ADVANTAGES AND DISADVANTAGES TO VIETNAM OF JOINING THE ICSID CONVENTION
The report “Advantages and disadvantages to Vietnam of joining the ICSID Convention” is the result of a collaborative effort between the Ministry of Planning and Investment of the Government of Vietnam and the United States Agency for International Development (USAID) through the Governance for Inclusive Growth Program. The opinions expressed in this report are those of the authors and do not necessarily reflect the views of USAID or the Government of the United States of America.
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EXECUTIVE SUMMARY

This report is intended to assist Vietnam to assess the advantages and disadvantages of becoming a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). The specific objectives of this report are to:

(i) Compare key aspects of the ICSID rules and arbitration procedures with other arbitral rules commonly used in investor-State dispute settlement (ISDS) to identify the advantages and disadvantages;

(ii) Examine the key commitments under international investment agreements including the Trans-Pacific Partnership Agreement, with regard to ICSID; and

(iii) Review a couple of ISDS case settled through the ICSID mechanism, with a focus on illustrating the procedure for the settlement of investment disputes under the ICSID Convention.

This report was informed by comments, suggestions and exchanges between the author and various stakeholders, in particular during the workshop organized for this purpose on 28-29 July 2016 in Ho Chi Minh City. The report also benefited from discussions with various stakeholders including Government officials, academics and private practitioners.

Comparison of ICSID and other arbitral rules

The report compares several key aspects of ICSID and other arbitral rules – primarily the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. The report focuses on:

• timelines
• screening and registration process
• frivolous claims
• jurisdiction
• appointment of arbitrators
• transparency
• annulment & setting aside awards
• enforcement; and
• cost

The assessment of the advantages and disadvantages in each of these areas in this report is primarily from the perspective of Vietnam as a potential respondent State in an ISDS dispute. In each of these areas there is some difference between disputes conducted under ICSID Rules as compared to UNCITRAL and other arbitral rules, in some areas the differences are significant.

Many of the differences between ICSID and other arbitral rules flow from the fact that ICSID is the only system which is specifically designed for ISDS
disputes. Other arbitral rules, including UNCITRAL, are designed more broadly for commercial disputes. ICSID is more or less a self-contained regime which is largely insulated from local courts. In contrast, investment disputes under other arbitral rules depend more on local courts, applying domestic law, to support proceedings and as a forum to challenge or review awards.

There are several aspects of the ICSID Rules and procedures which have no equivalent in other arbitral rules commonly used in ISDS. For example, ICSID contains a unique mechanism to screen requests for arbitration before the process can commence (although the ICSID Additional Facility contains a similar mechanism). Requests which manifestly fail to meet the requirements to bring a claim to ICSID (for example because the relevant treaty provides no ISDS mechanism) will not be registered and cannot proceed. Similarly, ICSID contains an expedited process for an objection that a claim is ‘manifestly without legal merit’ to be decided, and the claim potentially dismissed, at a very early stage of the proceedings.

Both of these mechanisms provide respondent States with protection against obviously unmeritorious or frivolous claims, either at a very early stage of the proceedings and potentially before proceedings commence at all. Even though the mechanisms will only apply in the clearest cases, the ability to prevent a frivolous claim from going ahead, or to have it dismissed at an early stage, is likely to result in a significant saving of costs, time and other resources. With the exception of the ICSID Additional Facility Rules, there are no equivalent mechanisms under other relevant arbitral rules and so these clear advantages of ICSID from the perspective of a respondent State.

Similarly, ICSID has unique jurisdictional requirements which must be met in order for an investor to submit a claim to ICSID. These include a requirement that a dispute ‘arises directly out of an investment’. In some cases this requirement has been interpreted to mean that a claim cannot be brought to ICSID if the alleged investment does not have certain characteristics of a typical investment. The parties to a treaty have broad freedom to define the meaning of an ‘investment’ but the ICSID Convention places an outer limit on which claims can be brought to ICSID. Other arbitral rules do not have an equivalent jurisdictional requirement or limitation because they are not focused on investment disputes. In this regard, the existence of ICSID’s jurisdictional requirements are an advantage for a respondent State even if they are only likely to prevent claims in extraordinary cases.

In other areas the differences between ICSID and non-ICSID arbitration are smaller. For example in terms of timelines and appointment of arbitrators the ICSID and UNCITRAL Rules are more similar. ICSID generally sets more prescriptive timelines and is supported by a permanent Secretariat and so could be expected to be timelier other things being equal, however the timelines in a specific case are more likely to be affected by the nature of the dispute and approaches taken by the disputing parties and the tribunal than the applicable arbitral rules.
The ICSID cases reviewed in Section 3 demonstrate that cases can either be short and efficient or very long and complicated depending on the circumstances. Similarly, the approaches under ICSID and UNCITRAL Rules with regard to the appointment of arbitrators are reasonably similar. The main difference is that the process under ICSID is slightly more streamlined and the disputing parties have more direct control over the selection of the presiding arbitrator.

Investor-State disputes are expensive and cost is a significant factor for governments. The available evidence supports a conclusion that arbitration under ICSID is less expensive than arbitration under non-ICSID rules. This is primarily because ICSID has fixed fees for arbitrators which are significantly below market rates.

In other areas, the advantages and disadvantages of ICSID require more of a balance or depend one’s perspective. In relation to transparency, ICSID is more transparent than the earlier versions of the UNCITRAL Rules (which would apply under most of Vietnam’s investment agreements) however it is much less transparent than the 2013 UNCITRAL Rules which apply to agreements concluded on or after 1 April 2014 (unless they provide otherwise).

Two of the major differences between ICSID and other arbitral rules relate to the approach to the annulment and enforcement of awards. The self-contained nature of the ICSID system means that national courts play no role to play in the annulment process. ICSID annulment proceedings are conducted in accordance with a single set of rules under the ICSID Convention. In contrast, the setting aside of non-ICSID awards is conducted before national courts in accordance with local laws and procedures, which vary between jurisdictions. This results in some uncertainty about which grounds of annulment will apply. Non-ICSID awards may also be subject to appeal in domestic courts, which adds to the length, cost, and unpredictability of enforcement. On the other hand, in some cases ICSID annulment committees have applied the grounds for annulment inconsistently, which has undermined the predictability of the ICSID process to some extent.

In terms of the use and outcomes of annulment proceedings applications for annulment have been more successful under ICSID than in the non-ICSID system. Whether this is an advantage or disadvantage depends on whether you are seeking or objecting to annulment. The statistics demonstrate that the ICSID annulment has been used more by State respondents than investors, and that States have been more successful than investors. Although it will depend on the particular circumstances of a case these figures suggest that the ICSID annulment system has overall been more beneficial for respondent States than investors.

Under the ICSID Convention monetary obligations of ICSID awards (orders for damages or costs) must be enforced automatically, there is no scope for a challenge to enforcement before local courts. In contrast, the recognition and enforcement of non-ICSID awards must be sought under the New York
Convention which provides for a number of grounds for a domestic court to refuse recognition and enforcement. The approach taken by domestic courts varies between jurisdictions. The result is that the process to seek recognition and enforcement of a non-ICSID award and the enforcement of non-ICSID awards is not automatic and is less predictable.

Whether the automatic recognition and enforcement of awards under ICSID is seen as an advantage or disadvantage may depend to some extent on the particular case, and whether you are the party seeking to enforce, or objecting to enforcement of the award. If the respondent is objecting to enforcement then the automatic enforcement of awards under ICSID could be seen as a disadvantage. On the other hand, where the respondent State has been awarded costs against the investor, or has been successful in a counterclaim it may be the State seeking to enforce the award. In these circumstances, the automatic enforcement of ICSID awards would be an advantage.

There is no basis for a State who is party to the ICSID Convention to refuse to enforce an award on grounds of public policy or non-arbitrability. This may raise issues if domestic law provides that certain categories of disputes may not be settled by arbitration.

*Commitments under international investment agreements*

Most of Vietnam’s investment agreements – including the TPP – provide for submission of an investment dispute under ICSID Rules as one of the choices available to an investor. However this is only available if Vietnam is a party to the ICSID Convention. Therefore, the main difference from the perspective of Vietnam’s commitments under the TPP and other investment agreements should Vietnam decide to join ICSID, would be that an investor would be able to choose to submit an ISDS dispute under the ICSID Rules. If Vietnam does not join ICSID this would not affect the ability of an investor to submit an ISDS claim to arbitration. It would however mean that an investor could only do so under the ICSID Additional Facility Rules (if these are available) or the UNCITRAL Rules.

The implications of the investor choosing ICSID rules (or other rules) will depend on the nature of the treaty. The older-style BITs contain very little detail on ISDS proceedings. As a result, most of aspects of the procedure are left to arbitral rules and the rules have a bigger role to play. With these treaties the choice of arbitral rules will make more of a difference and some of the advantages and disadvantages of ICSID will be more of significant.

In contrast, the more modern-style agreements such as the TPP have detailed provisions on ISDS. With these agreements, less is left to the arbitral rules and so the rules have a relatively smaller role to play. However even with these modern agreements there are significant differences between ICSID and other arbitral rules. While treaties can modify the ICSID Arbitration Rules, they cannot modify the ICSID Convention. As a result, they do not modify the rules related to registration and screening, jurisdiction, annulment,
or recognition and enforcement. Nor do they change the fees set by ICSID for arbitrators or for administering the proceedings.

Review of illustrative ICSID cases

The three ICSID cases examined in Section 3 demonstrate different procedural aspects of arbitration under ICSID Rules including preliminary objections, applications for disqualification of an arbitrator, annulment and costs determinations. They illustrate that the progress of a case under ICSID Rules will depend on the circumstances, the approach of both disputing parties and their interactions with the tribunal. The cases used as examples show how the timeframes in the rules can be stretched if the parties raise procedural issues or objections. The cases also demonstrate how fast and effective the ICSID mechanism to determine frivolous claims can be.
### Summary Table: Comparison of arbitral rules

<table>
<thead>
<tr>
<th></th>
<th>ICSID</th>
<th>ICSID Additional Facility</th>
<th>UNCITRAL</th>
<th>ICC</th>
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<tbody>
<tr>
<td><strong>Screening &amp; registration</strong></td>
<td>Screening process for claims manifestly outside ICSID jurisdiction</td>
<td>Screening / registration</td>
<td>No screening / registration process</td>
<td>No screening / registration process</td>
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<td></td>
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<td>process to confirm dispute</td>
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<td></td>
<td>meets requirements of ICSID</td>
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<td></td>
<td></td>
<td>AF</td>
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<tr>
<td><strong>Preliminary objections</strong></td>
<td>Expedited process for claims manifestly without legal merit</td>
<td>Expedited process for claims</td>
<td>No process for expedited</td>
<td>No process for expedited</td>
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<td>/ frivolous claims</td>
<td></td>
<td>manifestly without legal</td>
<td>preliminary objections</td>
<td>preliminary objections</td>
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<td>merit</td>
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<tr>
<td><strong>Jurisdiction</strong></td>
<td>Jurisdictional limits in Art 25 ICSID Convention</td>
<td>Applies to disputes which do</td>
<td>No jurisdictional limit – applies broadly to</td>
<td>No jurisdictional limit – applies broadly to</td>
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<tr>
<td></td>
<td></td>
<td>do not satisfy ICSID</td>
<td>disputes</td>
<td>disputes</td>
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<td></td>
<td></td>
<td>jurisdiction</td>
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<tr>
<td><strong>Annulment / setting aside</strong></td>
<td>Annulment exclusively on grounds in ICSID Convention – no review by</td>
<td>Grounds for setting aside</td>
<td>Grounds for setting aside and process depend on</td>
<td>Grounds for setting aside and process depend on</td>
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<td>local courts</td>
<td>national laws / local courts</td>
<td>national laws / local courts</td>
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<tr>
<td><strong>Enforcement</strong></td>
<td>Monetary awards must be enforced – no review by domestic courts</td>
<td>Awards subject to challenge</td>
<td>Awards subject to challenge before local courts</td>
<td>Awards subject to challenge before local courts –</td>
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<td>before local courts –</td>
<td>– grounds and process vary between jurisdictions</td>
<td>grounds and process vary between jurisdictions</td>
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<td>grounds and process vary</td>
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<td></td>
<td>between jurisdictions</td>
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<tr>
<td><strong>Costs</strong></td>
<td>Cheaper on average</td>
<td>Similar to ICSID</td>
<td>More expensive on average</td>
<td>More expensive on average</td>
</tr>
<tr>
<td><strong>Appointment of arbitrators</strong></td>
<td>Default procedures similar – ICSID slightly more streamlined and</td>
<td>Similar to ICSID</td>
<td>Default procedures similar – less control over</td>
<td>Default = sole arbitrator (3 likely in ISDS) - less</td>
</tr>
<tr>
<td></td>
<td>parties have more control</td>
<td></td>
<td>appointment presiding arbitrator</td>
<td>control over appointment presiding arbitrator</td>
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<td></td>
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<td></td>
<td></td>
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<tr>
<td><strong>Transparency</strong></td>
<td>More transparent than ICC or earlier UNCITRAL rules (1976, 2010),</td>
<td>Similar to ICSID</td>
<td>Earlier UNCITRAL rules (1976, 2010) less</td>
<td>Largely confidential (except fact of arbitration</td>
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<td></td>
<td>much less transparent than 2013 UNCITRAL rules</td>
<td></td>
<td>transparent than ICSID, 2013 UNCITRAL rules</td>
<td>unless parties agree otherwise)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>much more transparent</td>
<td></td>
</tr>
</tbody>
</table>
1. COMPARISON BETWEEN ICSID AND OTHER DISPUTE SETTLEMENT PROCEDURES

1.1 Introduction

The International Centre for Settlement of Investment Disputes (ICSID) was established in 1966 under the ICSID Convention with the purpose to ‘provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States’.¹

ICSID, and the ICSID Rules of Procedure for Arbitration Proceedings (ICSID Rules) are unique. ICSID is the only permanent institution which acts as a forum for the resolution of investment disputes. The ICSID Rules are the only arbitral rules which are specifically designed for investment disputes. With the exception of the ICSID Additional Facility Rules, where are designed for use in disputes which do not meet the jurisdictional requirements of ICSID, the other rules commonly used in ISDS disputes were predominantly designed for use in commercial disputes.

