# DOCTORAL (PhD) DISSERTATION

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# SMALL AND MEDIUM-SIZED INVESTORS' ACCESS TO INVESTOR-STATE DISPUTE SETTLEMENT

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## DECLARATION

I, the undersigned **Bálint Kovács**, being fully aware of my legal liability, do hereby declare and certify with my signature that my thesis, entitled **"Small and Medium-Sized Investors' Access to Investor-State Dispute Settlement"** is my original work and the printed and electronic literature referred to in it was used in accordance with the applicable rules of copyright. I have indicated the original location of the ideas, data, and the sources used from others in the references (footnotes) and bibliography.

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## RECOMMENDATION OF THE SUPERVISOR

Access to justice is a fundamental right in the modern era. The content of the right to access to justice embraces both private individuals and legal persons. In the 21st century, it became an essential question on how to provide for options to small and medium-sized enterprise to settle their disputes in an out of court setting. Commercial arbitration has been suffering from this deficit in being generally available to all types of businesses, including SMEs. It, however, a remains a challenge to overcome the costly nature of arbitration that typically seizes SMEs from taking advantage of this otherwise very popular and impartial form of dispute settlement. Especially in cases on investment related disputes, the existing mechanisms get more attention and are preferred over the otherwise operating arbitration tribunals that have competency to hear and settle commercial disputes.

The thesis, therefore, focuses on the challenges SMEs face in investor-state disputes when the undeniable inequality in the available resources cannot be overlooked. The dissertation opens with clarifying some basic concepts and definitions related to investment related disputes and SMEs. Then, the author thoroughly analyzes the most important impediments that can jeopardize the efficient enforcement of the right to access to justice in investor-state related disputes for small and medium-sized enterprises. Beyond the general questions attached to jurisdiction and costs, the thesis dedicates a fair amount of pages to the unresolved riddle of international business law: what constitutes an investment. The latter is a particularly interesting concept as the lack of a clear and concise definition is somewhat of a characteristic for several relevant international treaties and conventions (e.g. the Washington Convention for the ICSID). The author does not stop here and built on the uncovered problems and barriers in the right to access to justice, provides for some solutions, alternatives that can help overcome the difficulties and can potentially contribute in establishing a more coherent, more predictable and, above all, fair scheme for settling investor-state disputes in the international arena.

The thesis relies on the most up to date legal literature when examining the topic and dedicates subchapters to some of the most novel problems connected to the topic (e.g. third-party funding,

expedited proceedings, mass claims). The novelty of the dissertation lies in its complex approach to the problem that does not focus on just one already existing solution and seeks to provide for some solution to the shortcomings of it. Instead, it aims to build a series of principles and foundational rules that can serve as beacons for virtually any out of court dispute settlement methods that offer the settlement of investment related disputes to the parties. The research focuses on not just arbitration but mediation and litigation to get to a well-justified conclusion on the shortcomings of the existing schemes and to offer well-grounded alternatives.

Debrecen, 27 August 2024

**Dr. Tamás Fézer, PhD**
**supervisor**

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| | |
|---|---|
| ACWL | Advisory Centre on World Trade Organization Law |
| BIT(s) | bilateral investment treaties |
| CETA | Comprehensive Economic and Trade Agreement (EU–Canada) |
| CIFA | Cooperation and Facilitation Investment Agreements |
| CIETAC | China International Economic Trade Arbitration Commission |
| CCIAG | Corporate Counsel International Arbitration Group |
| CJEU | Court of Justice of the European Union |
| CPTPP | Comprehensive and Progressive Agreement for Trans-Pacific Partnership |
| e.g. | exempli gratia (for example) |
| EC | European Commission |
| ECT | Energy Charter Treaty |
| ed. | editor |
| eds. | editors |
| et al. | et alii (and others) |
| etc. | et cetera (and so forth) |
| EU | European Union |
| EUSIPA | EU–Singapore Investment Protection Agreement |
| EUVIPA | EU–Vietnam Investment Protection Agreement |
| FDI | foreign direct investment |
| FET | fair and equitable treatment |
| GATT | General Agreement on Tariffs and Trade50 |
| IBA | International Bar Association |
| ICC | International Chamber of Commerce |
| ICJ | International Court of Justice |
| ICS | Investment Court System |
| ICSID | International Centre for the Settlement of Investment Disputes |
| ICSID Convention | Convention on the settlement of investment disputes between States and nationals of other States (1965) |
| IIA(s) | international investment agreements |
| ILC | International Law Commission |
| IMF | International Monetary Fund |
| INTA | The Committee on International Trade of the European Parliament |
| IPA | Investment Protection Agreement |
| ISDS | Investor–state dispute settlement |
| ISM | Investor-state mediation |
| ITA | Investor-state arbitration |
| MIC | Multilateral Investment Court |

