Chapter 7

Dispute Settlement

7.1 Investor–state dispute settlement

Cross references

Section 4.2.1	The role of preambles in IIAs	42
Section 4.3	Definitions	48
Section 4.5	Scope of application	94
Section 5.4	Most favoured nation	124
Section 5.5	Fair and equitable treatment and the minimum standard of treatment	138
Section 5.6	Limitations on expropriation and nationalisation	152
Section 5.12	Reservations and exceptions	224
Section 6.13	Enforcement of investor obligations	372
Section 6.17	Counterclaims by states in investor–state arbitrations	401
Section 8.2	Technical assistance	499
Section 9.3	Termination of IIAs	510

Historically, only a party state had standing to make a claim that another party state had not complied with its obligations under an IIA, even if it was the state's investor that had suffered a loss as a result. Often, the only direct recourse that foreign investors had when they were unhappy about something a host state had done was through domestic courts or other institutions in the host state under domestic law or, if the dispute related to a contract between the investor and the host state, through any dispute settlement procedure provided in the contract. Most IIAs now give an investor of one party state the right to claim compensation directly against the other party state in binding arbitration if the other party state breaches the substantive standards of investor protection set out in the agreement and cause a loss to the investor.[1,2] While investor–state arbitration has some benefits for investors and host states, it also raises a number of serious concerns for host states.

7.1.1 Costs and benefits of investor–state arbitration

Investor–state dispute settlement was developed at the initiative of developed capital-exporting states because it offers significant benefits for their investors.

1 Some IIAs contemplate a broader scope of application of the investor–state dispute settlement process (UNCTAD (2007), *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking*, UN publication, Sales No. E.06.II.D.16 at 23, United Nations, New York and Geneva, at 101–4). Most treaties now provide for investor–state dispute settlement in some form (ibid. at 100).

2 Most Caribbean and Pacific BITs provide for investor–state arbitration (M Malik (2009), *Report on Bilateral Investment Treaties*, Commonwealth Secretariat, London, at 31, 60).

- **Seeking redress in the host country's domestic courts or through administrative remedies may be unattractive to foreign investors because of the weakness of local institutions.** Investor–state arbitration removes the investor's exposure to any uncertainties, delays and other problems with the host state's judicial and administrative systems. Investors may be concerned that local judicial or administrative procedures are slow and that local judges are unsophisticated, will be prejudiced towards foreigners or lack independence from the government whose actions are being challenged by them.[3]
- **Investor–state arbitration allows foreign investors to claim relief for the violation of standards of state behaviour set out in the IIA**. Such standards may permit claims for relief under a much wider range of circumstances than is possible under the domestic law of the host state. As noted, investor–state cases have produced some surprisingly broad interpretations of these obligations.
- **Investor–state arbitration can be initiated at the discretion of the investor.** If an investor is forced to rely on its home state to pursue claims against a host state on its behalf, the investor has to lobby its home government to take up its claim. The willingness of the investor's home state to pursue a private claim may ultimately depend on a range of political considerations that are beyond the control of the investor and unrelated to the merits of the investor's claim. The relative political power of the home and host states and the political sensitivities related to the investment in the host state and to the measure challenged will also play a role. Replacing reliance on state espousal of an investor's claim with binding investor–state arbitration that can be initiated by the investor ensures that an investor has access to a process for seeking relief if a state breaches its IIA obligations. In addition, the investor will be in control of how to pursue its claim in the dispute resolution process, making its own decisions about how to argue its case, whether to settle and so on.
- **Investor–state arbitration can lead to awards of compensation directly to the investor.** Where an investor's home state initiates and pursues a claim against a host state for breach of an international obligation, there is no guarantee that any relief will ultimately be received by the investor. In investor–state arbitration, where a breach by a host state is found, the tribunal orders compensation to be paid to the investor and, typically, the investor has certain rights to enforce the arbitral award under the IIA or the domestic laws of the host state if the host state does not pay.

From the point of view of a host state, agreeing to submit to investor–state arbitration can also have certain benefits.

- **Committing to investor–state arbitration in an IIA demonstrates a strong commitment to the investor protection obligations set out in the agreement and so may help to encourage investment in the host state.**

3 UNCTAD (2003), *World Investment Report 2003: FDI Policies for Development: National and International Perspectives*, United Nations, New York and Geneva, at 114–18.

- **Committing to investor–state arbitration in an IIA can help to lock in investment-liberalising reforms to the host state's domestic regime.** The possibility of investor claims based on broad treaty standards for investor protection through investor–state arbitration in an IIA may make it difficult for future host state governments to change the domestic regime affecting foreign investors. This may be attractive to a host state government interested in ensuring that future governments do not back away from reforms it has adopted to open markets to foreign investors.
- **Investor–state disputes settlement depoliticises disputes with investors**. In the past, state-to-state disputes were sometimes resolved through the exertion of political pressure by developed states on developing states. Investor–state arbitration requires disputes to be resolved based on the application of the legal standards in the IIA to the state's conduct, rather than on the relative power of the states.[4]

At the same time, experience with investor–state arbitration has shown that it can impose a variety of costs on host states and can constrain their ability to legislate to achieve sustainable development.

- **Investor–state arbitration is initiated by investors solely to pursue commercial interests (e.g. profit) and may be used to challenge actions by host states to achieve their public policy goals.** The intergovernmental and other factors that tend to limit the claims brought on behalf of investors by their home states do not operate under an IIA regime that permits investor–state arbitration.
- **Exposure to investor–state arbitration may create 'regulatory chill'.** Especially because the obligations in IIAs are broadly worded and so far the subject of limited and sometimes inconsistent interpretation, investors and their counsel have an incentive to bring a wide variety of claims on novel and sometimes outlandish theories. This is not to say, of course, that all such claims will be successful. Nevertheless, the existence of investor–state dispute settlement increases the risk that claims may be brought and that states will be held responsible to investors for their actions. Generally, a state cannot be required to change its investment regime by an arbitral tribunal. The relief available to investors through investor–state arbitration in existing IIAs is normally limited to monetary compensation.[5] Some argue, however, that the threat of investor–state arbitration has a chilling effect on domestic legislators, discouraging them from actions that are, or that even might be, contrary to investment obligations.[6]

---

4 It is argued that because inequalities of power continue, treaty making and dispute settlement are not really neutral or depoliticised: e.g. M Sattorova (2012), 'Return to the Local Remedies Rule in European BITSs? Power (Inequalities), Dispute Settlement, and Change in Investment Treaty Law', 39 *Legal Issues of Economic Integration* 223.

5 See, generally, M Endicott (2007), 'Remedies in Investor–state Arbitration: Restitution, Specific Performance and Declaratory Awards', in P Kahn and T Wälde (eds), *New Aspects of International Investment Law,* Martinus Nijhoff, The Hague, at 517.

6 H Mann and K von Moltke (1999), *NAFTA's Chapter 11 and the Environment*, International Institute for Sustainable Development, Winnipeg.

- **Committing to investor–state arbitration exposes host states to a process that is very costly.** The awards obtained in some investor–state cases to date have been large. In 2012, almost US$1.9 billion was awarded to a US investor against Ecuador.[7] This is one of the largest investor–state awards ever made. For small states, even one large award like this could be catastrophic. Even if a host successfully defends a claim, the cost of defending the claim is typically significant. Usually, the parties split the cost of the arbitration tribunal and any institutional fees, and pay their own costs. The OECD recently reported that the average cost of participating in an investor–state dispute for both parties is around US$8 million, but that it can be much higher.[8] The defence of claims by small states tends to be more expensive if they lack internal capacity to carry on the defence and have to hire private sector lawyers.
- **Investor–state arbitration raises legitimacy and democracy concerns.** In many investor–state arbitration cases, the investor is seeking relief from the actions of a host state that have been taken by the state with a view to fulfilling its responsibility to regulate in the public interest. For the adjudication of challenges to such public acts to be regarded as legitimate, the process should meet certain standards for openness and accountability. In addition, sustainable development requires rule-making that ensures the fair representation of all affected stakeholders. Although some improvements have been made over time, in many respects investor–state dispute settlement is not open and accountable in the way that domestic courts are in most countries. Specific concerns include the following:
    - Domestic laws and policies of host states are subject to interpretation by international arbitrators who may have no background in host state law;
    - There is limited transparency regarding the proceedings. Except in a few IIAs, there are no guarantees regarding public access to documents submitted to or issued by tribunals. Not all final awards are made public;
    - While public access to investor–state arbitration hearings is sometimes permitted in investor–state arbitration, there are no guarantees that hearings will be open to the public, except in a few IIAs; and
    - Civil society groups lack effective access to investor–state proceedings, although there has been some progress in allowing limited participation through *amicus curiae* submissions.[9]

---

7 *Occidental Petroleum v. Ecuador*, ICSID Case No. ARB06/11, Award, 5 October 2012. Previously, one of the largest awards had been US$867 million against the Slovak Republic in *SCOB* v. *Slovak Republic*, ICSID Case No. Arb/97/4, Final Award, 29 December 2004.

8 OECD, *Investor–state Dispute Settlement, Public Consultation*: 16 May–23 July 2012, available at: www.oecd.org/dataoecd/61/29/50291642.pdf (accessed 24 June 2012), at 19. S Franck (2011), 'Rationalizing Costs in Investment Treaty Arbitration,' 88 *Washington University Law Review* 279, discusses the complexity of measuring costs.

9 J A VanDuzer (2007), 'Enhancing the Procedural Legitimacy of Investor–state Arbitration through Transparency and *Amicus Curiae* Participation', 52 *McGill Law Journal* 681.

- **Investment arbitrators are not subject to the same requirements for independence and accountability as judges.** While arbitral rules and some IIAs have requirements for arbitrator independence, as well as procedures to challenge arbitrators, investment arbitrators are not subject to the same independence standards as domestic judges. Arbitrators are appointed on an ad hoc basis for a particular case. Usually each party selects one arbitrator and the parties agree on a third. It is the parties who pay them. Unlike judges in domestic and some international tribunals, arbitrators do not have security of tenure or financial independence and are not prohibited from undertaking other remunerative work. As a result, it is argued that arbitrators have an incentive to try to make decisions that will result in their reappointment. They may have other kinds of interests that could affect their decision making. For example, unlike judges, some arbitrators act as counsel in investment arbitrations. Their interest in getting work as advocates could affect their independence as decision-makers.[10]
- **Investment arbitrators often have no expertise in non-investment-related matters and are alleged to have a pro-investor bias**. Most IIAs contain no requirement for arbitrators to be competent in relation to any particular subject matter. Those who are appointed tend to be experienced international investment law experts. They often lack familiarity with non-investment issues that may be important considerations in determining the legality of state actions. For a particular case, expertise related to host state law, the rights of indigenous peoples, environmental protection or human rights may be needed to make a proper assessment of a claim. The result, some argue, is that tribunals tend to be biased in favour of investors' interests.[11]
- **Investor–state awards have lacked consistency, impairing the predictability of IIA obligations.** While investment arbitrators often refer to prior arbitral decisions in their awards, prior awards are not binding and tribunals have not always followed prior decisions. UNCTAD recently concluded that the awards issued in 2011 demonstrated continued disagreement on the meaning of core IIA provisions,[12] though there are contrary views regarding the pervasiveness and significance of inconsistent awards.[13] Inconsistency undermines predictability for

10 J Wouters and N Hachez (2011), 'Institutionalization of Investment Arbitration and Sustainable Development', in M-C Cordonier Segger, A Newcombe and M Gehring (eds), *Sustainable Development in World Investment Law,* Kluwer Law International, The Hague, at 627–9.

11 A related concern that has been expressed by some commentators is that if the Secretary-General of ICSID is the person who appoints arbitrators where the parties fail to do so, there may be a perception that the process may be affected by the interests of the World Bank. The empirical research on the question of whether arbitrators have a pro-investor bias is mixed. Susan Franck found that there is no correlation between developing country status of respondent states or the developing country origin were not related to the outcome of arbitrations: S Franck (2009), 'Development and Outcomes of Investment Treaty Arbitration', 50 *Harvard Law Review* 435.

12 See UNCTAD (2012), *Latest Developments in Investor–state Dispute Settlement*, IIA Issues Note No. 1, United Nations, New York and Geneva.

13 C Schreuer and Weinigar (2008), 'A Doctrine of Precedent', in P Muchlinski, F Ortino and C Schreuer (eds), *The Oxford Handbook of International Investment Law,* Oxford University Press, Oxford and New York, at 1188.

all parties and aggravates the challenge of compliance for host states, as well as exacerbating the regulatory chill effect noted above.

- **Definitions of investors of a state in IIAs that are based solely on the state in which an investor is incorporated or organised permit increased use of investor–state arbitration through treaty shopping.** In the Section of the Guide dealing with the definition of investor, the problem of treaty shopping was discussed.[14] Where a person can qualify as an investor under an IIA that a state has with another state simply by incorporating a subsidiary in the state, it is relatively easy for investors to structure their affairs so as to be able to acquire treaty protection and become eligible to bring investor–state claims.

- **Some investor–state state disputes have become politicised.** As noted, one of the anticipated benefits of investor–state arbitration is that it helps to ensure that disputes between investors and host states are resolved on the basis of law, not power. Recently, a couple of developments have revealed ways in which investor–state disputes may still be subject to the exercise of political power. Argentina has taken the position that investors with awards against it should seek to enforce them in Argentinian courts. Rather than do this, some US investors lobbied the US government to put pressure on Argentina to pay. In 2012, the US government suspended trade concessions granted to Argentina under its Generalized System of Preferences until Argentina pays the awards against it.[15] In another development, Ecuador initiated state-to-state dispute settlement proceedings under the Ecuador–US BIT to, in effect, overturn an interpretation adopted by an investor–state tribunal in a case against it.[16]

7.1.2 Statistics show increasing use of investor–state arbitration

One measure of the growing significance of investor–state arbitration is the dramatic increase in the number of investor–state cases. It is impossible to obtain a reliable estimate of all investor–state cases or to find out about the disposition of all cases, because there is no complete public record. Nevertheless, UNCTAD recently reported that at the end of 2011 450 known treaty-based investment arbitration claims had been initiated, most by developed country investors against developing countries.[17]

---

14 See Section 4.3 (Definitions).

15 UNCTAD (2012), *World Investment Report 2012: Towards a New Generation of Investment Policies*, United Nations, New York and Geneva, at 87, citing United States, Presidential Proclamation, 'To Modify Duty-Free Treatment under the Generalized System of Preferences and for Other Purposes', *Federal Register*, 26 March 2012.

16 UNCTAD (2012), *World Investment Report 2012*, ibid. at 87. The interpretation challenged was that adopted by the tribunal in *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, 30 March 2010.

17 See UNCTAD (2012), *Latest Developments in Investor–state Dispute Settlement*, op. cit. This statistic includes only claims that have actually been submitted to arbitration. It does not include cases in which only a notice of an intention to submit a claim to arbitration has been filed. It also includes only known arbitrations.

While this may seem a relatively modest total, there has been a significant increase in investor–state claims in the past few years. More than 85 per cent of treaty-based investor–state claims have been filed since 2000. Forty-six new claims were filed in 2011, the highest single-year total and more than 10 per cent of all claims ever filed. Overall, 89 states have been the subject of treaty-based claims. Argentina has been named in the largest number of claims (51), followed by Venezuela (25), Ecuador (23), Mexico (19) and the Czech Republic (18). Canada has been the subject of 17 claims, while the USA, Egypt, Poland and Ukraine have all been named in 14 claims.[18] Out of 220 concluded cases, 40 per cent were decided in favour of the state, 30 per cent were decided in favour of the investor and the remaining 30 per cent were settled by the parties.

The growth in claims is undoubtedly the result of the increasingly dense international network of IIAs providing for investor–state arbitration, combined with growth in international investment activity.[19] Increased awareness regarding the existence and nature of investor–state proceedings resulting, in part, from increased transparency and a few large high-profile awards may also be factors.

7.1.3 Dissatisfaction with investor–state arbitration

While the inclusion of investor–state arbitration procedures is typically sought by developed countries in the IIAs that they negotiate because of the advantages that these procedures offer to their investors, recent experience with investor–state arbitration starkly illustrates the costs and challenges for host states that may be associated with investors' use of these procedures, as discussed above. In response, some states have adjusted their IIA models to ensure a better balance between the interests of states and investors and sought to clarify IIA provisions to avoid undesired interpretations. Others have rejected investor–state dispute settlement entirely. In 2011, the Australian government broke ranks with all other developed countries and announced that it would no longer seek investor–state arbitration in the IIAs it negotiates.[20] India has announced that it will not agree to investor–state arbitration in its ongoing negotiations for a free trade agreement with the EU. Venezuela, Bolivia and Ecuador have denounced the ICSID Convention,[21] which

---

18 Ibid. at 1–2.

19 UNCTAD (2007), *Treaties 1996–2006*, op. cit., at 16.

20 Gillard Government Trade Policy Statement, available at: www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html (accessed 29 May 2012). South Africa issued a policy statement in 2010 declaring that it 'will only enter into BITs in future on the basis of compelling economic or political reasons' (Republic of South Africa, Department of Trade and Industry (2010), Policy Statement: The South African Government's Approach to Future International Investment Treaties, available at: www.jadafa.co.za/LinkClick.aspx?fileticket=9A6eXZstRl0%3D&tabid=432 (accessed 8 January 2013).).

21 The ICSID Rules are contained in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington 18 March 1965, 575 *United Nations Treaty Series* 159, reprinted in 4 *International Law Materials* 532 (1965) and the rules created by the Administrative Council of ICSID under Arts. 6(1)(a)–(c) of the ICSID Convention, published in *ICSID Basic Documents*, ICSID, Washington, 2006.

establishes the arbitral procedure used in approximately two-thirds of investor–state arbitrations. Recently, Ecuador and some other countries have gone so far as to terminate some of their IIAs altogether.[22] In August 2010, more than 50 academics from around the world signed a public statement of concern about the harm done to public welfare by international investment agreements. The statement asserts that international investment agreements hamper the ability of governments to act for their people in response to concerns regarding human development and environmental sustainability.[23]

These expressions of dissatisfaction make clear that each state must carefully consider, as a threshold question, whether to agree to investor–state arbitration in its IIAs at all. To the extent that a state has already agreed to investor–state arbitration in an IIA, the commitments undertaken should be reviewed. Nevertheless, states, including developing countries, continue to negotiate IIAs with investor–state arbitration provisions. Fifty-four new IIAs were negotiated in 2011. Most of them include investor–state arbitration provisions. Where a state does agree to investor–state dispute settlement, close attention must be paid to the precise terms that are included in investor–state procedures. The Guide discusses the costs and benefits of some of the options.

7.1.4 Features of investor–state dispute settlement procedures

The features of investor–state dispute settlement procedures in IIAs vary widely in their scope, content and level of detail. Some model agreements set out few details.[24] Others, including the Canadian and US models, the ASEAN Agreement and the COMESA Investment Agreement, set out much more comprehensive schemes dealing precisely with many aspects of the process.

Typically, investor–state proceedings take place under a set of international arbitration rules chosen by the investor from several permitted under the treaty, as modified by the provisions of the treaty itself. The typical procedural steps in investor–state arbitration are set out in Box 7.1.

---

22 In 2008, Ecuador terminated nine BITs. A few other BITS have been denounced: Bolivia had denounced its BIT with the United States, Nicaragua has denounced its BIT with El Salvador and the Bolivarian Republic of Venezuela has renounced its BIT with the Netherlands. In 2010, Ecuador's Constitutional Court declared arbitration provisions of six more BITs unconstitutional (UNCTAD (2010), *Denunciation of the ICSID Convention and BITS: Impact on Investor–state Claims*, IIA Issues Note No. 2, December 2010).

23 Public Statement on the International Investment regime, available at: www.osgoode.yorku.ca/public_statement (accessed 24 June 2012).

24 E.g., UK model IPPA; Indian model BIPPA. Few Caribbean BITs have detailed rules governing investor–state dispute settlement (Malik, op. cit., at 32). The same is true for the India–Singapore CECA (Art. 6.21). An UNCTAD study came to the same conclusion: UNCTAD (2007), *Treaties 1996–2006*, op. cit., at 101. The rules in the COMESA Investment Agreement are much more detailed (Arts. 28–31, Annex A).

Box 7.1 Overview of possible steps in the process of an investor–state arbitration

(Note: steps in brackets do not occur in every case)

- Request for consultations by investor to host state – disclosing legal and factual basis of claim (may be followed or accompanied by notice of intent to submit a claim if required under the IIA);
- Consultations between the investor and the state;
- Submission of claim by investor if no resolution within some specified time after request for consultations, including the investor's choice of arbitral rules;
- Arbitrators appointed – tribunal constituted and arbitration formally commenced;
- Preliminary motions by parties and orders by tribunal on various issues, including:
  - Challenges based on the tribunal lacking jurisdiction to hear the investor's claim,
  - Disclosure of documents and protection of confidentiality,
  - Scheduling filing of written submissions and oral hearing;
- Written submissions of parties filed with tribunal and each other, including responses to the other party's submissions;
- Oral hearing;
- Award by tribunal;
- (Judicial review or, in an ICSID arbitration, ICSID annulment proceeding regarding award may be initiated possibly leading to award being set aside);
- (Payment of damages in award, if any); and
- (Enforcement proceedings if award of damages not paid).

The content of the investor–state procedures in IIAs varies. An overview of the following key issues and approaches is provided below:

- Scope of application of investor–state dispute settlement;
- Initiation of investor–state claims;
- Dealing with jurisdictional challenges and frivolous claims;
- Alternative dispute resolution;
- Applicable arbitral rules;
- Selection of arbitrators;

- Governing law;
- Interpretation of IIAs by the parties;
- Subrogation of political risk insurers;
- Third party funding;
- Consolidation of claims based on identical or similar issues of fact or law;
- Transparency of proceedings and civil society participation in investor–state arbitration;
- Enforcement of awards;
- Dealing with inconsistent arbitration awards and other problems with investor–state arbitration through improved dispute settlement institutions; and
- Remedies issues.

Scope of application of investor–state dispute settlement

An important feature of investor–state arbitration procedures is what claims they allow to be brought. There are a variety of questions related to the scope of investor–state procedures including the following.

- Who is entitled to bring a claim?
- What substantive obligations may be the basis of a claim?
  - Do they include some or all of the substantive obligations set out in the treaty?
  - Do they include other claims that an investor may have against the state on other legal grounds through a so-called 'umbrella clause'?
- What are the time limits on claims?

Who is entitled to bring a claim?

In general, a legal or natural person satisfying the definition in an IIA of 'investor' of one party state who has made an investment in another party state is eligible to make a claim under the IIA against the other party state. An issue that arises is whether a corporation *incorporated under the laws of the host state* that is controlled by a foreign investor of the other party state (a *subsidiary*) should be able to make a claim. Based on its incorporation in the host state, under general principles of international law, the subsidiary has the nationality of the host state and so would not be able to make a claim against the host state. Nevertheless, some IIAs permit a claim to be made on behalf of the subsidiary so long as it is controlled by investors of the other party to the IIA.[25] Many other IIAs do not include such a provision, with the result that claims can be made by investors only on their own behalf.[26]

25 E.g. Canadian model FIPA, Art. 23; US model BIT, Art. 24.1(b).

26 E.g. ASEAN Agreement, Art. 32; COMESA Investment Agreement; India–Singapore CECA. Under the ASEAN–Australia–New Zealand FTA Investment Chapter, only investors can make claims, but they can claim for loss or damage suffered by them or by a covered investment, which would include a subsidiary (Art. 20(b)).