One of the most significant differences of the ICSID Rules are the extent to which they are insulated from domestic courts and laws. The ICSID Convention and ICSID Rules create a largely free-standing regime. This includes an internal system for the review and annulment of awards and a separate enforcement mechanism which minimizes the scope for judicial review of any ICSID awards.² This is in contrast to all other arbitral rules including the ICSID Additional Facility Rules.

1.2 Role of arbitral rules in ISDS cases

There are several sources of law or sets of rules which are potentially relevant to the conduct of a treaty-based investor-State dispute settlement (ISDS) arbitration:

i. the treaty obligations and rules of law specified by the treaty;
ii. the arbitral rules which apply to the arbitration; and
iii. the law of the ‘seat’ (legal place) of the arbitration; and
iv. the law of the place where recognition and enforcement of the award is sought, or where proceedings are instituted to set an award aside.

ICSID is a largely self-contained system which is for most purposes insulated from domestic law and so the laws identified in (iii) and (iv) above have a much smaller role to play.

Treaties can, and do, modify or supplement arbitral rules, sometimes significantly. Earlier investment agreements (including Vietnam’s older-style bilateral investment treaties) don’t contain detailed ISDS procedures – most

¹ ICSID Convention, Article 1.
aspects of the procedure are left to arbitral rules (and if there is a gap, to the law of the place of the arbitration where relevant). Modern agreements – including the Trans-Pacific Partnership (TPP) – contain detailed ISDS procedures which significantly modify or supplement the arbitral rules.

As a result, the choice of arbitral rules will make more of a difference to the conduct of an ISDS arbitration under one of the older-style agreements (where more issues are left to the rules) than under one of the modern agreements (where many issues are dealt with in the treaty rather than being solely governed by the rules). One reason why parties include such detailed ISDS procedures in investment agreements is to make the conduct of an ISDS arbitration more predictable irrespective of the arbitral rules that apply.

1.3 Use of arbitral rules in ISDS cases

The ICSID Rules have been used significantly more than any other arbitral rules in ISDS disputes. In 2015, ICSID Rules were used in 63% of all cases filed, followed by the UNCITRAL Rules at 26%.³

With regard to all ISDS disputes where there is data, 56% have been conducted under ICSID rules.⁴ Next are the UNCITRAL Rules, which have been used in 31% of all ISDS disputes. The ICSID Additional Facility Rules (6%) and the Stockholm Chamber of Commerce Rules (5%) have each been used in dozens of disputes. The use of other rules – including the ICC Rules – is very uncommon.

The choice of these rules reflects in part the choices available in investment agreements. It is common for investment agreements – including many of Vietnam’s treaties – to provide investors with a choice of arbitral rules between ICSID, UNCITRAL, and sometimes, the ICSID Additional Facility (ICSID AF). This report focuses primarily on the differences between the ICSID and UNCITRAL Rules as they are the most commonly used rules in ISDS and the most commonly available rules under Vietnam’s treaties. The vast majority of Vietnam’s treaties provide investors with a choice of UNCITRAL Rules. In contrast, a relatively small proportion provide a choice of the ICSID AF Rules.⁵

If an investor wishes to submit a dispute under arbitral rules which are not explicitly referred to in the relevant treaty, it can generally only do so with the agreement of the respondent government.

The frequent use of the ICSID Rules is significant as it has resulted in a large number of cases which have applied and interpreted the rules. This history makes it easier to predict how the rules will be applied.

⁵ Each of Vietnam’s FTAs which contain ISDS refer to the ICSID AF Rules however we have identified only 6 BITs which refer to the ICSID AF as an option. We have not been able to access all of Vietnam’s BITs and so it is possible that there are more.
Table 1: Applicable Rules in known ISDS cases

<table>
<thead>
<tr>
<th>Arbitral Rules</th>
<th>Number</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICSID (International Centre for Settlement of Investment Disputes)</td>
<td>390</td>
<td>56.4</td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>212</td>
<td>30.7</td>
</tr>
<tr>
<td>ICSID AF (ICSID Additional Facility)</td>
<td>42</td>
<td>6.1</td>
</tr>
<tr>
<td>SCC (Stockholm Chamber of Commerce)</td>
<td>34</td>
<td>4.9</td>
</tr>
<tr>
<td>ICC (International Chamber of Commerce)</td>
<td>4</td>
<td>0.6</td>
</tr>
<tr>
<td>None (ad-hoc)</td>
<td>4</td>
<td>0.6</td>
</tr>
<tr>
<td>MCCI (Moscow Chamber of Commerce and Industry)</td>
<td>3</td>
<td>0.4</td>
</tr>
<tr>
<td>CRCICA (Cairo Regional Center for International Commercial Arbitration)</td>
<td>1</td>
<td>0.1</td>
</tr>
<tr>
<td>LCIA (London Court of International Arbitration)</td>
<td>1</td>
<td>0.1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>691</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

* Source: UNCTAD 2016

1.4 ICSID v ICSID Additional Facility

A dispute may only be submitted to ICSID where it satisfies the jurisdictional requirements of the ICSID Convention. Article 25 of the ICSID Convention provides that the jurisdiction of ICSID only extends to disputes which:

(i) arise directly out of an investment; and
(ii) are between a Contracting State and a national of another Contracting State.

In contrast, the ICSID AF is available in cases which do not meet the jurisdictional requirements of ICSID. It is available for the settlement of legal disputes in two circumstances:

(i) where the dispute arises directly out of an investment but is not within the jurisdiction of ICSID because either the State party to the dispute or the State whose national is a party to the dispute is not a member of ICSID; or
(ii) where the dispute is not within the jurisdiction of ICSID because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State.²


² ICSID AF Rules, Art 2.
The ICSID Convention does not apply to awards rendered under the ICSID AF. Therefore the provisions in the ICSID Convention dealing with key issues such as jurisdiction, annulment and recognition and enforcement do not apply to ICSID AF Awards. As a result, in this respect arbitration under the ICSID AF is more similar to arbitration under other non-ICSID Rules such as the UNCITRAL Rules. In other respects however the ICSID AF Rules are quite similar to the ICSID Rules including in terms of timeframes, appointment of arbitrators and costs (see further below).

All of Vietnam’s FTAs provide investors with a choice of the ICSID AF Rules if they are available. However we have identified only 6 of Vietnam’s earlier bilateral investment treaties which provide for a choice of the ICSID AF Rules.

1.5 Timelines

The timeline of any particular ISDS dispute depends on a range of factors including: the complexity of the claims and whether they involve extensive evidence and witnesses; whether any jurisdictional objections are decided separately or together with the merits; the availability of the tribunal members and parties (including their counsel); whether the proceedings involve extensive document production; and whether the parties have disputes over procedural issues (such as seeking to disqualify an arbitrator, or disputes with regard to confidentiality). The cases reviewed in Section 3 demonstrate how these factors combine to make cases either very fast or very slow.

Both ICSID and non-ICSID rules generally give significant discretion to the tribunal to set timeframes and organise proceedings. Therefore, the broader circumstances of a case and the approach of the parties and tribunal are more likely to make a difference to the timeframes than the applicable arbitral rules.

That being said, there are some differences between ICSID and UNCITRAL Rules in terms of timeframes. In general ICSID contains more prescriptive timeframes at certain points of the process than the UNCITRAL Rules, and so other things being equal, it would be reasonable to expect an ICSID case to proceed in a more timely fashion than a case under UNCITRAL Rules.

In this section, we will outline some of the key differences in the timeframes between ICSID and UNCITRAL Rules.

Appointment of arbitrators

As outlined in more detail below (in Section 1.8) ICSID, the ICSID AF and UNCITRAL are similar in terms of the timeframes for the appointment of arbitrators.

First session of the tribunal

Under ICSID Rules, and the ICSID AF Rules, the first session of the tribunal must be held within 60 days from date of constitution of the tribunal, unless
the parties agree otherwise. There is no fixed timeframe for the first session under other arbitral rules.

**Expedited preliminary objections**

Under ICSID Rules, and the ICSID AF Rules there is an expedited process for the tribunal to decide on an objection that a claim is “manifestly without legal merit”. If a respondent raises such an objection within 30 days after constitution of the tribunal, the tribunal is required to decide on this objection “at its first session or promptly thereafter”. As examined (in Section 1.6) below, this mechanism has the potential to dismiss a frivolous claim at a very early stage of the proceedings. There is no equivalent expedited mechanism under UNCITRAL Rules.

**Timing of award**

Under ICSID Rules, an award must be signed in the within 120 days after the proceedings are closed, with a possible extension of 60 days. There is no specific timeframe for an award to be issued under the UNCITRAL Rules, nor under the ICSID AF Rules.

**Annulment and setting-aside**

Under the ICSID Convention and application for annulment must be made with 120 days of the award (except in the case of corruption). For non-ICSID arbitration (including ICSID AF arbitration), the timeframes for setting-aside an award will vary between jurisdictions depending on local law. For jurisdictions which have adopted the approach in the UNCITRAL Model Law, an application for setting aside an award must be made within three months of the award.

**General administration**

There is also some evidence that the efficiency of arbitration under ICSID Rules is assisted by the existence of a permanent Secretariat which administers the process (in contrast to arbitration under the UNCITRAL Rules). A recent study found that in recent years ICSID has taken a number of steps to reduce timeframes, lower costs and streamline processes. Writing in 2012, the report found that the average duration from registration to conclusion of a case has dropped from 42 to 31 months since 2009.

**Advantages and disadvantages**

The timeframes of a particular ISDS dispute will generally depend more on the circumstances of the case rather than the applicable arbitral rules. Both ICSID and UNCITRAL Rules give the tribunal significant discretion to set the

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8 ICSID Rule 13(1), ICSID AF Rule 21(1).
9 ICSID Rule 41(5), ICSID AF Rule 45(6).
10 ICSID Rule 46
11 ICSID Convention, Article 52.
12 UNCITRAL Model Law Article 34(3).
timetable and run the proceedings. However in general ICSID has more prescriptive timeframes than the UNCITRAL Rules, in particular with regard to timing for the first session of the tribunal and issuance of an award. Other things being equal, it is reasonable to expect ISDS disputes to be timelier under ICSID rules. The timeframes under the ICSID AF Rules are similar in many respects to the ICSID Rules however there are less prescriptive in some areas – including in relation to the timing of the award. In general a longer proceeding means greater costs, and so to the extent that ISDS under ICSID rules would be expected to be faster, this would be an advantage.

1.6 Screening and registration process

ICSID (and in a similar way the ICSID AF) is unique among arbitration rules in that involves a screening and registration process of a request for arbitration before the process can commence.

Under Article 36 of the ICSID Convention the Secretary-General is given the power to refuse registration of a request for arbitration if on the basis of the information provided in the request he / she finds that the dispute is manifestly outside the jurisdiction of ICSID.14

This limited screening power is designed to deal with unfounded cases at an early stage and avoid starting the machinery of an arbitration procedure in cases which are clearly outside ICSID’s jurisdiction.15 It was intended to avoid States suffering the embarrassment, and cost, of having an arbitration commenced against it in cases where there was obviously no jurisdiction.


‘Manifestly’ has been interpreted in other parts of the ICSID Convention and ICSID Rules according to mean ‘clear’ or ‘obvious’.\textsuperscript{16} Decisions to refuse registration of arbitration requests are not published, but they are rare.\textsuperscript{17} A 2012 article reported that there had been 13 decisions refusing to register requests for arbitration over a period of 45 years.\textsuperscript{18}

Schreuer reports that cases in which requests were not registered include lack of consent to ICSID (for example because the relevant treaty does not provide consent to ICSID arbitration), the absence of a legal dispute, non-ratification of the Convention by the investor’s home State and the absence of an investment.

The Secretary-General’s determination is made on the basis of the information contained in the request for arbitration. There is no specific form that a request must take but it must contain all the information listed in ICSID Institution Rule 2. These include:

- the parties to the dispute,
- the date of consent to ICSID arbitration and the instrument in which consent is recorded; and
- information concerning the issues in dispute indicating that there is a legal dispute arising directly out of an investment.\textsuperscript{19}

If one of the requirements of ICSID jurisdiction is manifestly lacking, the Secretary-General must refuse to register the request. Otherwise the dispute must be registered.\textsuperscript{20}

The screening process must be completed as soon as possible after the filing of the request for arbitration. The process takes on average three weeks, depending on whether ICSID needs clarifications or additional information from the requesting party.\textsuperscript{21}

The fact that the Secretary-General registers a request for arbitration does not determine whether or not the tribunal established has jurisdiction. It remains open for a respondent to raise jurisdictional objections, which will be for the tribunal to determine.

The ICSID AF Rules include a somewhat similar registration process although it is focused on establishing the requirements necessary to access the Additional Facility rather than whether the dispute satisfies the jurisdictional requirements of the ICSID Convention.\textsuperscript{22}

The other arbitral rules commonly used in ISDS proceedings – including the UNCITRAL Rules – do not include a similar screening or registration process.

\textit{Advantages and Disadvantages}

The registration process under the ICSID Rules (and the somewhat similar mechanism under the ICSID Additional Facility Rules) is unique to ICSID. It provides a mechanism to avoid arbitration proceedings being triggered at all in cases where the claim is manifestly (clearly, obviously) unfounded. Although there is little public information on requests which have been refused, the evidence suggests that it is rare. A request will only be refused in the clearest of cases. While the refusal of a request for arbitration is exceptional, the possibility for a clearly unfounded request to be refused is valuable for States.

Under other arbitral rules, where there is no screening / registration requirement there is no mechanism for such manifestly unfounded claims to be filtered out before the arbitration process is initiated. Under ad-hoc arbitration, the only body who has the power to decide on such matters is the tribunal. Based on the nature of the screening process, it is extremely likely that any request for arbitration which was refused would be found by a tribunal to be outside of ICSID jurisdiction if it was registered and proceeded to arbitration. It is therefore likely that any such case would be dismissed at an early stage of the ISDS proceedings.

However, as examined further below, there are significant costs – in terms of both money and resources – associated with defending an ISDS claim even if it is obviously unfounded and is dismissed at an early stage.

We should not expect manifestly unfounded claims to happen regularly, initiating an arbitration claim involves cost to an investor as well, and this cost would act as a deterrent for clearly unfounded claims. However, it is not possible to rule out such a claim entirely as they do happen.

ICSID offers the opportunity for a potential respondent State to avoid these costs altogether by preventing a manifestly unfounded claim from proceeding to arbitration at the outset.

There are no disadvantages associated with the ICSID screening / registration process when compared to other arbitral rules.