| | |
|---|---|
| MNE(s) | Multinational Enterprise(s) |
| NAFTA | North American Free Trade Agreement |
| NGO(s) | Non-governmental organizations |
| OECD | Organization for Economic Cooperation and Development |
| OJ | Official Journal |
| OUP | Oxford University Press |
| PCA | Permanent Court of Arbitration |
| SCC | Stockholm Chamber of Commerce |
| SME(s) | Small and medium-size enterprise(s) |
| TPF | Third-party funding |
| TRIPS | Agreement on Trade-Related Aspects of Intellectual Property Rights |
| TTIP | Transatlantic Trade and Investment Partnership (EU–US) |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCTAD | United Nations Conference on Trade and Development |
| UNGA | United Nations General Assembly |
| UK | United Kingdom |
| US | United States |
| USMCA | United States–Mexico–Canada Agreement |
| VCLT | Vienna Convention on the Law of Treaties |
| WBG | World Bank Group |
| WG | Working Group |
| WTO | World Trade Organization |

# CHAPTER 1 – INTRODUCTION

## 1.1. Background

In the area of economic development, foreign direct investment ("FDI") is the recurring element, basically regarded as a *sine qua non* factor. The benefits of FDI are innumerable, while its absence is near fatal. States will engage in competition for FDI, and regions within states will do so as well. Competition may be good, especially when it is conducive to improving the legal and administrative system, and strengthening the rule of law. Competition may be bad, when countries engage in a *race to the bottom*, competing to attract investors by reducing standards in areas such as labour and environmental protection. States will also make promises to each other regarding how they will treat one another's investors, also with the aim of attracting investment. These promises are regularly made in the form of an international investment agreement ("IIA"), which contains the agreement of parties to extend to investors from the other party fair and equitable treatment, full protection and security, and other special treatment standards, as the contracting states may agree upon.

An innovation that is contained in many IIAs has to do with the method used for resolving disputes that arise out of the treatment applied to such investments. IIAs regularly contain a clause for the settlement of disputes directly between the foreign investor and the state on the territory of which the investment was made ("host state"). The investor-state dispute settlement ("ISDS") clause, usually provides for a cooling-off period, granting the state and the investor a certain period in order for an attempt to be made at the amicable settlement of the dispute. The ISDS clause then usually provides that the foreign investor may initiate arbitral proceedings against the host state, by lodging a claim under certain arbitral rules. It is what is widely called investor-state arbitration ("ISA").

This system, which in its current form was created in the middle of the 20$^{th}$ century, gained traction by the end of the century, and is today widely known and (often) much criticised. Its roots go back to earlier times, but the way in which it has developed is quite original. It attracts much attention, and for multiple reasons. The procedure for ISA used to be less transparent, making it fertile ground for speculation. Once the system became more transparent, it came under fire for

everything and anything, both false faults and correct criticism were lodged against it. In a sense it became a type of an inkblot test, and a major line of attack for opponents of free trade agreements.

The starting point of this research is the aim of formulating valid critique. And this, regarding an inherent defect of the ISA system, or maybe just an unfortunate development within it. An avenue of access to justice that has more-or-less successfully served the large foreign investor, seems to scarcely be accessible to the small and medium-sized investor ("SMI"). Following the identification of some of the main culprits of unequal access, potential solutions will also be explored.

### 1.2. Research Purpose, Key Questions, and Thesis Statement

The aim of this thesis is to explore the challenges faced by SMIs in accessing currently used ISDS methods, with a special attention to ISA, and its practice, as well as to explore ways in which such access may be improved. In this regard, the key questions are the following:

(1) Is the ISDS system one that was designed to be accessible only to the large few?

(2) Is the solution for improving access of SMIs to ISDS to be found within the existing system and how would the current reform efforts assist in finding a solution?

