order to improve foreign investment dispute settlement.

I generally agree with your draft resolution. I would like to make some amendment proposals to it. I attach your file with my proposals in track changes. They reflect the comments I made to your preliminary report through the answers to the questionnaire you submitted to the members of the Commission last year.

My suggestions aim at enforcing the required balance between the considerations with regard to investors and those regarding States. In this sense, in the Preamble, after the mentioning of equality of the parties as a human right, I consider necessary to refer also to the State as a sovereign entity pursuing public goals.

In Article 2 (2), after the reference of the possibility of the State to use its own judicial system, I consider necessary to refer what the State whose investor cannot resort to international arbitration can do in this circumstance.

Article 2 (3) ancillary refers to the object of investment treaties and only mentions the object of promoting and protecting foreign investment and the rights of foreign nationals. Equality here commands to also refer to the object of these treaties for States: to pursue their goals for a sustainable development.

In Article 3 (3) and Article 9 (2) I propose to change the adjectives “satisfactory” and “suitable” for “useful” when referring to the IBA Rules. This suggestion, while keeping the reference to the IBA Rules, allows for some flexibility: they can always be improved.

Following the example of the ICJ (see Practice directions VII and VIII), I suggest to add a further paragraph to Article 3 in order to discourage that a same person acts as arbitrator in one or more cases and as counsel or advocate in another.

In paragraph (2) of Article 4, I suggest the deletion of the sentence “If a permanent tribunal is established, both methods of dispute resolution will continue to exist in parallel.” We can debate about whether this is

suitable or not, but this not a matter that has to be decided in a resolution dealing with equality of the parties. Furthermore, we can consider that it will always be possible for the parties to a dispute to establish an arbitral tribunal if they wish to do so.

In paragraph (3) of the same Article, I suggest to add other elements to be considered for the election of judges of a future permanent court of tribunal, such as adequate gender and geographic representation, as well as of the principal legal systems of the world.

The suggestion for paragraph (4) is just to render it more satisfactory.

With regard to Article 5 on Counter-claims (term to be harmonized: in the draft appears as “Counterclaims” and in the Report both are used), I suggest the deletion of paragraph (4). I understand that when “arbitration agreement in an investment treaty” in this paragraph is employed it refers to compromissory clauses in investment treaties (the same comment applies for the Report). This is an arguable point on which there will certainly be different views among the confrères and consœurs of the Institute. I would prefer avoiding this debate, since this question needs not to be decided for the purposes of the topic of our commission.

In Article 7, I consider necessary to add that a third party willing to make submissions discloses not only its connection with the parties but also with the subject-matter of the dispute.

With regard to evidence, I believe that the specific character of the parties must be taken into account, i.e. the sovereign character of the State and its implications and commercial or economic confidentiality and its implications. Accordingly, I propose to modify Article 9 (2) and consequently Article 10. I do not consider that an investment arbitral tribunal can impose to a State the disclosure of documents that according to its legislation are secret or confidential. I also believe that protection of foreign investment cannot put foreign investors in an economic privileged position vis-à-vis national investors. What can be requested as document production for the State should normally be documentation that nationals of the State can also obtain in similar circumstances. I made proposals of amendments of paragraphs (2), (3) and (4) in this regard.

The reference to the “substantial” dimension of the principle of equality of arms in Article 12 may be misleading. Maybe paragraph (1) of this Article could directly start with the second sentence. I propose to change the reference to “least developed States” to include “developing States”.

Paragraph (2) presupposes that third party funding is appropriate, a point that raises some serious concern, not only with regard to conflict of interests. Sometimes, third party funding could be considered illegal, unfair or improper to the system. This is a point deserving further

consideration beyond the scope of the task of our commission. To avoid discussing this question, the solution could be not to mention the exclusive consideration of a potential conflict of interest with members of the tribunal.

I am aware that some of these proposals may not obtain unanimity of the members of our commission, but I hope they will be useful and deserving consideration.