\textsuperscript{22} ICSID AF Rules, 2-4.
1.7 Frivolous claims

ICSID Rule 41: Preliminary Objections

(5) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, file an objection that a claim is “manifestly without legal merit”. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. …

(6) If the Tribunal decides that … all claims are manifestly without legal merit, it shall render an award to that effect.

In addition to the ability to raise jurisdictional objections, the ICSID Rules include a mechanism to deal with and potentially dismiss frivolous claims at a very early stage of the proceedings.

Under ICSID Rule 41(5) a disputing party (most likely a respondent State) may no later than 30 days after the constitution of the Tribunal, file an objection that a claim is “manifestly without legal merit”. The tribunal is required to decide this objection at the first session of the tribunal or promptly afterwards. Under ICSID Rule 13(1) the first session of a tribunal must be held within 60 days from date of constitution of the tribunal, unless the parties agree otherwise, so this is a very quick process. The case of Trans-Global v Jordan (discussed further below in Section 3) provides an example of how quick the process is. There is substantially identical mechanism in the ICSID AF Rules (Rule 45(6)).

Tribunals deciding Rule 41(5) objections have found that the rule is directed only at clear and obvious cases. This is confirmed by the very short time periods to raise and decide on an objection. They have also found that this is consistent with the ordinary meaning of “manifestly” which is “clear” or “obvious”.23 There is very little jurisprudence in relation to the ICSID AF Rule 45(6) however it would be reasonable to expect tribunals to interpret it consistently with ICSID Rule 41(5).

The objection is only for claims which obviously have no legal merit, and tribunals will not engage in a detailed examination of factual matters.

Advantages and Disadvantages

While the Rule 41(5) objections mechanism has a limited scope and will only be successful in the clearest of cases, it is a useful safeguard for respondent States. It acts as a disincentive for investors to bring frivolous claims and

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provides a very quick mechanism to dismiss such claims without having to go through a full hearing. If a State is able to have a claim dismissed at such an early stage this would result in a significant saving of costs and other resources.

The expedited process to dismiss claims manifestly without legal merit is unique to ICSID and the ICSID AF – there is no equivalent in other arbitral rules used in ISDS cases. There is no disadvantage to respondent States associated with the process and so it is an advantage of litigating an ISDS dispute under the ICSID Rules.

Some modern treaties, including the TPP include an expedited process to resolve preliminary objections which is similar to ICSID Rule 41(5). However Vietnam’s older-style treaties with ISDS do not contain an equivalent provision and so this mechanism would not be available in any dispute under these older-style treaties unless the dispute was submitted under ICSID Rules.

1.8 Jurisdiction

ICSID Convention: Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. …

Disputes arising directly out of an investment

In contrast to other arbitral rules and regimes, ICSID is a specialised system for the settlement of investment disputes. The ICSID Convention confirms that the jurisdiction of ICSID only extends to disputes “arising directly out of an investment”.24 The drafting history of the Convention confirms that ICSID was not intended to be available for ordinary commercial disputes.25

In most investment agreements the parties define “investment” broadly, and they are free to do this, however the approach of ICSID tribunals suggests that this freedom is not unlimited. In examining whether the requirements for an “investment” have been met, most tribunals have applied a dual test: whether the activity in question is covered by the definition of an investment in the relevant treaty, and whether it meets the ICSID Convention’s requirements.26

24 ICSID Convention, Article 25(1).

25 Schreuer 2009 [note 13], p.117.

The ICSID Convention does not define the term “investment”. However ICSID tribunals have interpreted it to include certain characteristics including:

a) a contribution in money or other assets;

b) a certain duration;

c) an element of risk; and

d) a contribution to the economic development of the host State.  

Some tribunals have regarded satisfying these elements of an investment as requirements to establish ICSID jurisdiction. Other tribunals have disagreed that these characteristics are mandatory rules necessary to establish ICSID jurisdiction. They have taken a more flexible approach which treats the characteristics as typical features of an investment which may be useful in extreme cases to identify claimed assets fall outside the normal concept of an investment.

Even under this more flexible approach, which tribunals have generally recognised that there are outer limits to the concept of an investment under ICSID, for example a single commercial transaction for the sale of goods would not be regarded as an “investment” for the purposes of ICSID.

Advantages and disadvantages

Whether tribunals regard the characteristics of an “investment” under ICSID as mandatory jurisdictional requirements, or typical features to be applied more flexibly, the jurisdictional limitation of ICSID to “investment” disputes is a requirement which must be satisfied for ICSID arbitrations.

Under the approach taken by some tribunals – requiring an investment to make a contribution to the economic development of the host State – this additional hurdle could be significant. Under the more flexible approach adopted by other tribunals it is not likely to be a demanding hurdle, however it does place an outer limit on what kinds of disputes can be brought to ICSID.

Other arbitral rules – including UNCTIRAL Rules – do not contain an equivalent limitation as they are not specifically designed for investment disputes. The ICSID AF Rules are specifically designed for disputes which do not satisfy the requirements of ICSID jurisdiction.

27 Schreuer 2009 [note 13], p.128; see also Salini v Morocco para 52; Joy Mining v Egypt, para 53; Note, some tribunals have disagreed with the fourth element of a contribution to the economic development of the host State: Phoenix v. Czech Republic, Award, 15 April 2009 para 85; Victor Pey Casado v. Republic of Chile, Award, 8 May 2008, para 232.
28 Salini v Morocco para 52; Joy Mining v Egypt, paras 49-50.
29 Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) v. Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013 (Philip Morris v Uruguay) paras 206-209.
30 Philip Morris v Uruguay, para 203.
In this respect, from the perspective of a State, the ICSID jurisdictional limitation to "investment" disputes is an advantage as it represents an additional test which an investor must satisfy. It would prevent claims with regard to assets which could not reasonably be described as investments. There is no disadvantage related to the ICSID jurisdictional requirements from the perspective of a potential respondent State.

1.9 Appointment of arbitrators

The methods for the appointment of arbitrators do not differ dramatically between the ICSID, ICSID AF and UNCITRAL Rules. In general the ICSID and ICSID AF Rules in this respect are very similar. Under each of these sets of rules, unless the disputing parties agree otherwise, the default rule is for three arbitrators, with one arbitrator appointed by each of the disputing parties.

The rules differ however, in terms of who appoints the third arbitrator, who acts as chair of the tribunal. Under ICSID, and the ICSID AF the disputing parties must seek to agree on the presiding arbitrator, while under the UNCITRAL Rules it is the two party-appointed arbitrators who are responsible for appointing the presiding arbitrator. In this respect the disputing parties have more control over the appointment of the presiding arbitrator under ICSID and ICSID AF Rules.

Each of the ICSID, ICSID AF and UNCITRAL Rules also provide for a default appointment process in case a disputing party fails to appoint an arbitrator, or there is no agreement on the presiding arbitrator. This default process prevents one party from frustrating the proceedings from going ahead. The rules provide for an appointing authority to appoint any arbitrators which have failed to be appointed within certain time limits. Under ICSID and ICSID AF Rules the appointing authority is the Chairman of the Administrative Council (through the Secretary-General) of ICSID. Under UNCITRAL Rules it can be any person or institution but is commonly the Secretary-General of the Permanent Court of Arbitration.

In terms of timeframes the ICSID, ICSID AF and UNCITRAL Rules are similar. Under the ICSID and ICSID AF Rules, if the tribunal is not constituted within 90 days after registration of the request for arbitration, either party can request the ICSID Secretary-General to appoint the remaining arbitrators. For ICSID arbitrations, this process is generally completed within 30 days.

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31 In this section, we refer to the 2010 version of the UNCITRAL Rules.
32 See ICSID Convention, Article 37(2)(b); UNCITRAL Rules 2010, Art 7(1); ICSID AF Rule 6(1)
33 ICSID Convention, Article 37(2)(b); ICSID AF Rules 6(1), 9; UNCITRAL Rules 2010, Art 9(1).
34 ICSID Convention, Article 38; ICSID AF Rules 6(4), 10; UNCITRAL Rules 2010, Articles 9(2), 9(3).
35 ICSID Convention, Article 38; ICSID AF Rules 6(4).
Under UNCITRAL Rules, if the second party has not nominated an arbitrator within 30 days after the nomination of an arbitrator by the first party, the first party can request the appointing authority to make this appointment. Similarly, if the two appointed arbitrators cannot agree on a presiding arbitrator within 30 days, the appointing authority makes the appointment. In both cases the appointing authority would be expected to make an appointment within 30 days.

Therefore, under each of these sets of rules, if the default process is used, the tribunal would be expected to be established within around 120 days of the registration of the request for arbitration, or receipt of the Notice of Arbitration.

**Advantages and disadvantages**

The processes for the appointment of arbitrators and the timeframes involved are similar under ICSID, ICSID AF and UNCITRAL Rules. The main potential advantage of ICSID (and ICSID AF) is that the disputing parties have more initial control over the selection of the presiding arbitrator. However if the disputing parties cannot agree on the presiding arbitrator (which is common) this task will fall to an appointing authority as it does under UNCITRAL Rules.

The process under ICSID (and the ICSID AF) is also somewhat simpler and more streamlined as it involves a single stage for the Secretary-General to appoint any remaining arbitrators if the tribunal has not been composed with 90 days of registration. In contrast, under UNCITRAL Rules there is a two-step default process to appoint arbitrators and potentially another process to select an appointing authority if the disputing parties cannot agree.

**1.10 Discontinuance**

Another procedural advantage under the ICSID Rules is the rule that if the parties fail to take any steps in the proceeding during six months (or such period as they agree with the approval of the Tribunal) they shall be deemed to have discontinued the proceeding. This effectively acts as a discipline on investors and prevents them from unreasonably prolonging a dispute through failing to respond in a timely manner.

There is an equivalent rule in the ICSID AF Rules but no direct equivalent under the UNCITRAL Rules.

**1.11 Transparency**

The level of transparency associated with ICSID and other arbitral rules depends on which version of the rules is applicable. For example, ISDS under ICSID (and the ICSID AF) involves a higher degree of transparency.
than ISDS under the 1976 or 2010 UNCITRAL Rules, but a much lower level of transparency than the 2013 UNCITRAL Rules.

ICSID

In general there is a similar level of transparency for arbitrations conducted under both the ICSID Rules and ICSID AF Rules. ICSID publishes information on the registration of requests for arbitration, and post-award remedies (for ICSID proceedings) and maintain registers of all proceedings. The registers are updated on ICSID’s website and include details concerning the method of constitution and composition of each Tribunal and the procedural steps in the proceedings.\(^{40}\)

ICSID will only publish ICSID or ICSID AF awards with consent of the disputing parties. If the parties do not consent to the publication of the award, ICSID publishes excerpts of the legal reasoning of the Tribunal promptly after an award has been rendered.\(^{41}\)

Under both ICSID and ICSID AF Rules a tribunal has the ability to allow non-parties to attend hearings unless either disputing party objects (subject to procedures for the protection of confidential or privileged information).\(^{42}\)

Under both ICSID and ICSID AF Rules a tribunal also has discretion, after consulting both parties, to allow a ‘non-disputing party’ to file a written submission to the tribunal.\(^{43}\) In determining whether to allow such a submission, the tribunal must consider whether it would assist the tribunal by bringing a different perspective or insight. The tribunal must ensure that the non-disputing submission does not disrupt the proceeding or unfairly prejudice either party.

UNCITRAL Rules

The level of transparency of an investor-State arbitration conducted under UNCITRAL Rules depends on which version of the UNCITRAL Rules apply. This depends on the treaty which the claim is brought under and the time the treaty was concluded. For treaties concluded before 1 April 2014, either the 1976 or 2010 versions of the UNCITRAL Rules will apply. These rules are similar with regard to transparency and both provide for a low level of transparency.

Under the 1976 and 2010 UNCITRAL Rules there are no requirements to publish any information about the dispute. While most ISDS disputes become public eventually it is possible for disputes under UNCITRAL Rules to remain unknown. Hearings are closed unless the disputing parties agree otherwise.\(^{44}\)

\(^{40}\) Administrative and Financial Regulations 22(1) and 23
\(^{41}\) ICSID Convention Article 48(5); ICSID Rule 48(4); ICSID AF Rule 53(3).
\(^{42}\) ICSID Rule 32; ICSID AF Rule 39(2).
\(^{43}\) ICSID Rule 37; ICSID AF Rule 41(3).
\(^{44}\) UNCITRAL Rules 2010, Article 28(3).
If a claim is brought under a treaty concluded on or after 1 April 2014, the 2013 version of the UNCITRAL Rules will apply. The 2013 version of the UNCITRAL Rules contains a separate set of rules on transparency which apply only to investor-State arbitrations. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Transparency Rules”). The Transparency Rules apply to investor-State arbitrations initiated under the UNCITRAL Rules pursuant to treaties concluded on or after 1 April 2014 unless the Parties to the treaty have agreed otherwise.45

When the Transparency Rules apply, the disputing parties may not derogate from the Transparency Rules unless permitted to do so by the treaty.46 Where there is a conflict between the Transparency Rules and the treaty, the treaty prevails.47

The Transparency Rules provide for a high degree of transparency – much higher than under the ICSID Rules. In particular, they provide that:

- information about the claim is made published promptly (including the disputing parties, economic sector involved and treaty which the claim is brought under)48
- all key documents (including submissions, expert reports and witness statements) must be published or made available on request (subject to the protection of confidential or protected information)49
- after consultation with the disputing parties, the arbitral tribunal may allow either a third party, or a non-disputing Party to the treaty, to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute (similar to the ICSID rule)50
- Hearings shall be public (subject to the protection of confidential information and appropriate logistical arrangements)51

The level of transparency of ISDS proceedings under the 2013 UNCITRAL Rules is high. It is similar to the level of transparency in the TPP, however in some respects the 2013 UNCITRAL Rules go beyond the TPP – for example by requiring expert evidence and witness statements to be made public.

Most of the Vietnam’s investment agreements were concluded before 2014, therefore if an ISDS claim is submitted under UNCITRAL Rules, the relatively less transparent 1976 or 2010 versions of the rules will be applicable.