The thesis argues that the current system of ISDS, which revolves principally around ISA, is one that is not inherently imbalanced in favour of the large claimant, but its specialised nature makes it fairly difficult to gain access to it. This challenge is both a jurisdictional and a material one. This results in a dispute resolution system, in which SMIs may find themselves locked out of this avenue of access to justice. The thesis critically analyses the reform process underway at the United Nations Conference on International Trade Law ("UNCITRAL") in its Working Group III, in terms of the suitability of those proposals to resolve these issues of asymmetric access to justice.

### 1.3. Research challenges

The issue of access to ISA as a means of access to justice is part of the discussion. The topic has been explored extensively by scholars. Within this, the access to ISDS of micro, small

and medium-sized enterprises ("SMEs") and individual investors—what are referred to herein collectively as small and medium-sized investors ("SMIs")—is also a known challenge. In fact, the question of SMIs accessing ISDS was already a topic of discussion at the time when the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention") was being negotiated.[1] This question later re-emerged, around the time ISA took off and the number of cases registered per year swelled into the double digits.[2] SMIs access to ISDS is now featured in the reform process taking place at United Nations Commission on International Trade Law ("UNCITRAL") in Working Group III.[3] It is recognised as an issue, a deficiency of the system, which needs to be addressed.

Despite the long and pervasive presence of this deficiency, it appears to be a low-key, tertiary issue. The deficiency of the system in terms of ensuring its accessibility to all investors, the lack of access of small and medium-sized enterprises, is often cited. But it is only given a fleeting reference most of the time. It seems to be presented more often as a component in an enumeration. It became part of the decorum, taken at face value, without much analysis of what its implications may be. A natural deficiency of the system, a minor issue, a glitch. In-depth research on the matter is rather scarce, yet it holds significant value. For critics of ISDS it may be more of a feature than a bug. For this researcher, it is an opportunity to explore ISDS from a particular viewpoint: that of the SMI.

The topic of ISDS has gained popularity in the past decade, with pressure mounting for its reform from the part of academia and practitioners, as well as civil society and the general public. High profile ISA cases break the news, bringing more attention to real or perceived deficiencies of the system. While the reform process at UNCITRAL is aimed at systemic reform, incremental changes regularly appear in the amendments to arbitration rules, and IIAs. In some aspects, ISA is constantly changing, evolving. In terms of the topic of SMI access to ISDS, however, it appears to be at a standstill.

In researching the matter of SMI access to ISA, the first hurdle that emerges is one of a lack of empirical evidence. It is difficult to come by information on the size of the investor-

[1] History of the ICSID Convention, Volume II-1, International Centre for Settlement of Investment Disputes, Washington, D.C., 2009, pp. 436, 553.
[2] Opening remarks by Secretary General of ICSID, Roberto Dañino, at symposium co-organised by ICSID, OECD and UNCTAD, titled Making the most of international investment agreements: A common agenda, p. 3. Available at: https://www.oecd.org/investment/internationalinvestmentagreements/36053800.pdf (Last accessed 01.03.2024)
[3] Report of Working Group III on the work of its thirty-ninth session, A/CN.9/1044, 10 November 2020, para. 64.

claimant in ISA cases. It has been attempted by scholars with a solid institutional background, and reliable information is difficult to come by. Nevertheless, some progress can be made even without all-encompassing empirical evidence. Anecdotal evidence, and qualitative research helps reveal useful patterns.

A second hurdle is that of definitions. How to define what qualifies as an SMI? Starting from the existing definitions for SMEs, we see that there is not a lack of definitions. On the contrary, there are multiple definitions, each of them having its own legitimacy, validity. The confusion created by the abundance of definitions, has also allowed for clarity as to why choosing *one* particular definition may actually be a flawed approach.

A third hurdle is related to the existing case law. Cases that have not been brought cannot be evaluated. Some of the relevant cases have nevertheless been identified, and did prove useful for this research. Other cases, even if brought by SMIs, only partially reinforce the critique on lack of accessibility of ISDS. Nevertheless, many ISDS cases, especially the ones settled by means other than ISA, remain confidential.

A fourth hurdle is the lack of extensive scholarly literature dealing with this topic. While this research is a humble contribution aimed at improving this situation, the author has faced sufficient scepticism regarding the relevance of this contribution, which may in part be attributed to the limited exposure the topic has received. The author is also thankful to all those senior academics and practitioners who have not spared words of encouragement regarding this research.