In an investor–state arbitration under the ICSID Convention, the requirements of the convention must be met as well as the requirements under an IIA. As discussed above,[27] the ICSID Convention generally permits arbitration under its rules only where the investor's state and the state complained against are different and both states are parties to the Convention. The Convention permits a subsidiary incorporated in the host state to bring a claim against the host state only if it is foreign controlled and the parties to the dispute both agree that the subsidiary should be treated as a national of another ICSID party state.[28] Some IIAs specifically provide this consent on behalf of the host state.[29] The investor consents by bringing the claim. If both parties consent, an investor of an IIA party state with a subsidiary in the host party state that is affected by a measure can cause the subsidiary to bring the claim under the ICSID Convention. For a treaty-based claim, however, the treaty would have to permit claims by the subsidiary as well. The investor can always claim on its own behalf for losses that it has suffered in relation to its investment in the subsidiary.

Whether or not the subsidiary can bring a claim may have important practical consequences. In some cases, the damages recoverable may vary depending on whether a claim is made for compensation by the subsidiary (or on behalf of the subsidiary) or by the foreign investor on its own behalf.[30] In general terms, if a host state measure affects a subsidiary of a foreign investor, the subsidiary can claim all the losses that it experiences, but the investor claiming on its own behalf can claim only for losses related to its investment in the subsidiary. In a variety of circumstances, the losses to the investor will be less than the losses of the subsidiary, such as where the investor does not own 100 per cent of the subsidiary.[31]

The ASEAN Agreement deals with one other problem related to nationality where a person is a dual national. Under the Agreement, a natural person who is a national of a party state cannot bring a claim against that state, even if they are also a national of the other treaty party.[32] This provision ensures that the requirement under the ICSID Convention for the investor to have a different nationality from the host state is satisfied. This issue can also be addressed by defining 'investor' of a party state to exclude nationals of the other party state. This latter approach not only denies such a person access to dispute settlement, but denies all the protections of the agreement to them.[33]

What substantive obligations may be the basis of a claim?

Many IIAs apply to all disputes related to investments that fall within the definition of 'investment' in the IIA.[34] Some provisions of this type are so broadly worded that

27 See Section 4.3 (Definitions) 'investor' and Box 4.4.

28 ICSID Convention, Art. 25(2).

29 E.g. Ethiopia–Malaysia BIT (1998), Art. 7.

30 S Ripinsky with K Williams (2008), *Damages in International Investment Law*, British Institute of Comparative Law, London, at 158.

31 This distinction was noted by the tribunal in *United Parcel Service of America, Inc.* v. *Canada*, UNCITRAL, Award on the Merits, 24 May 2007, at para. 35.

32 ASEAN Agreement (2009), Art. 29.2.

33 See Section 4.3 (Definitions) 'investor'.

34 UNCTAD (2007), *Treaties 1995–2006*, op. cit., at 102. E.g. India–Singapore CECA (2005), Art. 6.21.1; Indian model BIPPA, Art. 9(1).

they may extend to obligations owed by the state to the investor outside those in the IIA in relation to such investments. Other IIAs specifically restrict the process to breaches of obligations in the agreement.[35]

A provision in an IIA that obliges a party state to respect obligations it has towards investors from the other party state in addition to those obligations specifically set out in the treaty is called an *umbrella clause*. UNCTAD estimates that approximately 40 per cent of BITs have such a provision.[36] While the scope of these provisions varies, sometimes they are interpreted as extending to contractual commitments undertaken by a state to an investor, with the result that compensation for a host state breach of obligations under the contract can be pursued using the investor–state procedures in the treaty.[37] This may be so even in cases where the contract specifically requires the investor to use some other dispute settlement procedure for such disputes, such as litigation in domestic courts.[38]

Some agreements deal with obligations outside the substantive investor protection obligations in the IIA more specifically. The US model agreement, for example, provides that the investor–state procedures may be used to deal with a claim by an investor that a state has breached:

- An investor protection obligation under the treaty;
- A state authorisation to the investor to make an investment; or
- An investment agreement between the investor and the state that the investor has relied on in making the investment.[39]

There are few benefits of umbrella clauses and similar provisions for host states. The range of possible liability for states is wide and hard to define specifically, making it difficult for states to manage their liability risk. The possibility for an investor to bring a claim under the investor–state procedures in an IIA with a generally worded umbrella clause, when some other procedure has been agreed to in a contract governing the specific transaction between the investor and the state, seems to fly in the face of the parties' intentions expressed in the contract and raises the prospect of multiple claims in relation to the same dispute. In these circumstances, it would seem preferable for the state and the investor to be required to use whatever dispute settlement procedures they had agreed would govern their relationship in the context of the contract negotiation. In addition, to the extent that umbrella clauses operate to give rights to investors who are already engaged in contracts with the host state, they do not encourage new investment. In general, however, by broadening

35 Some IIAs are broader in that disputes need not relate to a *breach* of an IIA provision but could relate to other issues regarding the provisions. Some IIAs refer to any dispute 'concerning an obligation', e.g. China–Guyana, Agreement between the Government of the People's Republic of China and the Government of the Republic of Guyana on the Promotion and Protection of Investments, signed 27 March 2003, in force 26 October 2004, Art. 9.

36 UNCTAD (2007), *Treaties 1995–2006*, op. cit., at 73–5.

37 Ibid. See, for example, the China–New Zealand BIT (2008), Art. 10.

38 Malik, op. cit., at 14.

39 US model BIT, Arts. 1, 24.

the scope of possible investor–state claims for investors, it is possible that umbrella clauses could encourage investment.

Limiting investor–state dispute settlement to specific IIA obligations

The narrowest approach to the scope of investor–state arbitration provisions in IIAs is to limit their application to some subset of the obligations in the treaty. One approach is to limit investor–state arbitration to disputes about the amount of compensation for an expropriation.[40] Such a narrow scope for investor–state dispute settlement is rare. Many agreements limit access to investor–state arbitration to claims related to the main investor protection obligations in the IIA. The ASEAN–Australia–New Zealand FTA Investment Chapter, for example, permits claims only in relation to alleged breaches of the following provisions:

- National treatment;
- Fair and equitable treatment;
- Compensation for losses due to armed conflict, civil strife or state of emergency;
- Transfer of funds; and
- Expropriation without compensation.

The investor's claim must also relate to the 'management, conduct, operation or sale or other disposition' of a covered investment.[41] The US model agreement limits claims to a longer list of substantive investor protection obligations (national treatment, MFN, fair and equitable treatment, compensation for losses, expropriation, transfer of funds, and prohibitions on performance requirements and nationality restrictions) and adds the obligation compelling disclosure of existing laws and regulations in that model.[42] Unlike the ASEAN–Australia–New Zealand FTA Investment Chapter, the US model does not restrict the activities to which the breach must relate.

While it is not a common approach in IIAs, a state may want to exclude the interpretation of certain exceptions that deal with sensitive areas of policy, such as national security, from the scope of investor–state arbitration procedures altogether. A more flexible approach where a state seeks to rely on an exception would be to require a binding interpretation from the party states with respect to whether the exception is available to protect a measure that an investor is complaining is a breach of an IIA provision. If the parties decide that the exception is available, then an investor could not pursue the claim. A procedure for having the parties make binding interpretations is discussed below. An alternative, which gives even more flexibility to a state, would

40 E.g. China–Jamaica BIT (1994); Mauritius–Swaziland, Agreement between the Government of the Republic of Mauritius and the Government of the Kingdom of Swaziland for the Promotion and Reciprocal Protection of Investments, signed 15 May 2000, not yet in force.

41 ASEAN–Australia–New Zealand FTA (2009) Investment Chapter, Art. 20. See the similar approach taken in the ASEAN Agreement (2009) (Art. 32(a)) (the list in that agreement also includes the MFN obligation and the prohibition on nationality restrictions) and COMESA Investment Agreement (2007) (Art. 28.1).

42 US model BIT, Art. 24.1(a)(i)(A).

be to allow the state to declare unilaterally that an exception is available. While, as discussed above, some exceptions, such as national security exceptions, are often drafted to be self-defining in this way, most are not. Investors would probably be concerned that leaving it up to the state complained against to determine if an exception is available would provide too much flexibility for states and not enough certainty for investors.

Recent IIAs have adopted another limitation on access to investor–state arbitration. Both the Canadian and US model agreements require that a claimant must have suffered loss or damage by reason of, or arising out of, the breach.[43] The same approach is followed in recent BITs of other countries.[44] Such a requirement may go some way towards avoiding frivolous claims.

Finally, where investor obligations are contemplated in an IIA, several issues arise regarding the scope for the investor–state arbitration process to address host state claims that an investor must have not complied with its obligations. These issues are discussed above.[45]

What are the time limits on claims?

Claims that relate to events occurring before the treaty comes into force are often excluded from the scope of investor–state arbitration.[46] However, many IIAs are not specific in this regard. Claims based on a breach of the treaty may be limited by a scope provision in the treaty. If the treaty does not apply to measures enacted prior to the treaty coming into force, then no claim can be made that such a measure is a breach of the treaty, even if the measure continues to operate after the treaty comes into force.[47]

Some investor–state procedures also set maximum time periods after which no claim can be brought. In the Canadian model treaty and some other treaties, for example, claims can be made only within three years after the investor became aware of the events giving rise to the claim. In the draft Norwegian model treaty, the limitation period is ten years. Limitation periods provide certainty and finality for states regarding their liability risk.[48] Restrictions on claims that arise following termination of the IIA are discussed below.[49]

Initiation of investor–state claims

General requirements

IIAs impose a variety of preliminary requirements on investors that must be satisfied before they can initiate investor–state arbitration. Typically, the state and the

43 Canadian model FIPA, Art. 23, NAFTA (1992), Art. 1118, US model BIT, Art. 24.

44 UNCTAD (2007), *Treaties 1995–2006*, op. cit., at 104, identifying Austria, Japan and Mexico, as well as the US and Canada. See also ASEAN Agreement (2009), Art. 29; India–Singapore CECA (2005), Art. 6.21.1; COMESA Investment Agreement (2007), Art. 28.1.

45 See Section 6.13 (Enforcement of investor obligations).

46 E.g. ASEAN Agreement (2009), Art. 20(3); AALCC model Agreements, Art. 10.

47 See Section 4.5 (Scope of application).

48 E.g. Canadian model FIPA, Art. 26, COMESA Investment Agreement (2007), Art. 28.2.

49 See Section 9.3 (Termination of IIAs).

investor must consult prior to the formal commencement of an arbitration.[50] In many IIAs, this is facilitated by a requirement for the investor to file a notice of intent to bring a claim 90 days prior to the submission of the claim itself.[51] The notice of intent provides some basic information to the state to permit it to make a preliminary assessment of the claim and engage in consultations with the investor on a more informed basis.

Most agreements impose a requirement for investors to wait between three and six months after the events giving rise to the claim before filing their claim.[52] IIA practice seems to be converging on a six-month delay.[53] Under the COMESA Investment Agreement, during this six-month 'cooling off' period before a claim may be filed, the parties must participate in mediation with a view to resolving the dispute.[54] In addition, each set of arbitral rules that may govern an investor–state arbitration has its own specific requirements for initiating an arbitration.[55]

Exhaustion of local remedies

IIA practice One significant design issue in relation to an IIA's prerequisites to allowing an investor to initiate investor–state arbitration is determining whether it is appropriate to require investors to seek relief through domestic dispute resolution mechanisms prior to making a claim in investor–state arbitration. While many IIAs give investors the right to make claims to compensation against states in binding arbitration, in a few, access to international arbitration is subject to requirements for the investor to seek local remedies first.

One option is to require that an investor exhaust all remedial possibilities under domestic law before being able to make a claim for relief through investor–state

---

50 Canadian model FIPA, Art. 25; US model BIT, Art. 23; COMESA Investment Agreement (2007), Art. 26.3; ASEAN Agreement (2009), Art. 31; India–Singapore CECA (2005), Art. 6.21(2); NAFTA (1992), Art. 1118.

51 E.g. Canadian model FIPA, Arts. 24–6; US model BIT, Art. 24; ASEAN Agreement (2009), Art. 34.1(b); COMESA Investment Agreement (2007), Art. 26; India–Singapore CECA (2005), Art. 6.21(4)(b); ASEAN–Australia–New Zealand FTA (2009) Investment Chapter, Art. 22.1(b). The Colombian model agreement requires 180 days, notice of an intention to file a claim (Art. IX.5).

52 Canadian model FIPA, Arts. 24–6; US model BIT, Art. 24. The COMESA Investment Agreement (2007) has a similar provision (Arts. 26.1, 28) as does the ASEAN Agreement (2009) (Arts. 31, 34.1) and the India–Singapore CECA (2005) (Art. 6.21(3)). Caribbean and Pacific BITS typically require between 3 and 6 months to have elapsed prior to a claim being filed (Malik, op. cit., at 32, 60). The Colombian model agreement requires 12 months to have expired before a claim can be filed (Art. IX.4).

53 UNCTAD (2007), *Treaties 1995–2006*, op. cit., at 105. Some IIAs do not have a time limit, e.g. Australia–India BIT (1999), Art. 12.

54 COMESA Investment Agreement (2007), Arts. 26.3–26.6.

55 E.g. *Arbitration Rules of the United Nations Commission on International Trade Law*, approved by the United Nations General Assembly on 15 December 1976, UN GAOR, 31st Session, Supp. No. 17 at 46, Chapter V, Section C, UN Doc. A/31/17, 1976, as revised in 2010 approved by the United Nations General Assembly on 6 December 2010, UN GAOR, 65th Session, No. 17, Chap. III, U.N. Doc. A/Res/65/2, Art. 3; ICSID Convention, Art. 36.

dispute settlement under an IIA. Such a provision prevents investors from initiating an investor–state claim if they have not pursued domestic remedies diligently. Most IIAs, however, do not mention exhaustion of local remedies. Neither the Canadian model treaty nor the US model, for example, contains an exhaustion of local remedies requirement. In the absence of a specific requirement to exhaust local remedies, arbitral cases have confirmed that IIAs do not require exhaustion of local remedies. By contrast, the IISD model treaty requires all domestic remedies to be exhausted before international investor–state dispute settlement mechanisms are engaged.[56]

The draft Norwegian treaty adopted a compromise approach. It requires investors to exhaust their domestic remedies, but imposes a time limit for doing so. If the dispute cannot be resolved within 36 months from the date of the submission of the dispute to a local court, the investor can proceed directly to investor–state arbitration.[57] An investor is not required to exhaust local remedies, however, if there is no reasonable possibility of local remedies providing redress for the injury to the investor. Some existing treaties similarly provide requirements for investors to seek to exhaust local remedies, but for limited time periods.[58]

Another approach adopted in some IIAs is to require investors to have recourse to domestic administrative review procedures, as opposed to the exhaustion of all local remedies, as a condition of being able to commence investor–state arbitration.[59]

Costs and benefits of exhaustion of local remedies requirements A requirement to exhaust local remedies prior to resorting to relief before international tribunals is consistent with the approach taken generally under international law. In addition, there are several advantages to having investors submit to domestic law and domestic procedures, as listed in Box 7.2.

---

56 IISD model treaty, Art. 45(B). Article 26 of the ICSID Convention specifically contemplates that states may require exhaustion of local remedies as a condition of consenting to arbitration.

57 Norwegian draft APPI, Art. 15.3. The Colombian model agreement requires the exhaustion of local administrative remedies if required by the domestic law of the host state but only up to 6 months (Art. IX.1).

58 E.g. China–Côte d'Ivoire, Agreement between the Government of the People's Republic of China and the Government of the Republic of Côte d'Ivoire on the Promotion and Protection of Investments, signed 23 September 2002, not yet in force, Art. 9 (6 months); Italy–Jamaica, Agreement between the Government of the Italian Republic and the Government of Jamaica for the Promotion and Protection of Investments, signed 29 September 1993, in force 9 November 1995 (18 months).

59 E.g. Protocol to China–Latvia, Agreement between the Government of the People's Republic of China and the Government of the Republic of Latvia on the Promotion and Protection of Investments, signed 15 April 2004, in force 1 February 2006; and Belgium–Luxembourg–Colombia, Agreement between the Belgium–Luxembourg Economic Union and the Republic of Colombia for the Reciprocal Promotion and Protection of Investments, signed 4 February 2009, not yet in force.

Box 7.2 Advantages of an IIA requirement to exhaust local remedies

- Domestic tribunals have an opportunity to correct mistakes made by states by providing relief in obvious cases.
- Domestic tribunals can screen out claims with no obvious merit.
- Domestic dispute resolution may be less costly.
- Forcing disputes to be addressed first under domestic law and by domestic tribunals creates incentives for foreign investors, domestic investors and the host state to further develop domestic investment rules and contribute to the development of domestic institutions.
- Domestic dispute resolution contributes to a perception that the outcome to a dispute is more legitimate, since it has been decided in accordance with democratically determined domestic laws and is consistent with domestic constitutional requirements.
- If investor–state arbitration tribunals are subsequently required to interpret domestic law for the purpose of settling a dispute, they will have access to interpretations of these laws made by domestic courts, which have more expertise in domestic law.

The question of legitimacy of investor state arbitration decisions noted in Box 7.2 is an important one. For instance, in the *CMS Gas* case, the ICSID tribunal took it upon itself to interpret the Argentine Constitution,[60] an approach that raised concerns about the legitimacy of the ICSID decision in Argentina and other developing countries.

However, there are also potential drawbacks to insisting on the exhaustion of domestic dispute resolution mechanisms. The main drawback is that such a requirement could discourage potential investors from investing as a result of the difficulties that could arise if they must use domestic courts. As discussed, avoiding domestic courts is one of the essential reasons that motivate investors to seek treaty-based investor–state arbitration. A concern for host states is that an exhaustion of local remedies requirement creates the possibility that a host state may spend some period of time defending an investor's claim in its domestic courts and then be forced to defend essentially the same claim in investor–state arbitration. This issue of dealing with multiple claims is discussed in the next section.

Issues related to multiple remedial possibilities for investors

Even where exhaustion of local remedies is not required, many IIAs have other provisions that address the interaction between investor–state arbitration and remedies

60 *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 21 May 2005, at paras. 119–20.

in the host state. One of the challenges for host states is finding ways to manage the risk that investors may pursue multiple litigation strategies in different venues in connection with a particular host state action. For example, where an investor has a contract with the host state, the contract itself may contemplate a particular dispute resolution procedure, such as commercial arbitration, which, depending on the terms of the dispute resolution clause, may be pursued in parallel with domestic court action. A claim under an IIA may also be possible, depending on the scope of the dispute resolution provisions in the treaty. A broadly worded umbrella clause may permit a treaty-based claim in addition to the others. Finally, the foreign investor may be organised as a related group of entities with different nationalities and this may permit it to initiate multiple investor–state arbitration claims under different IIAs that the host state has entered into. Some IIAs have tried to address these kinds of problems in limited ways, as discussed below.

Waiver Some IIAs provide that a choice by an investor to initiate investor–state arbitration means that the investor must give up all other claims to relief. Both the US and Canadian models require that investors waive their rights to initiate or continue any other dispute settlement procedure relating to the measure for which the investor is seeking relief as a condition of the investor being permitted to pursue its claim in investor–state arbitration. This waiver does not extend to claims for relief other than monetary compensation, since these claims may not be pursued in investor–state arbitration.[61] Waivers are also required under the ASEAN Agreement and the India–Singapore CECA.[62] The ASEAN Agreement and the India–Singapore CECA go on to provide that once a claim has been made, relief cannot be sought through diplomatic negotiations between states.[63] The COMESA Investment Agreement simply provides that after a claim is made, the investor may not pursue relief in other fora.[64] Sometimes the approach taken in these treaties is described as a 'no U-turn' model. Waiver requirements are not a barrier to pursuing investor–state arbitration. Nor do they prevent an investor from seeking local remedies until they prove unsuccessful and then initiating an investor–state arbitration.[65] Once the investor–state claim is made, however, recourse to other remedies is precluded, even if the investor–state claim is ultimately unsuccessful.

Waiver provisions are consistent with Article 26 of the ICSID Convention, which provides that the consent of the parties to arbitration under the Convention is deemed, in the absence of any agreement to the contrary, to mean that parties have agreed to arbitrate 'to the exclusion of any other remedy'. Article 27 of the Convention stipulates that no party state can pursue a diplomatic solution or bring an

61 Canadian model FIPA, Art. 27; US model BIT, Art. 26.
62 The ASEAN Agreement (2009) (Art. 34.1(c)) and the India–Singapore CECA (2005) (Art. 6.21) do not carve out injunctive relief.
63 ASEAN Agreement (2009), Art. 34.3, and the India–Singapore CECA (2005), Art. 6.21(4).
64 The COMESA Investment Agreement (2007), Art. 28.3.
65 An investor would have to initiate the claim before the expiry of any maximum time period in the treaty. See above 'General requirements'.

international claim with respect to a dispute which one of its nationals and another party state have agreed to arbitrate under the Convention. The only exception to this limitation is if the other party state fails to abide by and comply with an award rendered in the dispute. Some IIAs contain similar provisions.

'Fork in the road' Some treaties provide that an investor must choose to pursue its claim either in domestic courts or through investor–state arbitration under an IIA and that, once that choice is made, it is final and irrevocable. This means that the investor cannot pursue relief in any other forum. Such a provision is known as a 'fork in the road provision' and is intended to ensure that states have to defend investors' claims in only one forum. The Colombia model agreement provides this fork in the road provision:

> Once the investor has submitted the dispute to either a competent tribunal of the Contracting Party in whose territory the investment has been admitted or any of the arbitration mechanisms stated above, the choice of the procedure shall be final.[66]

A fork in the road provision is not a barrier to investor–state claims. In fact it may encourage them where seeking domestic relief is unattractive for any reason. An investor will not want to risk losing an opportunity to pursue relief in investor–state arbitration by pursuing a risky domestic claim.

Other approaches to the risk of multiple claims States can also seek to avoid multiple claims in other ways. Where a host state and an investor have entered into a contract, a state may seek to include a term in the contract that commits the investor to deal with disputes under the agreed dispute resolution mechanism in the contract to the exclusion of all other procedures, including those provided for in IIAs. In their IIAs, states may wish to confirm that investors who have entered into such a commitment cannot make a claim under IIA investor–state arbitration in relation to any dispute that is subject to the contractual dispute settlement mechanism. Such an approach, under which an investor waives their right to investor–state arbitration, is not currently part of IIA practice. States may also consider not entering into IIAs that have umbrella clauses to limit their exposure to multiple claims. If an IIA does not contain an umbrella clause, an investor can only bring an investor–state claim based on a breach of an IIA provision, not on a simple a breach of a contract with the host state or other obligation owed to the investor by the state.[67] States should review their existing treaties and contracts to determine their exposure to multiple claims.