However for treaties concluded on or after 1 April 2014, unless the Parties agree otherwise, the highly transparent 2013 version of the UNCITRAL Rules will apply. For example, the Eurasian Economic Union-Viet Nam FTA contains no rules on transparency. As it was concluded in 2015, and doesn’t

45 UNCITRAL Rules on Transparency, Article 1.1.
46 UNCITRAL Rules on Transparency, Article 1.3(a).
47 UNCITRAL Rules on Transparency, Article 1.7.
48 UNCITRAL Rules on Transparency, Article 2.
49 UNCITRAL Rules on Transparency, Articles 3, 7.
50 UNCITRAL Rules on Transparency, Articles 4, 5.
51 UNCITRAL Rules on Transparency, Articles 3, 7.
specify a particular version of the UNCITRAL Rules, and doesn’t exclude the 2013 Transparency Rules, these would apply to any dispute submitted under UNCITRAL Rules.

Advantages and Disadvantages

Whether a high or low level of transparency is an advantage or disadvantage depends on the attitudes towards transparency in each system. It is clear that there has been a general trend towards greater transparency in ISDS proceedings in recent years. This trend can be seen both in modern agreements – such as the TPP – which often have a high level of transparency; and in the evolution of arbitral rules, in particular the 2013 UNCITRAL Rules. Although it is possible for ISDS proceedings under the previous UNCITRAL Rules to remain entirely confidential this is increasingly uncommon as most ISDS disputes become known one way or another.

The advantages or disadvantages associated with the level of transparency in arbitral rules also depends very much on which treaty a dispute is brought under. Modern agreements – such as the TPP – provide for a high level of transparency whichever rules are chosen. In contrast, older-style treaties generally have no provisions dealing with transparency and so the choice of rules could make a significant difference to the level of transparency.

1.12 Annulment & setting aside awards

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<thead>
<tr>
<th>ICSID Convention: Article 52</th>
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<tr>
<td>(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:</td>
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<td>(a) that the Tribunal was not properly constituted;</td>
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<tr>
<td>(b) that the Tribunal has manifestly exceeded its powers;</td>
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<td>(c) that there was corruption on the part of a member of the Tribunal;</td>
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<td>(d) that there has been a serious departure from a fundamental rule of procedure; or</td>
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<td>(e) that the award has failed to state the reasons on which it is based.</td>
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<td>(2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.</td>
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ICSID Rules

An important aspect of the self-contained nature of the ICSID system is the remedies available after an award has been made. ICSID awards are binding on the disputing parties, may not be appealed, and are not subject to any
remedies except those provided for in the ICSID Convention. This does not apply to ICSID AF awards as the ICSID Convention does not apply to disputes brought under the ICSID AF.

For ICSID awards the annulment procedure in Article 52 of the ICSID Convention is the only way of having the award set aside. Unlike awards under other arbitral rules, including awards under the ICSID AF, ICSID awards cannot be challenged before national courts.

Only a final award (including an award denying jurisdiction) can be the subject of an ICSID annulment review. Preliminary decisions, including decisions upholding jurisdiction cannot be the subject of a review.

Article 52 provides an exhaustive list of five grounds for annulment. Either disputing party can request annulment. An award may be annulled on one or more of the following grounds:

(a) the Tribunal was not properly constituted;
(b) the Tribunal manifestly exceeded its powers;
(c) there was corruption on the part of a Tribunal member;
(d) there was a serious departure from a fundamental rule of procedure; or
(e) the award failed to state the reasons on which it is based.

Use and interpretation of the grounds for annulment

In 2016, ICSID reported that in 52 cases where annulment decisions were rendered the applications sought annulment on the following grounds:

(a) the Tribunal was not properly constituted: 5 cases
(b) the Tribunal manifestly exceeded its powers: 51 cases
(c) there was corruption on the part of a Tribunal member: 0 cases
(d) there was a serious departure from a fundamental rule of procedure: 41 cases
(e) the award failed to state the reasons on which it is based: 50 cases.

The grounds of ‘manifest excess of powers’ and ‘failure to states reasons’ where raised in almost all proceedings, and a ‘serious departure from a fundamental rule of procedure’ was raised in most cases. We will briefly examine the interpretation of these grounds.

52 ICSID Convention, Article 53(1); ICSID (2016) [note 2], pp.1-2.
53 ICSID AF Rules, Article 3.
54 Schreuer 2009 [note 13], p.899.
56 ICSID Convention, Article 52; ICSID (2016) [note 2], pp.1-2.
**The Tribunal manifestly exceeded its powers**

There may be an excess of powers when a tribunal goes beyond the scope of the parties' consent to arbitration, decides issues which had not been submitted to it, or fails to apply the law agreed to by the parties.\(^{57}\)

(a) Manifest Excess of Powers Relating to Jurisdiction

There may be an excess of powers if a tribunal incorrectly concludes that it has jurisdiction when in fact jurisdiction is lacking, or when the tribunal exceeds the scope of its jurisdiction. It may also be an excess of power of a tribunal rejects jurisdiction over an issue or claim which it does have jurisdiction over.\(^{58}\)

The issue of lack an excess of powers relating to jurisdiction has been ruled on in 43 annulment decisions and has led to 2 full and 3 partial annulments.\(^{59}\)

(b) Manifest Excess of Powers Relating to the Applicable Law

A tribunal's failure to apply the proper law (the law chosen by the parties) can also constitute a manifest excess of powers.\(^{60}\)

ICSID Committees have consistently found that a tribunal’s complete failure to apply the proper law could constitute a manifest excess of powers. However, ad hoc Committees have taken different approaches to whether an error in the application of the proper law amounts to non-application of the proper law. Some ad hoc Committees have found that a gross misapplication or misinterpretation of the law could justify annulment, while others have found that such an approach would be too close to an appeal.

A failure to apply the proper law has been claimed in 44 annulment decisions. It has resulted in two partial and two full annulments.\(^{61}\)

**Serious departure from a fundamental rule of procedure**

Examples of fundamental rules of procedure identified by ad hoc Committees include: equal treatment of the parties; the right to be heard; and an independent and impartial Tribunal.

The ground of serious departure from a fundamental rule of procedure has been raised in 41 proceedings. It resulted in the one full and two partial annulments of awards.\(^{62}\)

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\(^{57}\) ICSID (2016) [note 2], pp.54-55.
\(^{58}\) ICSID (2016) [note 2], p.56.
\(^{59}\) ICSID (2016) [note 2], p.57.
\(^{60}\) ICSID (2016) [note 2], p.57.
\(^{61}\) ICSID (2016) [note 2], p.58.
\(^{62}\) ICSID (2016) [note 2], p.59-60.
**Failure to state reasons**

The requirement to state reasons is intended to ensure that parties can understand the reasoning of the tribunal, and how it reached its conclusion. Whether or not the reasoning is correct or convincing is not relevant. However, ad hoc Committees have in general found that ‘frivolous’ and ‘contradictory’ reasons are equivalent to no reasons and could justify an annulment.\(^{63}\)

Some ad hoc Committees have suggested that ‘insufficient’ or ‘inadequate’ reasons could justify annulment. This approach has been criticised by some commentators as being an overly broad interpretation of the grounds for annulment and risks confusing annulment with an appeal.\(^{64}\)

The ground of failure to state the reasons has been invoked by parties in 50 proceedings and was upheld in 8 cases which resulted in 2 full and 6 partial annulments.\(^{65}\)

**Process**

Either the claimant investor or the respondent State can initiate an annulment proceeding. The applicant must file an application for annulment within 120 days of the date on which the award was rendered (except in the case of corruption).\(^{66}\)

The annulment process is performed by ad hoc committees specifically composed for each case. ICSID annulment committees are not permanent bodies. Their composition in each case is different, and the disputing parties do not have control over the members of the committee.\(^{67}\) Once an application for annulment is registered, the Chairman of the ICSID Administrative Council (who is also the President of the World Bank) appoints an ad hoc Committee of three persons, drawn from the ICSID Panel of Arbitrators, to decide the annulment application.\(^{68}\)

The Committee may:

(i) reject all grounds for annulment, meaning that the award remains intact;

(ii) uphold one or more grounds for annulment in respect of a part of the award, leading to a partial annulment;

(iii) uphold one or more grounds for annulment in respect of the entire award, meaning that the whole of the award is annulled; or

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\(^{63}\) ICSID (2016) [note 2], p.60-62.
\(^{64}\) Bondar (2015) [note 50], pp.672-673.
\(^{65}\) ICSID (2016) [note 2], p.62.
\(^{66}\) ICSID Convention, Articles 52(1), 52(2).
\(^{67}\) Bondar (2015) [note 50], p.625.
\(^{68}\) ICSID Convention, Articles 52(3).
exercise its discretion not to annul notwithstanding that an error has been identified.\(^6^9\)

It is not the role of an annulment Committee to rule on the merits of the dispute if it decides to annul. This would be the task of a new tribunal if either disputing party resubmits the dispute following annulment of the award.\(^7^0\)

**Consequences of annulment**

A decision to annul an award invalidates the award completely.\(^7^1\) In the case of a partial annulment the binding force of the annulled portion of the award is terminated however the decision on annulment does not replace the award or substitute any of the reasoning in the award.\(^7^2\) There is no appeal from a decision to annul. However either disputing party has the ability to resubmit the dispute to a new tribunal.\(^7^3\) A new tribunal is not bound by the reasoning of the annulment Committee. In the case of a partial annulment, it does however remain bound by any unannulled portions of the original award.\(^7^4\)

If the Committee rejects the application for annulment is unsuccessful, the award remains binding on the parties.\(^7^5\)

**Use of ICSID annulment proceedings and outcomes**

ICSID reports that since the entry into force of the ICSID Convention in 1966, there have been annulment proceedings in 87 cases. In 3 of those cases, there was a second set of annulment proceedings after the case was resubmitted, so there have been 90 annulment proceedings in total.\(^7^6\) In 15 of these cases the award has been either partially or completely annulled, which is around 17%.

There has been an increase in the number of annulment applications since 2001. However this reflects the increased number of awards rather than an increased in the rate of annulment. ICSID reports that the rate of annulment has fallen over time. The rate of annulment from 2011 to the present is 3%. The rate of annulment from 1971 to 2000 was 13% and from 2001 to 2010 was 8%.\(^7^7\)

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\(^6^9\) ICSID (2016) [note 2], p.23.
\(^7^0\) ICSID (2016) [note 2], p.12.
\(^7^1\) Bondar (2015) [note 50], p.628.
\(^7^2\) ICSID (2016) [note 2], p.31.
\(^7^3\) Bondar (2015) [note 50], p.628. Under ICSID there is no ability to resubmit the dispute to the original tribunal (known as ‘remission’).
\(^7^4\) ICSID (2016) [note 2], p.31.
\(^7^5\) Bondar (2015) [note 50], p.628.
\(^7^6\) ICSID (2016) [note 2], pp.10-11.
\(^7^7\) ICSID (2016) [note 2], pp.10-11, 35.
ICSID reports:

‘In its 50 year history, ICSID has registered 505 Convention arbitration cases and rendered 228 awards. Of these, 5 awards have been annulled in full and another 10 awards have been partially annulled. In other words, only 2 percent of all ICSID awards have led to full annulment and 4 percent have led to partial annulment.’

Approximately 54% of annulment proceedings were initiated by respondent States and 40% were initiated by claimants (both parties applied for annulment in the remaining 6% of cases). Where an award has been partially or wholly annulled, respondent States have a better success rate (60%) than claimants (40%).

Non-ICSID awards

In non-ICSID arbitration (including arbitration under the ICSID AF) the normal method to challenge an award is through national courts. This review (normally called ‘setting aside’) may be exercised by the courts of the country in which the tribunal had its seat or by the courts where enforcement of the award is being sought.

In contrast to ICSID arbitration, which is largely self-contained, the place of arbitration is important in the case of non-ICSID awards. The grounds for setting aside an award, and approaches to reviewing an award, vary from jurisdiction and jurisdiction. Further, in non-ICSID arbitrations, the parties often cannot directly choose the place of arbitration. For example, under the UNCITRAL Rules, if the parties don’t agree on the place of arbitration, this is determined by the tribunal. In practice tribunals in non-ICSID arbitrations generally select a place from a limited number of places of arbitration where the approach to setting-aside is reasonably consistent and the judiciary shows a high degree of deference to arbitral awards.

A significant number of States (72 according to UNCITRAL) have adopted legislation based on the approach set out in the UNCITRAL Model Law on Arbitration (Model Law). The Model Law is not a treaty but rather, a model law which is intended to provide a basis for the harmonization and improvement of national laws on international arbitration. The Model Law

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78 ICSID (2016) [note 2], p.63
79 ICSID (2016) [note 2], p.12.
80 ICSID (2016) [note 2], p.29.
81 Schreuer 2009 [note 13], p.900.
82 Bondar (2015) [note 50], pp.629-630.
83 2010 UNCITRAL Arbitration Rules, Article 18(1).
84 Bondar (2015) [note 50], pp.629-630.
provides a limited number of grounds for setting aside an award by a domestic court. These grounds are closely modelled on the exceptions to enforcement of an award under Article V of the New York Convention (discussed further below).88

Under the approach set out in the Model Law89, a court may set aside an award if:

(a) the party making the application proves that:

(i) a party to the arbitration agreement was under some incapacity; or the agreement is not valid; or
(ii) the party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; or
(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
(ii) the award is in conflict with the public policy of this State.

Process

Procedures for applications to set aside non-ICSID awards are set out in domestic legislation and differ substantially from jurisdiction to jurisdiction.90

While the Model Law91 and most national laws give the courts discretion to set aside an award92, some national laws require the courts to set aside the award if one of the grounds is fulfilled.93

Like ICSID Committees, national courts have consistently stated that their role is to ensure the integrity of the process, rather than review the merits of an award.94
Consequences

The consequences of setting aside proceedings differ depending on the jurisdiction.
In some jurisdictions, the court may order remission to the original arbitral tribunal in order to correct the ground for setting-aside the award. 95

In contrast to the ICSID annulment process, in several jurisdictions, a court decision confirming or setting aside an award may be subject to appeal. This may result in increased time and cost and a risk that the court’s decision to confirm or set-aside the award may be reversed. 96

The effect of setting-aside a non-ICSID award is similar to the effect of annulment on ICSID awards. If the court does not order remission to the original tribunal, either of the parties can start new arbitration proceedings. The award ceases to have legal effect under the laws of the state where it was annulled. 97

The question of whether non-ICSID awards which have been set aside by courts in the seat of the arbitration may still be recognized and enforced by courts of other jurisdictions is more controversial. The approach on this issue is not uniform and national courts in several jurisdictions have held that such an award may be recognized and enforced in some circumstances, such as where the award it was set aside on grounds of public policy or non-arbitrability which do not apply in the enforcing jurisdiction. 98

Statistics: non-ICSID setting-aside proceedings

Because setting aside proceedings for non-ICSID awards are conducted before various national courts rather than in a single forum, it is more difficult to find accurate information on their usage and outcomes than for ICSID awards.