### 1.4. Existing academic work

The barriers faced by SMIs in accessing ISDS has scarcely been explored in a detailed manner. The seminal works on the matter are those of Lee M. Caplan titled "Making Investor-State Arbitration More Accessible to Small and Medium-Sized Enterprises"[4] and of Perry S. Bechky titled "Microinvestment disputes".[5] There are three further papers on this matter written by Perry

[4] Lee M. Caplan, Chapter 15, Making Investor-State Arbitration More Accessible to Small and Medium-Sized Enterprises, in Catherine A. Rogers, Roger P. Alford (eds.) The Future of Investment Arbitration, Oxford University Press, 2009, pp. 297–311.
[5] Perry S. Bechky, Microinvestment Disputes, 45 Vanderbilt Journal of Transnational Law 2012, pp. 1043–1094.

S. Bechky, Alexander Gebert and Joachim Karl, respectively, in a book edited by Thilo Rensmann.[6] The latter constituted the starting point for my research on the topic, when I came upon this book on my study visit at the UNCITRAL Law Library in Vienna.

More recently there have been two important contributions. One was made by the International Bar Association, which delved into the ways in which small value claims may more efficiently be brought.[7] The other one is by Catharine Titi and Katia Fach Gomez titled "Facilitating Access to Investor-State Dispute Settlement for Small and Medium-Sized Enterprises: Tracing the Path Forward".[8]

For the exploration of various related topics, extensive bibliography is available. From works on access to justice, through commentaries of arbitration rules, to the specific question of costs, third-party funding, and ISDS reform, these have all been helpful in attempting to meaningfully contribute to the topic at hand.

### 1.5. Methodology

In analysing the matter of SMI access to ISDS and especially ISA, this research uses various sources of law, such as international conventions, national laws, and arbitration rules. The research also analyses relevant jurisprudence stemming from arbitral awards and court decisions. The principal source that was utilised is legal scholarship. These tools have been put to use in order to identify the challenges faced by SMIs in accessing ISDS, but also to explore and propose potential solutions to this weakness of the system.

The methodology used in this research consists of doctrinal analysis, the non-doctrinal method, the comparative method, as well as the evolutionary method. In this sense, there is extensive comparison between provisions of various IIAs, and between the principal arbitration rules. The doctrinal method was used to identify the law, engage in its analysis, and critique. Non-

[6] Thilo Rensmann (ed.), Small and Medium-Sized Enterprises in International Economic Law, Oxford University Press, 2017, notably in Part III, pp. 241–308.
[7] International Bar Association, Arbitrating Small Value Claims in Investment Arbitration, 2022, available at https://www.ibanet.org/document?id=Arbitrating-Small-Value-Claims-in-Investment-Arbitration-2022 (Last accessed 23.08.2024)
[8] Katia Fach Gomez, Catharine Titi, Facilitating Access to Investor-State Dispute Settlement for Small and Medium-Sized Enterprises: Tracing the Path Forward, European Business Law Review 34 (7) 2023, pp. 1039–1068.

doctrinal research was employed in a qualitative sense, especially in terms of exploring the ongoing reform process concerning ISDS. For a topic characterised by such dynamism, it was only fitting to engage in an evolutionary view, and study the developments in the field of ISDS. Accordingly, the conducted research presents historical analysis, exploring negotiation documents, and past jurisprudence. The research also involved, albeit to a small extent, interdisciplinary approaches, especially by engaging the relevant work of economists and political scientists. Empirical data used within the research is primarily sourced from other scholars' work. In a qualitative sense the author has engaged in extensive discussions with highly regarded, reputable individuals, both scholars and practitioners in the field of international investment law, in order to gain some insight, and tips on relevant jurisprudence.

# CHAPTER 2 – SMALL AND MEDIUM-SIZED INVESTORS AND ACCESS TO JUSTICE

## 2.1. Introductory remarks about access to investor-state dispute settlement

The access granted to foreign investors for resolving their disputes with host states in a direct manner through investor-state dispute settlement—especially investor-state arbitration—in a truly impartial venue, is an unrivalled form of access to justice. The possibility of foreign investors to lodge a case, whereby government action is reviewed under what have been agreed by the same governments to constitute international legal standards, is one of the great accomplishments of the past century. The review of government action by independent and impartial judicial bodies is an essential component of the rule of law. Efforts to reform ISDS in its principal form, which is investor-state arbitration, are ongoing, ever since concerns about details as to its current functioning reached a critical point. Lacking a similarly impartial avenue for resolving disputes, it is without a doubt that this direct form of access to justice granted to foreign investors against host states is necessary and continues to merit its place in the international legal order.