State consent and prerequisites to making a claim

The consent of both parties is required to create the jurisdiction of an arbitration tribunal. The state's consent is typically provided in the treaty to all claims that are

66 Colombian model agreement, Art. IX.7.

67 Some breaches of contract might amount to a breach of an IIA in some circumstances.

made in accordance with the treaty,[68] though some IIAs do not expressly mention the state's consent. The investor's consent is given at the time it initiates the arbitration. A small number of treaties provide that the state must separately give its consent in each case.[69] This allows a host state to decide whether it wants to arbitrate with an investor, based on the facts of a specific case. While this provides maximum flexibility to the host state, it renders the possibility of investor–state arbitration much less certain for investors.

An issue that has arisen in investor–state arbitrations under NAFTA is whether preliminary requirements that an IIA requires be satisfied prior to a claim being filed, such as filing a waiver of other claims, are merely procedural or should be interpreted as conditions of the state's consent to arbitration.[70] The Canadian model FIPA adopted in 2004 and the new US model BIT adopted in 2012 expressly identify satisfaction of all pre-arbitration requirements in these agreements as conditions of the state's consent.[71] As a result, the failure by an investor to satisfy any one of them deprives the tribunal of jurisdiction and the investor is forced to recommence its arbitration after satisfying the condition.[72]

Dealing with jurisdictional challenges and frivolous claims

Jurisdictional challenges by states are common in investor–state arbitration. In an IIA, the state gives its consent in advance to arbitrate with an unlimited class of investors who satisfy the requirements of the treaty for standing to bring a claim. Often, whether an investor meets one of these requirements is challenged by the host state. A state may dispute, for example, whether the person making the claim is an investor of the other party to the IIA within the meaning of the IIA's definition of investor. As noted in the previous section, if one of the conditions of the state's consent to arbitrate has not been satisfied, an arbitral tribunal has no jurisdiction to hear the claim.

Jurisdictional challenges are typically raised by the host state early in an investor–state case. In some cases, however, tribunals have declined to deal with a jurisdictional issue at an early stage in the arbitration because they have determined that they needed all of the evidence and submissions of the parties on the merits of the claim to be provided before they could render a decision on the issue.[73] In these cases, the tribunals made their decision on the jurisdictional issues at the same time as their decisions on the

---

68 E.g. Canadian model FIPA, Art. 25; US model BIT, Art. 25; COMESA Investment Agreement (2007), Art. 28.4; India–Singapore CECA (2005), Art. 6.21(4).

69 E.g. Argentina–New Zealand BIT (1999), Art. 12; Sweden–Malaysia, Agreement between the Government of Sweden and the Government of Malaysia concerning the Mutual Protection of Investments, signed 3 March 1979, in force 6 July 1979, Art. 6.

70 *Waste Management, Inc.* v. *United Mexican States*, ARB (AF)/98/2, Award, 2 June 2000.

71 Canadian model FIPA, Art. 27; US model BIT, Art. 26.

72 The same approach is taken in the draft Norwegian APPI (Art. 15.4) and the ASEAN Agreement (2009) (Art. 34).

73 Tribunals are expressly empowered to decide to do either under the ICSID Convention (Art. 41).

merits. This practice has caused concerns for some states that cases that were outside the jurisdiction of the tribunal were not being terminated until considerable expense had been incurred in connection with the case, including costs related to extensive argument on procedural matters, the preparation of lengthy submissions on the merits and an oral hearing.

Some states have been similarly concerned that investors' claims with little merit were not being disposed of at an early stage. As a result, states have been forced to incur substantial unnecessary costs.[74]

One response to these concerns has been to adopt IIA provisions that require tribunals to deal with preliminary challenges, including challenges that the investor's claim or part of it is either frivolous or outside the competence of the arbitral tribunal, at the earliest opportunity. The ASEAN Agreement, for example, requires that where a party state makes a preliminary objection that the investor's claim is outside the competence of the tribunal or 'manifestly without merit', the tribunal must deal with the objection before proceeding to the merits.[75] The tribunal assumes, for the purposes of such a preliminary objection, that that the facts alleged by the investor are true and then decides if the claim (or part of the claim) is one that it has jurisdiction to adjudicate or if the claim has enough merit to proceed.

In order to protect against both frivolous claims and frivolous objections to claims, it would be possible to provide in an IIA that a tribunal that rejects a frivolous claim or objection could award the costs associated with the claim or objection against the losing party. No IIA has addressed this issue specifically.

Alternative dispute resolution

Experience with investor–state arbitration has demonstrated its costs to host states. As a consequence, there has been increasing interest in approaches to the resolution of disputes other than through binding adjudication by arbitral tribunals. In addition to cost savings, alternative dispute resolution (ADR) procedures are more likely to preserve the relationship between the investor and the state, compared with investor–state arbitration, which has proved to be protracted and contentious. ADR creates the possibility of faster and more flexible solutions agreed to by the parties that are not available in arbitration, where there must be a winner and a loser. In arbitration, an award of compensation is made or the investor gets nothing. ADR may also be a useful way to deal effectively with frivolous claims.[76] Typical ADR procedures are described in Box 7.3.

74 UNCTAD (2007), *Treaties 1996–2006*, op. cit., at 122–3.

75 ASEAN Agreement (2009), Arts. 36.1–36.4. The Canadian model FIPA (all preliminary objections, no procedure specified) and the US model BIT (objections to jurisdiction only, detailed procedure specified) contain a similar process for dealing with preliminary objections.

76 UNCTAD (2010), *Investor–state Disputes: Prevention and Alternatives to Arbitration*¸ United Nations, Geneva and New York, at 4–7, 16–20.

Box 7.3 Examples of alternative dispute resolution procedures

There is significant variation within categories of ADR procedures and the categories themselves overlap. Nevertheless, it is possible to identify the general characteristics of the following major categories of ADR procedures.

- **Negotiation:** The parties to the dispute meet to exchange information about their interests, arguments about their legal positions and proposals for resolution of the dispute with the goal of agreeing on a particular resolution. No third party is involved.
- **Mediation (or assisted negotiation):** At the request of the parties to the dispute, a third party assists the parties to negotiate a solution by:
  - Seeking to ensure a constructive process of communication and interaction between the parties, including, in some cases, acting as the communications conduit;
  - Helping parties to identify their real interests in the dispute (as opposed to their legal positions) and reframing issues with a view to facilitating agreement;
  - Providing advice on substantive issues;
  - Identifying possible solutions; or
  - On request, giving an opinion regarding the likely legal outcome of the dispute.
- **Fact finding:** Where the facts in a dispute are contested, the parties agree to each submit factual information to a neutral expert, who makes a non-binding assessment of what the facts are. The goal is to obtain an independent assessment of the facts to facilitate the settlement of the dispute. The fact finder does not make recommendations to the parties regarding how the dispute should be resolved.
- **Early neutral evaluation:** The parties agree to submit their dispute to a lawyer or other expert, often someone with specific knowledge of the dispute, for a confidential assessment of the likely outcome of the case, should it go to arbitration. At a meeting with the expert, the parties present their arguments and evidence and the expert provides the assessment. The goal is to facilitate settlement by providing an early evaluation of the likely outcome of an arbitration. The expert may play a continuing role in trying to assist the parties to settle following the assessment.
- **Conciliation:** This is the most formal ADR method. At the request of the parties to the dispute and in accordance with specific rules, a third party (the conciliator or a panel of conciliators) encourages the parties to settle by:
  - Seeking to ensure a constructive process of communication and interaction between the parties;

(Continued)

(Continued)

- Providing advice on substantive issues;
- Suggesting possible solutions; or
- Producing a non-binding written report on how the issue may be resolved.[77]

IIA practice

As noted above, IIAs require a period of time to elapse prior to the initiation of an investor–state arbitration claim to permit the host state and the investor to consult with a view to negotiating a solution. Also, IIAs often mandate the investor and the host state to try to settle the dispute amicably.[78] To assist in the process, many IIAs identify ADR methods, especially conciliation, as alternative approaches to the resolution of disputes that the parties may agree to pursue.[79] In a few agreements, participation in ADR is mandatory. Under the COMESA Investment Agreement, during the six-month period before a claim may be filed, the parties must participate in mediation with a view to resolving the dispute.[80]

The ICSID Convention permits conciliation, as well as fact finding, to be used as alternatives to arbitration with the agreement of the parties. Under the ICSID rules, the role of the conciliation commission set up under the Convention is 'to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms'.[81] If the parties reach agreement, the conciliation commission draws up a report noting the issues in dispute and recording that the parties have reached agreement. If the parties do not agree, the commission draws up a report recording its failure to bring the parties to agreement.[82] Under the ICSID fact-finding rules, an independent committee is established to provide an impartial and non-binding assessment of the facts. No conclusions are reached regarding the application of the law and no recommendations to the parties are made.[83]

77 These categories are discussed at length, ibid., at 25–30.

78 E.g. Canadian model FIPA, Art. 25.1; US model BIT, Art. 23; Indian model BIPPA, Art. 9; ASEAN–Australia–New Zealand FTA (2009), Investment Chapter, Art. 19.1; India–Singapore CECA (2005), Art. 6.21.1.

79 E.g. Indian model BIPPA, Art. 9(2) (conciliation under the UNCITRAL Conciliation Rules); UK–Jamaica BIT (1987) (ICSID conciliation). Some treaties simply identify the possibility of the use of non-binding third party procedures, e.g. ASEAN–Australia–New Zealand FTA (2009) Investment Chapter, Art. 19.1.

80 COMESA Investment Agreement (2007), Arts. 26.3–26.6.

81 ICSID Convention, Art. 34(1).

82 ICSID Convention, Art. 34(2).

83 ICSID Additional Facility Rules, Schedule A – Fact Finding (Additional Facility) Rules.

Challenges and limitations of requiring ADR in IIAs

Despite its availability and advantages over investor–state arbitration, use of ADR has been rare in investor–state disputes.[84] This may be because there are specific challenges that impede the use of ADR procedures by states:

- **States' flexibility to find solutions to disputes with investors may be limited by requirements to act through laws and regulations that involve more or less complex and time-consuming procedures and multiple stakeholders;**
- **Government officials may not have appropriate authority to take decisions in the context of ADR procedures to propose or agree to solutions;** [85] **and**
- **ADR procedures may not be well known to government officials or investors.** Since ADR procedures typically require the consent of the parties, a lack of familiarity may discourage their use.

Dispute prevention policies are another useful alternative approach to dealing with conflicts between investors and host states. These host state policies seek to identify and address developing conflicts with investors at an early stage to prevent them from developing into disputes. There is increasing discussion of such policies and they undoubtedly have a role to play. Since, in most cases, however, they do not involve IIA provisions, they will not be further addressed in this section of the Guide.[86] Technical assistance to support the development and implementation of dispute prevention policies is discussed briefly in Section 8.2 (Technical assistance).

Applicable arbitral rules

Under most recent BITs, proceedings take place under a set of international arbitration rules chosen by the investor from a list of alternatives set out in the treaty, as modified by the provisions of the treaty itself.[87] NAFTA is an example of a treaty that provides this option.[88]

Usually, where both the investor's state and the state complained against are parties to the ICSID Convention, arbitration may take place under the arbitration rules of the Convention.[89] The ICSID Convention came into force in 1965 with the

84 Ibid. at xxvi.

85 Gantz concludes that it is difficult for government officials to settle claims without a binding award. See D Gantz (2011), 'Resolution of Investor–state Controversies in Developing Countries', Arizona Legal Studies Discussion Paper No. 11–29, University of Arizona, Tucson.

86 UNCTAD (2010), *Investor–State Disputes*, op. cit.; R Echandi (2011), 'Toward a New Approach to Address Investor–state Conflict: Developing a Conceptual Framework', NCCR Trade Regulation Working Paper No. 2011/46, Bern.

87 Some treaties specify a single forum for dispute settlement, e.g. Saudi Arabia–Malaysia, Agreement between the Government of the Kingdom of Saudi Arabia and the Government of Malaysia concerning the Promotion and Reciprocal Protection of Investments, signed 25 October 2000, in force 14 August 2001.

88 NAFTA (1992), Art. 1120.

89 E.g. US model BIT; Indian model BIPPA; Canadian model FIPA. The UK model IPPA also contemplates arbitration under the rules of the Court of Arbitration of the International Chamber of Commerce and the investor and the state must agree on the applicable rules (Art. 8).

sponsorship of the World Bank and now has 148 parties. Its main goal is to create a set of rules specifically designed to govern disputes between private investors and states and to provide institutional support for arbitrations under those rules through the International Center for the Settlement of Investment Disputes (also known as ICSID). Where the investor's state and the state complained against are not both parties to the Convention, arbitration under the ICSID Convention is not available. To address this situation, ICSID's Administrative Council adopted the Additional Facility rules in 1973.[90] These rules, which are similar to the rules under the ICSID Convention, are routinely provided as an alternative in IIAs where one party to the IIA is not a party to the ICSID Convention.

In most recent IIAs, investors may also choose to arbitrate under the arbitration rules of the UN Commission on International Trade Law (UNCITRAL Arbitration Rules). These are general rules designed to govern private international commercial arbitrations. They are not specifically adapted to investor–state arbitration and do not have the support of an institution like ICSID. In Norway's draft treaty, UNCITRAL arbitration was not included as an option. The rationale expressed by the drafters was that the ICSID rules are preferable because they are designed to be used in investor–state dispute settlement and provide greater predictability. Some IIAs contemplate the use of other rules, such as those of the International Chamber of Commerce and the Stockholm Chamber of Commerce[91] or any rules that the parties may agree on.[92] ICSID arbitration has been preferred by investors in almost two-thirds of arbitrations to date.[93] Some states and commentators have expressed concerns about the fairness of the ICSID process for host states.[94]

Selection of arbitrators

Basic rules

Many IIAs do not address the selection of arbitrators, leaving this issue to be governed by the arbitral rules applicable to the investor–state arbitration.[95] Normally, IIAs that

90 The International Center for the Settlement of Investment Disputes Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings was created by the Administrative Council of ICSID on 27 September 1978, reprinted in Document ICSID/11 (June 1979). Schedule C to the Additional Facility sets out the Arbitration (Additional Facility) Rules, as amended.

91 E.g. Korea–Trinidad and Tobago BIT (2002), Art. 8. The ASEAN Agreement (2009) allows the investor to choose to arbitrate at the Regional Centre for Arbitration in Kuala Lumpur or any other regional arbitration centre in ASEAN (Art. 33.1). Investor–state disputes under the COMESA Investment Agreement (2007) can be initiated before the COMESA Court of Justice, a regional institution established in accordance with the Treaty establishing the Common Market for Eastern and Southern Africa (Art. 28.1(b)).

92 E.g. Hong Kong–UK BIT (1998), Art. 8. Under this BIT, if the parties do not agree, the arbitration takes place under the UNCITRAL Arbitration Rules.

93 UNCTAD (2010), *Investor-state Disputes*, op. cit., at 1.

94 G van Harten (2010), 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law', in S Schill (ed.), *International Investment Law and Comparative Public Law*, Oxford University Press, Oxford.

95 E.g. India–Singapore CECA (2005).

address the appointment of arbitrators provide that there should be three arbitrators, one appointed by each party and the third selected by the other two or agreed by the parties. These IIAs also provide an appointment procedure that applies if a party fails to appoint an arbitrator within the time specified in the treaty. Appointing authority might, for example, be given to the President of the International Court of Justice or the Secretary-General of ICSID.

This is the approach under the Indian model agreement. Each party must appoint an arbitrator within two months of the commencement of the arbitration and the arbitrators choose a presiding arbitrator. If the parties or arbitrators fail to appoint an arbitrator, an appointment is made by 'the President, the Vice-President or the next senior Judge of the International Court of Justice, who is not a national of either Contracting Party'.[96] The ASEAN–Australia–New Zealand FTA Investment Chapter provides similar, but more detailed, rules. A different feature of this agreement is that the parties themselves must agree on the third arbitrator, who cannot be a national of either party to the IIA. This approach is also followed in the US and Canadian model agreements and gives the parties more control over the identity of the arbitrators.[97]

Standards for arbitrators

An issue that arises in investor–state practice is the independence, impartiality and expertise of arbitrators. A few IIAs prescribe standards for arbitrators. For example, the Canadian model provides as follows:

> 2. Arbitrators shall
>
>   a. have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements;
>   b. be independent of, and not be affiliated with or take instructions from, either Party or the disputing party [i.e. the host state, the investor's home state or the investor]; and
>   c. comply with any Code of Conduct for Dispute Settlement as agreed by the Commission.[98]

Where the arbitration relates to financial institutions, and the parties agree, the arbitrators are required to have expertise or experience in financial services law or practice. If they do not agree, then each party can appoint arbitrators with these qualifications.

The applicable arbitral rules may also provide some basic standards,[99] as well as procedures to challenge arbitrators where it is alleged that these standards are not

96 Indian model BIPPA, Art. 9(3)(c).
97 US model BIT, Art. 27; Canadian model FIPA, Art. 29.
98 Canadian model FIPA, Art. 29(2). The Commission is a committee composed of ministerial-level appointments from each party state. No roster has been established. The ASEAN–Australia–New Zealand FTA (2009) Investment Chapter has a similar provision (Art. 23.2).
99 E.g. UNCITRAL Arbitration Rules, Arts. 9, 10; ICSID Convention, Art. 14.

met.[100] These procedures have been used on a number of occasions in investor–state cases, though such challenges have rarely succeeded.[101] Neither the arbitration rules nor most IIAs address the standards for independence and impartiality in any detail. There are, however, other useful sources of rules.

Under NAFTA, a code of conduct has been agreed to by the party states for members of panels deciding state-to-state cases.[102] It contains the following elements:

- Standards for independence of panel members;
- Detailed requirements regarding disclosure of financial and personal relationships between a prospective arbitrator and the parties or the matter in dispute, including relationships through the prospective arbitrator's employer, partner, business, associate or family member;
- Standards for the conduct of panel members during the dispute and after its termination related to confidentiality; and
- A restriction on representing any participant in the dispute for one year following the termination of the dispute.

Some or all of these requirements, with any adjustments desired by the parties, could be adopted by parties in an IIA or a separate code of conduct.

In addition, the International Bar Association has developed a set of very specific guidelines regarding conflicts of interest for commercial arbitrators. The guidelines have been applied in a number of investor–state arbitrations considering challenges to arbitrators.[103] One award referred to the guidelines as representing 'international best practices.'[104] The guidelines set standards for arbitrator independence and for disclosure by arbitrators. They also deal with specific fact situations, such as an arbitrator previously having been retained to give advice or an expert opinion to one of the parties to the dispute. The guidelines assign conflicts to categories, depending on the seriousness of the risk of a conflict of interest, identifying which conflicts should be prohibited, as well as those that are less serious. While the guidelines are not specifically drafted for investor–state arbitration, they address issues that can arise in all arbitrations and could be referred to in an IIA to ensure that they are applied in investor–state arbitrations. Alternatively, key rules from the guidelines could be incorporated directly in an IIA to set specific mandatory standards for arbitrator independence.

---

100 E.g. UNCITRAL Arbitration Rules, Arts. 9, 10; ICSID Convention, Art. 12, 13.

101 E.g. *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23 (BLEU/Argentina and France/Argentina BIT), Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler, 25 June 2008; *ICS Inspection and Control Services Limited (United Kingdom) v. Republic of Argentina*, UNCITRAL, PCA Case No. 2010–9 (UK/Argentina BIT), Decision on Challenge to Arbitrator, 17 December 2009.

102 Code of Conduct for Dispute Settlement Procedures under Chapters 19 and 20, available at: www.nafta-sec-alena.org/en/view.aspx?conID=658 (accessed 25 June 2012).

103 The IBA Guidelines on Conflicts of Interest in International Arbitration (adopted by the IBA Council 22 May 2004) were referred to in *EDF v. Argentina, Arbitrator Challenge*, op. cit., at para. 69.

104 *ICS v. Argentina*, Arbitrator Challenge, op. cit.

A second set of issues relates to the competence of arbitrators. Often, investor–state disputes require expertise not only in international investment law, but also in international law generally, especially if other areas are implicated in the dispute outside international investment law, such as international environmental law. In many cases, the domestic law of the host state must also be addressed. It may be difficult to find arbitrators with adequate expertise and who have the necessary independence. This is particularly true in developing countries. While the representation of developing countries on arbitral tribunals is desirable, there are often few people with the requisite expertise who are not associated with the state against which a claim is being made.

Existing IIAs do not address competence issues in a significant way. The US and Canadian models provide an option for arbitral tribunals to seek the advice of an expert, either on its own initiative or at the request of a party on any factual issue, concerning environmental, health, safety or other matters raised by the disputing party.[105]

One proposed solution to the challenge of ensuring that arbitrators have the necessary expertise is to create some kind of permanent decision-making institution to which the most competent persons would be appointed.[106] The challenges involved in establishing permanent institutions are discussed below in this section.[107]

The COMESA Investment Agreement adopts an approach that may address the problem of expertise in a modest way. It requires that a roster of qualified arbitrators be maintained by the party states from which parties to investor–state dispute can select arbitrators.[108] No specific qualifications are specified for roster members, however. Creating a roster and requiring that arbitrators be chosen from the roster is another way for the party states to exert more control over who decides the dispute and ensures that arbitrators have the competence or other characteristics desired by the party states. A roster may include, for example, developing country representatives or people with particular expertise beyond investment law.

A roster system could be made more effective by IIA commitments on technical assistance to support the training of competent developing country arbitrators who could become members of the roster. This would be likely to work most effectively in the context of a regional IIA. Within a region there would be more eligible candidates with expertise and the costs of training could be spread among more countries. Also, a regional training initiative could produce competent arbitrators, some of whom would not have the nationality of the state complained against and would not face conflicts of interest in arbitrations involving that state or its investors.[109]

---

105 Canadian model FIPA, Art. 42; US model BIT, Art. 32.

106 F Marshall (2009), 'Defining New Institutional Options for Investor–state Dispute Settlement', International Institute for Sustainable Development, Winnipeg.

107 See below in this section 'Dealing with inconsistent arbitration awards and other problems in investor–state arbitration through improved institutions'.

108 COMESA Investment Agreement (2007), Art. 30.

109 Technical assistance provisions in IIAs are discussed below. See Section 8.2 (Technical assistance).

Governing law

As noted above, the substantive legal basis for investor claims under an IIA is typically defined as a breach of the investor protection provisions of the treaty.[110] Beyond defining what can be the basis of a claim, many IIAs do not indicate specifically what is to be the governing law. For treaties that address the issue, the most common formulation is to say that the investor–state tribunal is to decide the claim 'in accordance with the treaty and applicable rules of international law'.[111] Applicable rules of international law include, for example, generally accepted principles of international law codified in the *Vienna Convention on the Law of Treaties*, which are typically used to interpret IIAs.[112] Also, in practice, in order to determine whether a domestic measure of the host state is consistent with the treaty provisions, often it will be necessary for the tribunal to consider the operation of the applicable domestic law.

Where there is no direction regarding governing law in the treaty, the applicable arbitral rules will apply. Article 42(1) of the ICSID Convention provides that in the absence of an agreement between the parties on the governing law, an arbitral tribunal shall apply the law of the host state and such rules of international law as may be applicable. Under the UNCITRAL Arbitration Rules, the tribunal is to determine the governing law by reference to whatever conflicts of law rules it determines are applicable.[113] In the interests of certainty, it is preferable for treaties to specify the governing law, rather than leaving it to arbitral tribunals.