A 2015 article reported that there had been 46 proceedings to set-aside non-ICSID, with 5 of these being successful. This equates to around 11% of challenged awards.

Comparison of grounds for setting-aside / annulment under ICSID and non-ICSID

For ICSID awards, annulment review is limited to the exhaustive list of grounds in Article 52(1) of the ICSID Convention. The grounds for setting aside awards in national arbitration statutes differ according to the seat of

95 Model Law, Article 34(4). For example, remission is available under Swiss, French and United States in some circumstances, but is not available under French law. See Bondar (2015) [note 50], p.632.
96 See Bondar (2015) [note 50], p.632.
98 For example in France, the United States, Belgium, Austria, the Netherlands and England. See Bondar (2015) [note 50], p.633.
arbitration. However a large number of jurisdictions have adopted an approach based on the Model Law, which provides an exhaustive list of grounds for setting aside.

Some of the grounds under the ICSID Convention and Model Law are similar. These include the improper constitution of an arbitral tribunal, failure to respect certain rules of procedure and excess of power. The Model Law does not explicitly refer to ‘excess of power’ but this concept corresponds to a number of grounds in the Model Law, including the lack or invalidity of an arbitration agreement, and an award dealing with matters outside scope of the consent to arbitration. In some respects the ICSID Convention has a higher threshold to satisfy a ground for annulment. For example, it only allows for the annulment of awards when tribunals ‘manifestly’ exceed their powers or there was a ‘serious’ departure from a ‘fundamental rule of procedure’.99

The following table illustrates some of the overlap between the grounds for annulment / setting-aside under ICSID Rules and the UNCITRAL Model Law.

<table>
<thead>
<tr>
<th>ICSID</th>
<th>UNCITRAL Model Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Tribunal not properly constituted</td>
<td>(a)(i) arbitration agreement not valid</td>
</tr>
<tr>
<td>(d) serious departure from fundamental rule of procedure</td>
<td>(a)(ii) party not given proper notice of proceedings or otherwise unable to present case</td>
</tr>
<tr>
<td></td>
<td>(a)(iv) composition of tribunal or arbitral procedure not in accordance with the agreement of the parties</td>
</tr>
<tr>
<td>(b) Tribunal manifestly exceeded its powers</td>
<td>(a)(iii) award deals with matters beyond scope of the submission to arbitration</td>
</tr>
<tr>
<td></td>
<td>(a)(i) arbitration agreement not valid</td>
</tr>
<tr>
<td>(c) corruption of a Tribunal member</td>
<td>(b)(ii) award in conflict with the public policy of the State</td>
</tr>
<tr>
<td></td>
<td>(b)(i) subject-matter of the dispute not capable of settlement by arbitration under the law of the State</td>
</tr>
<tr>
<td>(e) award failed to state the reasons</td>
<td></td>
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</tbody>
</table>

The Model Law includes two additional grounds for setting aside an award, where:

99 Bondar (2015) [note 50], pp.634-635.
(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the State; and
(ii) the award is in conflict with the public policy of the State.

These grounds of non-arbitrability and public policy have no equivalent under the ICSID Convention and in this respect the grounds for setting aside awards under the Model Law are broader. On the other hand the ICSID ground of a ‘failure to state reasons’ has no direct equivalent under the Model Law and is not generally reflected in domestic laws as a ground for setting aside awards.

Comparison of approach and outcomes

Statistics show that more ICSID awards (17%) were annulled than non-ICSID awards (11%) in proportion to the total number of awards rendered. Although non-ICSID awards are challenged as frequently as ICSID awards, challenges of ICSID awards have been more successful than challenges of non-ICSID awards. On the other hand, the statistics also show that respondent States have been more likely to initiate ICSID annulment proceedings, and that they have been more successful in their challenges than claimants.

Both ICSID ad hoc committees and national courts confirm their role is to ensure the integrity of the process, rather than review the merits of awards. However, there is evidence that ICSID committees typically review the award in more detail than domestic courts which typically give greater deference to the tribunal’s findings.

While ICSID is a more predictable system in terms of the process and grounds for annulment, some cases have raised concerns that the grounds for annulment have not been applied consistently. There have been concerns that some ICSID annulment committees have adopted a broad view of their powers and gave some grounds a wide interpretation. The most controversial grounds for ICSID annulment have been failure to apply proper law and failure to state reasons. In some of these cases there have been concerned that ICSID Committees have gone beyond their mandate in examining the merits of the award and have blurred the line between annulment and appeal.

One article suggested that claimant investors may choose to avoid ICSID because it is easier to annul ICSID awards than have them set-aside under the domestic laws of popular arbitration places such as England, France or

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100 Bondar (2015) [note 50], p.635.
103 Bondar (2015) [note 50], p.672.
104 Bondar (2015) [note 50], p.674-675
the United States. The article concluded that arbitration under the UNCITRAL Rules may reduce the chances that an award is successfully challenged.\textsuperscript{106}

However, there are signs that these concerns may have reduced in recent years. Since 2011, there have been only 3 decisions to annul awards (either in whole or part) in contrast to 23 applications which were rejected.\textsuperscript{107}

\textit{Advantages and Disadvantages}

The most significant difference between the annulment / setting-aside procedures for ICSID and non-ICSID awards is the role of national courts and domestic law. The self-contained nature of the ICSID system means that national courts play no role to play in the annulment process. ICSID annulment proceedings are conducted in accordance with a single set of rules – as set out in the ICSID Convention.

In contrast, the setting aside of non-ICSID awards is conducted before national courts in accordance with the local arbitration laws and procedures, which vary between jurisdictions. This means there is more uncertainty about which grounds of annulment will apply. Where States have adopted arbitration laws based on the Model Law this uncertainty is reduced. However there remains some uncertainty due to the grounds for setting aside based on public policy and arbitrability (whether or not matters are capable of arbitration). These concepts vary between jurisdictions and some States take a broader view of public policy than others. This degree of variation introduces a degree of uncertainty in relation to the setting aside of non-ICSID awards.\textsuperscript{108}

On the other hand, there have been concerns that ICSID Committees have not always applied the grounds for annulment consistently, which has undermined the predictability of the ICSID annulment process to some extent.\textsuperscript{109} There are however indications that these concerns have diminished in recent years to some extent.

Non-ICSID awards may also be subject to appeal, which adds to the length, cost, and unpredictability of enforcement. In contrast, there is no possibility to appeal a decision of an ICSID Committee.\textsuperscript{110}

Applications for annulment have been more successful under ICSID than in the non-ICSID system. Whether this is an advantage or disadvantage depends on whether you are seeking or objecting to annulment. However the statistics demonstrate that the ICSID annulment has been used more by State respondents than investors, and that States have been more successful than

\textsuperscript{106} Burgstaller & Rosenberg (2011) [Note 100], p.93.
\textsuperscript{107} As at May 2016, see Bondar (2015) [note 50], p.673; ICSID (2016) [note 2], p.30.
\textsuperscript{108} Bondar (2015) [note 50], p.674.
\textsuperscript{109} Bondar (2015) [note 50], p.673; Christoph Schreuer, From ICSID Annulment to Appeal Half Way Down the Slippery Slope, 10 Law and Practice of International Courts and Tribunals (2011), p.211.
\textsuperscript{110} Bondar (2015) [note 50], pp.633-634.
investors. Again, this will depend on the particular circumstances of a case but this suggests that the ICSID annulment system *overall* has been more beneficial for respondent States than investors.

1.13 Enforcement

<table>
<thead>
<tr>
<th>ICSID Convention: Article 54</th>
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<tr>
<td>(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.</td>
</tr>
<tr>
<td>(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.</td>
</tr>
</tbody>
</table>

*ICSID Rules*

One of the unique features of ICSID is that it provides no grounds for the national courts of ICSID parties to refuse recognition and enforcement of awards issued by ICSID tribunals. As outlined above, ICSID establishes a self-contained system in which awards may only be challenged through the ICSID annulment mechanism. ¹¹¹ This does not apply to ICSID AF awards as the ICSID Convention does not apply to disputes brought under the ICSID AF. ¹¹²

The ICSID Convention requires that a party must recognise an ICSID award as binding and enforce any monetary obligations (damages) imposed by the award, as if it was a final judgment of the domestic courts of that party. This obligation to recognize and enforce ICSID awards applies to *all* to parties to the ICSID Convention, not just the parties who are connected to the dispute. ¹¹³

ICSID does not permit any external review of the award by domestic courts. Domestic courts may not re-examine the ICSID tribunal's jurisdiction, the award on the merits, nor examine the fairness of the proceedings. ¹¹⁴

The automatic enforcement of ICSID awards means that Parties to the ICSID Convention cannot refuse on enforcement on any grounds, including that the award deals with a subject matter not capable of being settled by arbitration

¹¹² ICSID AF Rules, Article 3.
¹¹³ Schreuer 2009 [note 13], p.1123.
¹¹⁴ Schreuer 2009 [note 13], p.1139.
under domestic law, or where it is contrary to the public policy of that State. For example, if under domestic law disputes with regard to real estate were only permitted to be settled by domestic courts, this would not be a basis to refuse to enforce an ICSID award which involved a dispute concerning real estate.

**Ability to take ‘reservations’ against the ICSID Convention**

Article 25(4) of ICSID contains a ‘notification’ mechanism which provides that:

> Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. …

While Article 25(4) may look like a process for taking reservations, or a mechanism to exclude certain categories of disputes for ICSID jurisdiction, the commentary and interpretation of this provision makes clear that this is not the case.

The Report of the Executive Directors states:

> The provision makes clear that a statement by a Contracting State that it would consider submitting a certain class of dispute to the Centre would serve for purposes of information only and would not constitute the consent required to give the Centre jurisdiction. Of course, a statement excluding certain classes of disputes from consideration would not constitute a reservation to the Convention.¹¹⁵

A leading expert on the ICSID Convention states further that:

> [n]otifications under Art. 25(4) are for purposes of information only and are designed to avoid misunderstandings. They do not have any direct legal consequences …¹¹⁶

A number of States have made notifications under Article 25(4). The list of these notifications is maintained and published by ICSID.¹¹⁷ As one example, Turkey made a notification in 1989 announcing its intention to exclude “disputes, related to the property and real rights upon the real estates”, which are to remain “totally under the jurisdiction of the Turkish courts”.

However, a notification under Art 25(4) does not override consent given in a treaty. If a State has not limited its consent to ICSID jurisdiction in a treaty this will prevail over a notification under Art 25(4).¹¹⁸ In *PSEG v Turkey*, the

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¹¹⁶ Schreuer 2009 [note 13], pp.343-344.
¹¹⁷ Notifications Concerning Classes of Disputes (ICSID/8-D).
¹¹⁸ Schreuer 2009 [note 13], p.345.
Tribunal found that notifications do not have an autonomous legal operation but express questions of policy as a matter of information. The Tribunal said:

"to be effective the contents of a notification will always have to be embodied in the consent that the Contracting Party will later give in its agreements or treaties. If, as in this case, consent was given in the Treaty before the notification, that treaty could have been supplemented by means of a Protocol to include the limitations of the notification into the State’s consent. Otherwise the consent given in the Treaty stands unqualified by the notification."\(^{119}\)

Tribunals have found that once consent is given in a treaty is cannot be limited or defeated through a subsequent notification under Art 25(4)\(^{120}\).

However notifications could have some interpretative effect with regard to a consent clause in a subsequent treaty that is not entirely clear. Schreuer considers that in the absence of contrary evidence, it may be assumed that a State intended to remain within the limits of its notification when entering into the consent agreement.\(^{121}\)

**Enforcement vs execution**

The more or less automatic recognition and enforcement of ICSID awards does not however mean that there is automatic execution of an award. The execution of an award is the successful party’s actual collection of monetary damages. It generally requires the assistance of local courts, for example to order that assets of the losing party be used to satisfy the award debt.\(^{122}\)

The ICSID Convention provides for domestic law to govern the execution of awards and confirms that the ICSID Convention does not derogate from the law in force in a party with regard to sovereign immunity.\(^{123}\) For example, courts may refuse to execute an award against non-commercial assets of another State (for example diplomatic assets) if this was contrary to their approach to sovereign immunity.

**Non-ICSID awards**

The self-contained enforcement system under ICSID is in contrast to other arbitral rules which do not contain an equivalent enforcement system. Non-ICSID awards, including awards under the ICSID AF, may be reviewed by domestic courts and generally depend on the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) for enforcement.

\(^{119}\) PSEG Global Inc. v. Republic of Turkey, ICSID Case No. ARB/02/5, Decision on Jurisdiction, 4 June 2004, para 145.
\(^{120}\) Schreuer 2009 [note 13], p.347.
\(^{121}\) Schreuer 2009 [note 13], p.346.
\(^{122}\) Duclos (2015) [note 106], p.378.
\(^{123}\) ICSID Convention, Article 54(3), Article 55.
The New York Convention gives a detailed list of grounds on which recognition and enforcement may be refused. These grounds – which mirror those in the UNCITRAL Model Law – include:

(a) incapacity of the parties to enter into the arbitration agreement or invalidity of the arbitration agreement;
(b) lack of proper notice to or incapacity to present its case of the party against which the award is invoked;
(c) decision beyond the terms of the arbitration agreement;
(d) improper composition of the tribunal or improper arbitral procedure; and
(e) award not yet binding on the parties or set aside or suspended.

In addition, domestic courts may refuse to recognize and enforce an award if:

(a) the subject matter is not capable of settlement by arbitration under the local law; or
(b) recognition or enforcement would be contrary to the local public policy.

The existence of these grounds to refuse recognition and enforcement of an award under the New York Convention demonstrate that non-ICSID awards do not provide the same degree of enforceability as the ICSID Convention. Different national courts take different approaches to the recognition and enforcement of arbitral awards. Courts in jurisdictions where arbitrations are commonly conducted generally take a restrictive approach to reviewing arbitral awards, however the approach varies from country to country. In particular, concepts of public policy and arbitrability vary between jurisdictions.

As with ICSID awards, the New York Convention does not affect the execution of awards and so does not derogate from domestic laws and approaches to sovereign immunity.

