

Towards Consistency in International Investment Jurisprudence

*A Preliminary Ruling
System for ICSID Arbitration*

Katharina Diel-Gligor

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A Preliminary Ruling System for ICSID Arbitration

By

Katharina Diel-Gligor

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Towards Consistency in International Investment Jurisprudence

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Katharina Diel-Gligor
Berlin, December 2016

List of Abbreviations

A Conventions, Treaties, Statutes, and Rules

ACIA	ASEAN Comprehensive Investment Agreement, 26 February 2009 (entry into force 29 March 2012)
AktG	Aktiengesetz (German Stock Corporation Act), 6 September 1965, BGBl. I 1965, 1089
Amsterdam Treaty	Treaty of Amsterdam, 2 October 1997 (entry into force 1 May 1999), OJ C 340 (1997)
ASEAN Agreement	Agreement between the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, 15 December 1987, 27 ILM 612 (1988)
CAFTA-DR	Dominican Republic-Central America Free Trade Agreement, 5 August 2004, 43 ILM 514 (2004)
CJEU Rules of Procedure	Rules of Procedure of the Court of Justice of the European Union, 29 September 2012 (entry into force 1 November 2012), OJ L 265-1 (2012)
CUSFTA	Free Trade Agreement between the Government of Canada and the Government of the United States of America, 2 January 1988 (entry into force 1 January 1989), 27 ILM 281 (1988)
Drago-Porter Convention	Hague Convention II of 1907 Respecting the Limitations of the Employment of Force for the Recovery of Contract Debts, 18 October 1907, 205 Con. TS 250 (1907)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950 (entry into force 3 September 1953), ETS No. 005
ECSC Treaty	Treaty establishing the European Coal and Steel Community, 18 April 1951 (entry into force 25 July 1952, expiry 23 July 2002), 261 UNTS 140 (1957)

ECT	Energy Charter Treaty, 17 December 1994 (entry into force 16 April 1998), 34 ILM 360 (1995)
EC Treaty	Treaty Establishing the European Community (consolidated version), 2 October 1997 (entry into force 1 May 1999), OJ C 340 (1997); formerly EEC Treaty/Rome Treaty
EEC Treaty/Rome Treaty	Treaty Establishing the European Economic Community, 25 March 1957 (entry into force 1 January 1958), 298 UNTS 11 (1958)
EURATOM Treaty	Treaty Establishing the European Atomic Energy Community, 25 March 1957 (entry into force 1 January 1958), 298 UNTS 167 (1958)
FINSA	US Foreign Investment and National Security Act of 2007, enacted 26 July 2007, Pub.L. 110-49, 121 Stat. 246
Geneva Convention	Geneva Convention on the Execution of Foreign Arbitral Awards, 26 September 1927, LNTS 302
ICC Arbitration Rules (2012)	ICC Rules of Arbitration, effective as of 1 January 2012
ICJ Statute	Statute of the International Court of Justice, San Francisco, 26 June 1945 (entry into force 24 October 1945), TS No. 993
ICSID AFR	ICSID Additional Facility Rules, Doc. ICSID/11 (June 1979), as amended and effective 10 April 2006
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings, Doc. ICSID/15 (January 1985), as amended and effective 10 April 2006
ICSID Conciliation Rules	ICSID Rules of Procedure for Conciliation Proceedings, Doc. ICSID/15 (January 1985), as amended and effective 10 April 2006
ICSID Convention	ICSID Convention for the Settlement of Investment Disputes between States and Nationals of Other States, Doc. ICSID/2 (18 March 1965), 575 UNTS 159 (1966), 4 ILM 532 (1965)
ICSID Institution Rules	ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, Doc.

	ICSID/15 (January 1985), as amended and effective 10 April 2006
ILC Draft Articles on State Responsibility	ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its Fifty-third Session, UN GAOR, Fifty-sixth Session, Supp. No. 10, 43, UN Doc. A/56/10 (annexed to UN Doc. 56/83, 12 December 2001) (2001)
ILC Guiding Principles	ILC, Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, Doc. A/CN.4/L-703, ILC Report U.N. A/61/10 (2006)
LCIA Arbitration Rules (2014)	LCIA Arbitration Rules, effective 1 October 2014
Lisbon Treaty	Treaty of Lisbon, 13 December 2007 (entry into force 1 December 2009), OJ C 306 (2007)
MAI	Multilateral Agreement on Investment, Draft Consolidated Text, 22 April 1998, DAFIE/MAI(98)7/REV1
Mauritius Transparency Convention	UN Convention on Transparency in Treaty-Based Investor-State Arbitration, UN GA Res. 69/116, UN Doc. No. A/RES/69/116 (10 December 2014)
NAFTA	North American Free Trade Agreement, 17 December 1992 (entry into force 1 January 1994), Can.-Mex.-US, 32 ILM 289 (1993)
New York Convention	UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, 330 UNTS 38 (1959)
Nice Treaty	Treaty of Nice, 26 February 2001 (entry into force 1 February 2003), OJ C 80 (2001)
OSPAR Convention	Convention for the Protection of the Marine Environment of the North-East Atlantic, 22 September 1992 (entry into force 25 March 1998), 2354 UNTS 67, 32 ILM 1069 (1993)
Rome I Convention	1980 Rome Convention on the Law Applicable to Contractual Obligations (consolidated version), 26 January 1998, OJ C 27/02 (1998), 34-46
SCC Arbitration Rules (2010)	SCC Arbitration Rules, effective as of 1 January 2010

