

NIJHOFF INTERNATIONAL INVESTMENT LAW SERIES

The Independence and Impartiality of ICSID Arbitrators

*Current Case Law, Alternative
Approaches, and Improvement
Suggestions*

Maria Nicole Cleis

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By

Maria Nicole Cleis



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The Independence and Impartiality of ICSID Arbitrators

Nijhoff International Investment Law Series

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List of Abbreviations

AAA	American Arbitration Association
AS	Amtliche Sammlung [official collection of Swiss law]
ASA	Association Suisse de l'Arbitrage [Swiss Arbitration Association]
BIT	Bilateral Investment Treaty
Can.	Canada
CAS	Court of Arbitration for Sport
CCJA	Common Court of Justice and Arbitration
CERD	Committee on the Elimination of Racial Discrimination
CETA	Comprehensive Economic and Trade Agreement Between Canada and the European Union and its Member States
CIETAC	China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center
ECHR	European Court of Human Rights
EU	European Union
IBA	International Bar Association
ICC Court	International Court of Arbitration of the ICC
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID Chairman	The Chairman of the ICSID Administrative Council
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
ISDS	Investor-State dispute settlement
LCIA Court	Arbitration Court of the London Court of International Arbitration
LCIA	London Court of International Arbitration
Malay.	Malaysia
Mex.	Mexico
MIGA	Multilateral Investment Guarantee Agency
OECD	Organisation for Economic Co-operation and Development
OHADA	Organisation pour l'Harmonisation en Afrique du Droit des Affaires [Organisation for the Harmonization of Business Law in Africa]
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SCC Board	Board of Directors of the Arbitration Institute of the Stockholm Chamber of Commerce
SCC Institute	Arbitration Institute of the Stockholm Chamber of Commerce
SCC	Stockholm Chamber of Commerce

Switz.	Switzerland
TTIP	Transatlantic Trade and Investment Partnership
U.N.	United Nations
U.S.	United States of America
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
Venez.	Venezuela
WIR	World Investment Report
World Bank	International Bank for Reconstruction and Development
WTO AB	Appellate Body of the World Trade Organization
WTO DSB	Dispute Settlement Body of the World Trade Organization
WTO	World Trade Organization

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Introduction

Foreign direct investments are an important part of today's globally integrated economy. Their popularity and level have dramatically risen since the 1990s, when technological advances and the demise of the Soviet Union fueled the trend towards globalization. Foreign direct investments take on many forms. They are characterized by the acquisition of virtually any kind of asset that creates a lasting interest by a foreign national in another State. The acquired asset can be a physical one, such as a building, factories, machines or equipment, or it can be a portion of a foreign company's shares.¹ Currently, most foreign direct investments are made in the services sector.² In terms of industries, the extractive industry, the electric power industry, transportation, construction and finance are particularly attractive.³ Foreign investors are frequently involved in providing public services in their host countries, such as operating water and sanitation systems, electricity plants, telecommunication services or public transportation systems. In the past, foreign direct investments have allowed developing countries to tap foreign financial sources and know-how to support their industrialization process. Investors, on the other side, were able to gain access to new markets.

Foreign investors are particularly vulnerable to government interference with their operations. They invest with a view to a long term operation, and therefore take substantial sunk costs. At the same time, their inability to participate in the democratic process in their host State makes it difficult to foresee government actions. Accordingly, they have a heightened interest in the stability and predictability of the regulatory environment in their host State.⁴

- 1 DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, *FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY* 9 (2nd ed. 2014); ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 91 (2009).
- 2 United Nations Conference on Trade and Development, *World Investment Report 2015*, at 12, UNCTAD/WIR/2015 (June 25, 2015) [hereinafter UNCTAD, *WIR 2015*]; Organisation for Economic Co-operation and Development, *OECD International Direct Investment Statistics 2014*, at 15, available at <http://dx.doi.org/10.1787/idis-2014-en>.
- 3 UNCTAD, *WIR 2015*, *supra* note 2, at 13–14; International Centre for Settlement of Investment Disputes, *The ICSID Caseload-Statistics (Issue 2016–1)*, at 12, [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-1%20\(English\)%20final.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-1%20(English)%20final.pdf) [hereinafter ICSID, *Caseload-Statistics 2016–1*].
- 4 Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, RECUEIL DES COURS 331, 343 (1972).