**Advantages and Disadvantages**

The self-contained nature of the ICSID arbitration system means that ICSID awards (assuming they are not annulled) will be recognized and enforced more or less automatically. The only grounds to challenge an ICSID award are contained in the ICSID Convention, and there is no scope for a challenge to enforcement before local courts. The result is that the ICSID enforcement process is predictable.

In contrast, the recognition and enforcement of non-ICSID awards must be sought under the New York Convention which provides for a number of grounds for a domestic court to refuse recognition and enforcement. The approach taken by domestic courts varies between jurisdictions. The result is that the process to seek recognition and enforcement of a non-ICSID award...
and the issues which must be addressed will vary depending on where recognition and enforcement is being sought. The process is not automatic and is less predictable. It may require hiring local lawyers with expertise in the law where recognition and enforcement is being sought.

As discussed above in the section on Annulment, there is also the potential in the non-ICSID system, for awards to be enforced in one jurisdiction even where they have been set-aside in the place where the arbitration was held. This possibility undermines certainty and is not possible under the ICSID system. A related disadvantage of the non-ICSID system is the added complexity of potentially having to participate in setting-aside, recognition and enforcement proceedings in different jurisdictions and under different systems of law. This is not the case with respect to ICSID awards.

Whether the automatic recognition and enforcement of awards under ICSID is seen as an advantage or disadvantage may depend to some extent on the particular case, and whether you are the party seeking to enforce, or objecting to enforcement of the award.

If the respondent is objecting to enforcement then the automatic enforcement of awards under ICSID could be seen as a disadvantage. As discussed above, there is no basis for a respondent State who is party to the ICSID Convention to refuse to enforce an award on grounds of public policy or non-arbitrability. In cases where domestic laws in a State provide that certain categories of disputes may not be settled by arbitration, these laws may need to be amended in order for the State to be able to comply with its obligations under the ICSID Convention.

On the other hand, it may be the respondent State which is seeking enforcement of the award. This could be the case where the State has been awarded costs against the investor, or where the State has been successful in a counterclaim. In these circumstances, the automatic enforcement of ICSID awards would clearly be an advantage as the investor would have no basis to oppose enforcement.

An assessment of the advantages and disadvantages of the automatic enforcement of ICSID awards should also take the ICSID annulment mechanism into account. As discussed above, this provides a number of similar grounds to challenge an award as those provided under the New York Convention in relation to the enforcement of awards (although there is no direct equivalent to the grounds of public policy or arbitrability).

1.14 Costs

The costs of ISDS proceedings are a significant factor for States. Irrespective of the arbitral rules used in a dispute the costs of ISDS litigation are substantial. However it is difficult to get a clear picture of costs associated with ISDS as in many cases the details of costs awards are not published. As a result the estimates of average costs are based on cases where this information where this is available.
In 2012 the OECD calculated that legal and arbitration costs for both parties combined in ISDS cases averaged over US$8 million with costs exceeding $US30 million in some cases.\textsuperscript{128}

More recent estimates suggest that these costs have increased. In 2014 the law firm Allen & Overy estimated average total costs of ISDS proceedings (for both parties combined) at almost $US10 million with average respondent legal costs at $US 4.6 million.\textsuperscript{129} Similarly a very recent survey of recent ICSID cases, found the average total cost of ICSID arbitration to be almost US$ 11.5 million, with average respondent legal costs close to US $5 million.\textsuperscript{130}

Despite the difficulties of finding accurate information on costs, there seems to be a consistent view that the costs of ICSID arbitration are lower than the costs under other arbitral rules and ad-hoc arbitration.\textsuperscript{131}

The largest proportion of costs associated with ISDS are the fees and expenses incurred by each party for its legal counsel and experts. The OECD calculated that these costs account for 82% of the total costs of a case on average. The cost of the tribunal (arbitrator fees) is the other major cost, at an average of around 16% of total costs. The costs of administering the arbitration – by bodies including ICSID and the Permanent Court of Arbitration (PCA) are relatively low, and were found by the OECD to account for around 2% of costs on average.\textsuperscript{132}

A party’s legal costs are not directly related to the applicable arbitral rules. However the other two major sources of costs: the cost of the tribunal; and the cost of administering the arbitration are influenced by the choice of arbitral rules.

There is evidence that both of these costs are generally cheaper in an ICSID arbitration. In 2014 the law firm Allen & Overy published a study of 176 publicly available ISDS cases (up to 31 December 2012) which contained information on costs. This study found that the average cost of arbitration under ICSID (including arbitrator fees and administrative fees) averaged $US769,000. In contrast, the average cost of a UNCITRAL arbitration was $US853,000.\textsuperscript{133}

\textsuperscript{128}Gaukrodger, D. and Gordon, K (2012) [Note 11], p.19.
\textsuperscript{132}Gaukrodger, D. and K. Gordon (2012) [note 11], p.19.
\textsuperscript{133}Hodgson (2014) [note 123].
In contrast to ad-hoc arbitration under other arbitral rules, ICSID’s fees are transparent and predictable.

Costs of the Tribunal

Under ICSID arbitration, each member of the tribunal is entitled to receive:

- a fee of US$3,000 per day of meetings or other work performed in connection with the proceedings (corresponding to US$375 per hour); and
- the reimbursement of any expenses reasonably incurred in connection with travel and otherwise, including a per diem (currently US$115-185 per day).

These rates are set out in the Memorandum on the Fees and Expenses of ICSID Arbitrators and the Schedule of Fees. These fees and rates apply also to arbitrations under the ICSID AF (unless the parties have agreed otherwise).

The ICSID rate for arbitrators may seem high but it is significantly below the rates charged by senior lawyers in private practice and less than the fee charged by many arbitrators in ad-hoc arbitrations under other arbitral rules.

It is difficult to get an accurate picture of the fees charged by arbitrators under other arbitral rules. For example, there are no fees set for arbitrators under the UNCITRAL Rules. The tribunal’s fees must be agreed between the parties and the tribunal. When arbitrator fees are not regulated by the relevant rules it can be difficult for a respondent State who may not feel comfortable negotiating on fees with an arbitrator who is going to decide their case.

There is a relatively small pool of experienced senior lawyers who are commonly selected as arbitrators and their fees can easily be in the range of $US600 to $1000 per hour. As a comparison, even at the lower end of this scale, if all three arbitrators charged US$600 per hour for an eight hour day this would amount to a cost of US$14,400 per day for the tribunal’s fees compared to US$9,000 for an ICSID tribunal. At the higher end the tribunal’s fees under ad-hoc arbitration could cost $24,000 per day.

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136 This is because the relevant ICSID Administrative and Financial Regulations apply to ICSID AF arbitrations, see ICSID AF Rules, Art 5.


Some non-ICSID arbitral rules / institutions do set arbitrator fees. For example, the ICC Court fixes arbitrator fees based on its Scales of Administrative Expenses and Arbitrator’s Fees. Unlike ICSID arbitration, the arbitrator fees under ICC Rules vary depending on the amount in dispute (the more in dispute, the higher the fees). The average amount claimed in an ISDS dispute was estimated in 2014 to be close to US$500 million. Using this as a guide, the average arbitrator fees for an ISDS dispute where the investor claimed US$500 million in damages is estimated at US$1,057,750.

**Administrative costs**

The vast majority of ISDS cases, whether under ICSID Rules or ad-hoc arbitration under other arbitral rules, are administered by an institution. All arbitrations under ICSID or the ICSID Additional Facility are administered by ICSID. In contrast, there is no dedicated authority to administer arbitrations under UNCITRAL Rules. According to UNCTAD, the Permanent Court of Arbitration (PCA) has administered the largest number of UNCITRAL ISDS arbitrations (82) while ICSID has also administered a significant number (19).

ICSID does not charge the parties for its services by the hour but charges a flat annual fee, which is currently US$32,000. The fee covers time spent by all members of the team assigned to the case, including the assistance of a Secretary at hearings and the financial management of the case accounts. The fee is usually divided equally between the parties. It applies to all ICSID cases and non-ICSID cases administered by ICSID.

It is difficult to compare the administrative fees charged by ICSID with those charged under other arbitral rules as the information is not always public. The PCA charges an hourly rate for staff administering an arbitration (currently €175 per hour for legal staff). Other institutions charge an administrative fee which depends on the amount in dispute. For example, for a dispute where the investor claims US$500 million, the ICC estimates an administrative fee of US$113,215. This is significantly more than the fee charged by ICSID. Based on these figures, it seems likely that the cost of an

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139 ICC Rules of Arbitration, Appendix III: Article 4: Scales of Administrative Expenses and Arbitrator’s Fees
140 Hodgson, M (2014) [note 123].
144 See https://pca-cpa.org/en/fees-and-costs/.
ISDS arbitration administered by ICSID would be significantly cheaper, on average, than an arbitration administered by another body.

**Advantages & Disadvantages**

Available evidence suggests that ISDS arbitration under ICSID Rules (or the ICSID AF) is significantly cheaper, on average, than arbitration under other arbitral rules, including the UNCITRAL Rules and the ICC Rules. This is primarily because of ICSID’s scheduled fees for arbitrators which are significantly below the market rates charged by some investment arbitrators. It is also due to ICSID’s fixed administrative fee, which in many cases is likely to be cheaper than the fee charged by other institutions.

In addition to delivering lower costs, arbitration under ICSID (and ICSID AF) Rules provides greater certainty on costs than other arbitral rules. ICSID is unique in having both a fixed daily rate for arbitrators and a fixed annual administrative charge. This allows the parties to estimate and plan for their litigation expenses more easily and with greater accuracy.

**2. COMMITMENTS UNDER INTERNATIONAL INVESTMENT AGREEMENTS WITH REGARD TO ICSID**

**2.1 Introduction**

There is no obligation to join ICSID under the TPP or other investment agreements. The key commitment in investment agreements is that ICSID Rules are one of the sets of arbitral rules under which an investor may choose to submit an ISDS claim. However this is only available if both the investor’s national State and the respondent State are parties to the ICSID Convention. Article 9.19 of the TPP illustrates this choice or arbitral rules:

**Article 9.19: Submission of a Claim to Arbitration**

4. The claimant may submit a claim … under one of the following alternatives:

(a) the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention;

(b) the ICSID Additional Facility Rules, provided that either the respondent or the Party of the claimant is a party to the ICSID Convention;

(c) the UNCITRAL Arbitration Rules; or

(d) if the claimant and respondent agree, any other arbitral institution or any other arbitration rules.

Most modern agreements, including the TPP and the ASEAN-Australia-New Zealand FTA, (AANZFTA) contain other commitments which relate to ICSID.
2.2 Trans-Pacific Partnership Agreement

There are several commitments in the TPP Investment Chapter which have some reference to ICSID. ICSID and the ICSID Rules are relevant in several different ways:

(i) The ICSID Rules are one of the sets of arbitral rules that an investor may choose to submit an ISDS claim under.\textsuperscript{146}

(ii) The Secretary-General of ICSID is nominated as the appointing authority under the TPP ISDS provisions.\textsuperscript{147} This means that, if the disputing parties fail to appoint or agree on an arbitrator, the Secretary-General of ICSID may be requested to compose the panel.\textsuperscript{148}

(iii) The provisions in the TPP ISDS procedures concerned with the enforcement of arbitral awards take account of the ability of a disputing party, under the ICSID Convention, to seek revision or annulment of awards.\textsuperscript{149} The TPP also confirms that a disputing party may seek enforcement of an arbitration award under the ICSID Convention.\textsuperscript{150}

(iv) Annex 9-L: Investment Agreements provides that an investor may not submit an ISDS claim for breach of an ‘investment agreement’ if the investment agreement provides the respondent’s consent for the investor to arbitrate the alleged breach under the ICSID Rules (among other rules).

Item (ii) above – the appointment of the ICSID Secretary-General as appointing authority – applies whether or not Vietnam joins ICSID. The other items referred to above do not operate unless Vietnam joins ICSID.

There are a number of other consequential references to ICSID in the TPP Investment Chapter, which are primarily concerned with confirming that the consent to ISDS in the TPP will satisfy the requirement of consent in the ICSID Convention,\textsuperscript{151} and that any appointment of arbitrators is not frustrated.\textsuperscript{152} Again, these would only have effect if Vietnam joined ICSID and an investor chose to submit an ISDS dispute under ICSID rules.

The main difference from the perspective of Vietnam’s TPP commitments should Vietnam decide to join ICSID, would be that an investor would be able to choose to submit an ISDS dispute under the ICSID Rules. If Vietnam does not join ICSID this would not affect the ability of an investor to submit an ISDS claim to arbitration under the TPP. It would however mean that an investor could only do so under the ICSID Additional Facility Rules (if these are

\textsuperscript{146} TPP, Article 9.19.4(a).
\textsuperscript{147} TPP, Article 9.22.2.
\textsuperscript{148} TPP, Article 9.22.2.
\textsuperscript{149} TPP, Article 9.29.9.
\textsuperscript{150} TPP, Article 9.29.12.
\textsuperscript{151} TPP, Article 9.20.2(a).
\textsuperscript{152} TPP, Article 9.22.4.
available) or the UNCITRAL Rules (or other rules if Vietnam agreed to these).\textsuperscript{153}

2.3 Other investment agreements

We have reviewed a number of Vietnam’s other treaties which include ISDS. Some of these, including the ASEAN-Australia-New Zealand FTA, contain commitments very similar to the TPP. Others, including most of Vietnam’s older bilateral investment treaties do not contain detailed ISDS procedures. The key commitment in these older agreements related to ICSID is the ability of an investor to choose the ICSID Rules to submit a dispute to ISDS if both Vietnam and the other party are parties to the ICSID Convention.

We have identified at least 38 bilateral investment treaties (BITs) concluded by Vietnam which are either signed or in force and include consent to ISDS.\textsuperscript{154} At least 31 of these 38 BITs (25 in force) provide a choice of arbitration under ICSID Rules. The relevant treaties are with: Italy, Belgium-Luxembourg, Australia, Philippines, France, Switzerland, Singapore, Denmark, Sweden, Netherlands, Hungary, Poland, Romania, Lithuania, Latvia, Argentina, India, Egypt, Czech Republic, Chile, Mongolia, Cambodia, United Kingdom, Japan, Bangladesh, Spain, Finland, Greece, United Arab Emirates, Uruguay, and Morocco.\textsuperscript{155}

We have also identified 7 Free Trade Agreements (FTAs) which Vietnam is party to which are either signed or in force, provide consent to ISDS, and a choice of ICSID Rules. These are the ASEAN-Korea Investment Agreement, ACIA, AANZFTA, ASEAN-China Investment Agreement, ASEAN-India Investment Agreement, Korea-Viet Nam FTA, and the Eurasian Economic Union-Viet Nam FTA.\textsuperscript{156}

Vietnam’s older-style BITs (signed between 1990 and 2014 but most signed in the 1990s) with ICSID arbitration do not contain detailed ISDS procedures. In these older agreements, the key commitment is ability of an investor to submit an ISDS dispute under the ICSID Rules (if both State Parties are ICSID parties).