Interpretation of IIAs by the parties

Some IIAs provide a mechanism by which the party states may adopt interpretations of the agreement that are binding on investor–state arbitration tribunals.[114] Such a mechanism provides a way for party states to correct interpretations of the agreement by investor–state tribunals that are unduly broad, inconsistent or otherwise objectionable to them. This mechanism has been used by Canada, the USA and Mexico in NAFTA and is provided for in the Canadian and US model treaties.[115] Under the ASEAN Agreement, tribunals may request interpretation on their own

110 Some existing IIAs further limit the scope of what may be the subject of an investor–state claim, e.g. ASEAN Agreement (2009), Art. 32.

111 E.g. US model BIT, Art. 30; Canadian model FIPA, Art. 40; draft Norwegian APPI, Art. 15(1); ASEAN–Australia–New Zealand FTA (2009) Investment Chapter, Art. 27 (also refers specifically to any applicable agreements between the parties). The UK model IPPA and the Indian model BIPPA do not expressly address governing law but investor–state dispute settlement is limited to disputes regarding the interpretation or application of the agreement (UK model IPPA, Art. 9; Indian model BIPPA, Art. 9).

112 For a discussion of the *Vienna Convention*, see Section 4.2.1 (The role of preambles in IIAs).

113 UNCITRAL Arbitration Rules, Art. 33.1.

114 E.g. US model BIT, Art. 30; Canadian model FIPA, Art. 40.2; draft Norwegian APPI, Art. 23; ASEAN Agreement (2009), Art. 40(2); ASEAN–Australia–New Zealand FTA (2009) Investment Chapter, Art. 27(2).

115 NAFTA (1992), Art. 1131; US model BIT, Art. 30; Canadian model FIPA, Art. 40. A similar provision is contained in the ASEAN Agreement (2009), Art. 40.3, and ASEAN–Australia–New Zealand FTA (2009) Investment Chapter, Art. 27.3.

account and must request an interpretation if one of the parties to an arbitration, typically the host state, asks for one.[116]

Subrogation of political risk insurers

Most developed countries, and an increasing number of developing countries, have state insurance programmes that protect their investors against political risks in connection with their investments abroad. These risks include, for example, the risk of expropriation by the host state without compensation. Some recent IIAs contain a subrogation provision that allows a state insurance company or other state agency that makes a payment to an investor to compensate for some act of a host state to assume any rights the investor may have to pursue an investor–state claim against the host state in relation to the act.[117] Some of these IIAs also allow an investor to pursue an investor–state claim even when they have received or may receive such compensation.[118] This reflects the view that the liability for host state action belongs to the host state and that the investor and the insurer can sort out who is entitled to any compensation that the host state is required to pay by an arbitral tribunal.

Allowing subrogation may promote investment. Giving insurers access to a mechanism that will permit them to recover benefits they have paid out should encourage them to issue insurance against political risk to foreign investors. In turn, the availability of such insurance should encourage investment.

Third party funding of investor–state arbitration

A relatively recent concern raised with respect to investor–state arbitration is investors being funded by third parties to pursue claims.[119] Third party funders typically have no interest in the investor's claim, but provide funds simply in return for a share of any eventual award. Third party funding permits some investors that have valid claims, but who would be deterred from pursuing them by the high costs of lengthy arbitration proceedings, to pursue their claims. Some argue that funders will fund only strong claims that have a relatively high chance of success.[120] However, at the same time, third party funding enhances the likelihood of more claims against states, with potentially large financial implications. The other main concern of host states is that

---

116 ASEAN Agreement (2009), Art. 40.2. The ASEAN–Australia–New Zealand FTA (2009) Investment Chapter has a similar provision (Art. 27.2). Both the Canadian and US models provide that tribunals shall request an interpretation when a host state relies on a reservation to the treaty as a defence and requests an interpretation. US model BIT, Art. 31; Canadian model FIPA, Art. 41.

117 UNCTAD (2007), *Treaties 1995–2006*, op. cit., at 114.

118 E.g. UK model IPPA, Art. 16; ASEAN–Australia–New Zealand FTA (2009) Investment Chapter, Art. 10. In the ASEAN–Australia–New Zealand FTA (2009), Investment Chapter, if an insurer has made a payment to the investor and taken over all the investor's rights, the investor cannot make a claim based on those rights without the permission of the insurer (Art. 22.3).

119 The incidence of third party funding is discussed in E de Brabandere and J Lepeltak (2012), 'Third-Party Funding in International Investment Arbitration', Grotius Centre Working Paper No. 2012/1, The Hague.

120 Ibid. at 7.

the interests of third party funders will influence the claim and the arbitration. Claims may be inflated to ensure that enough is awarded to satisfy both the funder and the investor. Settlement may be discouraged and proceedings delayed. Indeed, it is argued that in some cases the financial interests of third party funders result in an 'abuse of process', where they prolong or otherwise affect arbitral proceedings in ways that are inconsistent with the interests of the parties to the arbitration.[121]

No IIA addresses third party funding and only a few investor–state cases have considered its significance. In those cases, the issue has typically been whether the fact that an investor has its costs covered by a third party should be relevant to an allocation of costs in the final award. So far, tribunals have declined to take the existence of third party funding into account.[122]

IIA provisions could address third party funding by requiring investors to disclose the existence of any third party funding arrangement. Transparency in this regard would allow a tribunal to be on the watch for and address any possible abuse of process. It would also permit there to be an enquiry into whether the arbitrators were independent of the funders, as well as the parties to the dispute.

Consolidation of investor claims based on identical or similar issues of law or fact

In order to achieve the fair and efficient resolution of claims, some IIAs provide for the consolidation of claims where investors have initiated separate investor–state arbitrations raising identical or similar issues of law or fact. Where a government has enacted a measure that affects a number of investors in exactly the same way and more than one of the investors is making an investor–state claim against the host state in relation to the measure on the same legal basis it may be desirable to consolidate the claims into a single arbitration. Host states benefit from consolidation because combining arbitrations initiated by a number of investors should reduce the costs of defending the claims.[123] Consolidation also eliminates the risk of inconsistent decisions being made by tribunals on the same issues.[124]

121 This issue was raised unsuccessfully in the Australian High Court: *Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited*, [2006] *High Court of Australia* 41.

122 See, for example, *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Order Taking Note of the Discontinuance of the Proceeding, 11 July 2011.

123 E.g. US model BIT, Art. 33; Canadian model FIPA, Art. 32; ASEAN Agreement (2009), Art. 37.

124 Inconsistent investor–state arbitration decisions in relation to the same government measure occurred in three cases under NAFTA (*Archer Daniels Midland Company and Tate and Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/5 (NAFTA). Award (Redacted Version), 21 November 2007; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2 (NAFTA), Award (redacted version), 18 September 2009; *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/1 (NAFTA), Decision on Responsibility (redacted version), 15 January 2008). A request for consolidation by Mexico of the *Archer Daniels* and *Corn Products* cases was refused on the basis that the parties were competitors and, in a consolidated case there was a risk of disclosure of confidential information (Order of the Consolidation Tribunal, 20 May 2005).

However, consolidation may increase the costs of proceedings for investors by enlarging their scope and the number of parties involved. In a consolidated proceeding, individual investors lose control of how the claim is argued. In addition, investors making the same claim will often be competitors, since investors affected by a host state measure will often be carrying on business in the same economic sector. In such a situation, consolidation may create the risk that an investor's confidential business information will be disclosed to a competitor.

NAFTA contains a consolidation procedure.[125] There have been several consolidation proceedings under NAFTA, but consolidation has been ordered in only one case.[126]

Transparency and civil society participation in investor–state arbitration

Until recently, most IIAs did not impose any requirements regarding the transparency of investor–state arbitration proceedings and, with some exceptions, there was limited public disclosure regarding such proceedings.[127] A large majority of agreements do not provide any mechanism for civil society to participate in investor–state arbitration. Since state measures intended to fulfil the state's responsibility to protect the public interest are often the subject of investor–state cases, this lack of openness has been strongly criticised.[128]

Transparency

Most IIAs that have incorporated transparency provisions related to dispute settlement procedures impose only limited requirements. For example, the ASEAN–Australia–New Zealand FTA Investment Chapter provides only that the host state *may* make publicly available all awards and decisions of an investor–state tribunal.[129] Transparency requirements in NAFTA are similar.[130] In investor–state arbitrations under NAFTA, however, much greater transparency has been provided in practice. Public access to documents submitted to and issued by arbitration tribunals (subject to the redaction of proprietary confidential information) and publicly accessible hearings have now become commonplace. Greater openness is beginning to occur in other investor–state procedures as well.[131] Public access to hearings is now expressly

125 NAFTA (1992), Art. 1126.

126 A consolidation tribunal ordered the stay of the individual arbitrations in *Canfor Corporation v. United States of America*, *Tembec Inc., et al. v. United States of America* and *Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, Order of the Consolidation Tribunal, 7 September 2005, at paras. 3–17.

127 There are no transparency requirements in most Caribbean and Pacific BITS (Malik, op. cit., at 32, 61) or in the India–Singapore CECA (2005).

128 UNCTAD (2011), *Transparency in IIAs*, United Nations, New York and Geneva.

129 ASEAN–Australia–New Zealand FTA (2009) Investment Chapter, Art. 26.1.

130 In addition to disclosure of awards (NAFTA (1992), Art. 1137.4), a record must be kept of claims (NAFTA (1992), Art. 1126.13).

131 The NAFTA parties confirmed their commitment to such disclosure in NAFTA Free Trade Commission, 'Notes of Interpretation of Certain NAFTA Chapter 11 Provisions' (31 July 2001), available at: www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en (accessed 29 May 2012). They subsequently committed to public hearings. These developments are discussed in VanDuzer, op. cit., at 681–723.

permitted based on amendments to the ICSID arbitration rules and the Additional Facility rules adopted in 2006[132] and are mandatory under the Canadian and US model treaties, as well as the COMESA Investment Agreement.[133] The Canadian and US model agreements have detailed requirements relating to transparency of documents filed by the parties and issued by tribunals. Under the US model, the host state must make available to the public:

(a) The notice of intent [filed by the investor],

(b) The notice of arbitration [filed by the investor],

(c) Pleadings, memorials, and briefs submitted by a disputing party, …

(d) Minutes or transcripts of hearings of the tribunal, where available, and

(e) Orders, awards, and decisions of the tribunal.[134]

Disclosure of settlement terms is not addressed in any IIA. In the approximately 30 per cent of investor–state cases that are settled, typically there has been no disclosure regarding the terms of the settlement.

Participation by non-disputing party states and amici curiae

A few years ago, NAFTA tribunals began to permit NGOs to submit briefs as 'friends of the court' or *amici curiae* in investor–state cases. Subsequently, this practice has

---

132 Proposals for reform were made initially by the ICSID Secretariat in 'Possible Improvements of the Framework for ICSID Arbitration: ICSID Secretariat Discussion Paper,' released on 22 October 2004. The proposals were amended in March 2005 following comments from various constituencies and a revised working paper was issued 12 May 2005: 'Suggested Changes to the ICSID Rules and Regulations', available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement22 (accessed 29 May 2012). Revised proposals were submitted to the Administrative Council of ICSID in autumn 2005. On 5 April 2006, the Administrative Council approved amendments of the ICSID Arbitration Rules (ICSID Arbitration Rules are contained in the *ICSID Convention*, and the arbitration rules created by the Administrative Council of ICSID under Arts. 6(1)(a)–(c) of the ICSID Convention and published by ICSID in ICSID Basic Documents (2006), ICSID, Washington, DC: *Administrative and Financial Regulations*; *Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules)*, and the *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)*, as amended) and the Additional Facility Rules. Schedule C to the Additional Facility sets out the Arbitration (Additional Facility) Rules, as amended. These amendments to Arts. 32 and 48 of the ICSID Arbitration Rules and Arts. 39 and 53(3) (formerly 54(3)) of the Additional Facility Rules came into effect on 10 April 2006. Pursuant to Art. 44 of the ICSID Convention, unless otherwise agreed by the parties, an ICSID arbitration proceeding is conducted in accordance with the arbitration rules in effect on the date on which the parties consented to arbitration.

133 Canadian model FIPA, Art. 38; US model BIT, Art. 29; COMESA Investment Agreement (2007), Art. 28. The ASEAN Agreement (2009) permits (but does not require) a member state to disclose documents but contains no commitments regarding the openness of hearings and does not address *amicus curiae* participation (Art. 39). Other member states can obtain a copy of the notice of arbitration (Art. 39.6).

134 The Australia–Chile FTA (2008) (Art. 10) is similar.

been followed in a few ICSID cases under other IIAs. *Amicus curiae* submissions may provide relevant information to investor–state tribunals that is not available from the disputing parties and may represent interests affected by the dispute that are distinct from the general public interest. For example, in one recent claim by a Canadian mining company against the USA, an *amicus curiae* submission from a local Native American tribe was accepted because it provided unique information regarding the cultural and spiritual significance of the land that was the subject of the dispute.[135]

Both the Canadian and US model agreements confirm that tribunals have the authority to admit *amicus curiae* submissions.[136] The Canadian model goes on to establish detailed procedures for dealing with *amicus curiae* submissions. These address the process of submission, the criteria to be applied in deciding whether to accept a submission and the weight to be accorded to it. The provisions are intended to ensure that *amicus curiae* submissions assist, rather than encumber, the decision-making process. Tribunals have to consider:

- Whether the submission would assist the tribunal to deal with a factual or legal issue by bringing insights or information that are different from that provided by the disputing parties; and
- Whether there is a public interest in the subject matter of the arbitration.

Tribunals must also ensure that an *amicus curiae* submission does not disrupt the proceedings or unduly burden or prejudice either of the parties. Tribunals are not required to address *amicus curiae* submissions, even if they admit them.

The 2006 amendments to the ICSID rules also gave tribunals the power to allow a 'non-disputing' party to make a written submission after consulting with the parties.[137] Such non-disputing parties are just like *amici curiae* and the ICSID rules address some of the same issues as the rules for *amici curiae* in the Canadian model treaty.

The effectiveness of *amicus curiae* participation will be directly affected by their access to information regarding the dispute.[138] In this way, transparency requirements and the utility of *amicus curiae* submissions are linked.

As a practical matter, *amicus curiae* submissions are filed most often by NGOs in support of host state measures being challenged by investors. This is not necessarily the case, however. In a NAFTA claim brought by a US investor against Canada, the American Chamber of Commerce, a pro-business organisation, filed an *amicus curiae* brief challenging Canada's arguments regarding the interpretation of the national treatment obligation in NAFTA.[139]

---

135 *Glamis Gold Ltd. v. United States*, UNCITRAL, Application for Leave to File a Non-Party Submission, 19 August 2005.

136 Canadian model FIPA, Art. 39; US model BIT, Art. 28.3.

137 ICSID Arbitration Rules, Rule 37(2).

138 N Bernasconi-Osterwalder (2011), 'Transparency and *Amicus Curiae* in ICSID Arbitration' in Cordonier Segger et al., op. cit., at 201–206.

139 *United Parcel Service of America, Inc. v. Canada*, Application for *Amicus Curiae* Status by Chamber of Commerce of the United States, 20 October 2005.

Another feature of some investor–state procedures is that a IIA party state other than the one complained against is entitled to participate in the arbitration, at least in relation to issues associated with the interpretation of the investment treaty.[140] Such a right has been routinely exercised in NAFTA cases and provides party states with a right to have a say in the development of treaty norms that affect them.[141]

Costs and benefits of greater transparency and *amicus curiae* participation Greater transparency and the prospect of responding to *amicus curiae* submissions impose additional burdens on investors participating in investor–state dispute settlement, and may therefore reduce the attractiveness of dispute settlement procedures to them. Host states may have other reservations regarding transparency and *amicus curiae* submissions. Making documents and proceedings publicly accessible is not required under the domestic legal systems of all states to the same extent. In some cases, states may prefer proceedings to be conducted without public scrutiny. The involvement of *amicus curiae* in investor–state cases, in particular, remains controversial.[142] Many states do not permit participation by non-parties in domestic legal proceedings.

Nevertheless, greater transparency and involvement of civil society contributes to public understanding of the arbitration process and enhances the democratic accountability of states for what occurs in dispute settlement.[143] Civil society participation may also help to improve the sensitivity of arbitration tribunals to policy considerations other than the protection and promotion of investment. For these reasons, many consider that greater openness is important to the legitimacy of the investor–state dispute settlement procedures and to a process that contributes to sustainable development.[144]

Enforcement of awards

Most IIAs provide that investor–state arbitration decisions are final and binding[145] and many go on to state that a host state against which an award had been made will comply with it. Only a few address enforcement in any further detail. Commitments regarding enforcement in IIAs do not bind non-party states, but other international treaties addressing the enforcement of arbitral awards may apply to them, as well as to the party states to the IIA under which an award was made.

- **United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards** (known as the *New York Convention*): This treaty requires that each party state recognise and enforce foreign arbitral awards, which include

---

140 E.g. Canadian model FIPA, Arts. 33–6. A similar right is provided for in the Norwegian draft APPI (Art. 18). No such right is provided for in the UK model IPPA, the US model BIT or the Indian model BIPPA.

141 NAFTA (1992), Art. 1128.

142 UNCTAD (2011), *Transparency*, op. cit., at 71.

143 Soloway describes the problem as follows: '[The] lack of transparency seems to run counter to "the values and views" integral to the post-war trading system and indeed democratic principles, where transparency of legal process is a fundamental norm' (J Soloway (1999), 'NAFTA's Chapter 11, the Challenge of Private Party Participation', 16 *Journal of International Arbitration*, 8 at 10).

144 VanDuzer, op. cit.

145 E.g. Indian model BIPPA, Art. 9(3)(c)(iii).

investor–state awards. Normally this is done through domestic courts in the party state.[146] There are very limited grounds upon which a domestic court in a New York Convention state can refuse enforcement of an arbitral award under the treaty. Grounds include the arbitral tribunal exceeding its jurisdiction and fundamental procedural errors in the conduct of the arbitration.[147] Some states have filed a reservation permitted under the New York Convention, which provides that they are required to respect the requirements of the treaty in relation only to arbitral awards made in other New York Convention party states.[148] States are also permitted to file reservations that limit their convention obligations to foreign arbitral awards that arise out of 'commercial' disputes. One hundred and forty-six countries are parties to the New York Convention and more than half have filed a reservation limiting their obligations to awards made in other party states. More than 40 have filed a reservation limiting their obligation to awards arising out of commercial disputes.[149]

- **ICSID Convention:** The ICSID Convention has its own enforcement scheme for awards made under the Convention. ICSID provides a procedure in which a party to an arbitration may seek to have an award annulled. It is not an appeal and an award may only be annulled on limited grounds, including the arbitral process being tainted by serious procedural problems and the tribunal manifestly exceeding its jurisdiction.[150] The grounds for annulment are set out in Box 7.4. Subject to the successful annulment of an award, which is relatively rare, each party to the ICSID Convention must ensure that the award is enforced in its territory as if it were a final judgment of a court in that state. There is no basis to refuse enforcement, but execution of the award is governed by the same rules that govern the execution of domestic court judgments.[151] As noted, 148 states are parties to the ICSID Convention.[152]

Box 7.4 ICSID annulment proceedings

Under Article 52 of the ICSID Convention, a party to an investor–state arbitration under the ICSID rules may request that an arbitration award be annulled on any of the following grounds:

(Continued)

146 *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, signed 6 July 1958, in force 7 June 1959 (called the *New York Convention*), Art. III.

147 *New York Convention*, Art. V. Awards may be set aside by a court in the place of arbitration on similar grounds.

148 *New York Convention*, Art. I.

149 See status table maintained by UNCITRAL, available at: www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (accessed 22 May 2012).

150 ICSID Convention, Art. 54. Some other grounds for annulment are provided for in Art. 54.

151 ICSID Convention, Art. 54. Domestic rules in the state in which enforcement is sought regarding the sovereign immunity from execution of foreign state assets still apply (Art. 55)

152 See ICSID list of contracting states, available at: www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (accessed 22 May 2012).

(Continued)

a. The tribunal was not properly constituted;

b. The tribunal has manifestly exceeded its powers;

c. There was corruption on the part of a member of the tribunal;

d. There has been a serious departure from a fundamental rule of procedure; or

e. The award has failed to state the reasons on which it is based.

When the Secretary-General of ICSID receives a request, the Chairman of the ICSID Administrative Council is required to appoint an ad hoc committee of three persons, none of whom served on the original tribunal or have the same nationality of the parties or any of the arbitrators on the original tribunal. The procedure followed by an annulment committee is essentially the same as for regular ICSID arbitrations.

While the grounds for annulment are narrow, annulments have been granted in a number of cases. Annulment decisions have not been consistent, even in cases that have the same issues of fact or law, resulting in substantial criticism of the process.[153]

Some IIAs include provisions to ensure that that investor–state awards benefit from these enforcement obligations. One approach is to require that an award be made in a state that is party to the New York Convention and to include a provision deeming the award to be 'commercial' for the purposes of the Convention.[154]

Where a party state fails to comply with an award, it is usually possible for the investor's home state to initiate state-to-state procedures under the IIA to seek compliance. Some IIAs expressly provide for this.[155] Effective enforcement measures may be an important feature of IIAs for investors, though they have not been used frequently in practice.

153 D Kim (2011), 'The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away from an Annulment-Based System', 86 *New York University Law Review* 242.

154 E.g. Canadian model FIPA, Arts. 36, 45.7; US model BIT, Arts. 28.1, 34.10; ASEAN Agreement (2009), Art. 34.3. No such provision is included in the UK model IPPA, the ASEAN–Australia–New Zealand FTA (2009) Investment Chapter, the COMESA Investment Agreement (2007) or the Indian model BIPPA. Enforcement may occur in similar circumstances under the *Inter-American Convention on International Commercial Arbitration*, signed 30 January 1975, in force 16 June 1976, to which many states in the Americas are party.

155 E.g. Canadian model FIPA, Art. 45.5; US model BIT, Art. 34.8. A similar right is provided for in the India–Singapore CECA (2005) (Art. 6.21.6) and the Australia–India BIT (1999) (Art. 12). No such provision is found in the UK model IPPA, the Indian model BIPPA, the COMESA Investment Agreement (2007) or the ASEAN–Australia–New Zealand FTA (2009) Investment Chapter.

Dealing with inconsistent arbitration decisions and other problems with investor–state arbitration through improved dispute settlement institutions

As noted, one concern regarding investor–state arbitration is inconsistency between arbitral decisions that are interpreting the same or similar IIA provisions. Some inconsistency is an inevitable result of decisions made by tribunals appointed on an ad hoc basis for a particular case and tasked with interpreting provisions in different treaties that are not identical. In addition, while arbitral awards frequently rely on previous decisions for guidance, there is no requirement in investor–state arbitration that a decision in one case must be consistent with that in another, unlike in some domestic legal systems. The likelihood of inconsistent decisions is compounded by the fact that most arbitrations have taken place in the last few years, and that submissions of parties and awards of arbitrators cannot take into account arguments and awards in other cases that are being argued and decided at the same time. While there is disagreement about the magnitude and seriousness of the problem of inconsistent decisions, there is no doubt that new and different interpretations by international tribunals of an obligation in one IIA that is similar or identical to provisions in other existing agreements force states to revise their understanding of the effective scope of their obligations. Inconsistent interpretation also reduces the predictability of IIA obligations for investors and, more importantly, for states.[156] Predictability is further impaired by the increasing frequency of dissenting opinions, in which one of the arbitrators expresses different conclusions regarding the interpretation of IIA provisions from the others.