Geneva, 5 November 2018
Marcelo Kohen

Rapporteur's Note to Commission Members, 21 November 2018

I am most grateful to the Members of the 18th Commission for their careful review of my first draft of our Resolution.

Members will find attached:

A consolidated document showing the comments of all members on the first draft;

A revised draft in track changes;

A revised draft in clean text.

In summary:

Four members (Alexandrov, Mikulka, Reinisch and Vinuesa) expressed their agreement with the original draft and had no further comments;

Ten members (Boisson de Chazournes, Crawford, D'Argent, Gaja, Giardina, Kazazi, Kohen, Stern, Treves and Rao) expressed their general satisfaction with the draft, whilst at the same time offering specific comments. Confrère Kohen also submitted an explanatory note for his proposals dated 5 November 2018, which was copied to all members for their attention.

In addition two members (Boisson de Chazournes and Stern) offered some valuable detailed drafting suggestions on the Report itself.

I have benefited greatly from Members' observations and suggestions. As will be seen in particular from the track changes version of the revised draft, I have as a result introduced quite a number of revisions to the text.

In so doing, I have sought to reflect my understanding (based on Members' replies to the Questionnaire and their comments on the draft Resolution) of the broad consensus of the Commission. This means of course that it has not been possible to adopt every proposal.

I have also kept constantly in mind the need to ensure that the Resolution is supported by research findings in the Report itself and the scope of our mandate, which is limited to the equality principle. This principle undoubtedly intersects with many other important and currently

controversial issues in the resolution of international investment disputes. But in my view our conclusions will have particular force if they are, so far as possible, closely anchored to equality as their central organising principle. This also means that I have sought to find formulations that are consistent with the equality of the parties.

I have also made a number of purely drafting changes designed to improve the clarity and consistency of the text.¹

There is one matter of substance to which I wish to draw Members' specific attention. This relates to the impact on arbitrator impartiality where arbitrator also serves as counsel in other investment cases (the so-called 'double-hatting' issue).

The question whether it is permissible *vel non* for an arbitrator also to be able to act as counsel in other investment arbitration cases is a matter of current controversy. Some claim that a reform of ethical rules that would preclude such a possibility is normatively desirable.² The matter is on the agenda at UNCITRAL, where States have expressed a variety of views, not all of them opposed to the practice and focussed mainly on the identification of specific conflicts of interest.³

The Institut adopted a Resolution at its Tokyo Session in 2013 on the proposal of 18th Commission under its previous mandate, which goes some way towards addressing the issue in the following terms:

Article 9

Acceptance by individuals of different roles as counsel, arbitrators, members of ICSID *ad hoc* committees must not be allowed to affect the impartiality and independence of arbitrators.

Confrère Kohen proposes to add to Article 3 of our draft a sub-paragraph that would state: 'It is not in the interest of a sound administration of justice that persons sitting as arbitrators in investment tribunals also act as counsel or advocates before other investment tribunals and vice-versa.'

¹ In addition to Members' helpful comments on drafting matters, I also express my appreciation for the drafting suggestions of Ms Rose Cameron, legal assistant to Confrère Crawford.

² See e.g. Langford, Behn and Lie, 'The revolving door in international investment arbitration' (2017) 20 JIEL 301.

³ UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23-27 April 2018) UN Doc. A/CN.9/935 (14 May 2018), [78]-[81].

At present I have not proposed to include such a provision in our Resolution. This is not because I am opposed in principle to the adoption of a more absolute rule. It may well form part of a more general increase in the differentiation of adjudicatory functions⁴ and the elaboration of more specific ethical guidelines. At the same time, the adoption of an absolute rule may have significant implications, in particular for the diversity of appointments especially from younger candidates.