For example, the 1994 Hungary – Vietnam BIT contains just two paragraphs dealing with ISDS:

\textbf{Hungary – Vietnam BIT (1994) Article 8:}

1. Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment

\textsuperscript{153} TPP, Article 9.19.
\textsuperscript{154} There are another 21 BITs which may include ISDS and consent to ICSID but they were either not accessible through the UNCTAD database or are not in English (or French of Spanish).
\textsuperscript{155} Identified using the UNCTAD: International Investment Agreements Navigator.
\textsuperscript{156} Identified using the UNCTAD: International Investment Agreements Navigator.
on the territory of that other Contracting Party shall be subject to negotiations ...

2. If any dispute between an investor of one Contracting Party and the other Contracting Party can not be thus settled within a period of six months, the investor shall be entitled to submit the case either to:

/a/ the International Centre for Settlement of Investment Disputes (ICSID) …;

or

/b/ an arbitrator or international ad hoc tribunal established under the UNCITRAL Arbitration Rules … The parties to the dispute may agree in writing to modify these Rules. The arbitral awards shall be final and binding on both Parties to the dispute.

In contrast – most of Vietnam’s FTAs and more recent Investment Agreements (including the ASEAN agreements) – contain more detailed ISDS procedures. For example, the TPP contains 15 pages of ISDS procedures (27 pages if you include the relevant annexes).

AANZFTA, ACIA, the Korea-Vietnam FTA, and to a slightly lesser degree the ASEAN-India Investment Agreement, contain detailed ISDS procedures which are broadly similar to the TPP. The ASEAN-Korea and ASEAN-China Investment Agreements have more detailed procedures than the older-style BITs, but include simpler procedures than these other modern agreements including the TPP. The Eurasian Economic Union-Viet Nam FTA is much more similar to the older-style BITs as it contains very little detail apart from a consent to ISDS and choice of rules.

2.4 Relationship between the treaty and arbitral rules

States can – and do – modify or supplement arbitral rules in investment agreements, sometimes significantly. The ICSID Convention confirms parties are free to modify the ICSID Rules.\(^{157}\) This does not however apply to the requirements of the ICSID Convention. The text of the TPP also confirms that the treaty is intended to modify whichever arbitral rules are chosen: “The arbitration rules applicable … shall govern the arbitration except to the extent modified by this Agreement.”\(^{158}\)

As discussed above, some modern treaties, including the TPP, significantly modify or supplement the arbitral rules in a number of areas including preliminary objections and protection against frivolous claims and transparency.

2.5 Implications of joining ICSID

The review of Vietnam’s treaties which include consent to ISDS reveals that many of these provide for submission of a dispute under ICSID Rules.

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\(^{157}\) ICSID Convention, Article 44.

\(^{158}\) TPP Article 9.19.6.
Therefore, if Vietnam joins ICSID, an investor which is covered by one of these treaties could choose to submit a claim to arbitration under ICSID Rules in the event of an investment dispute.

The implications of the investor choosing ICSID rules (or other rules) will depend on the nature of the treaty. The older-style BITs contain very little detail on the ISDS proceedings. As a result, most of aspects of the procedure are left to arbitral rules and the rules have a bigger role to play. With these treaties the choice of arbitral rules will make more of a difference and some of the advantages and disadvantages of ICSID will be more of significant.

In contrast, the more modern-style agreements such as the TPP have detailed provisions on ISDS. With these agreements, less is left to the arbitral rules and so the rules have a relatively smaller role to play. However even with these modern agreements significant differences will remain between ICSID and other arbitral rules. While treaties can modify the ICSID Arbitration Rules, they do not modify the ICSID Convention. As a result, they do not modify the ICSID rules related to registration / screening, jurisdiction, annulment, or recognition and enforcement. Nor do they change the fees set by ICSID for arbitrators or for administering the proceedings.

3. REVIEW OF ICSID CASES

3.1 Introduction

This report will review three completed ICSID cases to provide examples of the timelines and procedural steps in ICSID proceedings. We will focus on procedural aspects rather than the subject matter or substantive claims of the disputes.

We have selected three disputes which are very different in terms of their timelines and procedural steps. The first, Trans-Global v Jordan (Trans-Global)\(^{159}\) provides an example of a very quick and simple process. The second, Phoenix Action Ltd v Czech Republic\(^ {160}\) (Phoenix) has a relatively simple process but also some delays. The third case, Total S.A. v Argentine Republic (Total)\(^ {161}\) involves a long and relatively complicated process with a large number of procedural steps and an annulment proceeding.

3.2 Trans-Global v Jordan

*Background*

*Trans-Global* concerned a claim brought by a US investor under the US – Jordan BIT. The dispute arose out of the Claimant's investment of US$29 million in a petroleum exploration venture in Jordan that uncovered numerous

\(^{159}\) Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan (ICSID Case No. ARB/07/25)

\(^{160}\) Phoenix Action Ltd v Czech Republic (ICSID Case No. ARB/06/5)

\(^{161}\) Total S.A. v Argentine Republic (ICSID Case No. ARB/04/1)
"pay zones" which confirmed the existence of oil deposits in the designated area of exploration. The Claimant performed exploratory work over a ten-year period pursuant to a contract with the Government. After confirming its discovery of oil zones, Claimant alleged the Respondent began a campaign to destroy its investment by preventing the Claimant from pursuing any further role in the development of those oil deposits.

**Timeline**

<table>
<thead>
<tr>
<th>Date</th>
<th>Development</th>
</tr>
</thead>
<tbody>
<tr>
<td>September 24, 2007</td>
<td>Secretary-General registers a request for arbitration</td>
</tr>
<tr>
<td>January 24, 2008</td>
<td>Tribunal is constituted</td>
</tr>
<tr>
<td>February 25, 2008</td>
<td>Respondent files an objection that the claim is manifestly without legal merit</td>
</tr>
<tr>
<td>March 21, 2008</td>
<td>Claimant files a response to the Respondent’s objection</td>
</tr>
<tr>
<td>April 4, 2008</td>
<td>Respondent files a reply to the Claimant’s response</td>
</tr>
<tr>
<td>April 18, 2008</td>
<td>Claimant files a rejoinder to the Respondent’s reply</td>
</tr>
<tr>
<td>April 22, 2008</td>
<td>Tribunal holds a first session in Washington, D.C.</td>
</tr>
<tr>
<td>May 12, 2008</td>
<td>Tribunal issues a decision on the Respondent’s objection</td>
</tr>
<tr>
<td>December 18, 2008</td>
<td>Claimant files a request for production of documents</td>
</tr>
<tr>
<td>January 23, 2009</td>
<td>Respondent files observations on the Claimant’s request for production of documents</td>
</tr>
<tr>
<td>January 29, 2009</td>
<td>Tribunal issues a procedural order concerning production of documents and procedural matters</td>
</tr>
<tr>
<td>April 8, 2009</td>
<td>Tribunal renders award embodying the parties’ settlement agreement, under ICSID Rule 43(2).</td>
</tr>
</tbody>
</table>

**Procedural aspects**

*Trans-Global* was a relatively short case, lasting less than 19 months from registration of the request until the final award. The Tribunal made no decision on the merits of the case because the parties agreed to settle the dispute. Therefore the Tribunal’s award essentially just confirms the parties’ settlement agreement. Under ICSID Rule 43(2), the disputing parties can settle their dispute at any time up to the issuance of a final award.

The most significant procedural aspect of *Trans-Global* however is that it was the first case where a respondent made an objection under the expedited process for preliminary objections under ICSID Rule 41(5) that a claim is “manifestly without legal merit”. In *Trans-Global*, the Tribunal upheld the respondent’s objections under Rule 41(5) with regard to one of the claims but rejected the objections with respect to the other two claims and so the case continued.
The Tribunal confirmed that the tribunals will only uphold objections under Rule 41(5) in “clear and obvious” cases and that they will not engage in any detailed examination of contested facts.\footnote{Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan (ICSID Case No. ARB/07/25), Decision on the Respondent’s objection under Rule 41(5), 12 May 2008, pp.90-97}

Trans-Global also demonstrates how fast the expedited process under Rule 41(5) is. In this case, the request for arbitration was registered in September 2007, the respondent filed its objections under Rule 41(5) in February 2008 and the Tribunal issued its decision in May 2008. So the process from the time the respondent raised its objections took less than three months. If the Tribunal had upheld the respondent’s objections against all claims, the case would have been dismissed within 9 months of the request for arbitration being registered.

### 3.3 Phoenix Action Ltd v Czech Republic

#### Background

Phoenix concerned a claim under the Czech Republic – Israel BIT. The claimant – Phoenix - was an Israeli company which owned two Czech subsidiaries which were involved in trade in ferroalloys. Phoenix was entirely owned by a Czech national, Mr. Vladimir Beno. Before Phoenix acquired the Czech companies, Mr Beno was the Executive Officer of one the Czech companies. Following a criminal investigation into tax and customs duties fraud Mr Beno escaped from police custody and fled to Israel. Mr Beno registered Phoenix as a new company in Israel and Phoenix subsequently acquired the Czech subsidiaries at the center of the dispute. The Czech Republic argued this was a clear case of treaty shopping and that Phoenix was a sham company created by a Czech national and fugitive from justice.\footnote{Phoenix Action Ltd v Czech Republic (ICSID Case No. ARB/06/5) Decision on Provisional Measures, April 6, 2007, pp.2-5.}

Phoenix provides an example of a relatively simple procedure. There were no procedural objections or processes of document production. At 3 years and 1 month from registration of the request for arbitration until the final award the process was relatively brief, although the claim was dismissed at the jurisdictional stage and so there were no exchanges or hearings on the merits.

The proceedings would have been significantly shorter if not for two delays: one during the process for the registration of the request for arbitration, and one after the required advances were not paid to ICSID to cover the costs of the arbitration.
## Timeline

<table>
<thead>
<tr>
<th>Date</th>
<th>Development</th>
</tr>
</thead>
<tbody>
<tr>
<td>February 15, 2004</td>
<td>ICSID receives request for arbitration from the Claimant</td>
</tr>
<tr>
<td>March 23, 2006</td>
<td>Secretary-General registers a request for the institution of arbitration proceedings.</td>
</tr>
<tr>
<td>January 8, 2007</td>
<td>Tribunal is constituted</td>
</tr>
<tr>
<td>February 23, 2007</td>
<td>Tribunal holds its first session in Paris.</td>
</tr>
<tr>
<td>April 6, 2007</td>
<td>Tribunal issues a decision on provisional measures.</td>
</tr>
<tr>
<td>May 25, 2007</td>
<td>Claimant files a memorial on the merits.</td>
</tr>
<tr>
<td>July 24, 2007</td>
<td>Respondent files a memorial on jurisdiction.</td>
</tr>
<tr>
<td>September 25, 2007</td>
<td>Claimant files a counter-memorial on jurisdiction.</td>
</tr>
<tr>
<td>October 11, 2007</td>
<td>Tribunal issues a procedural order that objections to jurisdiction will be dealt with as a preliminary question.</td>
</tr>
<tr>
<td>November 12, 2007</td>
<td>Respondent files a reply on jurisdiction.</td>
</tr>
<tr>
<td>December 18, 2007</td>
<td>Proceeding is stayed in accordance with ICSID Administrative and Financial Regulation 14(3)(d).</td>
</tr>
<tr>
<td>May 22, 2008</td>
<td>Proceeding is resumed following payment of the required advances.</td>
</tr>
<tr>
<td>June 27, 2008</td>
<td>Claimant files a rejoinder on jurisdiction.</td>
</tr>
<tr>
<td>September 1, 2008</td>
<td>Tribunal holds a hearing on jurisdiction in Paris.</td>
</tr>
<tr>
<td>October 1, 2008</td>
<td>Parties file statements of costs.</td>
</tr>
<tr>
<td>April 15, 2009</td>
<td>Tribunal renders its award.</td>
</tr>
</tbody>
</table>

### Procedural aspects

#### Registration of the request for arbitration

There was a significant delay in the registration of the request for arbitration in Phoenix. It took more than two years for the request to be registered, which is extraordinary given that the average timeframe for registration is reported to be three weeks. The reason for this long delay is that there were several exchanges between the ICSID Secretariat and the claimant, with ICSID seeking further clarification of the basis for the claim. There were also several delays between these exchanges.

Phoenix is an exceptional case but it illustrates that the Secretariat will seek further information from a claimant if it is not satisfied that the request for arbitration should be registered. It also however illustrates that the Secretariat will only refuse registration rarely, and in the clearest cases. Although it is clear that the Secretariat had significant questions about whether the claimant did have jurisdiction to bring an ICSID claim, the request was ultimately registered.

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164 Source: ICSID. Full case details available at https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/06/5 &tab=PRD

Appointment of arbitrators

There was also a delay in the appointment of arbitrators. In Phoenix the process took almost 10 months. Under ICSID Rules, if the parties cannot agree on a procedure to appoint arbitrators within 60 days of registration of the request, either party may inform the Secretary-General that it chooses the default ICSID appointment process. However the claimant did not trigger the default appointment process for an additional three months after this period had elapsed. It seems from the Award that the claimant did not follow the default appointment process but rather requested that ICSID appoint the arbitrators after another three month period. Under ICSID rules the claimant could have done this after three months from the registration of the request for arbitration, however it did not do so for nine months.

Provisional measures

Shortly after the constitution of the Tribunal the Claimant requested the Tribunal to order the transfer of funds from a bank account of one of the Czech subsidiary companies which had been frozen by the Czech authorities. Arbitration Rule 39 gives a tribunal the power to recommend provisional measures.

Stay of proceedings – failure to pay advances

A further delay was caused when the claimant failed to pay its part of the required advances to ICSID. The ICSID Administrative and Financial Regulations empower the ICSID Secretary-General to stay proceedings if advances are not paid within a certain time. The claimant eventually paid its required advances but this caused a delay of over five months.