Concerns about inconsistent decisions have produced a number of proposals for reform of investor–state arbitration procedures, though very little has been done in IIAs to date.[157] Most proposals involve the creation of permanent institutions in order to ensure greater consistency, predictability and quality in decisions interpreting IIA obligations. For example, the IISD model treaty tries to address the problem of inconsistent decisions by establishing a permanent dispute resolution body, whose decisions are binding precedents for future decisions. The model contemplates a roster of 35 experts, three of whom will be selected for each case, who must meet high standards for independence and expertise.[158] The IISD model also contemplates a standing appellate body with nine full-time members appointed for seven-year terms (renewable once). All proceedings are to be open to the public.[159] The aim

156 In some circumstances there may also be a risk of parallel claims under: (i) an IIA and domestic law in local courts; (ii) an IIA and a contractually agreed dispute settlement procedure; and (iii) multiple IIAs. States may wish to clearly stipulate in an IIA that an investor's commitment to an exclusive dispute settlement clause in an investment contract precludes resort to IIA investor–state arbitration in any dispute that is subject to the contractual dispute settlement mechanism. Likewise, in relation to such disputes, states may wish to incorporate a clause in their IIAs that an investor may by contract waive its right to bring a claim under the IIA.

157 US–Uruguay BIT (2005) obliges the parties to discuss the desirability of an appellate body (Annex E).

158 A roster of presiding arbitrators is contemplated under NAFTA (1992) (Art. 1124) but has never been established.

159 IISD model treaty, Art. 46(D).

of these provisions is to promote both procedural fairness and greater accountability to the public in both host and home states[160] as well as to eliminate the problem of inconsistencies in decisions of arbitration tribunals.[161]

A permanent dispute resolution body or appellate review by a standing appellate body can also address another problem arising out of the ad hoc nature of investor–state arbitration. As noted, the institutional safeguards that guarantee the independence of judges in national and international judicial systems, such as security of tenure and a prohibition on accepting outside remuneration, do not exist in investor–state arbitration. A permanent dispute resolution body and/or appellate review by a standing appellate body would help to ensure that decisions are ultimately taken by people whose independence is protected by such safeguards.

A standing permanent dispute resolution body or appellate body could, however, have significant resource implications for party states. Resources would be needed to identify and appoint judges and support the operation of permanent bodies. If appointees were to be full time and not pursue other remunerative activities, the cost would be greater. In a bilateral treaty context, there may be too few disputes to justify such expenditures. Where a dispute resolution body is charged with dealing with disputes under multiple agreements, the resource implications may be more manageable. The resource constraints will be reduced, for example, if a regional body is set up to deal with disputes between investors and all the states in a region, either under a regional agreement or under multiple IIAs.[162]

Another approach, discussed above, would be to have a roster of experts selected by the party states that constitutes a pool of people from which arbitrators would be appointed for a particular dispute. Such a solution does not deliver the institutional safeguards of a permanent institution, but may go some way to improving consistency and quality in decisions. It also gives parties more control over who the arbitrators will be. As discussed above, finding appropriate qualified people for the roster may prove challenging for some states. Some strategies for dealing with this problem are discussed above.[163]

As noted, another approach in existing IIAs to addressing the problem of inconsistent decisions is to permit the party states to issue authoritative interpretations. Unlike an appellate process, however, interpretations are not capable of correcting the result

160 IISD model treaty, Art. 40. See also Annex A.

161 IISD model treaty, Annex A, Art. 14. On the advisability of establishing a permanent dispute resolution body, see N Blackaby (2003), 'Public Interest and Investment Treaty Arbitration', in A J van den Berg (ed.), *International Commercial Arbitration: Important Contemporary Questions*, Kluwer International, New York; see also W M Reisman (1994), 'Control Mechanisms in International Dispute Resolution,' 2 *United States–Mexico Law Journal* 129.

162 The COMESA Investment Agreement (2007) is one of the few existing IIAs that provide for an appellate process. In state-to-state disputes, member states may appeal to the COMESA Court of Justice (COMESA Investment Agreement (2007), Annex A, Art. 13).

163 See above 'Selection of arbitrators'. See also Section 8.2 (Technical assistance).

in a particular case decided before the interpretation was issued. In addition, an interpretation power does not address the other problems noted above that flow from ad hoc arbitration.

Remedies issues

The remedies available in IIAs are generally limited to restitution of property or monetary damages.[164] Except with respect to compensation for expropriation, most IIAs provide no guidance regarding the assessment of damages. A few IIAs exclude the possibility of punitive damages.[165] As discussed above, investor–state tribunals have determined that it is not appropriate to award punitive damages.[166] The basis of damage awards should be compensation for loss.

There are several ways that damage awards could be limited to address some of the challenges associated with broad and unclear IIA standards for investor protection, as well as other situations in which an argument can be made that damages should be reduced or limited:

- **Reduce damages where the investor's own conduct has contributed to the loss suffered by the investor:** The notion of contributory fault is recognised in international law generally and has been applied in some investor–state cases.[167] The COMESA Investment Agreement provides that a state may assert as a 'defence, counterclaim or set-off' that an investor has not fulfilled its obligations under the agreement, which suggests the possibility of reducing damages where the investor bears some fault.[168] The COMESA Investment Agreement requires that investors comply with the domestic law of the host state. A failure to do so could be a basis for reducing damages paid to the investor in some cases where the breach by the investor was what caused the state to act. The expression and application of a principle of contributory fault, however, is complex. Investor–state tribunals would have significant discretion to determine whether an investor's conduct forced the state to act or otherwise contributed to the harm suffered and to what extent damages should be reduced as a result.
- **Reduce damages where the state's action has breached rules that the tribunal determines were unclear or subject to conflicting interpretation in some way that is relevant to the finding of liability:** Some tribunals have taken uncertainty of IIA standards into account in their awards, though there is no accepted practice in this regard.[169]

---

164 E.g. US model BIT, Art. 34.1; Canadian model FIPA, Art. 44.1; ASEAN–Australia–New Zealand FTA (2009) Investment Chapter, Art. 28.1; ASEAN Agreement (2009), Art. 41.2. Typically a state may elect to pay damages instead of giving restitution.

165 E.g. US model BIT, Art. 34.3; ASEAN–Australia–New Zealand FTA (2009) Investment Chapter, Art. 28.3; ASEAN Agreement (2009), Art. 41.4; NAFTA (1992), Art. 1135(3).

166 See Section 5.6 (Limitations on expropriation and nationalisation).

167 Ripinsky with Williams, op. cit., at 314–19.

168 Arguably, this provision also refers to unrelated breaches by the investor of its obligations.

169 E.g. *Ethyl Corporation v. Canada*, UNCITRAL, Decision on Jurisdiction, 24 June 1998 (regarding costs).

- **Reduce damages to the extent that the investor has not taken reasonable steps to mitigate its losses:** This principle is accepted in most domestic legal systems[170] and major international commercial instruments.[171] It is specifically provided for in the COMESA Investment Agreement.[172]
- **Preclude damages where the breach by the state does not surpass some minimum threshold of seriousness:** This approach has been taken by the European Court of Justice in some cases regarding claims that there has been a breach of Community law.[173] In some investor–state arbitration cases dealing with the fair and equitable treatment standard a minimum threshold of seriousness has been required as a condition of granting relief.[174]

To some extent, the incorporation of express provisions to address these issues would direct tribunals to do what some tribunals are doing already. In particular, taking into account contributory fault and a failure to mitigate damages are well-accepted principles for the assessment of damages, and their express inclusion in an IIA should be uncontroversial. Expressing these principles in the treaty has the benefit of ensuring that tribunals will consider them. The application of these principles may lessen the burden of investor–state arbitration for states. Damage awards may be smaller in some cases, and fewer cases may be brought as a result. At the same time, expressing these requirements in an IIA may affect investors' perception of the likely benefits of investor–state arbitration.

Some other limitations on damages, discussed in relation to compensation for expropriation, could also be adopted in relation to the assessment and payment of damages for breaches of other obligations.[175] These were the following:

- **Limiting compensation to direct losses, not including loss of future profits, and prohibiting the calculation of compensation based on the discounted value of future cash flows:** The main purpose of this limitation is to avoid damages based on unreliable speculation regarding the profits an investment would have made in the future. However, such a blanket limitation would extend to situations in which lost future profits could be ascertained with reasonable certainty, such as where a business has made consistent profits for a period of years.
- **Prohibit awards of moral damages to compensate for non-economic losses, such as for mental suffering and injury to reputation:** As discussed,[176] these kinds of damages have been sought and, in at least one investor–state case, awarded. Nevertheless, they are likely to be rarely appropriate in investor–state cases,

---

170 Ripinsky with Williams, op. cit., at 319.

171 E.g. United Nations Convention on Contracts for the International Sale of Goods (1980), Art. 77. There is evidence that it is becoming accepted as a general principle of law (Ripinsky with Williams, op. cit., at 321–2).

172 COMESA Investment Agreement (2007), Art. 28.9.

173 *Brasserie du Pecheur v. Germany*, [1996] All ER (EC) 301 CASE C-46/93.

174 See Section 5.5 (Fair and equitable treatment and the minimum standard of treatment).

175 See Section 5.6 (Limitations on expropriation and nationalisation).

176 See Section 5.6 (Limitations on expropriation and nationalisation).

which are fundamentally about the protection of economic interests, and are inherently unpredictable. Prohibiting moral damages would make damage awards more predictable. On the other hand, mental suffering and other kinds of non-economic losses can be suffered by investors in some cases. Moral damages may be useful to deter states from mistreating investors and their personnel.

Neither of these is expressed as a general rule related to the award of damages in existing IIAs, but consideration could be given to including them in a treaty.

Two other procedural devices were discussed in the section on expropriation that would help host states to deal with their liability in a manner that is responsive to their particular circumstances:[177]

- **Giving the state and the investor a period of time to negotiate compensation prior to an award of damages by the tribunal after a finding of state liability; and**
- **Providing for situations in which payment of compensation by the state may be delayed, including, for example, a financial crisis.**

While IIA provisions according these procedural options are not generally found, the second option does appear in the COMESA Investment Agreement.[178]

One other clarification of the manner in which damages are to be established may be helpful in an IIA. A treaty could expressly indicate that the investor has an obligation to prove all elements of its claim, including damages suffered, and to show that the losses were sustained by reason of the host state's breach of its IIA obligations. Such a requirement is consistent with general principles of law applicable to international arbitration and is included in some IIAs.[179]

Counterclaims

Counterclaims were discussed above in Section 6.17 (Counterclaims by states in investor–state arbitration).

Box 7.5 Summary of options for investor–state dispute settlement provisions

1. *No investor–state arbitration*
2. *Agree to investor–state arbitration but subject to one or more of the following limitations*

(Continued)

177 See Section 5.6 (Limitations on expropriation and nationalisation).

178 COMESA Investment Agreement (2007), Art. 20(5). See the same provision in the IISD model treaty (Art. 8(F)).

179 E.g. US–Uruguay BIT (2005), Protocol, Art. 2.

(Continued)

a. Limitations on the scope of protection, such as permitting only claims by investors that the state has breached listed investor-protection obligations in the IIA and not including an umbrella clause.

b. Limitations in the form of prerequisites that must be satisfied for the investor to obtain access to investor–state arbitration:

   i. Exhaustion of local remedies or a fork in the road;

   ii. Waivers of other claims;

   iii. Consultations and ADR procedures;

   iv. Limitation periods.

c. Limitations in the form of additional institutional requirements to ensure the fairness and quality of the process:

   i. Specify arbitral rules;

   ii. Require tribunals to rule on challenges to jurisdiction and objections that an investor's claim is frivolous before proceeding to the merits;

   iii. Set standards for arbitrators and their appointment;

   iv. Create a permanent dispute settlement body and/or appellate body;

   v. Establish requirements for transparency and *amicus curiae* participation;

   vi. Permit consolidation of multiple claims based on the same or similar issues of fact or law;

d. Limitations on the damage awards:

   i. Reducing damage awards where:

      - The investor's conduct contributed the losses suffered;
      - The state's action breached rules that the tribunal determines were unclear or subject to conflicting interpretation;
      - The investor did not take reasonable steps to mitigate its losses;

   ii. The breach by the state does not surpass some minimum threshold of seriousness;

   iii. Limiting compensation to direct losses not including loss of future profits and prohibiting the calculation of compensation based on the discounted value of future cash flows;

   iv. Requiring a period of time following a finding of state liability to negotiate the amount of damages;

(Continued)

(Continued)

v. Permitting payment of damages to be delayed in some circumstances based on hardship to the host state;

vi. Prohibiting punitive or moral damages; and

vii. Imposing requirements that damages be proved.

3. *Permit counterclaims by states and limitations on access to dispute settlement for investors that have breached their obligations under an IIA*
4. *Agree to investor–state arbitration for all claims by an investor against a host state through an umbrella clause with or without the other limitations in options 2 and 3*

7.1.5 Discussion of options

1. *No investor–state arbitration*

Given the concerns that states and others have expressed regarding the cost of investor–state arbitration, the uncertainty and unpredictability of the results and the lack of institutional guarantees regarding independence of the decision-makers, some states may decide that they should not agree to include investor–state arbitration procedures in their IIAs. This would be a marked shift from historical IIA practice. Until recently, investor–state arbitration has been universally sought by developed countries and many developing countries because of the benefits that it provides to their investors. However, in light of states' experience with investor–state arbitration and the concerns it has produced, some countries, including Australia, are no longer willing to accept this mode of dispute resolution. Consequently, not including investor–state arbitration may be more feasible than ever before in some negotiating contexts. If it was excluded, it is possible that any investment-enhancing effect of the IIA would be reduced.

In the absence of an IIA commitment to investor–state arbitration, a state could still agree to investor–state arbitration in a particular case where it chose to do so. Without a state's agreement to investor–state arbitration, the investor often would be limited to seeking relief in the domestic courts of the host state under host state law, or through commercial arbitration, if provided for in a contract with the host state, or lobbying its home state to espouse its claim through the state-to-state dispute settlement procedures in the IIA or in some other way. Under the constitutional laws of some host states, IIA investor-protection standards will be incorporated into domestic law and may form the basis of a claim in domestic courts. Under some other constitutional systems, however, such a claim is impossible because treaty obligations are not part of domestic law.[180]

180 Some treaties specifically address treaty-based claims in domestic law. Such claims are prohibited under NAFTA (1992) (Art. 2031).

Even if investor–state dispute settlement is not included in an IIA, it is possible that an obligation to give investors from the other party state the benefit of such a procedure would be incorporated into the IIA if it contained an MFN clause and the state had entered into another IIA that provided for investor–state arbitration. As discussed in Section 5.4 (Most favoured nation), a number of investor–state cases have allowed the importation of more favourable investor–state procedures from other treaties. As yet, no case has permitted the wholesale importation of investor–state arbitration where the parties have not agreed to the procedure.

2. *Agree to investor–state arbitration but subject to one or more of the following limitations*

    a. Limitations on the scope of protection, such as permitting only claims by investors that the state has breached listed investor-protection obligations in the IIA and not including an umbrella clause

    As noted, many treaties now specify that an investor's claim can be based only on alleged breaches of listed investor protection obligations in the IIA that have resulted in a loss to the investor. This approach reflects the view that some IIA provisions are intended to commit the host state to creating a generally supportive environment for investment, but where a failure by the host state to comply does not cause any direct loss to the investor. As a result, these obligations should not be subject to investor–state dispute settlement. General transparency obligations to publish laws are one example.

    Specification of the provisions that can be the basis for a claim enhances certainty regarding the scope and effect of investor–state procedures. By comparison, umbrella clauses that treat all obligations owed by the state to an investor as obligations under the treaty, and subject to claims under treaty-based investor–state arbitration, broadly expand the scope of access to the investor–state procedures in unpredictable ways and create the prospect of investors pursuing claims in different fora: domestic courts and dispute settlement procedures agreed to in contracts with the state, as well as treaty-based investor–state dispute settlement. A specific list of provisions that may be the basis of an investor–state claim is used in a number of treaties and in Canada's treaty model. Restricting the scope of potential claims to breaches of identified provisions may be viewed negatively by some capital-exporting states, especially those that have umbrella clauses in their model treaties.

    b. Limitations in the form of prerequisites that must be satisfied for the investor to obtain access to investor–state arbitration

        i. Exhaustion of local remedies or a fork in the road

        Relatively few IIAs impose a requirement to exhaust local remedies. In large part, this is because a significant objective of developed countries and their investors in seeking investor–state arbitration in IIAs was to avoid having to rely on domestic courts in the host state for relief.

Including an exhaustion of local remedies requirement may be perceived negatively by capital-exporting states and their investors as a result. Nevertheless, as indicated, there are a significant number of possible benefits associated with forcing investors to seek relief in the host state, including early resolution of many claims, resort to a process in which the decision-makers have expertise in local law and local conditions, and giving investors a stake in the improvement of host state institutions. A possible compromise position adopted in some treaties is to limit the time that an investor must pursue local remedies before they can make an investor–state claim.

A disadvantage of an exhaustion of local remedies requirement from a host state's point of view is that it sets up the possibility that the state will have to defend itself in domestic courts for some time, and then find itself re-litigating the investor's claim in investor–state arbitration. To avoid this possibility, some IIAs include a 'fork in the road' provision, under which an investor must choose to pursue investor–state arbitration or domestic relief. Once the choice is made, the investor can never pursue relief through another procedure. While this does not create any impediment to investor–state arbitration, it does eliminate the prospect of multiple sequential claims by an investor using different procedures.

ii. Waivers of other claims

Another approach to limiting the risk of multiple claims by investors is to require that they waive their right to pursue other relief in other fora as a condition of being able to make an investor–state claim. This approach is found in many IIAs, including the Canadian and US models.

Another issue relating to the risk of multiple claims is the possibility of claims under other investment treaties entered into by the host state by entities that are affiliated with an investor that is making a claim. This might occur, for example, where an investment is ultimately controlled by a parent corporation incorporated in one state through a series of intermediate subsidiaries incorporated in other states. It is possible that, under IIAs between the host state and the country of each of these entities, each entity could bring a claim based on the same host state measure. While an investor–state tribunal might consider that bringing multiple claims under multiple treaties was an abuse of process, it may be reluctant to strike out the claim it is hearing, since it only has jurisdiction over that claim. A provision could be included in an IIA that contains a waiver of claims by affiliated corporations related to the same measure.

iii. Consultations and ADR procedures

Virtually all agreements provide that some period, usually six months, must expire after the events giving rise to a claim before an investor can

file an investor–state claim. Most agreements provide that this is a period in which the parties should attempt to settle their dispute amicably.

Some IIAs contemplate that the parties may agree to try to resolve their dispute through mediation, conciliation or an undefined category of third party assisted negotiation. For the most part, these ADR procedures have not been used. There are some inherent impediments to the use of ADR procedures to reach a settlement with an investor, especially where the investor is complaining about a measure put in place to achieve an important public policy objective through legislation or some other formal government procedure that may be difficult for the host state to change. Another barrier is a lack of knowledge and experience regarding ADR procedures among host states and investors.

The nature of many ADR procedures is that both parties must agree to their use if they are to be effective. Their desirability and feasibility are likely to vary with the circumstances. As a consequence, while it is possible to contemplate the possibility of the parties using ADR procedures in an IIA, it may not be helpful to make them mandatory.

Undoubtedly, in practice, ADR procedures, as well as dispute prevention policies, can play a useful role in reducing the duration, cost and frequency of disputes between investors and host states and providing ways to deal with disputes that are more likely to preserve the relationship between an investor and the host state. In order to make use of these strategies, however, states will have to develop capacity and expertise related to them.

iv. Limitation periods

Many treaties now contain time limits after which an investor is prohibited from bringing a claim. Limitation periods provide certainty and finality for states regarding their liability risk.

c. Limitations in the form of additional institutional requirements to ensure the fairness and quality of the process.

i. Specify arbitral rules

Most treaties provide that the investor may choose from a list of arbitral rules, usually including the rules under ICSID Convention and the UNCITRAL Arbitration Rules. While this has become accepted in IIA practice, some treaties provide a single set of rules. Such an approach may make the process somewhat more predictable for states, since they will know in advance what rules will apply. More important, however, a state should provide in the treaty itself any procedural requirement that it views as necessary and that is not adequately addressed in the possibly applicable arbitral rules.

ii. Require tribunals to rule on challenges to jurisdiction and objections that an investor's claim is frivolous before proceeding to the merits

In order to avoid the costs associated with written arguments and hearings on an investor–state claim that a tribunal ultimately finds to be frivolous or outside its jurisdiction, a few recent IIAs require that tribunals address both kinds of preliminary objection before proceeding to the merits of the claim. In principle, there is no obvious objection to the early resolution of these issues. Both parties may benefit. In practice, however, it may be hard for tribunals to make these assessments without the benefit of extensive submissions by the parties in some cases. In these cases, some of the expected cost savings may be reduced.

iii. Set standards for arbitrators and their appointment

Few IIAs create standards to be met by arbitrators in terms of competence or independence. While most arbitral rules impose some standards for independence as well as procedures to challenge arbitrators who do not meet them, the Canadian model agreement goes farther than most treaties to describe such standards. The Canadian treaty model, however, refers only to independence and general competence in international investment law and, in the case of issues related to financial services, in financial services. Given the various other kinds of policy issues that have to be addressed in investor–state cases, it may be that other kinds of expertise should be provided for as well. IIA provisions could also incorporate more specific standards for independence and requirements related to disclosure of interests by arbitrators; requirements for arbitrator protection of confidentiality during and after the arbitration; and restrictions on arbitrators representing the parties to a dispute for a period of time after the completion of an arbitration. Such provisions could draw on the code of conduct for members of state-to-state dispute settlement panels established under NAFTA and the International Bar Association Guidelines on Conflicts of Interest in International Arbitration.

Another approach to ensuring the quality of arbitrators is to establish a roster from which arbitrators are to be selected. The party states may agree on members of the roster or, as in some other contexts, each party could provide a set number of nominees. Such a pre-approved roster would contribute to consistency in decision making as well as ensuring that arbitrators have the qualities that the parties desire. To address the shortage of arbitrators from developing countries, IIAs could require the provision of technical assistance for arbitrator training.

None of these kinds of provisions should raise concerns among capital-exporting states or their investors.

iv. Create a permanent dispute settlement body and/or appellate body

Even with standards for arbitrators, ad hoc investment arbitration does not provide the significant institutional guarantees of independence that are found in domestic judicial systems. In order to establish these kinds of guarantees, it would be necessary to provide for a permanent dispute

settlement body and/or a permanent appellate body with the authority to overturn tribunal decisions, the members of which have the benefit of such guarantees. The appointment of permanent decision-makers would help to improve the consistency and quality of investor–state decisions as well.