The reason I have not included this aspect is because I consider that it falls outside our topic of the equality of the parties. It is an aspect of a broader set of considerations that apply to the independence and impartiality of those persons appointed to decide international investment disputes. For that reason, I had not included in my Report a detailed evaluation of the substantial issues that arise in consideration of this question. In these circumstances, I doubt that it would be advisable for this Commission to take the matter further than the formulation already adopted in 2013.

I stand ready to provide any further comments or explanations that any Member may request, and to respond to any further proposals.

The manuscript of my Report itself is now ready for submission for publication in volume 1 of the *Annuaire*, together with, as *travaux préparatoires*, the consolidated set dated 17 January 2018 of Members' Replies to the Questionnaire.

I would be most grateful to hear from Members by Friday 7 December 2018 as to whether they have remaining comments on the draft Resolution, or whether they are now content for it to be published as the consensus proposal of the Commission for consideration by the plenary of the Institut, when it debates the work of our Commission at its Session in The Hague in August 2019.

Campbell McLachlan, Rapporteur
21 November 2018

⁴ See, e.g. International Court of Justice, Speech by the President on the Occasion of the Seventy-third Session of the United Nations General Assembly (25 October 2018), 11-12.

DRAFT RESOLUTION

Revision 1 (after Members' comments)

The Institute of International Law,

Considering that the principle of the equality of the parties is a fundamental element of the rule of law that ensures a fair system of adjudication and as such is a general principle of law applicable to the procedure of international courts and tribunals,

Observing this the equality of the parties is also a fundamental human right recognised by Article 10 of the Universal Declaration of Human Rights 1948 and Article 14(1) of the International Covenant on Civil and Political Rights 1966,

Recalling that the Eighteenth Commission, in its Report to the Tokyo Session in 2013, had reserved for further consideration the principles applicable to the procedure of investment arbitration,

Acknowledging the contribution made by the United Nations Commission on International Trade Law ('UNCITRAL') and by the International Bar Association ('IBA') to the elaboration of important aspects of the principle in its application to international arbitration generally,

Mindful that the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 ('ICSID Convention') provides a framework for the resolution of investment disputes that has to date found wide acceptance amongst States and that the International Centre for the Settlement of Investment Disputes ('ICSID') is currently conducting a review of its Rules of Procedure for Arbitration Proceedings ('ICSID Arbitration Rules'),

Recognising that States resolved at the Fiftieth Session of UNCITRAL in 2017 to take up the topic of reform of investor-State dispute settlement, including consideration of the possibility of the establishment of a permanent International Tribunal for Investments, and that the application of the principle of the equality of the parties is one of the matters under consideration in that context,

Resolving that the application of the equality principle requires specific consideration in light of the particular characteristics of international investment disputes, in which the tribunal has before it two parties of a different juridical character: a private investor and a State, whose function it is to represent the public interest,

Determining that its consideration of this question should consider the position of both arbitral tribunals, which are appointed ad hoc to decide a particular case ('arbitral tribunal') and any standing tribunal that

is constituted now or in the future to decide investment disputes ('permanent tribunal'),

Adopts the following Resolution:

PART ONE
APPLICATION TO THE ESTABLISHMENT OF THE TRIBUNAL

CHAPTER I
FORUM

Article 1

Legal character

- (1) The ability of the national of one State ('the investor') to bring a claim against another State ('the State') in respect of an investment results from the latter's consent to submit to the jurisdiction of an international investment tribunal ('the tribunal') for the resolution of disputes concerning that investment. Submission of such a dispute to the tribunal engages the principle of the equality of the parties.
- (2) Such a forum is designed to secure equality between the parties in circumstances where the State has the sovereign power to enforce its own law and adjudicate its claims against investors for breach of its laws before its own courts.