The current system of ISDS is a consequence of the discussions that went on in the 1950s and 1960s aimed at increasing private investment in the countries of the Global South.[9] Reviewing the reasons that justified the development of the ISA system, it becomes fairly obvious why the element of foreign direct investor access to a form of international dispute settlement outside of domestic courts should be maintained. The custom whereby states espoused investors' claims against foreign sovereigns, proceeding to engage in a form of inter-state dispute settlement under complete control of the claim, were at least inefficient.[10] This was especially so in the case of smaller investors. Inefficiency, in its many forms, also plagues national judiciaries, which have an added deficiency in terms of a lack of independence and impartiality, even if it is only thus perceived. As is well known to our colleagues in common law systems "[j]ustice must not only be done, but must be seen to be done."[11] Through IIAs, foreign investors are often given the possibility to request the review of host state conduct in fora that bypass the deficiencies of domestic courts that were previously alluded to, fora that are independent of national courts.

This just scrapes the surface of the wealth of reasons why ISDS mechanisms are a necessary tool for access to justice. ISDS is a crucial component of the international rule of law, providing a mechanism through which government conduct may be subjected to legal scrutiny in an impartial setting. As noted by a tribunal, "the intent is to offer a readily understandable procedure that allows for intervention by international arbitrators, in addition to ordinary mechanisms."[12] Furthermore, without such access to international dispute settlement, investors would have a hard time enforcing their rights contained in IIAs. It is not only the interest of the investor, but also that of the state to have such a system of review. As was noted in arbitral practice regarding the principal agreement in this area, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention") "is aimed to protect, to the same extent and with the

[9] There are various other narratives put forward regarding the motives behind the current system of ISDS, which will not be explored herein. A notable one is that of historian Quinn Slobodian in Globalists: The End of Empire and the Birth of Neoliberalism, Harvard University Press, 2018.

[10] Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30), para. 21: "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights–its right to ensure, in the person of its subjects, respect for the rules of international law." Id. para. 22: "Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant."

[11] Lord Chief Justice of England in the case of Rex v. Sussex Justices, 1924.

[12] Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire, ICSID Case No. ARB/03/08, Award of 10 January 2005, para. 14(iii).

same vigour the investor and the host State, not forgetting that to protect investments is to protect the general interest of development and of developing countries."[13]

Despite being an important avenue of access to justice, there is much evidence pointing to the fact that accessing the most popular type of ISDS, which is ISA, is actually highly cumbersome. Of course, no barrier is high enough when one disposes of sufficient resources. However, in lieu of adequate resources, many investors are left without such access, resulting in a system accessible only to the privileged few. Without addressing the depths of this *olde worlde* means of protecting investors' interests, the espousal of claims against a foreign sovereign is unlikely to produce appropriate results for smaller investors, as previously stated.[14] As a system theoretically open to all, ISA is now confronted with the very same underlying issue. The observation made by colleagues in this field rings true: "Justice that is only available for a select few (large companies) does not embody access to justice."[15]

This thesis proposes to map out the entirety of the matter of accessing ISDS, with a specific focus on the viewpoint of SMIs. The author's proposition is that of an analysis pertaining to the important structural feature of ISA, asking the question '*who has access?*'. This was also the reason that the title of the thesis was adjusted. The title comes closer to a correct reflection of the issue at hand. It was necessary to point beyond micro, small and medium-sized enterprises, and find a term that includes individual investors as well. For this reason, the choice ultimately fell on giving the thesis a title that points to a somewhat wider focus, thus dealing with the small and medium-sized investor's situation, which is abbreviated herein as "SMI". It must be acknowledged that, here again, it is regularly *high net-worth individuals* that appear as investors who are usually active subjects in ISDS. Nevertheless, all individuals who enter the role of foreign investor should have effective access to ISDS, if they are entitled to such access by treaty or domestic law. This research made it necessary to consult scholarly works from other fields than that of international law, such as political science and economics. The need for this arose in part from the necessity of finding answers to questions regarding the subject of this thesis: who are these investors?; what