Investors are unlikely to be greatly concerned about creating such permanent institutions, except to the extent that it results in delays and increased expense in obtaining a final disposition of their claim. There are resource implications for states related to establishing permanent institutions that would have to be considered by states. These will be greatest where bodies are established for the purpose of a single bilateral IIA, but might be mitigated in regional institutions with responsibilities for disputes under multiple IIAs.

v. Establish requirements for transparency and *amicus curiae* participation

Greater transparency and involvement of civil society in investor–state arbitration as *amici curiae* enhance the democratic accountability of states for what occurs in dispute settlement. Participation of *amici curiae* may also help to improve the awareness of arbitration tribunals regarding policy considerations beyond the protection and promotion of investment. For these reasons, transparency and *amicus curiae* participation contribute to the legitimacy of the investor–state dispute settlement procedures and to ensuring that it is a process that promotes sustainable development.

At the same time, greater transparency and the prospect of responding to *amicus curiae* submissions impose additional burdens on investors participating in investor–state arbitration and, as a consequence, may reduce the attractiveness of the process to them. Some states may be hesitant about committing to transparency because making documents and proceedings publicly accessible is not required in their domestic legal systems. Even fewer states provide for *amicus curiae* participation in domestic judicial proceedings. While there appears to be a growing willingness to undertake transparency commitments, the involvement of *amici curiae* in investor–state cases remains controversial.

Only a few IIAs, including the Canadian and US models, contain explicit requirements for transparency and *amicus curiae* participation. Even these models, however, do not require disclosure of agreements to settle investor–state cases.

vi. Permit consolidation of multiple claims based on the same or similar issues of fact or law

A procedure for the consolidation of claims based on the same or similar issues of fact or law appears in some recent IIAs. It can have benefits for states. Multiple claims raising the same issues can be dealt with more efficiently in a single arbitration and the prospect of inconsistent results

in similar or identical cases is avoided. In practice, investors may object to losing control of their case by having to co-ordinate their claim with other similarly situated investors. Nevertheless, the NAFTA experience suggests that consolidation will be used infrequently in practice and the inclusion of consolidation in an IIA is unlikely to be a significant concern for investors or capital-exporting states.

d. Limitations on the damages that can be awarded

Damages in investor–state arbitration are generally intended to compensate the investor for the loss that they have suffered as a consequence of the breach of an IIA provision. Nevertheless, there are several rules that may be adopted to reduce the burden of damage awards:

i. Reducing damage awards where
   - The investor's conduct contributed to the losses suffered;
   - The investor did not take reasonable steps to mitigate its losses;
   - The state's action breached rules that the tribunal determines were unclear or subject to conflicting interpretation;

ii. Declining to award damages where the breach by the state does not surpass some minimum threshold of seriousness;

iii. Limiting compensation to direct losses, not including loss of future profits, and prohibiting the calculation of compensation based on the discounted value of future cash flows to avoid the risk of speculative damages being awarded;

iv. Requiring a period following a finding of state liability to permit the parties to negotiate the amount of damages;

v. Permitting payment of damages to be delayed in some circumstances based on hardship to the host state;

vi. Prohibiting punitive or moral damages; and

vii. Imposing requirements that damages be proved.

Reducing damages on the basis of contributory fault and a failure to mitigate damages are general principles recognised in international law that have been applied in some investor–state cases. Nevertheless, neither is identified specifically as a principle to govern the award of compensation in IIAs, with the exception of the COMESA Investment Agreement. While these principles may often be applied in any case by investor–state tribunals, referring to them specifically ensures that every tribunal will take them into account.

Reducing damages where the applicable IIA standard is uncertain, excluding damages unless some minimum threshold of seriousness is met and limiting compensation to direct losses are not accepted

international principles that have been endorsed in investor–state cases or the expression of these limitations on damages in an IIA, though both have some basis in investor–state practice. Imposing vague and untested threshold requirements for the seriousness of the breach by the state and the certainty of the IIA standard violated may be seen by capital-exporting states and their investors as leaving too much discretion in the hands of an investor–state tribunal.

Limiting compensation to direct losses removes the prospect that a host state will be held liable for speculative future profits, but investors may view a blanket exclusion as arbitrary, since it would extend to situations where a state measure made impossible the continued operation of a business with a demonstrated and consistent record of earning profits or caused a reduction from well-established profit levels. In such a situation, investors would undoubtedly view the present value of those certain future profits as a part of their loss that should be compensated.

Prohibiting awards of punitive damages, as is done in some treaties, may be justified on under general principles of international law that require damages for breaches of international law to be compensatory. Prohibiting awards of moral damages to compensate for non-economic losses, by contrast, is not supported under international law. Moral damages have been sought and, in at least one investor–state case, awarded. While they may be rarely appropriate in investor–state cases and unpredictable, mental suffering and other kinds of non-economic losses will be suffered by investors in some cases. Capital-exporting states and their investors may value the possibility of awards of moral damages to discourage states from mistreating investors and their personnel.

An IIA could provide that the state and the investor should have a period of time to negotiate compensation prior to an award of damages by the tribunal. Though this could occur in practice in any case, an express provision ensures that a tribunal delays its assessment of damages following a finding of state liability to permit the state to negotiate the compensation to be paid. It may also be useful to provide for situations in which payment of compensation by the state may be delayed, including, for example, a financial crisis. A delay in this specific situation may be permitted based on exceptions in the agreement in some circumstances, such as a prudential exception.

It may be useful to expressly indicate that the investor has an obligation to prove all elements of its claim, including damages suffered, and to show that the losses were sustained by reason of the host state's breach of its IIA obligations. Such a requirement is consistent with general principles of law applicable to international arbitration and is included in some IIAs.

Where any of the limitations discussed above are incorporated into an IIA, it is possible that a host state obligation to give investors from the

other party state the benefit of a more favourable procedure would be incorporated into the IIA if (i) the treaty contained an MFN clause and (ii) the host state had entered into another IIA that provided more favourable investor–state procedures.[181]

3. *Permit counterclaims by states and limitations on access to dispute settlement for investors that have breached their obligations under an IIA*

Where an IIA imposes obligations on investors, access to investor–state arbitration could be denied where an investor has failed to comply with its obligations. Alternatively, a host state against which a claim has been made could be given the right to make a counterclaim for losses suffered by it or its people as a consequence of the investor's failure to comply. Counterclaims may be used in other circumstances to the extent permitted by the IIA and the applicable arbitral rules. Counterclaims were discussed above.[182]

Counterclaim awards may be set off against any damages awarded to an investor in an investor–state case, but if the investor is not successful a counterclaim award must still be paid. There are a variety of situations in which investors may avoid paying damages awarded to a state under a counterclaim. This will be especially likely if the investor's claim is unsuccessful and the investor must find funds to pay the counterclaim award. In some cases, the investor may have few assets. This is a real risk since transnational businesses often have complex structures where multiple entities together carry on business. Within the group, the entity making the claim may not have been allocated significant assets. This might have been done for the purpose of limiting its ability to pay damages claimed by the state. This problem is discussed in detail above.[183] In addition to the options discussed, another way to address this problem might be to make the investor's state responsible for paying the damages if the investor is unable to pay after some period of time. No treaty has adopted this approach.

4. *Agree to investor–state arbitration for all claims by an investor against a host state through an umbrella clause, with or without the other limitations in options 2 and 3*

This is the broadest protection for investors, but creates a serious risk that investors will be able to pursue claims in multiple fora, including domestic courts and dispute settlement procedures agreed to in contracts with the state as well as treaty-based investor–state dispute settlement. To some extent, the risk of multiple claims can be reduced by fork in the road, waiver and other provisions.

A state's exposure to liability under an umbrella clause is broad and unpredictable. In most cases, an investor will have other remedial options to address state actions and may not require the additional option of treaty-based investor–state arbitration. As a result, the benefits to investors may be marginal, while the costs to host states may be substantial.

181 See Section 5.4 (Most favoured nation).
182 See Section 6.17 (Counterclaims by states in investor–state arbitration).
183 See Sections 6.13 (Enforcement of investor obligations) and 6.16 (Civil liability of investors).

7.1.6 Discussion of sample provisions

Some form of investor–state dispute settlement is included in most IIAs. Agreements that include investor–state procedures demonstrate a strong commitment to a pro-investment environment. Increasing dissatisfaction with investor–state arbitration, however, has caused a few states to reject it and many others to reconsider IIA provisions that establish and govern such procedures. Some states may decide that not committing to investor–state arbitration is the best choice. Other states may continue to agree to investor–state arbitration because of the protection afforded to its investors, in the hope of attracting more investment or as a concession to negotiating partners. The sample provision provides an example of a set of investor–state arbitration provisions that incorporate existing or emerging best practices from a sustainable development perspective and some new provisions that attempt to address some of the concerns that have been raised above.

Detailed specification of obligations

As noted, in overall design, investor–state dispute settlement procedures vary significantly in terms of the amount of detail in which the procedures are specified. In the UK and Indian models, relatively few details are provided. By comparison, the Canadian and US models are much more comprehensive.[184] In recent treaties, such as the COMESA Investment Agreement, the ASEAN–Australia–New Zealand FTA Investment Chapter and the ASEAN Agreement, more detailed rules are provided. The approach taken in the Guide sample provisions has been to provide detailed and specific procedures to give greater certainty and to put more control of the process into the hands of party states.[185] In addition, strict and specific time limits govern the dispute resolution process to help to ensure that it proceeds expeditiously.

Claims only permitted on the basis of listed investor protection provisions in the IIA

With a view to avoiding multiple investor claims in different fora arising out of the same facts and adding certainty to the scope of host state responsibility, the sample provisions provide that investors can seek relief only on the basis that the host state has breached identified investor protection provisions in the IIA and the investor has suffered a loss as a result. An umbrella clause permitting an investor to use the investor–state process in the treaty in relation to any dispute that the investor may have with the host state has not been included.

In accordance with the practice in most IIAs, claims by enterprises incorporated or organised under the laws of the host state and controlled by investors eligible for IIA protection cannot be brought under the investor–state procedure. Only claims by investors for losses that they have suffered themselves can be made.

---

184 Compare Canadian model FIPA, Arts. 20–47, and US model BIT, Arts. 23–36, with UK model IPPA, Art., 8 and Indian model BIPPA, Art. 9. The draft Norwegian APPI provides more details than the UK and Indian models but fewer than the models of Canada and the United States (draft Norwegian APPI, Art. 15.3).

185 UNCTAD (2007), *Treaties 1996–2006*, op. cit., identifies this as a trend, at 120.

Limits on access to investor–state arbitration through procedural prerequisites

The sample provisions impose limits on investor access to investor–state arbitration:

- **Access to investor–state dispute settlement is conditional on the exhaustion of local remedies, but this requirement is subject to a time limit of three years, following the approach in the draft Norwegian model agreement:**[186] After three years have expired since the investor first filed its claim in a domestic court, if the investor is still not satisfied with the result, it may make an investor–state claim. An exception to this three-year period is provided where there is no reasonably available domestic remedy. This approach reflects investors' interest in having access to an alternative to domestic litigation in the host state, but requires a substantial prior effort to seek relief in domestic courts. A fork in the road provision is a possible alternative that creates no barrier to investor–state claims, but ensures that an investor will be able to pursue only either a domestic remedy or an investor–state claim.
- **The investor must waive all rights to pursue a claim based on the same facts in any other forum:** This provision goes some way to reducing the incidence of multiple claims and follows the approach in the Canadian and US model agreements.
- **Investor claims are subject to a five-year limitation period:** A limitation on the period within which an investor may bring a claim provides certainty and finality for states regarding their liability risk. The five-year period in the sample provision is longer than the three-year period adopted in the Canadian and IISD models in order to accommodate the requirement that investors must seek to exhaust local remedies for at least three years.

Consultations are also required. ADR is permitted but not mandatory because most ADR procedures require the consent and co-operation of both parties to be successful. All of these requirements for the initiation of an investor–state claim are characterised as conditions of the jurisdiction of an arbitral tribunal.

Early decisions on jurisdictional challenges and a host state's objection that investor's claim is frivolous are required

The sample provision requires investor–state tribunals to make preliminary rulings on issues of jurisdiction raised by host states and on host state objections that an investor's claim is frivolous prior to addressing the substantive merits of an investor's claim in order to ensure that cases are terminated at the earliest possible stage at the least cost. This approach is followed in a number of existing IIAs.

Consolidation of multiple investor claims permitted

A sample provision creating a process for the consolidation of claims, which is found in the Canadian and US model treaties, as well as some other IIAs, is included because

186 Draft Norwegian APPI, Art. 15.3.

of the potential cost-saving benefits for host states and the desirability of avoiding the risk of conflicting decisions. Consolidation is not mandatory, however, and may be ordered by a tribunal only if it is satisfied that the benefits exceed the costs.

*Transparency required and **amicus curiae** participation permitted*

As noted, the newest models for IIAs, including the draft Norwegian agreement, the COMESA Investment Agreement and the Canadian and American model agreements, contain extensive provisions requiring transparency in investor–state proceedings and rules permitting, on certain conditions, the submission of *amicus curiae* briefs by interested parties. The Guide sample provisions include requirements for transparency and a procedure for tribunals to consider applications from interested persons to make *amicus curiae* submissions in the interests of ensuring public accountability.

In most cases, *amicus curiae* submissions will be in support of the state and could complicate and delay the resolution of an investor's claim. Nevertheless, experience under NAFTA suggests that permitting *amicus curiae* participation does not fundamentally undermine the benefits of investor–state dispute settlement for investors. The Guide sample provisions also contain clauses designed to ensure that the investor's interest in a speedy and efficient resolution of its claim is not abused by *amicus curiae* participation, such as a requirement to obtain leave of the tribunal and limits on the length of submissions.

Arbitrator qualifications

In order to ensure that arbitrators have the appropriate independence and expertise, requirements for both are specified in the sample provisions. The party states are also permitted to adopt a code of conduct for arbitrators and to make rules to govern investor–state arbitration. Requirements for arbitrators (i) to disclose conflicts of interest, (ii) to protect confidentiality during and after the arbitration and (iii) not to represent either of the parties for one year after the completion of the arbitration are included in the sample provision. These requirements are based on the NAFTA code of conduct for panellists in state-to-state dispute settlement proceedings.

In addition, it is provided that a roster is to be appointed by the party states, from which arbitrators are to be chosen. This will help to ensure that arbitrators have the characteristics that the party states desire. The number of members of the roster is set at 40, with each party entitled to appoint 20. While these numbers are somewhat arbitrary and may be changed to suit the views of particular negotiating parties, they are consistent with the approach taken in some other agreements.[187] The discussion of technical assistance below addresses the use of such assistance to provide training to developing country arbitrators to help create a pool from which roster members may be chosen.[188]

---

187 NAFTA (1992) contemplates a roster of 45 (15 appointed by each party state) for investor–state dispute settlement (Art. 1125.4).

188 See Section 8.2 (Technical assistance).

Limits on damages

Damages may be reduced where the investor was partly responsible for the losses it suffered or failed to take reasonable steps to mitigate the losses that it suffered: Consistent with general principles of law and some investor–state tribunal practice, the sample provisions provide that damages awarded to an investor may be reduced where the investor was partly responsible for the losses it suffered or failed to take reasonable steps to mitigate the losses that it suffered.

Damages are limited to an investor's direct losses: A limitation on damages to those needed to compensate the investor for direct losses, excluding loss of future profits and prohibiting the calculation of compensation based on the discounted value of future cash flows, is also included in the sample provisions. This limitation has some basis in the investor–state jurisprudence on expropriation and there will be cases in which it would be appropriate to apply such a limitation to breaches of other obligations. Nevertheless, there will be cases where an investor's actual loss will reasonably include future profits.[189]

No punitive or moral damages may be awarded: These categories of damages typically have not been awarded in investor–state cases to date. Punitive damages are generally not awarded for violations of international law.

Damages are awarded only where a state's breach of its obligations exceeds a minimum threshold for seriousness: An investor may not recover damages where the breach does not meet a minimum threshold for seriousness as determined by the tribunal. The last requirement is not well established in investor–state tribunal practice, but is based on practice before the European Court of Justice.

An obligation for tribunals to reduce damages where, in the tribunal's view, the liability of the host state is based on an obligation that was not certain and predictable at the time that the state acted was not included. It has no clear basis in principle or arbitral decisions. The discussion of the substantive investor protection obligations elsewhere in the Guide provides some suggestions for making these obligations more certain and their application more predictable.

Tribunals have discretion to delay obligation to pay damages: The sample provision gives a tribunal discretion to permit a delay in payment in situations where payment would be a significant hardship for the state. This may be especially important for small and vulnerable countries. An opportunity to negotiate compensation following an arbitral tribunal's determination of state liability and prior to an assessment of damages is also provided.

Investor has burden of proving damages: The sample provision clarifies that an investor that makes a claim has the burden of proving all elements of its claim,

---

189 This limitation on damages and the previous one were included in the sample expropriation provision. If they were incorporated in a damages provision relating to all investor–state arbitrations, there would be no need to duplicate these provisions in the expropriation provision. See Section 5.6 (Limitations on expropriation and nationalisation).

including the damages that it alleges were sustained as a consequence of the alleged breach. This reflects the approach taken in investor–state cases and general principles of international arbitration.

No permanent dispute resolution body

A permanent dispute resolution body and/or a permanent appellate body would help to improve the consistency and quality of investor–state decisions, as well as providing a way of putting in place institutional guarantees of independence that are lacking in the current system of investor–state arbitration. Investors are unlikely to be greatly concerned about creating permanent institutions, except to the extent that doing so results in delays and increased expense in obtaining a final disposition of their claims. Nevertheless, the Guide does not contain sample provisions establishing a permanent dispute settlement body or appellate review. This is because the resource implications for states related to establishing and maintaining permanent institutions are likely to make it infeasible, except in particular circumstances, such as in the context of a regional integration agreement where it would be possible to create institutions with responsibilities for disputes under multiple IIAs. The COMESA Investment Agreement provides an example of a regional institution, the COMESA Court of Justice, which may provide a model.[190] The IISD model treaty also has a well-developed model for a permanent dispute resolution body and an appellate body.[191]

Parties can issue binding interpretations

Consistency in decision making can be addressed to some extent by allowing a body established under the IIA to provide authoritative interpretations of the agreement. The power to issue binding interpretations gives the party states more direct control over the development of the standards in the agreement without the resource commitments associated with creating a standing dispute resolution or appellate body. The Guide sample provision provides an example of how this can be done.[192] The use of a roster may also assist in promoting high-quality, consistent decisions.

Counterclaims by states in investor–state arbitration are provided for

The considerations relevant to counterclaims were discussed above in Section 6.17 (Counterclaims by states in investor–state arbitrations). In the interests of consistency, the same rules for the assessment of damages that apply to awards of damages to investors apply to awards of damages in counterclaims, except that moral damages may be awarded. This difference is to address the fact that violations of some home state laws or treaty requirements related to areas such as human rights and labour rights will often be associated with the kinds of non-economic losses that moral damages compensate.

As well, the sample provision includes a requirement that the investor's host state will pay damages awarded in a counterclaim to the extent that the investor has not paid

190 COMESA Investment Agreement (2007), Art. 28.
191 IISD model treaty, Art. 40.
192 See also Section 9.2 (Commission).

them within 12 months of the award. While undoubtedly such a state guarantee will be resisted strongly by capital-exporting states, it does provide a strong incentive for investors' home states to encourage their investors operating abroad to comply with their obligations, including paying any counterclaim award made against them.

Other features of the sample provisions

Several other features have been included in the sample provisions to make the dispute resolution process more predictable and effective:

- Investor's claims can relate only to state actions that occur after the IIA comes into force;
- A form is provided for notices of intent to file a claim to ensure that host states receive adequate information regarding the nature of the claim;
- The identity of any third party funders of an investor's claim must be identified by the investor;
- Home state insurers are subrogated to the rights of investors where they have paid compensation to the investor for a host state's action;
- Arbitral tribunals may seek advice from experts;
- Party states, other than the one responding to a claim, are permitted to make submissions on issues raised by the claim that are related to the interpretation of the agreement; and
- The Commission (a ministerial level body composed of representatives of both party states)[193] can cap the level of arbitrators' fees.[194]

Some other provisions have been included to ensure that the dispute settlement provisions are consistent with applicable arbitral rules.

7.1.7 Sample provisions: investor–state dispute settlement

[Note: All references to other sample provisions from the Guide in these sample provisions are for convenience and illustrative purposes only and not recommendations that any particular provision be included in an IIA.]

Part [X]

Settlement of Disputes between an Investor and a Party[195]

---

193 See also Section 9.2 (Commission).

194 Capping fees at the ICSID maximum of US$3,000 per day was recently recommended by the European Union.

195 For the purposes of these provisions '*Party*' means a state party to the treaty, '*disputing Party*' means a party state against which a claim has been made by an investor, '*disputing party*' or '*disputing investor*' means an investor that has filed a claim, '*disputing parties*' means both the investor making the claim and the state against which a claim has been made, '*non-disputing Party*' means the state party to the treaty other than the state against which a clam has been made and '*non-disputing party*' means a person who has been given permission to file a non-disputing party submission.

Article [A]

Purpose

Without prejudice to the rights and obligations of the Parties under [Guide sample provision in Section 7.2 (State-to-state dispute settlement)], this Part establishes a mechanism for the settlement of investment disputes.

Article [B]

Claim by an Investor of a Party

An investor of a Party may submit to arbitration under this Part a claim that the other Party has breached an obligation under [Guide sample provision in Section 5.3 (National treatment)], [Guide sample provision in Section 5.4 (Most favoured nation)], [Guide sample provision in Section 5.5 (Fair and equitable treatment and the minimum standard of treatment)], [Guide sample provision in Section 5.6 (Limitations on expropriation and nationalisation)], [Guide sample provision in Section 5.7 (Compensation for losses)] and [Guide sample provision in Section 5.8 (Free transfer of funds)] by a measure that becomes effective after this agreement has come into force and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

Article [C]

Notice of Intent to Submit a Claim to Arbitration

1. The disputing investor shall deliver to the disputing Party written notice of its intent to submit a claim to arbitration at least 90 days before the claim is submitted, which notice shall specify:
   a. The name and address of the disputing investor;
   b. The provisions of this Agreement alleged to have been breached and any other relevant provisions;
   c. The issues and the factual basis for the claim, including the measures at issue; and
   d. The relief sought and the approximate amount of damages claimed.
2. The disputing investor shall also deliver, with its Notice of Intent to Submit a Claim to Arbitration, evidence establishing that it is an investor of the other Party.

Article [D]

Settlement of a Claim through Consultation

1. Before a disputing investor may submit a claim to arbitration under this Part, the disputing parties shall first hold consultations in an attempt to settle the claim amicably.
2. Consultations shall be held within 30 days of the submission of the Notice of Intent to Submit a Claim to Arbitration, unless the disputing parties otherwise agree.

3. The place of consultation shall be the capital of the disputing Party, unless the disputing parties otherwise agree.

4. At any time, the disputing parties may agree to use any non-binding dispute resolution procedures, including mediation, fact finding and conciliation, with a view to settling a dispute.