Article 2

Access

- (1) Both the State and the investor are equally entitled to submit a claim in relation to an investment to a tribunal, subject to the terms of the instrument of consent.
- (2) No State is obliged to submit any such dispute to a tribunal, unless it gives its consent and elects to do so. Otherwise, a State remains entitled to use the rights and remedies provided by its own national legal system in order to pursue its claim against an investor before its own courts.
- (3) The limitation of access to the investor of another State bears a direct relationship to the object of investment treaties, which is to promote and protect foreign investment and the rights of foreign nationals, while also respecting the State's sovereign right to regulate investment activities within its jurisdiction in the public interest. It does not infringe the principle of equality of access. Such protection is equally available to the investors of each State when they make an investment within the scope of the treaty protections by investing in the territory of the other State.

CHAPTER 2
TRIBUNAL

Article 3

Impartiality

- (1) The impartiality of all members of a tribunal is an indispensable prerequisite to the equality of the parties.
- (2) The substantive standards applicable to the determination of any question relating to the impartiality of a member of an arbitral tribunal should be uniform and transparent.
- (3) The IBA Guidelines on Conflicts of Interest in International Arbitration 2014 provide a useful framework of substantive rules within which to analyse questions that may arise as to the impartiality of a member of an arbitral tribunal constituted to decide an investment dispute.
- (4) As a procedural matter, challenges to the impartiality of a member of an arbitral tribunal should be determined by an independent third party decision-maker external to the tribunal.
- (5) As a consequence Member States of the ICSID Convention are encouraged to amend Article 58 so as to refer the determination of challenge applications to an independent third party decision-maker in all cases.

Article 4

Composition

- (1) The composition of a tribunal must be determined through a process of appointment that ensures that the parties to any dispute heard by that tribunal are treated with equality.
- (2) This is so whether the tribunal is constituted as an arbitral tribunal or is established as a permanent tribunal. The composition of both kinds of tribunal must respect the equality of the parties; but the different legal character of arbitration and a permanent judicial body dictate a different application of the principle in each case:
 - (a) The resolution of investment disputes by an arbitral tribunal composed of members appointed equally by the parties, with the president appointed by agreement (or, failing agreement, designated by an appointing authority) respects the principle of the equality of the parties, provided also that each member meets the same requirements of impartiality.
 - (b) In the case of a permanent tribunal, the principle of the equality of the parties does not require that each party retain the ability to

appoint a judge. The overriding consideration is the independence and impartiality of the tribunal as a whole.

- (3) A permanent tribunal should comprise a body of independent judges of recognized competence in international law that, as a whole, equitably represents the main forms of civilization and of the principal legal systems of the world, elected through a transparent process.
- (4) In the resolution of a specific dispute within the framework of a permanent tribunal, in order to respect the equality principle the composition of the particular Bench or Chamber should either:
 - (a) Exclude judges having the nationality of either the State party to the dispute or of the home State of the foreign investor; *or*,
 - (b) Ensure that judges from both such States are appointed, if necessary by making provision for the appointment of a judge *ad hoc*.

PART TWO

APPLICATION TO THE PROCEDURE OF THE TRIBUNAL

CHAPTER I

PARTIES

Article 5

Multiple claimants

- (1) Where several investors seek to institute their claims in a single arbitral proceeding against the same State, the tribunal must ensure, in its determination of jurisdiction and admissibility and in its procedural directions, that the parties are treated with equality.
- (2) In the establishment of its jurisdiction, the tribunal must be satisfied that:
 - (a) Each claimant individually satisfies the jurisdictional requirements (both of the instrument of consent and, where applicable, Article 25 of the ICSID Convention) in order to bring its claim; and
 - (b) The claim as a whole advances a single dispute, in that the interest represented by the claimants is in all respects identical, so that the respondent is not prejudiced by having to defend itself against claims that differ materially in the interest to be vindicated.
- (3) The tribunal may find a claim brought by multiple claimants inadmissible if it finds that the manner in which the claim is brought would adversely affect the tribunal's ability to ensure that both sides

of the dispute are treated with the equality in the presentation of their case or in their defence of the claims.