SOX	US Sarbanes-Oxley Public Company Accounting Reform and Investor Protection Act of 2002, enacted 30 July 2002, Pub. L. No. 107-204, 116 Stat. 745
TEU/Maastricht Treaty	Treaty of the European Union, 7 February 1992 (entry into force 1 November 1993), OJ C 191 (1992) amended by Amsterdam Treaty (1997), Nice Treaty (2001), Lisbon Treaty (2007)
TFEU	Treaty on the Functioning of the European Union (consolidated version), 13 December 2007 (entry into force 1 December 2009), OJ C 326 (2012); formerly EC Treaty
UN Charter	Charter of the United Nations, 26 June 1945 (entry into force 24 October 1945), 1 UNTS XVI (1946-1947)
UNCITRAL Arbitration Rules (1976)	UNCITRAL Arbitration Rules, GA Res. 31/98, UN Doc. A/31/17 (1976), 28 April 1976 (entry into force 15 December 1976)
UNCITRAL Arbitration Rules (2010)	UNCITRAL Arbitration Rules, GA Res. 65/22, UN Doc. A/65/465, 6 December 2010 (entry into force 15 August 2010)
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 21 June 1985, GA Res. 40/72, UN GAOR, 40th Sess., Supp. No. 17, Annex 1, UN Doc. A/40/17 (1985) (amendments of 7 July 2006)
UNCITRAL Rules on Transparency	UNCITRAL, Rules on Transparency in Treaty-based Investor-State Arbitration, Annex I, 11 July 2013 (entry into force 1 April 2014)
UNCLOS	UN Convention on the Law of the Sea, 10 December 1982 (entry into force 16 November 1994), 1833 UNTS 3 (1994)
UNESCO Convention	UNESCO Convention Concerning the Protection of World Cultural and Natural Heritage 1972, 1037 UNTS 151 (1977)
Vienna Convention/VCLT	Vienna Convention on the Law of the Treaties, 23 May 1969 (entry into force 27 January 1980), 1155 UNTS 331 (1980)
WTO DSU	WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2

	to the Agreement establishing the WTO, 33 ILM 1226 (1994)
WTO WPAR	WTO Working Procedures for Appellate Review, 16 August 2010, WT/AB/WP/6
1953 ILC Draft Convention	ILC Draft Convention on Arbitral Procedure, ILC Report, A/2456 (A/8/9), 1953, Chap. II, para. 57
1962 PSNR Resolution	UN-GA, Resolution 1803 (XVII) on Permanent Sovereignty over Natural Ressources, GA Res. 1803 (XVII), UN Doc. A/5217/Supp. No. 17 (14 December 1962)
1967 OECD Draft Convention	Draft Convention on the Protection of Foreign Property, Resolution of the OECD Council, 12 October 1967, OECD Publication No. 23081 (1967), 7 ILM 117 (1968)
1974 ERDS Charter	UN-GA, Resolution 3281 (XXIX), Charter of Economic Rights and Duties of States, UN Doc. A/RES/29/3281 (12 December 1974)
1974 NIEO Declaration	UN-GA, Resolution 3201 (S-VI), Declaration on the Establishment of a New International Economic Order, UN Doc. A/RES/S-6/3201 (1 May 1974)
1974 NIEO Program	UN-GA, Resolution 3202 (S-VI), Program of Action on the Establishment of a New International Economic Order, UN Doc. A/RES/S-6/3202 (1 May 1974)
1991 German Model BIT	Treaty between the Federal Republic of Germany and [Country] Concerning the Encouragement and Reciprocal Protection of Investments, 1991
2004 Canada Model BIT	Agreement between Canada and [Country] for the Promotion and Protection of Investments, 2004
2004 US Model BIT	Treaty between the Government of the United States of America and the Government of [Country] concerning the Encouragement and Reciprocal Protection of Investment, 2004
2005 UK Model BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern

2006 French Model BIT

2008 German Model BIT

2012 US Model BIT

Ireland and The Government of [Country] for the Promotion and Protection of Investments, 2005, amended 2006

Draft Agreement between the Government of the Republic of France and the Government of the Republic of [Country] on the Reciprocal Promotion and Protection of Investments, 2006
Treaty between the Federal Republic of Germany and [Country] concerning the Encouragement and Reciprocal Protection of Investments, 2008

Treaty between the Government of the United States of America and the Government of [Country] concerning the Encouragement and Reciprocal Protection of Investment, 2012

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Am. J. Comp. L.