Article [E]

Conditions Precedent to Submission of a Claim to Arbitration

1. A disputing investor may submit a claim to arbitration under Article [B] (claim by an investor of a Party) only if:

   a. The investor consents to arbitration in accordance with the procedures set out in this Agreement, including to arbitration of any counterclaim by the disputing Party under Article [W] (counterclaims);

   b. At least six months have elapsed since the events giving rise to the claim;

   c. Not more than five years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby;

   d. The investor can demonstrate that local remedies in the disputing Party have been exhausted, provided that the investor does not need to satisfy this requirement if the investor can demonstrate that there are no reasonably available local remedies to provide effective redress to the investor for losses resulting from the alleged breach referred to in Article [B] (claim by an investor of a Party); or more than 36 months have passed since the investor has made a claim in a local court in the disputing Party in relation to the measure that is the basis of the alleged breach, after having exhausted any administrative remedies in the disputing Party;

   e. The investor has delivered the Notice of Intent to Submit a Claim to Arbitration required under Article [C] (notice of intent to submit a claim to arbitration) in accordance with the requirements of that Article at least 90 days prior to submitting the claim;

   f. The investor and, where the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article [B] (claim by an investor of a party), except for proceedings for injunctive, declaratory or other extraordinary relief not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party; and

   g. It identifies any government, person or organisation (a 'third party funder') that has provided or agreed to provide any financial or other assistance to the

investor in connection with the claim or has an interest in the outcome of the claim, including the following information:

i. its membership and legal status (e.g. company, trade association or other non-governmental organisation), its general objectives, the nature of its activities, and any parent organisation (including any organisation that directly or indirectly controls the third party funder);

ii. whether the third party funder has any affiliation, direct or indirect, with any disputing party; and

iii. the nature of the interest that the third party funder has in the arbitration.

2. A consent and waiver required by this Article shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.

3. A waiver under section 1f. from the enterprise owned or controlled by the investor shall not be required only where a disputing Party has deprived a disputing investor of control of the enterprise.

4. Failure to meet any of the conditions precedent provided for in sections 1 through 3 shall nullify the consent of the Parties given in Article [G] (consent to arbitration).

Article [F]

Submission of a Claim to Arbitration

1. A disputing investor of a Party who meets the conditions precedent provided for in Article [E] (conditions precedent to submission of a claim to arbitration) may submit a claim to arbitration under:

   a. The ICSID Convention provided that both the disputing Party and the Party of the disputing investor are parties to the Convention;

   b. The Additional Facility Rules of ICSID provided that either the disputing Party or the Party of the disputing investor, but not both, is a party to the ICSID Convention;

   c. The UNCITRAL Arbitration Rules as they exist at the time the investor submits its claim; or

   d. Any other body of rules approved by the Commission as available for arbitrations under this Part.

2. The Commission shall have the power to make rules supplementing the applicable arbitral rules and may amend any rules of its own making. Such rules shall be binding on a Tribunal established under this Part and on individual arbitrators serving on such Tribunals.

3. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Part and supplemented by any rules adopted by the Commission under this Part.

Article [G]

Consent to Arbitration

1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement, including Article [W] (counterclaims).
2. The consent given in section 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:
   a. Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties; and
   b. Article II of the New York Convention for an agreement in writing.

Article [H]

Arbitrators

1. Except in respect of a Tribunal established under Article [K] (consolidation), and unless the disputing parties agree otherwise, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.
2. Arbitrators shall:
   a. Have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements;
   b. Be independent of, and not be affiliated with or take instructions from, either Party or the disputing party;
   c. Comply with Annex [H].1 and any Code of Conduct for Dispute Settlement adopted by the Commission; and
   d. Be chosen from the roster established under this article.
3. Where a disputing investor claims that a dispute involves measures adopted or maintained by a Party relating to financial institutions of the other Party, or investors of the other Party and investments of such investors, in financial institutions in a Party's territory, then:
   a. Where the disputing parties are in agreement, the arbitrators shall, in addition to meeting the criteria set out in section 2, have expertise or experience in financial services law or practice, which may include the regulation of financial institutions; or
   b. Where the disputing parties are not in agreement,
      i. each disputing party may select arbitrators who meet the qualifications set out in subsection 3a., and
      ii. if the Party complained against invokes [Guide sample provision in Section 5.8 (Free transfer of funds)] or [prudential measures exception in Guide

sample provision in Section 5.12 (Reservations and exceptions)], the chair of the panel shall meet the qualifications set out in subsection (a).

4. Where a Party claims that a dispute (including a counterclaim under Article [W] (counterclaims)) involves measures relating to the protection of human rights, labour rights or the rights of indigenous peoples or the environment or the interpretation of the domestic law of a Party:

   a. Where the disputing parties are in agreement, the arbitrators shall, in addition to meeting the criteria set out in section 2, have expertise or experience in the relevant area of law or practice; or

   b. Where the disputing parties are not in agreement, each disputing party may select arbitrators who meet the qualifications set out in subsection 4a.

5. The Parties shall establish a roster of [40] arbitrators for the purposes of conducting arbitrations under the Agreement. Each Party shall nominate [20] individuals to the roster who shall meet the requirements of subsections 2a., b. and c.

6. The disputing parties should agree upon the arbitrators' remuneration. If the disputing parties do not agree on such remuneration before the constitution of the Tribunal, the prevailing ICSID rate for arbitrators shall apply.

7. The Commission may establish rules relating to expenses incurred by the Tribunal and maximum fees that may be paid to arbitrators.

Article [I]

Constitution of a Tribunal When a Party Fails to Appoint an Arbitrator or the Disputing Parties Are Unable to Agree on a Presiding Arbitrator

1. The President of the International Court of Justice shall serve as appointing authority for an arbitration under this section. If the President is a national of either Party or is otherwise prevented from discharging the appointment function, the Vice-President of the International Court of Justice shall be invited to make the necessary appointments. If the Vice-President is a national of either Party or is otherwise prevented from discharging the appointment function, the member of the International Court of Justice next in seniority who is not a national of either Party shall be invited to make the necessary appointments.

2. If a Tribunal, other than a Tribunal established under Article [K] (consolidation), has not been constituted within 90 days from the date that a claim is submitted to arbitration, the President of the International Court of Justice, on the request of either disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed from the roster established under Article [H] (arbitrators), except that the presiding arbitrator shall not be a national of either Party. In making any such appointment, the President of the International Court of Justice shall ensure that any agreement of the disputing parties or any preference expressed by either of the disputing parties under Article [H] (arbitrators) in relation to the expertise, experience or independence of the arbitrators is given effect.

3. If no roster has been established under Article [H] (arbitrators) or no person on the roster is available to be appointed in accordance with the requirements of this Article, the President shall appoint another person who meets the requirements of subsections 2a., b. and c. of Article [H] (arbitrators) and this Article.

Article [J]

Agreement to Appointment of Arbitrators

For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator based on a ground other than citizenship or permanent residence:

a. The disputing Party agrees to the appointment of each individual member of a Tribunal established under the ICSID Convention or the ICSID Additional Facility Rules; and

b. A disputing investor referred to in Article [B] (claim by an investor of a Party) may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the disputing investor agrees in writing to the appointment of each individual member of the Tribunal.

Article [K]

Consolidation

1. A Tribunal established under this Article shall be established under the UNCITRAL Arbitration Rules and shall conduct its proceedings in accordance with those Rules, except as modified by this Part.

2. Where a Tribunal established under this Article is satisfied that claims submitted to arbitration under Article [F] (submission of a claim to arbitration) have a question of law or fact in common, the Tribunal may, in the interests of the fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

   a. Assume jurisdiction over, and hear and determine together, all or part of the claims; or

   b. Assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

3. A disputing party that seeks an order under section 2 shall request the President of the International Court of Justice to establish a Tribunal and shall specify in the request:

   a. The name of the disputing Party and/or disputing investors against which the order is sought;

   b. The nature of the order sought; and

   c. The grounds on which the order is sought.

4. The disputing party shall deliver to the disputing Party and/or disputing investors against which the order is sought a copy of the request.

5. Within 60 days of receipt of the request, the President of the International Court of Justice shall establish a Tribunal comprising three arbitrators. The President shall appoint the presiding arbitrator from the roster of arbitrators established under Article [H] (arbitrators) who shall not be a national of any of the Parties. The President shall appoint the two other members of the Tribunal from the roster within the same time period. One member of the Tribunal shall be a national of the disputing Party and one member shall be a national of the Party of the disputing investors.

   If the President is a national of either Party or is otherwise prevented from discharging the appointment function, the Vice-President of the International Court of Justice shall be invited to make the necessary appointments. If the Vice-President is a national of either Party or is otherwise prevented from discharging the appointment function, the member of the International Court of Justice next in seniority who is not a national of either Party shall be invited to make the necessary appointments.

6. Where a Tribunal has been established under this Article, a disputing investor that has submitted a claim to arbitration under Article [F] (submission of a claim to arbitration) and that has not been named in a request made under section 3 may make a written request to the Tribunal that it be included in an order made under section 2, and shall specify in the request:

   a. The name and address of the disputing investor;

   b. The nature of the order sought; and

   c. The grounds on which the order is sought.

7. A disputing investor referred to in section 6 shall deliver a copy of its request to the disputing parties named in a request made under section 3.

8. A Tribunal established under Article [F] (submission of a claim to arbitration) shall not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article has assumed jurisdiction.

9. On application of a disputing Party, a Tribunal established under this Article, pending its decision under section 2, may order that the proceedings of a Tribunal established under Article [F] (submission of a claim to arbitration) be stayed, unless the latter Tribunal has already adjourned its proceedings.

Article [L]

Notice to the Non-Disputing Party

A disputing Party shall deliver to the other Party a copy of the Notice of Intent to Submit a Claim to Arbitration and other documents, such as a Notice of Arbitration and Statement of Claim filed under this Part, no later than 30 days after the date that such documents have been delivered to the disputing Party.

Article [M]

Documents

1. The non-disputing Party shall be entitled, at its cost, to receive from the disputing Party in relation to a claim under this Part a copy of:
   a. The evidence that has been tendered to the Tribunal;
   b. Copies of all pleadings filed in the arbitration; and
   c. The written argument of the disputing parties.
2. The Party receiving information pursuant to section 1 shall treat the information as if it were a disputing Party.

Article [N]

Participation by the Non-Disputing Party

1. On written notice to the disputing parties, the non-disputing Party may make submissions to a Tribunal on a question of interpretation of this Agreement in an arbitration under this Part.
2. The non-disputing Party shall have the right to attend any hearings held under this Part, whether or not it makes submissions to the Tribunal.

Article [O]

Place of Arbitration

Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration in the territory of a state that is a party to the New York Convention, selected in accordance with:

a. The ICSID Arbitration Rules, if the arbitration is under the ICSID Convention;
b. The ICSID Additional Facility Rules, if the arbitration is under those Rules;
c. The UNCITRAL Arbitration Rules, if the arbitration is under those Rules; and
d. Any other rules governing the arbitration in accordance with this Part.

Article [P]

Preliminary Objections to Jurisdiction or Admissibility or that a Claim is Manifestly without Merit

1. Where an issue relating to jurisdiction or admissibility of a claim is raised as a preliminary objection by a disputing Party or a preliminary objection is made that a claim is manifestly without merit, a Tribunal shall decide on the objection before proceeding to the merits.
2. For greater certainty, the grounds for a preliminary objection include the following:

a. The investor is not an investor within the meaning of this Agreement;

b. The investor has not made or is not making an investment within the meaning of this Agreement; and

c. The investor has not fulfilled one of the conditions precedent to the submission of a claim to arbitration under Article [E] (conditions precedent to submission of a claim to arbitration).

Article [Q]

Public Access to Hearings and Documents

1. Hearings held under this Part shall be open to the public. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings *in camera*.

2. The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings in consultation with the disputing parties. Where a hearing has been closed to the public, transcripts of the hearings shall be prepared, and all aspects of those transcripts that are not protected from disclosure pursuant to this article shall be made available to the public. The disputing Party shall make public transcripts of hearings in the form and in the language in which it receives them from the Tribunal.

3. All Notices of Intent to Submit a Claim to Arbitration under Article [C] (notice of intent to submit a claim to arbitration) and claims to arbitration under Article [B] (claim by an investor of a Party) shall be made publicly available by the disputing Party in a timely manner, in the form and in the language in which it receives them, subject to the deletion of confidential information.

4. All documents submitted to, or issued by, the Tribunal shall be made publicly available by the disputing Party in a timely manner, in the form and in the language in which it receives them, subject to the deletion of confidential information.

5. Any Tribunal award under this Part shall be made publicly available by the disputing Party, subject to the deletion of confidential information, immediately upon its issue to the disputing parties.

6. If there is a dispute regarding designation of confidential information in documents referred to in section 2, 3, 4 or 5, the Tribunal, once constituted, shall promptly resolve that dispute and make an order regarding what must be disclosed.

7. For the purposes of this article, confidential information is information that is protected against disclosure by this Agreement or applicable law, confidential business information and information that may be designated as confidential by the Tribunal. A disputing party that provides information shall clearly designate whether it contends that the information is confidential at the time it submits the information to the disputing Party, in the case of information in documents referred to in section 3, or at the time it submits information to the Tribunal

in all other cases and shall, at the time it submits a document containing such information, submit a redacted version of the document that does not contain the information. Where the other disputing party disputes that any or all of such information is confidential, it shall so indicate within 30 days of receipt of the redacted document from the other party, identifying with precision the portions of the document that it contends ought not to be redacted. The arbitral tribunal shall then rule on any such objection to the designation or redaction of confidential information.

8. A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents referred to in section 2, 3, 4 or 5 as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents.

9. The Parties may share with officials of their respective federal and sub-national governments all relevant unredacted documents referred to in section 2, 3, 4 or 5 in the course of dispute settlement under this Agreement, but they shall ensure that those persons protect any confidential information in such documents.

10. As provided under [Guide sample provision in Section 5.12 (Reservations and exceptions)], a Tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting government confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which the Party determines to be contrary to its essential security interests.

11. To the extent that a Tribunal's confidentiality order designates information as confidential and a Party's law on access to information requires public access to that information, the Party's law on access to information shall prevail. However, a Party should endeavour to apply its law on access to information so as to protect information designated as confidential by the Tribunal.

12. Requirements for disclosure under this Article shall be satisfied by each Party establishing a publicly accessible web site and posting on that site all documents required to be disclosed under sections 2, 3, 4 and 5 of this Article in connection with any dispute with respect to which it is the disputing Party as required in those articles.

Article [R]

Submissions by a Non-Disputing Party

1. Any non-disputing party that is a person of a Party that wishes to file a written submission with a Tribunal (the 'Applicant') may apply for leave from the Tribunal to file such a submission, in accordance with Annex [R].1. The Applicant shall attach the submission to the application.

2. The Applicant shall serve the application for leave to file a non-disputing party submission and the submission on all disputing parties and the Tribunal.

3. The Tribunal shall set an appropriate date for the disputing parties to comment on the application for leave to file a non-disputing party submission.
4. In determining whether to grant leave to file an Applicant's submission, the Tribunal shall consider, among other things, the extent to which:
    a. The Applicant's submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
    b. The Applicant's submission would address a matter within the scope of the dispute;
    c. The Applicant has a significant interest in the arbitration; and
    d. The subject matter of the arbitration affects a public interest.
5. The Tribunal shall ensure that:
    a. Any Applicant's submission does not disrupt the proceedings; and
    b. Neither disputing party is unduly burdened or unfairly prejudiced by such submissions.
6. The Tribunal shall decide whether to grant leave to file a non-disputing party submission. If leave to file a non-disputing party submission is granted, the Tribunal shall set an appropriate date for the disputing parties to respond in writing to the non-disputing party submission. By that date, the non-disputing Party may, pursuant to Article [N] (participation by the non-disputing Party), address any issues of interpretation of this Agreement presented in the non-disputing party submission.
7. A Tribunal that grants leave to file a non-disputing party submission is not required to address the submission at any point in the arbitration or in the reasons for its decision, nor is the non-disputing party that files the submission entitled to make further submissions in the arbitration.
8. Access to hearings and documents by non-disputing parties that file applications under these procedures shall be governed by the provisions pertaining to public access to hearings and documents under Article [Q] (public access to hearings and documents).

Article [S]

Governing Law

1. A Tribunal established under this Part shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law and the domestic law of the disputing Party.
2. Where a disputing Party requests an interpretation of a provision of this Agreement, the Tribunal shall request the interpretation of the Commission[196] on

196 See Section 9.2 (Commission)

the issue. The Commission, within 60 days of delivery of the request, shall submit in writing its interpretation to the Tribunal. If the Commission fails to submit an interpretation within 60 days, the Tribunal shall decide the issue.

3. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Part and any award under this Part shall be consistent with such interpretation.

Article [T]

Expert Reports

Without prejudice to the appointment of other kinds of experts where authorised by the applicable arbitration rules, a Tribunal, at the request of a disputing party or, unless the disputing parties disagree, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

Article [U]

Interim Measures of Protection

A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article [B] (claim by an investor of a party).

Article [V]

Final Award

1. Subject to Article [W] (counterclaims), where a Tribunal makes a final award against the disputing Party, the Tribunal may award, separately or in combination, only:

    a. Monetary damages and any applicable interest;

    b. Restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.

    After making a finding of liability against a disputing Party but prior to making an award of damages under this Section, the Tribunal shall provide a reasonable time for the disputing parties to agree on the compensation to be paid by the disputing Party to the disputing party.

2. Where a Tribunal makes an award under Article [W] (counterclaim) against a disputing party, the Tribunal shall deduct the amount of any damages to be paid to the disputing Party under that award from any damages to be paid to the disputing party under this Section.

3. The Tribunal may also award costs in accordance with the applicable arbitration rules.
4. In assessing damages to be paid by a disputing Party, the Tribunal shall take into account the following principles:
   a. The investor shall take reasonable steps to mitigate its losses, and damages shall be reduced to the extent that it has not;
   b. Damages shall be reduced to the extent that the loss to the investor is attributable to the conduct of the investor;
   c. No punitive or moral damages shall be awarded;
   d. Damages shall be limited to direct losses of the investor and shall not include any amount for loss of future profits or be calculated on the basis of the discounted value of future cash flows; and
   e. No damages shall be awarded unless the breach of an obligation listed in Article [B] (claim by an investor of a Party) is sufficiently serious, in the Tribunal's discretion, to justify an award of damages.
5. The Parties confirm their shared understanding that when a disputing investor submits a claim to arbitration under this Part, it has the burden of proving all elements of its claim, including the damages that it alleges were sustained by reason of, or arising out of, the measures that are the basis of the claim.
6. Notwithstanding Article [X] (finality and enforcement of award), a Tribunal shall have a discretion to make an order that any payment of damages by a disputing Party be delayed where it determines that the payment would be a serious hardship for the Party. If the Tribunal determines that payment may be delayed, it shall establish a schedule for the payment of damages taking into account the ability of the disputing Party to make payments.

Article [W]

Counterclaims

1. Where an investor has submitted a claim under Article [F] (submission of a claim to arbitration), the disputing Party may counterclaim against the investor before the Tribunal established under this Agreement to hear the investor's claim that the investor has breached an obligation under [Guide sample provision in Section 6.7 (Investor obligation to comply with the laws of the host state)], [Guide sample provision in Section 6.8 (Investor obligation to respect internationally recognised human rights and undertake human rights due diligence)], [Guide sample provision in Section 6.9 (Investor obligation to refrain from the commission of, or complicity in, grave violations of human rights)], [Guide sample provision in Section 6.10 (Investor obligation to comply with core labour standards)] or [Guide sample provision in Section 6.11 (Investor obligation to refrain from acts, or complicity in acts, of bribery and corruption)], or non-compliance with a management plan in relation to the investor's investment where consultation

has not resulted in compliance with the management plan or the reasonable and appropriate modification of the plan in accordance with [Guide sample provision in Section 6.16 (Civil liability of investors)] or any other obligation owed to the disputing Party and the disputing Party or a person of the Party has suffered loss or damage by reason of, or arising out of, that breach.

2. Where a Tribunal makes a final award against the disputing party under this article, the Tribunal may award monetary damages and any applicable interest.

3. Where a disputing Party counterclaims against an investor under section 1, on the basis that the investor has breached an obligation under [Guide sample provision in Section 6.7 (Investor obligation to comply with the laws of the host state)], the Tribunal can only award damages if it determines that the breach is sufficiently serious, in the Tribunal's discretion, to justify an award of damages.

4. The Tribunal may also award costs in accordance with the applicable arbitration rules.

5. In assessing damages to be paid by a disputing party, the Tribunal shall take into account the following principles:

   a. The disputing Party shall take reasonable steps to mitigate its losses and damages shall be reduced to the extent that it has not;

   b. Damages shall be reduced to the extent that the loss to the disputing Party is attributable to the conduct of the disputing Party; and

   c. No punitive damages shall be awarded.

6. The Parties confirm their shared understanding that when a Party submits a counterclaim under this Part, it has the burden of proving all elements of its claim, including the damages that it alleges were sustained by reason of, or arising out of, the alleged actions which are the basis of the counterclaim.

Article [X]

Finality and Enforcement of an Award

1. An award, including any award made under Article [W] (counterclaims), made by a Tribunal shall have no binding force except between the disputing parties and in respect of that particular case.

2. Subject to Article [V] (final award), section 3 and any applicable review procedure for an interim award, a disputing investor and a disputing Party shall abide by and comply with an award without delay.

3. A disputing investor or a disputing Party may not seek enforcement of a final award, including any award made under Article [W] (counterclaims), until:

   a. In the case of a final award made under the ICSID Convention

      i. 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or

ii. revision or annulment proceedings have been completed and the award has not been annulled; and

b. In the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules or any other rules agreed to by the disputing parties

i. 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or

ii. a court has dismissed or allowed an application to revise, set aside or annul the award and no further appeal is available.

4. Each Party shall provide for the enforcement of an award, including any award made under Article [W] (counterclaims), in its territory.

5. If the disputing Party fails to abide by or comply with a final award, the Commission, on delivery of a request by the Party of the disputing investor, shall establish an arbitral panel under [Guide sample provision in Section 7.2 (State-to-state dispute settlement)]. The requesting Party may seek in such proceedings:

a. A determination that the failure to comply with the final award is inconsistent with the obligations of this Agreement; and

b. A recommendation that the disputing Party abide by or comply with the final award.

6. A disputing investor or a disputing Party may seek enforcement of an award, including any award made under Article [W] (counterclaims), under the ICSID Convention, or the New York Convention regardless of whether proceedings have been taken under section 5.

7. A claim that is submitted to arbitration under this Part shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention.

8. If a disputing party against which an award of damages by counterclaim has been made under Article [W] (counterclaim) fails to satisfy the award in full within 12 months of the date of the award, the non-disputing Party of the investor shall pay any outstanding amount to the disputing Party.

Article [Y]

General

Time when a Claim is Submitted to Arbitration

1. A claim is submitted to arbitration under this Part when:

a. The request for arbitration under paragraph (1) of Article 36 of the ICSID Convention is received by the Secretary-General of ICSID;

b. The notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General of ICSID;

c. The notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party; or

d. The requirements for the initiation of an arbitration under any other rules governing the arbitration in accordance with this Part have been satisfied.