Article 6

Counterclaims

- (1) The ability of a respondent to assert a counterclaim that is admissible before a tribunal is an important assurance of the procedural equality of the parties.
- (2) In order to be admissible, such a counterclaim must:
 - (a) Be within the jurisdiction of the tribunal; and,
 - (b) Arise directly out of the subject matter of the investment.
- (3) The jurisdictional requirement is met when, by virtue of the instrument of consent invoked by the respondent, the tribunal would have had jurisdiction over the counterclaim had it been asserted as a primary claim. Whether or not the tribunal has jurisdiction over a counterclaim does not depend upon the respondent invoking the same ground of jurisdiction as that relied upon by the claimant for its claim, nor is the tribunal's jurisdiction limited by the scope of the dispute as framed by the claimant in its Request for Arbitration.
- (4) Where the dispute settlement clause in an investment treaty contains an agreement that permits submission to the tribunal of any legal dispute arising between a State Party and an investor of the other Party in connection with an investment, the jurisdiction of the tribunal is not limited to claims under the treaty, since the arbitration agreement is a separable agreement between the parties and must be construed in accordance with its terms.
- (5) Where the dispute is submitted to arbitration under the ICSID Convention, the requirement in Article 46 that the counterclaim must also be 'otherwise within the jurisdiction of the Centre' means that it must fall within the criteria of Article 25(1) of the Convention by 'arising directly out of an investment, between a Contracting State...and a national of another Contracting State.'
- (6) The requirement of sufficiency of connection with the subject matter of the dispute is met where the counterclaim concerns the same investment that gave rise to the claim. It does not require that the cause of action be founded upon the same legal instrument or cause of action asserted by the claimant.
- (7) The tribunal may find a counterclaim to be admissible, whether it is founded upon international law or host State law, provided that it

fulfils the other requirements set out in this Article and concerns a subject matter that is capable of submission to arbitration.

Article 7

Third person submissions

- (1) The admission of submissions from third persons may valuably assist a tribunal to determine the dispute, where they bring a perspective, knowledge or insight that is different from that of the disputing parties.
- (2) In order to protect the equality of the parties, in accordance with the UNCITRAL Rules on the Transparency in Investor-State Arbitration 2014:
 - (a) The third person must disclose any connection, direct or indirect, which it has with either of the disputing parties, their counsel or members of the tribunal or the subject-matter of the dispute;
 - (b) The tribunal must ensure that the disputing parties are given a reasonable opportunity to present their observations on any third person submission; and,
 - (c) The tribunal must otherwise ensure that any such submission does not unfairly prejudice either disputing party.

CHAPTER 2

PLEADING AND EVIDENCE

Article 8

Equality of arms

- (1) The equality of the parties includes the principle of the equality of arms, namely that:
 - (a) Each party shall have the right to be heard on the submissions of the other: *audi alteram partem*; and,
 - (b) Each party shall enjoy reciprocal treatment in the procedural timetable and in matters of pleading and evidence.
- (2) The tribunal should order and enforce a procedural timetable, which promotes both efficiency and equality of the parties.
- (3) Where, exceptionally, a party is able to establish a compelling case for the admission of late evidence or pleading, the tribunal must be satisfied that, if it admits the evidence or pleading, it is able to afford the other party equality of treatment, including an effective right to be heard on the new material.
- (4) Equality of treatment in a hearing requires that each party be allocated substantial equality of time to plead and present its

evidence; subject always to the tribunal's overall authority to ensure the fair and efficient conduct of the hearing, taking into account the number of witnesses and its own mandate to hear and test the evidence and arguments of the parties.