International investment agreements (IIAs) and bilateral investment treaties (BITs) satisfy those interests by protecting foreign investors from a range of adverse regulatory actions by host States. They contain definitions of the kinds of investments covered, and specify the substantive standards of protection they afford. Along with the spike in international investment in the second half of the 1990s, a particularly high number of BITs were entered into.⁵ Even today, their number is still growing,⁶ though not at as high a rate.

The substantive protection afforded by BITs and IIAs is procedurally enforceable pursuant to the dispute resolution clauses contained in such agreements. These clauses usually provide for the settlement of disputes between an investor and a host State (so-called investor-State dispute settlement, or ISDS) by arbitration (investor-State arbitration).⁷ For example, arbitration is the dispute settlement mechanism of choice in the U.S. Model BIT,⁸ in Swiss BITs,⁹ in the North American Free Trade Agreement¹⁰ and in the Energy Charter Treaty.¹¹ Today, arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States¹² is the most important

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- 5 United Nations Conference on Trade and Development, *World Investment Report Overview 2015: Reforming International Investment Governance*, at 24 fig.10, UNCTAD/WIR/2015(Overview) (June 25, 2015); Christoph H. Schreuer, *The Dynamic Evolution of the ICSID System*, in *THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES* (ICSID) 15, 20 (Rainer Hofmann & Christian J. Tams eds., 2007) [hereinafter Schreuer, *Dynamic Evolution*]; ANTONIO R. PARRA, *THE HISTORY OF ICSID* 199 (2012).
 - 6 United Nations Conference on Trade and Development, *IIA Issues Note: Recent Trends in IIAs and ISDS*, No. 1 (Feb. 2015), at 2, http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf.
 - 7 GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 3 n.10 (2007) [hereinafter VAN HARTEN, *INVESTMENT TREATY ARBITRATION*]. The terms investor-State dispute settlement, investor-State arbitration, investment treaty arbitration, and investment arbitration are often used interchangeably.
 - 8 2012 U.S. Model Bilateral Investment Treaty, *available at* <http://www.state.gov/documents/organization/188371.pdf> (last accessed on Dec. 30, 2016).
 - 9 See, e.g., Agreement on the Promotion and Reciprocal Protection of Investments, Switz.-China, art. 11, para. 2, Jan. 27, 2009, AS 2010 1717; Agreement for the Promotion and Protection of Investments, Switz.-India, art. 9, para. 3, Apr. 4, 1997, AS 2002 2037; Agreement on the Promotion and Reciprocal Protection of Investments, Switz.-Venez., art. 9, para. 2, Nov. 18, 1993, AS 1999 2149; Agreement concerning the Promotion and Reciprocal Protection of Investments, Switz.-Malay., art. 9, para. 2, AS 1978 1183.
 - 10 North American Free Trade Agreement, U.S.-Can.-Mex., art. 1120, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].
 - 11 The Energy Charter Treaty, art. 26, para. 2 (c) and 4, Dec. 17, 1994, 34 I.L.M. 381 (1995) [hereinafter ECT].
 - 12 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270 (entered into force Oct. 14, 1966) [hereinafter

ISDS mechanism.¹³ The Convention was adopted in 1965, and established the International Centre for Settlement of Investment Disputes (ICSID) as one of the five organizations of the World Bank Group.¹⁴

Like other ISDS mechanisms, the ICSID Convention does not contain rules on investors' substantive rights, but provides disputing parties with a procedural mechanism for the resolution of investment disputes.¹⁵ Investment arbitration under the ICSID Convention allows investors to bring claims directly against their host States,¹⁶ while evading the potentially biased courts in their host States, and avoiding reliance on their home States' discretionary exercise of diplomatic protection. By replacing the "gunboat diplomacy" formerly used to resolve investment disputes, and instead assessing competing legal claims in an independent and neutral manner,¹⁷ ICSID arbitration de-politicizes such controversies and advances the rule of law.¹⁸

the Washington Convention, the ICSID Convention or the Convention]. Disputes which are governed by the ICSID Convention are also subject to the ICSID Rules of Procedure for Arbitration Proceedings [hereinafter the ICSID Arbitration Rules or the Arbitration Rules].