Service of Documents

2. Delivery of notice and other documents on a Party shall be made to the place named for that Party below.

For ____________ ....

For ____________ ....

Annex [H].1

Rules for Arbitrator Conduct

1. Every arbitrator shall avoid impropriety and the appearance of impropriety and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement process under this Agreement is preserved. Without limiting the generality of the foregoing, arbitrators shall meet the following requirements during an arbitration under this Part:

   a. An arbitrator shall be independent and impartial. An arbitrator shall act in a fair manner and shall avoid creating an appearance of impropriety or an apprehension of bias;

   b. An arbitrator shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a disputing party or fear of criticism;

   c. An arbitrator shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere, with the proper performance of the arbitrator's duties;

   d. An arbitrator shall not use the arbitrator's position on the Tribunal to advance any personal or private interests. An arbitrator shall avoid actions that may create the impression that others are in a special position to influence the arbitrator. An arbitrator shall make every effort to prevent or discourage others from representing themselves as being in such a position;

   e. An arbitrator shall not allow past or existing financial, business, professional, family or social relationships or responsibilities to influence the arbitrator's conduct or judgment; and

   f. An arbitrator shall avoid entering into any relationship, or acquiring any financial interest, that is likely to affect the arbitrator's impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias.

2. For a period of one year after the completion of an arbitration under the Agreement, a former arbitrator shall not personally advise or represent either of the disputing parties.
3. An arbitrator shall disclose any interest, relationship or matter that is likely to affect the arbitrator's independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias in the arbitration to the disputing parties in writing prior to the arbitrator's appointment, taking into account the International Bar Association Guidelines on Conflicts of Interest for International Arbitrations. To this end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters, including:
    a. Any past or existing financial, business, professional, family or social relationship with either of the disputing parties, or their counsel, or any such relationship involving a candidate's employer, partner, business associate or family member; and
    b. Public advocacy or legal or other representation concerning an issue in dispute in the arbitration.
4. Once appointed, an arbitrator shall continue to make all reasonable efforts to become aware of any interests, relationships or matters referred to in section 3 and shall disclose them to the disputing parties in writing immediately upon becoming aware of them.
5. An arbitrator or former arbitrator shall not at any time disclose or use any non-public information concerning the dispute or acquired during the arbitration except for the purposes of the arbitration and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to affect adversely the interest of another.

Annex [R].1

Submissions by Non-Disputing Parties

1. An application for leave to file a non-disputing party submission shall:
    a. Be made in writing, dated and signed by the person filing the application, and include the address and other contact details of the applicant;
    b. Be no longer than five (5) typed pages;
    c. Describe the applicant, including, where relevant, its membership and legal status (e.g. company, trade association or other non-governmental organisation), its general objectives, the nature of its activities, and any parent organisation (including any organisation that directly or indirectly controls the applicant);
    d. Disclose whether the applicant has any affiliation, direct or indirect, with any disputing party;
    e. Identify any government, person or organisation that has provided any financial or other assistance in preparing the submission;

f. Specify the nature of the interest that the applicant has in the arbitration;

g. Identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission;

h. Explain, by reference to the factors specified in Article [R](4) (submissions by non-disputing party), why the Tribunal should accept the submission; and

i. Be made in a language of the arbitration.

2. The submission filed by a non-disputing party shall:

   a. Be dated and signed by the person filing the submission;

   b. Be concise, and in no case longer than 20 typed pages, including any appendices;

   c. Set out a precise statement supporting the applicant's position on the issues; and

   d. Address only matters within the scope of the dispute.

7.2 State-to-state dispute settlement

Cross references

Section 6.6	Sustainability assessments	267
Section 6.12	Other rights and obligations of host states	345
Section 6.13	Enforcement of investor obligations	372
Section 7.1	Investor–state dispute settlement	408

Most IIAs contain some procedure to be followed for the resolution of any dispute between the party states to the treaty. Such disputes have been rare in practice. Perhaps for this reason, unlike investor–state dispute settlement and state-to-state dispute settlement under the WTO Dispute Settlement Understanding (DSU), state-to-state dispute settlement procedures in IIAs have received relatively little attention and there has been much less development in state-to-state dispute settlement provisions.[197] The content of state-to-state dispute settlement provisions is likely to be of little interest to investors, at least where IIAs provide for investor–state arbitration.

7.2.1 IIA practice

Most IIAs devote a single provision to state-to-state procedures[198] though some provisions are more detailed than others. Procedures typically (i) address the scope of application of the procedures, (ii) impose an obligation to consult prior to the establishment of an arbitral tribunal, and (iii) establish rules for the conduct of the arbitral procedure. A few go on to deal with transparency of the process and enforcement of decisions.

197 UNCTAD (2007), *Treaties 1996–2006*, op. cit., at 126.
198 E.g. Indian model BIPPA, Art. 10; US model BIT, Art. 37.

Comprehensive trade and investment agreements often contain more elaborate state-to-state procedures.[199] Under the COMESA Investment Agreement, disputes can be referred to a regional institution, the COMESA Court of Justice, or an independent arbitral tribunal.[200] The COMESA Investment Agreement sets out a detailed set of rules for state-to-state arbitration that are similar to the rules for investor–state dispute settlement.[201] Within ASEAN, disputes can be dealt with under the ASEAN Protocol on Enhanced Dispute Settlement Mechanism, which follows the WTO model.[202]

Scope

Virtually all IIAs define the scope of state-to-state dispute settlement as 'the interpretation and application' of the agreement.[203] 'Interpretation' refers to what provisions mean in particular situations, while 'application' refers to whether particular state actions comply with the agreement. In practice, there will be considerable overlap between the two. Under such a provision, all obligations that are imposed on either party state in the IIA may be the subject of these procedures. In some IIAs, resort to state-to-state procedures is precluded in relation to any dispute that an investor has submitted to investor–state arbitration. Typically, these kinds of provisions permit state-to-state dispute settlement where an award has been issued in favour of an investor but not paid by the host state.[204] Another caveat is that the manner in which particular provisions are drafted may make it difficult to address them in state-to-state dispute settlement. For example, if an exception for essential security issues in an IIA allows a state to define what it considers to be an essential security interest, then there is little scope for a dispute about whether a particular measure that a state says is needed to protect its essential security interests is covered by the exception.[205]

Specific IIA obligations can be carved out of state-to-state dispute settlement. There are likely to be few obligations in conventional IIAs that a state will wish to exclude. However, some obligations, such as host state obligations related to environmental protection, human rights, labour rights and the rights of indigenous peoples of the kind that are discussed above, may be so sensitive that a state may want to exclude them,[206] so that the other party state cannot initiate state-to-state dispute settlement claiming that the state has not complied with these obligations. Under the US model

199 E.g. Chapter 20 of NAFTA (1992).

200 COMESA Investment Agreement (2007), Art. 27.

201 COMESA Investment Agreement (2007), Annex A.

202 ASEAN Agreement (2009), Art. 27. Neither this procedure nor its predecessor has ever been used.

203 E.g. UK model IPPA, Art. 9; Indian model BIPPA, Art. 10; US model BIT, Art. 37; Canadian model FIPA, Art. 48.

204 See Section 7.1 (Investor–state dispute settlement).

205 Some agreements specifically exclude security exceptions from dispute settlement.

206 See 6.12 (Other rights and obligations of party states); Section 6.13 (Enforcement of investor obligations).

agreement, the limited obligations regarding the protection of labour rights and the environment are excluded from state-to-state dispute settlement.[207]

Consultations

Most IIAs require consultations between the party states for a period of time. If consultations are not successful by the expiry of the period, either state may submit the dispute to an arbitral tribunal.[208] Typically, the period for consultations is six months.[209] IIAs may also require or permit the parties to resort to alternative dispute resolution procedures. These were discussed above.[210]

Arbitration procedures

Many IIAs provide that each party state chooses one arbitrator and the two appointed arbitrators select the third member of the panel.[211] Alternatively, the third arbitrator may be chosen by agreement of the parties. [212] Typically, the third arbitrator cannot be a national of either party state and is the presiding arbitrator or chair of the panel. If appointments are not made within the time limit set in the IIA, most IIAs provide that someone, often the Secretary-General of ICSID or the President of the International Court of Justice, will appoint any arbitrator not appointed on the request of a party.

Few IIAs set standards for arbitrators in state-to-state dispute settlement. The Canadian model is an exception and sets the same standards for expertise and independence as it does for arbitrators in investor–state arbitration.

5. Arbitrators shall:
    a. have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements;
    b. be independent of, and not be affiliated with or take instructions from, either Party; and
    c. comply with any Code of Conduct for Dispute Settlement as agreed by the Commission.

As with investor–state arbitrations, the Canadian model contemplates that if a party state claims that a dispute involves measures relating to financial institutions, or to investors or investments of investors in financial institutions, the parties can agree

207 US model BIT, Art. 37.

208 E.g. UK model IPPA, Art. 9; Indian model BIPPA, Art. 10; US model BIT, Art. 37; Canadian model FIPA, Art. 48.

209 UNCTAD (2003), *Dispute Settlement: State-to-State*, United Nations, New York and Geneva. Some treaties do not provide a time limit (e.g. Canadian model FIPA, Art. 48.2).

210 See Section 7.1 (Investor–state dispute settlement).

211 This approach is followed in the Canadian model FIPA, Art. 48.3, UK model IPPA, Art. 9(3), Indian model BIPPA, Art. 10(3), and Australia–India BIT (1999), Art. 13.3.

212 This approach is followed in the US model BIT, Art. 37.2.

that arbitrators must have expertise in financial services law and practice or the regulation of financial institutions.[213]

In terms of the procedure to be followed, some IIAs provide that the UNCITRAL rules shall be followed unless the parties agree to some other procedure.[214] Most provide simply that the panel established under the treaty shall decide on its own procedure.[215]

Each party state in a state-to-state dispute normally bears its own costs, while the fees and expenses of the tribunal are split between the parties. The Canadian model permits a panel to direct that a higher proportion of the costs be borne by one of the parties.[216] Such a rule would permit a panel to order that the loser pay a higher proportion of the costs.

The concerns that have been raised in connection with arbitrators in investor–state arbitration, including the absence of institutional guarantees of independence, have not been raised in relation to state-to-state dispute resolution. Undoubtedly, this is, in part, because of the very limited recourse to these procedures and the weak or non-existent enforcement procedures for state-to-state awards.

Transparency

Another design issue in relation to state-to-state dispute settlement is the degree to which the proceedings should be open and transparent. On this issue, there is significant variation among IIAs. The Canadian model, like most IIAs, does not address the issue, even though it has extensive provisions guaranteeing transparency in investor–state procedures, while the US model, the draft Norwegian model and the IISD model require essentially the same level of transparency and openness to the participation of *amici curiae* that they require for investor–state disputes be provided in state-to-state disputes.[217]

At the WTO, the general rule is that proceedings are confidential, but some parties now routinely provide public access to their submissions. *Amicus curiae* submissions have been accepted at the WTO. There is no evidence of such openness under state-to-state procedures in other contexts. In the three state-to-state disputes under NAFTA, for example, only the final awards have been disclosed. Greater openness in state-to-state dispute settlement may make it more difficult for the parties to

213 Canadian model FIPA, Art. 48.6. The US–Uruguay BIT (2005) contains a similar provision (Art. 20) but goes on to provide that the competent financial authorities from each party state shall consult with a view to finding an agreement prior to submitting the dispute to arbitration.

214 E.g. US model BIT, Art. 37.1. NAFTA (1992) Chapter 20 has its own procedural rules: Model Rules of Procedure for Chapter 20 of NAFTA.

215 E.g. Canadian model FIPA, Art. 48.7. The Indian model BIPPA and the UK model IPPA do not refer to what the arbitral rules should be or how they will be determined.

216 Canadian model FIPA, Art. 48.8.

217 US model BIT, Art. 37(4); IISD model treaty, Art. 43; draft Norwegian model APPI, Art. 21. See sample Article [Q] (public access to hearings and documents) in Section 7.1 (Investor–state dispute settlement).

negotiate a solution to the dispute, but may nevertheless be desirable to ensure public accountability for state actions.

Enforcement

Like most IIAs, under the Canadian, US, UK and Indian models, decisions of state-to-state tribunals are binding. Few IIAs, however, address what happens if a state fails to comply with a decision that its regime is not in compliance with the treaty. The Canadian model provides that if the parties cannot agree on how to resolve the dispute, which normally would require implementation of the panel decision, the other party state is entitled to receive compensation from the non-complying state or to suspend benefits to be accorded to the non-complying party that are of 'equivalent value to those awarded by the panel'. A number of questions would arise if this were ever to be used in practice, including the following:

- What benefits could be suspended?
- Would benefits be limited to the obligations owed to the party in breach under the IIA?
- What does it mean to limit the benefits suspended to benefits of 'equivalent value to those awarded by the panel', when there is no requirement for a panel to assess the costs of non-compliance?
- How would a suspension of benefits be valued?

To illustrate the last issue, consider the suspension of, for example, an IIA obligation to pay compensation for expropriation by a party in retaliation for the failure by the other party to change a measure that had been found by a state-to-state panel to be inconsistent with an IIA obligation. Such a suspension might create an incentive for compliance by the other party, but it is not obvious how one would value such a suspension. In any case, this kind of retaliation would undermine the overall objectives of the IIA.

Box 7.6 Summary of options for state-to-state dispute settlement provisions

1. *No reference to state-to-state dispute settlement*
2. *Include state-to-state dispute settlement possibly with:*
    a. Limitations on the scope of dispute settlement
    b. Requirements for transparency and *amicus curiae* participation

7.2.2 Discussion of options

1. *No reference to state-to-state dispute settlement*

This option is not typically found in IIAs. State-to-state dispute settlement complements the establishment of legal standards in the IIA by providing a

process to resolve differences regarding the interpretation of the treaty or its application to specific state actions. It also allows parties to know in advance how disputes will be addressed where consultation fails. State-to-state procedures also provide a mandatory process by which one party state can engage the other in addressing problems that arise. This may be particularly important for developing countries that are capital importers. For capital-exporting states, investor–state dispute settlement may be sufficient to deal with most problems.

2. *Include state-to-state dispute settlement*

Once a decision to include state-to-state dispute settlement has been taken, there are few issues regarding the design of such a provision. The basic architecture of IIA provisions is the same in most agreements, and is not controversial. Investors are unlikely to take into account arrangements for state-to-state dispute settlement in their investment decisions. Two issues, however, should be addressed.

a. Limitations on scope of dispute settlement

IIAs typically define the scope of state-to-state dispute settlement as any issue related to the interpretation or application of the agreement. One issue is whether anything should be excluded from the scope of state-to-state dispute settlement. Where sensitive obligations regarding environmental protection, human rights, labour rights and the rights of indigenous peoples, such as those that are discussed in the Guide are being undertaken by states, they may decide to exclude them. This is the approach followed under the US model agreement for the obligations regarding the protection of labour rights and the environment.

b. Requirements for transparency and *amicus curiae* participation

Few IIAs create transparency requirements related to state-to-state arbitration. Subjecting state-to-state dispute settlement to requirements to make publicly available the submissions of the parties and panel decisions, to have open hearings and to permit *amici curiae* to participate, if certain conditions are met, as required for investor–state arbitration in some IIAs, may impede the parties from agreeing to a solution to their dispute. Frank discussion of positions and possible solutions may be inhibited. On the other hand, transparency and *amicus curiae* participation may be desirable to ensure public accountability for state actions. Some of the offsetting considerations that are relied on to argue in favour of limiting transparency and openness in investor–state arbitration, such as the burden on the investor and possible disincentives to invest, are not relevant in the state-to-state context.

7.2.3 Discussion of sample provision

State-to-state dispute settlement procedures exist in almost all IIAs. The Guide sample provision for a state-to-state dispute settlement procedure is relatively detailed, in the interests of providing greater certainty regarding how the process works.

Exclusions from scope: IIAs define the scope of state-to-state dispute settlement as an issue related to the interpretation or application of the agreement. The sample

provisions adopt this approach but, following the approach in the US model agreement, any state obligations regarding environmental protection, human rights, labour rights and the rights of indigenous peoples[218] are excluded. States may want to consider whether other obligations should be excluded. If, for example, the novel enforcement provisions described above[219] for obligations on investors and state obligations related to sustainability assessments are included in an agreement, party states will need to consider whether they are comfortable with the prospect of these obligations being the subject of state-to-state dispute settlement.[220]

Arbitrator standards: The sample provision incorporates the same standards related to competence and independence for members of state-to-state dispute settlement panels as apply to arbitrators under the sample provisions on investor–state arbitration.[221]

Transparency: In the interests of public accountability and the trend towards transparency evident in international economic law generally, the sample provision provides for fully open hearings, public access to documents and the possibility of *amicus curiae* participation on the same basis as in investor–state proceedings.[222]

Enforcement: As in most existing IIAs, decisions are binding. However, no compensation or suspension of benefits provision has been included. The Canadian model is one of the few that provides for compensation to be paid and permits retaliation in circumstances where the parties cannot agree on the resolution of a dispute following the decision of a state-to-state dispute settlement panel. The Canadian model, however, does not provide adequate detail regarding how such a system of compensation and suspension would work, and it is not clear how a system of compensation or retaliation could be made to work. Also, experience to date does not suggest that such an enforcement provision is necessary or desirable.

7.2.4 Sample provisions: state-to-state dispute settlement procedure

State-to-State Dispute Settlement Procedure

1. Either Party may request consultations on the interpretation or application of this Agreement. The other Party shall give sympathetic consideration to the request. Any dispute between the Parties concerning the interpretation or application of this Agreement shall, whenever possible, be settled amicably through consultations.

2. If a dispute cannot be settled through consultations within 180 days of the submission of the request under section 1, it shall, at the request of either Party, be submitted to an arbitral panel for decision.

218 See Section 6.12 (Other rights and obligations of party states).
219 See Section 6.13 (Enforcement of investor obligations) and Sections 6.14 to 6.16.
220 See Section 6.6 (Sustainability assessments).
221 Sample provision Annex B.[H] in Section 7.1 (Investor–state dispute settlement).
222 The same approach is adopted in the COMESA Investment Agreement (2007), Art. 27.

3. Within two months after receipt through diplomatic channels of the request for arbitration, each Party shall appoint one member to the arbitral panel. The two members shall then select a national of a third state who, upon approval by the two Parties, shall be appointed Chair of the arbitral panel. The Chair shall be appointed within two months from the date of appointment of the other two members of the arbitral panel.

4. If within the periods specified in section 3 of this article the necessary appointments have not been made, either Party may invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Party or is otherwise prevented from discharging the appointment function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Party or is otherwise prevented from discharging the appointment function, the member of the International Court of Justice next in seniority who is not a national of either Party shall be invited to make the necessary appointments.

5. Panel members shall:

   a. Have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements;

   b. Be independent of, and not be affiliated with or take instructions from, either Party; and

   c. Comply with the Annex to this Section and any code of conduct for dispute settlement agreed by the Commission.

6. Where a Party claims that a dispute involves measures relating to financial institutions, or to investors or investments of such investors in financial institutions, then:

   a. Where the disputing Parties are in agreement, the panel members shall, in addition to meeting the criteria set out in section 5, have expertise or experience in financial services law or practice, which may include the regulation of financial institutions; or

   b. Where the disputing Parties are not in agreement, each disputing Party may select arbitrators who meet the qualifications set out in subsection 6a.

7. Where a Party claims that a dispute involves measures relating to the protection of labour rights, human rights, the rights of indigenous peoples or the environment, or the interpretation of the domestic law of a Party:

   a. Where the disputing Parties are in agreement, the arbitrators shall, in addition to meeting the criteria set out in section 5, have expertise or experience in the relevant area of law or practice; or

   b. Where the disputing Parties are not in agreement, each disputing Party may select members who meet the qualifications set out in subsection 7a.

8. The arbitral panel shall determine its own procedure. The arbitral panel shall reach its decision by a majority of votes. Such decision shall be binding on both Parties. Unless otherwise agreed, the decision of the arbitral panel shall be rendered within 180 days of the appointment of the Chair in accordance with sections 3 or 4 of this article.

9. Each Party shall bear the costs of its own member of the panel and of its representation in the arbitral proceedings; the costs related to the Chair and any remaining costs shall be borne equally by the Parties. However, the arbitral panel may in its decision direct that a higher proportion of costs be borne by one of the two Parties, and this award shall be binding on both Parties.

10. The Parties shall, within 60 days of the decision of a panel, reach agreement on the manner in which to resolve their dispute. Such agreement shall implement the decision of the panel.

11. Articles [Q] (public access to hearings and documents), [R] (submissions by a non-disputing party) and [S] (governing law) shall apply, *mutatis mutandis*, to dispute settlement proceedings under this Article. [See Guide sample provisions in Section 7.1 (Investor–state dispute settlement).]

12. Paragraphs 1 through 11 shall not apply to a matter arising under [see possible sample provisions discussed under Guide Sections 6.7–6.11 (obligations of investors)] or [Guide sample provisions in Section 6.6 (Sustainability assessments)].

Annex

Rules for Panel Member Conduct

1. Every panel member shall avoid impropriety and the appearance of impropriety and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement process is preserved. Without limiting the generality of the foregoing, panel members shall meet the following requirements.

    a. A panel member shall be independent and impartial. A panel member shall act in a fair manner and shall avoid creating an appearance of impropriety or an apprehension of bias.

    b. A panel member shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or fear of criticism.

    c. A panel member shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere, with the proper performance of the panel member's duties.

    d. A panel member shall not use the panel member's position on the tribunal to advance any personal or private interests. A panel member shall avoid actions that may create the impression that others are in a special position to influence the panel member. A panel member shall make every effort to prevent or discourage others from representing themselves as being in such a position.

   e. A panel member shall not allow past or existing financial, business, professional, family or social relationships or responsibilities to influence the member's conduct or judgment.

   f. A panel member shall avoid entering into any relationship, or acquiring any financial interest, that is likely to affect the panel member's impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias.

2. For a period of one year after the completion of an arbitration under the agreement, a former panel member shall not personally advise or represent either of the Parties.

3. A panel member shall disclose any interest, relationship or matter that is likely to affect the panel member's independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias in the arbitration to the Parties in writing prior to the panel member's appointment taking into account the International Bar Association Guidelines on Conflicts of Interest for International Arbitrations. To this end, a candidate to be a panel member shall make all reasonable efforts to become aware of any such interests, relationships and matters, including:

   a. Any past or existing financial, business, professional, family or social relationship with either of the Parties, or their counsel, or any such relationship involving a candidate's employer, partner, business associate or family member; and

   b. Public advocacy or legal or other representation concerning an issue in dispute in the arbitration.

4. Once appointed, a panel member shall continue to make all reasonable efforts to become aware of any interests, relationships or matters referred to in section 3 and shall disclose them to the Parties in writing immediately upon becoming aware of them.

5. A panel member or former panel member shall not at any time disclose or use any non-public information concerning the dispute or acquired during the arbitration except for the purposes of the arbitration and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to affect adversely the interest of another.