Article 9

Evidence

- (1) During the written phase, each party shall produce to the other the evidence on which it relies, so that the other party has a reasonable opportunity to respond.
- (2) The same standards shall be applied to adjudge the requests of both parties for the production of specific documents. The IBA Rules on the Taking of Evidence in International Arbitration 2010 provide a useful general framework for such determinations.
- (3) In ordering a timetable for production, the tribunal should take into account the particular challenges faced by States, especially developing States, in locating and producing documents. This must be balanced against ensuring that the other party has an adequate opportunity to consider and respond to the documents within the procedural timetable.
- (4) Where the investor is part of a group of companies, the principles of equality and good faith require that it should make reasonable efforts to obtain relevant documents that are held by its parent or affiliated companies or shareholders, when the respondent State so requests and the tribunal so directs.
- (5) The equality principle is an important consideration in a tribunal's determination of the admissibility of evidence. The tribunal may refuse to admit evidence if it cannot ensure that the other party's right to respond and defend itself can be equally protected.
- (6) Where a party has requested the attendance of a witness for cross-examination at the hearing and the party relying on the evidence of that witness fails without a valid reason to produce that witness, the tribunal shall (save in exceptional circumstances) disregard that evidence in order to preserve the procedural equilibrium between the parties.

Article 10

Objections to production

- (1) The tribunal shall apply the equality principle in making decisions with regard to pleas of privilege from disclosure, in light of the fact that the applicable standards may differ between the national laws of the parties. The tribunal should strive to apply a standard that operates equally for both parties.

- (2) Where the parties raise objections to disclosure with regard to documents on grounds of, respectively, commercial confidentiality or State secrecy, the tribunal should strive to secure a balance of treatment between the parties so as to ensure that each party has the ability to obtain evidence that is relevant and material to the issues in dispute, whilst at the same time respecting the wider interests of each party beyond the instant case and relevant policy considerations.
- (3) In the case of a plea of State secrecy, the tribunal must balance the public interest in the administration of justice which supports disclosure against the public interest underlying the confidentiality of governmental communications.
- (4) In so doing, it should invite the parties to agree protocols for the protection of confidentiality or secrecy in documents or parts thereof applicable in the case before the tribunal.
- (5) In a case in which an objection to production is raised:
 - (c) The objection must be justified with sufficient specificity in order to enable the opposing party to contest it and the objection to be determined;
 - (d) The tribunal has discretion whether to accept the objection, balancing the public interests involved;
 - (e) The tribunal will apply general principles recognised in international law to the determination of the objection not national law;
 - (f) The tribunal should, in appropriate cases, consider, in consultation with the parties, appointing an independent third party expert to review the documents and decide contested objections to production.

Article 11

Improper means

- (1) Both parties owe a duty to each other and to the tribunal to conduct themselves in the proceedings in good faith and to respect the equality of arms between them.
- (2) The tribunal has the power to exclude evidence where it is satisfied that the principles of good faith and equality of arms have not been respected.
- (3) Exceptionally, in order to protect the fairness of its own procedure and the equality of the parties, the tribunal may recommend measures in relation to the effect of the exercise of the State's

EQUALITY OF PARTIES BEFORE INTERNATIONAL INVESTMENT TRIBUNALS

powers of criminal investigation and prosecution upon the tribunal's own process.

- (4) In such a case, the tribunal will only act on the basis of clear evidence of conduct that is aimed at obtaining an unfair advantage in the proceedings before it or otherwise imperils the fair conduct of those proceedings.

CHAPTER 3 SUBSTANTIVE EQUALITY OF ARMS

Article 12

Costs

- (1) The ability of parties, whether investors or States, to pursue or defend claims before a tribunal should not be determined on grounds of cost. Particular regard should be paid in this context to the position of small and medium-sized enterprises and to that of least developed States.
- (2) Where a party's pursuit of its claim or defence is supported by third party funding, that party shall disclose the identity of the third party funder, so that inter alia the tribunal may consider any possible implications for the maintenance of the impartiality of the tribunal.
- (3) Where on the application of a party, the tribunal is satisfied that the party pursuing a claim may be unable to pay an award of costs in the event that its claim is unsuccessful and that the provision of security is necessary to preserve the equal protection of the parties, the tribunal has discretion to order that party to provide security for costs.

* * *

**Comments of M. Kazazi on Draft Resolution
Revision 1, 5 December 2018**

Article 9

Evidence

.....