- 13 See UNCTAD, *WIR 2015*, at 114, UNCTAD/WIR/2015 (June 25, 2015); Meg Kinnear & Frauke Nitschke, *Disqualification of Arbitrators under the ICSID Convention and Rules*, in *CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS* 34, 34 (Chiara Giorgetti ed., 2015); LUCY REED, JAN PAULSSON & NIGEL BLACKABY, *GUIDE TO ICSID ARBITRATION* 6–7 (2nd ed. 2011); Rainer Hofmann & Christian J. Tams, *Introduction: The International Convention on the Settlement of Investment Disputes (ICSID) – Taking Stock after 40 Years*, in *THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID)*, 9 (Rainer Hofmann & Christian J. Tams eds., 2007).
- 14 REED, PAULSSON, AND BLACKABY, *supra* note 13, at 9.
- 15 After long and unsuccessful attempts to agree on uniform substantive standards of investment protection in other international fora, such a goal was not even pursued during the drafting process. See *id.* at 2; Broches, *supra* note 4, at 343–344.
- 16 See CHRISTOPH H. SCHREUER ET AL., *THE ICSID CONVENTION – A COMMENTARY* ix (2nd ed. 2009) [hereinafter SCHREUER ET AL., *COMMENTARY*]; Schreuer, *Dynamic Evolution*, *supra* note 5, at 16.
- 17 Catherine A. Rogers, *The Politics of International Investment Arbitrators*, 12 SANTA CLARA J. INT'L L. 233, 226 (2013) [hereinafter Rogers, *Politics*]; Stephan W. Schill, *Private Enforcement of International Investment Law*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION* 29, 31 (Michael Waibel et al. eds., 2010); REED, PAULSSON, AND BLACKABY, *supra* note 13, at 4–5; Catherine A. Rogers, *International Arbitration in a Time of Global Upheaval*, Kluwer Arbitration Blog (Sept. 17, 2014), <http://kluwerarbitrationblog.com/blog/2014/09/17/international-arbitration-in-a-time-of-global-upheaval/> [hereinafter Rogers, *Global Upheaval*].
- 18 Broches, *supra* note 4, at 343; David W. Rivkin, *The Impact of International Arbitration on the Rule of Law*, 29 ARB. INT'L. 327, 341 (2013).

The ICSID Convention's focus on procedural empowerment instead of substantive protection is based on the idea that procedural settings shape substantive outcomes,¹⁹ without predetermining them. A neutral, law-based proceeding ensures that decisions are not reached in an environment of arbitrariness.²⁰ In the complex policy setting of investment disputes,²¹ where decisions on investor-State claims are unlikely to ever satisfy all participants, the parties' buy-in largely depends on their confidence in the mechanism's fairness. The parties' acceptance of and compliance with an unfavorable award is more likely in the absence of doubts about procedural fairness.²² Legitimacy, thus framed, does not lie in the outcome of a procedure, but in the perception of the award's procedural integrity.²³

The procedural fairness of the arbitral system is primarily dependent on its decision-makers. Thus, the requirement of arbitrators' independence and impartiality is "obvious and imperative,"²⁴ and common to all major arbitration

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- 19 Giacinto della Cananea, *Minimum Standards of Procedural Justice in Administrative Adjudication*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 39, 57 (Stephan W. Schill ed., 2010); Jan Wouters & Nicolas Hachez, *The Institutionalization of Investment Arbitration and Sustainable Development*, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 615, 618 (Marie-Claire Cordonier Segger, Markus W. Gehring, & Andrew Newcombe eds., 2011).
 - 20 della Cananea, *supra* note 19, at 57.
 - 21 Lars Markert, *Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines*, 3 CONTEMP. ASIA ARB. J. 237, 243 (2010).
 - 22 JAN PAULSSON, THE IDEA OF ARBITRATION 17 (2013) [hereinafter PAULSSON, THE IDEA]; Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, 214–215 (2007) [hereinafter Franck, *Integrating Investment Treaty Conflict*] (referencing empirical evidence which corroborates the positive effect procedural justice has on stakeholders' buy-in); Christopher Kee, *Judicial Approaches to Arbitrator Independence and Impartiality in International Commercial Arbitration*, in INVESTMENT AND COMMERCIAL ARBITRATION – SIMILARITIES AND DIVERGENCES 181, 195 (Christina Knahr et al. eds., 2010).
 - 23 THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990) (framing legitimacy as the acceptance of and compliance with rules or institutions, based on the belief that "generally accepted principles of right process" are observed); THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 7 (1995) [hereinafter FRANCK, FAIRNESS] ("To be effective, the system must be seen to be effective. To be seen as effective, its decisions must be arrived at discursively in accordance with what is accepted by the parties as right process."); David D. Caron, *Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy*, 513 SUFFOLK TRANSNAT'L. L.J., 514 (2008) [hereinafter Caron, *Investor State Arbitration*].
 - 24 Catherine A. Rogers, *The Ethics of International Arbitrators*, in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 621, 630 (Lawrence W. Newman &