Jurisdictional objections

Under ICSID Rules, the tribunal has discretion to decide whether to determine jurisdictional objections as a preliminary matter, before deciding on the merits, or whether to decide any jurisdictional objections together with the merits. In this case the Tribunal decided to determine the respondent’s objections as a preliminary matter and upheld the respondent’s objections, dismissing the claim.

ICSID jurisdictional requirements

Phoenix is also significant case as it dealt with the jurisdictional requirements of ICSID Art 25 with respect to which “investments” can be the subject of ICSID proceedings and the concept of ‘abuse of process’.

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166 ICSID Rules, Rule 2(3).
The *Phoenix* tribunal found (and the parties didn’t contest) that in order for the Tribunal to have jurisdiction, the investment must satisfy both the requirements under the relevant treaty (the definition of investment) and the jurisdictional requirements related to the concept of an “investment” under the ICSID Convention.\(^{169}\)

In this case, the Tribunal found that it did not have jurisdiction to decide the claimant’s dispute, as its claim was an abuse of the system of ICSID investment arbitration.\(^{170}\) In this respect the Tribunal found:

> The evidence indeed shows that the Claimant made an “investment” not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against the Czech Republic. … The unique goal of the “investment” was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty. This kind of transaction is not a bona fide transaction and cannot be a protected investment under the ICSID system.\(^{171}\)

**Costs**

Under Article 61(2) of the ICSID Convention, in the absence of any other agreement between the parties a tribunal has discretion in allocating arbitration costs and the fees for legal representation between the parties as it deems appropriate.

In *Phoenix*, the Tribunal noted that while many ICSID tribunals have ruled that each party should bear its own costs, many have also applied the principle that ‘costs follow the event’, which means that the losing party should bear the costs of the proceeding. In this case the Tribunal held that the claimant should bear all costs of the arbitration (estimated at US$356,000.00) as well as all of the respondent’s legal costs (approximately US$1 million). The Tribunal came to this decision based on its finding that claim was an abuse of the ICSID Convention; and also that the claimant had filed a request for provisional measures which added to the costs of the proceeding. The Tribunal recognised that the respondent had no choice with respect to participating in the proceedings and should not have to pay for its defence.\(^{172}\)

**3.4 Total S.A. v Argentine Republic**

*Background*

The claim was made by Total, a French company, under the Argentina — France BIT. Total claimed a number of investments in Argentina in the gas transportation, hydrocarbons and power generation industries. Total claimed

\(^{169}\) *Phoenix Action Ltd v Czech Republic* (ICSID Case No. ARB/06/5) Award, April 15, 2009, p.29

\(^{170}\) *Phoenix Action Ltd v Czech Republic* Award, April 15, 2009, p.56.

\(^{171}\) *Phoenix Action Ltd v Czech Republic* Award, April 15, 2009, p.56.

\(^{172}\) *Phoenix Action Ltd v Czech Republic* Award, April 15, 2009, pp.58-59.
that it made its investments on the basis of the representations and promises made by the Argentine government about the legal and regulatory framework in these industries. Total alleged that a number of measures taken by the Argentine government – mainly related to the pricing and tariffs – breached the commitments it made to attract investment and resulted in several breaches of the BIT.\textsuperscript{173}

*Timeline*

**Original proceeding\textsuperscript{174}**

<table>
<thead>
<tr>
<th>Date</th>
<th>Development</th>
</tr>
</thead>
<tbody>
<tr>
<td>October 12, 2003</td>
<td>Claimant submits request for arbitration</td>
</tr>
<tr>
<td>January 22, 2004</td>
<td>Secretary-General registers a request for the institution of arbitration proceedings.</td>
</tr>
<tr>
<td>August 24, 2004</td>
<td>Tribunal is constituted</td>
</tr>
<tr>
<td>November 15, 2004</td>
<td>Tribunal holds its first session in Washington, D.C.</td>
</tr>
<tr>
<td>April 11, 2005</td>
<td>Claimant files its memorial on the merits.</td>
</tr>
<tr>
<td>June 3, 2005</td>
<td>Respondent files its memorial on jurisdiction.</td>
</tr>
<tr>
<td>August 1, 2005</td>
<td>Claimant files a counter-memorial on jurisdiction.</td>
</tr>
<tr>
<td>September 15, 2005</td>
<td>Tribunal holds a hearing on jurisdiction in Washington, D.C.</td>
</tr>
<tr>
<td>August 25, 2006</td>
<td>Tribunal issues a decision on jurisdiction.</td>
</tr>
<tr>
<td>January 26, 2007</td>
<td>Respondent files a counter-memorial on the merits.</td>
</tr>
<tr>
<td>May 18, 2007</td>
<td>Claimant files a reply on the merits.</td>
</tr>
<tr>
<td>September 26, 2007</td>
<td>Respondent files a request for production of documents.</td>
</tr>
<tr>
<td>October 16, 2007</td>
<td>Respondent files a rejoinder on the merits.</td>
</tr>
<tr>
<td>November 20, 2007</td>
<td>Respondent files an expert report on damages, accompanied by its observations.</td>
</tr>
<tr>
<td>December 4, 2007</td>
<td>Claimant files a request for production of documents.</td>
</tr>
<tr>
<td>December 10, 2007</td>
<td>Tribunal holds a pre-hearing conference with the parties by telephone.</td>
</tr>
<tr>
<td>December 13, 2007</td>
<td>Tribunal issues procedural directions for the organization of the hearing on the merits.</td>
</tr>
<tr>
<td>December 14, 2007</td>
<td>The parties produce documents.</td>
</tr>
<tr>
<td>January 7-18, 2008</td>
<td>The Tribunal holds a hearing on the merits in Washington, D.C.</td>
</tr>
<tr>
<td>May 26, 2008</td>
<td>Parties file submissions on costs.</td>
</tr>
<tr>
<td>December 27, 2010</td>
<td>Tribunal issues a decision on liability; concurring opinion by one arbitrator, dissenting opinion by one arbitrator.</td>
</tr>
<tr>
<td>February 7, 2011</td>
<td>Parties file submissions on quantum.</td>
</tr>
</tbody>
</table>

\textsuperscript{173} Total S.A. v Argentine Republic (ICSID Case No. ARB/04/1), Decision on Liability, December 27, 2010, pp.9-10.

\textsuperscript{174} Source: ICSID. This is a simplified outline of the procedural steps. Full case details available at https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/04/1&tab=PRD
December 19-22, 2011 | Tribunal holds a hearing on quantum in Washington, D.C.
---|---
June 26, 2013 | Tribunal declares the proceeding closed in accordance with ICSID Arbitration Rule 38(1).
November 27, 2013 | Tribunal renders its award.

### Annulment proceeding

<table>
<thead>
<tr>
<th>Date</th>
<th>Development</th>
</tr>
</thead>
<tbody>
<tr>
<td>April 2, 2014</td>
<td>Secretary-General registers an application for annulment of the award filed by Argentina</td>
</tr>
<tr>
<td>May 27, 2014</td>
<td>Ad hoc Committee is constituted</td>
</tr>
<tr>
<td>December 22, 2014</td>
<td>Argentina files a memorial on annulment.</td>
</tr>
<tr>
<td>March 9, 2015</td>
<td>Total files a counter-memorial on annulment.</td>
</tr>
<tr>
<td>May 4, 2015</td>
<td>Argentina files a reply on annulment.</td>
</tr>
<tr>
<td>July 10, 2015</td>
<td>Total files a rejoinder on annulment.</td>
</tr>
<tr>
<td>August 6, 2015</td>
<td>Argentina files a proposal for disqualification of member Teresa Cheng. The proceeding is suspended</td>
</tr>
<tr>
<td>August 12, 2015</td>
<td>Argentina files observations on the proposal for disqualification.</td>
</tr>
<tr>
<td>August 17, 2015</td>
<td>Total files observations on the proposal for disqualification.</td>
</tr>
<tr>
<td>August 26, 2015</td>
<td>The proposal for disqualification of Teresa Cheng is declined by the other two members of the Committee</td>
</tr>
<tr>
<td>September 1-2, 2015</td>
<td>The ad hoc Committee holds a hearing on annulment in Washington, D.C.</td>
</tr>
<tr>
<td>November 10, 2015</td>
<td>Each party files a statement of costs.</td>
</tr>
<tr>
<td>December 24, 2015</td>
<td>The ad hoc Committee declares the proceeding closed</td>
</tr>
<tr>
<td>February 1, 2016</td>
<td>The ad hoc Committee issues its decision on annulment.</td>
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</tbody>
</table>

### Procedural aspects

In contrast to Phoenix, Total involved a long, complicated process. The original proceeding last almost 10 years from the time the request for arbitration was registered (over 12 years including annulment). Total involved separate phases on each of jurisdiction, merits and quantum (damages). The case involved several rounds of document production and a large number of procedural objections and decisions. It also involved an annulment proceeding and a proposal to disqualify one of the annulment Committee members.

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175 Source: ICSID. This is a simplified outline of the procedural steps. Full case details available at [https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/04/1&tab=PRD](https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/04/1&tab=PRD)
There were a couple of other delays in the proceedings:

(i) There was over 3 months between the request for arbitration and registration (ICSID states the average time for registration is three weeks)

(ii) It took over 7 months for the tribunal to be constituted (under ICSID procedures this would be expected within around 4 months)

(iii) The tribunal took over 11 months to issue its decision on jurisdiction. This is significantly longer than the maximum 180 days for issuing an award

(iv) There was almost 2 years between the hearing on the merits and the tribunal’s decision on liability. This is much longer than the maximum 180 days for issuing an award.

(v) There was almost 2 years between the hearing on the quantum and the tribunal’s final award. This is much longer than the maximum 180 days for issuing an award.

3.5 Summary

The three disputes outlined above are intended to demonstrate different procedural aspects of arbitration under ICSID Rules. They illustrate that the progress of a case under ICSID Rules will depend on the circumstances, the approach of both disputing parties and their interactions with the tribunal.

The cases used as examples show how the timeframes set out in the rules can be stretched if the parties raise procedural issues or objections – in particular in the Total v Argentina case. They also demonstrate that sometimes delays can be due to the availability or capacity of the arbitrators, especially when a dispute extends for longer than expected.

4. RECOMMENDATIONS

Based on the comparison of ICSID and other arbitral rules, the review of Vietnam’s relevant commitments in international investment agreements, and the progress of selected ICSID cases this report makes the following recommendations:

1. Note that in the areas examined in this report there are differences between ICSID and other arbitral rules, some of these differences are significant.

2. Note that the main impact from the perspective of Vietnam’s commitments under the TPP and other investment agreements should Vietnam join ICSID, would be that an investor would be able to choose to submit an ISDS dispute under the ICSID Rules.
2.1. Note that if Vietnam does not join ICSID this would not prevent ISDS claims under other rules.

3. Note that the impact of an investor choosing ICSID rules will depend on the nature of the treaty the dispute is brought under.

3.1. Note that older-style agreements leave most aspects of the ISDS procedures to the arbitral rules. As a result the choice of arbitral rules will make more of a difference and the advantages and disadvantages of ICSID will be more significant.

3.2. Note that modern-style agreements such as the TPP have detailed provisions on ISDS which apply whichever rules are chosen. As a result the choice of arbitral rules will make less of a difference.

3.3. Note that even under modern agreements there are significant differences between ICSID and other arbitral rules. Treaties cannot modify the core requirements of the ICSID Convention including with regard to registration, jurisdiction, annulment, recognition and enforcement.

4. Note that ICSID contains stronger mechanisms to prevent or dismiss frivolous claims than other arbitral rules. These mechanisms are an advantage as they offer the potential to save significant costs and other resources. With the exception of the ICSID AF Rules, other arbitral rules do not contain equivalent mechanisms.

5. Note that while investment arbitration is expensive, the cost of defending a dispute under ICSID Rules is in general significantly less expensive than defending a dispute under other arbitral rules (with the exception of the ICSID AF Rules).

6. Note that the timelines in a specific case are more likely to be affected by the nature of the dispute and approaches taken by the parties and the tribunal than the applicable arbitral rules. ICSID contains more prescriptive timelines and is supported by a permanent Secretariat and so could be expected to be timelier than arbitration under other rules, other things being equal.

7. Note that the approaches under ICSID, ICSID AF and UNCITRAL Rules with regard to the appointment of arbitrators are similar. However under ICSID and ICSID AF the disputing parties have more direct control over the selection of the presiding arbitrator.

8. Note that whether or not an arbitration under ICSID Rules is more or less transparent than a proceeding under UNCITRAL Rules depends on which version of the rules are applicable. ICSID is more transparent than the earlier versions of the UNCITRAL Rules (which would apply under most of Vietnam’s investment agreements) however it is much less transparent.
than the 2013 UNCITRAL Rules which apply to agreements concluded recently.

9. Note an ICSID award can only be annulled through the annulment process in the ICSID Convention. There is no scope for local courts to review or set-aside ICSID awards.

9.1. Note that the grounds and process for setting-aside an award under non-ICSID rules vary between jurisdictions and are less predictable.

9.2. Note, on the other hand, that the some ICSID annulment panels have interpreted the grounds for annulment inconsistently which has undermined the predictability of the ICSID annulment process to some degree.

9.3. Note that generally non-ICSID awards may be set aside on additional grounds when compared to ICSID including public policy and non-arbitrability.

9.4. Note that in terms of use and outcomes of the ICSID annulment mechanism the process has, overall, benefited respondent States more than investors.

10. Note that monetary obligations of ICSID awards (orders for damages or costs) must be enforced automatically, there is no scope for a challenge to enforcement before local courts.

10.1. Note whether automatic enforcement is seen as an advantage or disadvantage in a particular case may depend on whether the respondent was objecting to enforcement or seeking enforcement.

10.2. Note that enforcement of non-ICSID awards can generally be refused on a number of grounds including public policy and non-arbitrability (that the subject matter of a dispute cannot be settled by arbitration under domestic law).

11. Recommends that Vietnam examine whether its domestic laws and policies on arbitrability of disputes is consistent with the automatic enforcement of awards under the ICSID Convention. For example, whether domestic courts are granted exclusive jurisdiction to resolve certain categories of disputes.

12. Note that should Vietnam decide to join ICSID, it would have to be able to comply with the requirements of the ICSID Convention – including the enforcement of awards – by the time it becomes a party.