(5) The equality principle is an important consideration in a tribunal's determination of the admissibility of evidence. The tribunal may refuse to admit **late-filed** evidence if it cannot ensure that the other party's right to respond and defend itself can be equally protected.

(6) Where a party has requested the attendance of a witness for cross-examination at the hearing and the party relying on the evidence of that witness fails without a valid reason to produce that witness, the tribunal **may** (save in exceptional circumstances) disregard that evidence in order to preserve the procedural equilibrium between the parties.

Para 5 of Article 9

I wonder if the equality principle can be considered important in a tribunal's determination of the admissibility of evidence to the extent that the tribunal can generally exclude any evidence on that basis? If the equality principle is to ensure the right of defence, this proposition as it stands now may affect the right of defence of a party due to factors beyond its fault or control. My understanding of the current practice is that, save for late-filed evidence, it does not recognize a discretionary power for the tribunals to exclude evidence on the basis of a tribunal's inability to protect other party's rights to respond.

Therefore, I would limit this to the admissibility of late-filed evidence or at least mention that matter as an example to provide more clarification on the direction. Examples of other significant instances can be added too, but leaving it open-ended makes this provision too general and subjective, if not ambiguous.

Para 6 of Article 9

Certainly an international tribunal may disregard the evidence of a witness whose presence has not been secured in spite of a request by the opposing party in the case. But, whether this should be the rule in all situations? The draft rightly excludes absence of valid reasons (for the non-producing party) and cases of exceptional circumstances (for the tribunal). Nevertheless, I believe this wording, which mirrors the IBA Rules, may restrict the free evaluation of evidence by the tribunal, and I propose therefore to change *shall* to *may*.

Alternatively, this paragraph can be deleted, as it addresses only one aspect of the issue of non-production of evidence.

EQUALITY OF PARTIES BEFORE INTERNATIONAL INVESTMENT TRIBUNALS

Article 11

Improper means

(1) Both parties owe a duty to each other and to the tribunal to conduct themselves in the proceedings in good faith and to respect the equality of arms between them.

(2) The tribunal has the power to exclude evidence where it is satisfied that the principles of good faith and equality of arms have not been respected

Para 1 of Article 11

While the first part of this paragraph reflects a recognized rule in international procedure, I am not sure that the last phrase (*and to respect the equality of arms between them*) enjoys the same status. Unfortunately, the international procedure is not – yet – moralistic enough to elevate the respect for equality of arms as a duty for the parties in the proceedings (outside human rights issues) with negative consequences on the case. I therefore suggest to preferably delete this phrase, or otherwise separate it from the first sentence, to read, e.g.:

The parties shall endeavour to respect the equality of arms between them.

In addition, as explained in my cover note I think it is important to define the equality of arms.

Para 2 of Article 11

This paragraph seems to prescribe two new grounds for exclusion of evidence by international investment tribunals: good faith and equality of arms. In addition, the threshold for exclusion of such evidence is quite low, as it is based on lack of respect for the two mentioned principles, rather than the violation thereof.

I recall that after decades of discussion, the jurisprudence of the international courts and tribunals does not yet have a consistent approach towards exclusion of illegally obtained evidence, which is a more serious and clear matter. Therefore, expecting that the tribunals would exclude evidence on the ground of lack of respect for good faith or the equality of arms between the parties –even as *lege ferenda* – perhaps is too optimistic. Unless we define carefully quality of arms and limit this article to some specific patterns, I would propose to delete this paragraph.

Rapporteur's Note to Commission Members, 9 December 2018

I am most grateful to the Members of the 18th Commission for their careful review of our draft Resolution (Rev 1), which I circulated on 21 November 2018 after consideration of Members' comments.

Members will find attached a final revised text in both track changes and in clean text. This incorporates my proposed edits in light of comments received from Members on the second revised draft, together with some minor stylistic edits.