[13] Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, para. 23.
[14] Ursula Kriebaum argued that "[b]ig players are more likely than small companies to obtain diplomatic protection." Ursula Kriebaum, Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes, ICSID Review, Vol. 33, No. 1, 2018, p. 18.
[15] Petra Butler, Georgia Whelan, Chapter 6: Does the Dispute Resolution Regime in Europe Really Serve MSMEs? In Ben Beaumont, Alexis Foucard, Fahira Brodlija (eds.) International Arbitration: Quo Vadis?, Kluwer Law International, 2022, p. 124.

makes them small and medium?; how do they participate in international economic relations?; how do they appear as claimants in ISDS? In the consulted literature, the prevalent focus is that on SMEs, and not SMIs, which is why the former will also regularly appear throughout the thesis, when dealing with the above questions.

### 2.2. SMI as a category: All but some

The importance of delineating and profiling the main actor of this research, *i.e.* small and medium-sized investors, lies in the necessity of an accurate delimitation of particular hurdles certain foreign investors may face upon attempting to gain access to ISDS. Narrowing down the scope of the research in this sense has enabled increased focus on solutions addressing the exact concerns that will be identified. Small and medium-sized investors are most often dealt with in scholarly literature, official documents and statistical analysis, with a focus on the sub-group of small and medium-sized enterprises or SMEs. This category of enterprise, as shown, also appears defined, or rather circumscribed, in a multitude of ways worldwide.

Defining what is an SME enables the collection of various types of data on these companies. The variation in their definition may pose a series of difficulties for researchers, as data collected at state level can only be used in comparative and aggregate research by featuring caveats and explanations as to their shortcomings. There is also research in which the threshold for collecting data excludes small firms, making specific research into their particular situation near-impossible.[16] Considering that the focus of this research is in the realm of the international, the choice was made to rather focus on the definitions used by certain international entities in their own areas of activity. International organisations may have a more balanced approach, as the definitions used by them would have to be considerate of the differences amongst its constituent members, thus, it may be argued, that in a way these approaches embody a reflection of a middle-ground of sorts.

The research carried out by the World Bank Group (or "WBG") on this matter reflects the importance of this category of enterprises in every economy. The WBG uses a seemingly broader term, that of micro, small and medium-sized enterprise or MSME. The WBG MSME Economic Indicators Database contains data indicating the impact of MSMEs, with the percentage of

[16] See Slavo Radosevic, Urmas Varblane, Tomasz Mickiewicz, Foreign direct investment and its effect on employment in Central Europe, UNCTAD Transnational Corporations, Vol. 12, no. 1, April 2003, pp. 67–68.

companies in the economy that belong to this broad category being estimated at over 99% of all companies. Data also reveals that MSMEs employ the majority of workers in most economies.[17] Similar information is published by other international organizations. The World Trade Organization's (or "WTO") Informal Working Group on Micro, Small and Medium-sized Enterprises was established to "explore ways in which WTO members could better support MSMEs' participation in global trade." Their statistics reveal that "95% of companies across the globe are MSMEs, accounting for 60% of the world's total employment."[18]

If the hypothesis of this thesis is correct, that SMEs have limited access to ISDS, and in particular ISA, this means that a very large number of enterprises, with a significant impact, is potentially cut out of a dispute settlement mechanism that on the face of it has no access limitations in terms of claimants' size.

To gain more clarity in what this category of business entities encompasses, the next subchapters will look into what actually constitutes the category of SMEs, this very broad category containing all but large enterprises. The next subchapter deals with the definition of what is it that we should understand when talking about a small and medium-sized enterprise.

### 2.3. Navigating the multitude of definitions

Upon exploring the definition of an SME, or rather which companies belong in the category of small and medium-sized enterprises, we quickly find that there is not one single definition. The categorisation of such enterprises differs by country. Differences in the criteria and thresholds used in categorizing these enterprises sometimes also appear within the same country, differing by region. It often happens that the criteria, or thresholds used to categorise SMEs in one industry sector, would vary in another one: more labour-intensive sectors would have a higher threshold in terms of number of employees, whereas less labour-intensive sectors would have a lower employee threshold, but possibly a larger one in terms of annual turnover.