Am. J. Int'l L.

Am. Rev. Int'l Arb.

Am. U. Int'l L. Rev.

Ann. Surv. Int'l & Comp. Law

Arb.

Arb. Int'l

ARSP

Asian J. Int'l L.

Asian J. WTO & Int'l Health L. Pol'y

ASIL Proc.

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American Journal of International Law

American Review of International Arbitration

American University International Law Review

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Arbitration International

Archiv für Rechts- und Sozialphilosophie (Archive for Legal and Social Philosophy)

Asian Journal of International Law

Asian Journal of WTO and International Health Law and Policy

ASIL Proceedings

Australian International Law Journal

Berkeley Journal of International Law

Bond L. Rev.	Bond Law Review
Brit. Yb. Int'l L.	British Yearbook of International Law
Case W. Res. J. Int'l L.	Case Western Reserve Journal of International Law
CEPMLP Ann. Rev.	Centre for Energy, Petroleum and Mineral Law and Policy Annual Review
Chicago J. Int'l L.	Chicago Journal of International Law
CML Rev.	Common Market Law Review
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Corp. Gov.	Corporate Governance
Duke L.J.	Duke Law Journal
Econ. Reform Today	Economic Reform Today
EuR (German J. Eur. L.)	Zeitschrift Europarecht (German Journal of European Law)
Eur. J. Int'l L.	European Journal of International Law
Finnish Yb. Int'l L.	Finnish Yearbook of International Law
Fordham Int'l L.J.	Fordham International Law Journal
Fordham L. Rev.	Fordham Law Review
Ga. J. Int'l & Comp. L.	Georgia Journal of International and Comparative Law
GAR	Global Arbitration Review
Gaz. Pal.	Gazette du Palais
Geo. Wash. Int'l L. Rev.	George Washington International Law Review
German L.J.	German Law Journal
German Yb. Int'l L.	German Yearbook of International Law
Hague Yb. Int'l L.	Hague Yearbook of International Law
Harv. Int'l L.J.	Harvard International Law Journal
Harv. L. Rev.	Harvard Law Review
ICJ Rep.	ICJ Reports of Judgments, Advisory Opinions and Orders
ICSID Rep.	Reports of Cases Decided under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), Cambridge University Press, Cambridge
ICSID Rev. – FILJ	ICSID Review – Foreign Investment Law Journal
ILM	International Legal Materials
ILSA J. Int'l & Comp. L.	ILSA Journal of International and Comparative Law
Indian J. Int'l L.	Indian Journal of International Law

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 Michigan Law Review
 Minnesota Journal of International Law
 National Law Journal
 North Carolina Law Review

Netherlands Yb. Int'l L.	Netherlands Yearbook of International Law
Nw. J. Int'l L. & Bus.	Northwestern Journal of International Law and Business
NY L.J.	New York Law Journal
NYU J. Int'l L. Pol.	NYU Journal of International Law and Politics
NYU L. Rev.	NYU Law Review
OECD Fin. Mkt. Trends	OECD – Financial Market Trends
Oil, Gas & Energy L.J.	Oil, Gas and Energy Law Journal
Penn St. Int'l L. Rev.	Penn State International Law Review
Pol. Res. Q.	Political Research Quarterly
RdC	Recueil des Cours de l'Académie de droit international de La Haye (Collected Courses of the Hague Academy of International Law)
Rev. Int'l Pol. Econ.	Review of International Political Economy
Santa Clara J. Int'l L.	Santa Clara Journal of International Law
SchiedsVZ (German Arb. J.)	Zeitschrift für Schiedsverfahren (German Arbitration Journal)
Sri Lanka J. Int'l L.	Sri Lanka Journal of International Law
Stockholm Int'l Arb. Rev.	Stockholm International Arbitration Review
Suffolk Transnat'l L. Rev.	Suffolk Transnational Law Review
Sw. J. Int'l L.	Southwestern Journal of International Law
Sydney L. Rev.	Sydney Law Review
TDM	Transnational Dispute Management
Tex. Int'l L.J.	Texas International Law Journal
Tul. L. Rev.	Tulane Law Review
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 schaft (Journal for Comparative Law Studies)

C Other

AAA ICDR

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ASEAN

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BGBL

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BVerfGG

CACJ

CAN

CARICOM

CCJA

American Arbitration Association's International
 Centre for Dispute Resolution
 American Bar Association
 Anno Domini
 Additional Facility Rules
 alternative
 approximately
 Agreement of South East Asian Nations
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 Bundesgesetzblatt (German Federal Law Ga-
 zette)
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 Law
 bilateral investment treaty
 Bundesverfassungsgericht (German Federal Con-
 stitutional Court)
 Bundesverfassungsgerichtsgesetz (German Fed-
 eral Constitutional Court Act)
 Central American Court of Justice
 Andean Community of Nations
 Caribbean Community
 Common Court of Justice and Arbitration