In summary, by the deadline for comments of 7 December 2018, I had received the following responses on Rev 1:

- (1) Two members (Alexandrov and Crawford) confirmed that they were content for the revised draft to go forward to the Plenary without further amendment as the consensus draft of the Commission;
- (2) Five members (Boisson de Chazournes, Gaja, Kazazi, Kohen and Stern), while expressing their general satisfaction with the revised draft, advanced a more limited number of suggested amendments, some of an editorial nature and some of a more substantive character.

In the interests of achieving a consensus draft that all Members can support in the plenary debate in The Hague, I have adopted almost all of these proposed amendments.

In the present Note, I wish only to respond to the Note of Confrère Kazazi (dated 5 December 2018 and copied to all Members of the Commission). This concerns the treatment of the principle of equality of arms in draft articles 9 and 11. I am very grateful for his observations. I have sought to reflect his concerns by:

- (1) Deleting former art 9(5), which, as regards late-filed evidence was in any event repetitive of art 8(3);
- (2) Amending new art 9(5) to confirm that the rule in relation to non-attendance of a witness is concerned with the powers of the tribunal and is not an inflexible rule;
- (3) Deleting the reference to equality of arms in art 11(1), so that the duty on the parties is one of good faith; and,
- (4) Reformulating the tribunal's power to exclude evidence obtained by improper means in art 11(2) to require a higher standard.

At the same time, I wish to be clear that, on the basis of the research presented in the Report, I do regard 'equality of arms' as a general

EQUALITY OF PARTIES BEFORE INTERNATIONAL INVESTMENT TRIBUNALS

principle of law that is applicable to the procedure of international courts and tribunals (and not limited to the human rights context).

The present draft Resolution defines the principle of the ‘equality of arms’ in art 8(1) as comprising two elements, namely that:

- (a) Each party shall have the right to be heard on the submissions of the other: *audi alteram partem*; and,
- (b) Each party shall enjoy reciprocal treatment in the procedural timetable and in matters of pleading and evidence.

In my respectful opinion this formulation is supported in principle and in practice. In the context of the Resolution as a whole, it offers a useful precision in the context of pleading and evidence of the more general principle of the equality of the parties and should be retained in our analysis and presentation.

I accept that the invocation of this principle *ipso facto* does not dictate a particular solution in those difficult and exceptional cases that are the subject of article 11. Nevertheless, the jurisprudence on the use of improper means in relation to evidence (Report [276]-[300]) demonstrates some concrete instances where the intervention of the tribunal has proved necessary. In such cases, tribunals and academic commentary have linked the powers of the tribunal to the need to preserve the equality of the parties (see refs at [277] n 338, [279] n 339, [285] n 342, [396] n 360). The International Court of Justice has also invoked the principle of the equality of the parties in relation to the use of criminal enforcement powers to seize documents relating to a dispute that is subject to international arbitration: *Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (Provisional Measures) [2014] ICJ Rep 147, 153, [27]. For these reasons, in my opinion, the inclusion of a link between article 11 and the equality of the parties is both necessary and justified.

The Notes of confrère Kazazi dated 5 December 2018 and that of confrère Kohen dated 5 November 2018, commenting on the first draft, together with my Notes of 21 November and 9 December 2018, will, in accordance with the normal practice of the *Institut* be published (along with the replies of all Members to the earlier Questionnaire) in volume 1 of the *Annuaire*.

With these comments, I thank all Members for a most constructive interaction on the draft Resolution, which is as a result greatly improved from your Rapporteur’s first tentative attempt. I shall now submit the Draft Resolution as a Commission consensus draft to the Secretariat for publication in the *Annuaire* and consideration by the membership of the *Institut* as a whole.

EGALITE DES PARTIES DEVANT LES TRIBUNAUX INTERNATIONAUX D'INVESTISSEMENTS

I shall also prepare (with the assistance of a Francophone member of our Commission) a draft French text.

Campbell McLachlan
Rapporteur
9 December 2018