The definition of SMEs, as noted, regularly includes at least two criteria: a financial one (such as annual turnover and/or assets), and the number of employees. The content of the criteria may also change in accordance with the industry sector that an enterprise operates in. The variation

[17] MSME Economic Indicators Database 2019 – https://www.smefinanceforum.org/data-sites/msme-country-indicators (Last accessed 23.08.2024)
[18] Informal Working Group on Micro, Small and Medium-sized Enterprises (MSMEs) – World Trade Organization: https://www.wto.org/english/tratop_e/msmes_e/msmes_e.htm (Last accessed 23.08.2024)

that emerges from the detailed categorization of enterprises is wide, and the reason for the variation in the utilised thresholds becomes understandable once the complexities of the underlying economic development model of a particular country are revealed. An analysis of different economic development models exceeds the purposes of this scholarly inquiry, but the various definitions that resulted from these will be looked at in order to ascertain if and how these definitions may be of use in the narrower context of access to and use of ISDS.

The factors that influence the definition given to SMEs have to do with practical features of economies, such as an economy's overall development level, its size, the structure of its industries, and the country's policy objectives. Due to SMEs' importance in an economy, states will often develop policies to incentivize and support the development of SMEs. It is a natural consequence of this, that the definitions will reflect a variation in accordance with how a particular government chooses to prioritize the incentivization of economic growth, by stimulating job creation, and promoting entrepreneurship through its economic policy goals. It is also a fact that regional economic integration organisations will often use common definitions as they are more conducive to gathering data, creating statistics, developing stimulus programmes and so on.

The variation in SMEs' definitions is something that international organizations then have to grapple with. Of significant importance to this analysis, especially as a consequence of the fact that the International Centre for Settlement of Investment Disputes (or "ICSID") is part of it, is the WBG.[19] The WBG MSME Economic Indicators Database makes available data on MSMEs, across 176 economies. The Database also provides MSME definitions and other data on their impact in the numerous economies that they keep track of.[20] All the different criteria used by countries to determine business categories by size are featured in this database. Accessing this database reveals some of the similarities and differences in how countries define this category of enterprises, as summarily outlined in the above section. Most countries determine the size of an enterprise in accordance with the number of employees, while other countries also add a financial metric such as assets, turnover or balance sheet as further variables. Thresholds may also change in accordance with the economic sector a particular enterprise operates in. For example, the US Small Business Administration publishes a table that lists small business size standards matched to industries. It

[19] See also Daniel Behn, Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art, Georgetown Journal of International Law, 46(2), p. 384.

[20] MSME Economic Indicators Database 2019 – https://www.smefinanceforum.org/data-sites/msme-country-indicators (Last accessed 23.08.2024)

uses either the criterion of millions of dollars, or that of the number of employees, or sometimes even both as a standard of categorisation.[21]

While any choice in using a definition will constitute a limitation, it seems quite logical that using any one country's definition would not be the best choice, as international investment arbitration is—for all intents and purposes—*international*. Turning to definitions used by international organisations better serves the research conducted herein. In the work done in this area at the WBG we can find the criteria used by the International Finance Corporation (or "IFC"), a member of the WBG, for defining MSMEs for the purposes of their own projects. In accordance with this, a micro-enterprise has less than ten employees, owns less than US$100,000 in total assets, and has annual sales of no more than US$100,000; a small enterprise has between 10 and 49 employees, owns between US$100,000 and US$3 million in total assets, and produces between US$100,000 and US$3 million in annual sales; a medium enterprise has between 50 and 300 employees, owns between US$3 million and US$15 million in total assets, and produces between US$3 million and US$15 million in total annual sales. The same study also reveals that the WBG itself faces difficulties when attempting to define MSMEs, in the sense that the definitions used by different institutions belonging to the WBG may sometimes overlap, but they may also differ.[22] Thus, the variation is not only between or within countries, but also within the same international organisation.

In the European Union ("EU"), an SME is a company with an annual turnover of less than €50 million, and/or an annual balance sheet total not exceeding €43 million, employing less than 250 people. Broken down into its components, an enterprise falls into the category of small enterprise when it has fewer than 50 employees, and an annual turnover and/or balance sheet total not exceeding €10 million; and is considered a microenterprise when it employs fewer than 10 persons and has an annual turnover and/or annual balance sheet total not exceeding €2 million.[23]

While these definitions may evolve in accordance with development goals, the purpose of analysing SME access to investment arbitration is to promote them as enterprises that should also

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[21] See US Small Business Administration Table of size standards https://www.sba.gov/document/support-table-size-standards (Last accessed 23.08.2024)

[22] World Bank Group Support for Small and Medium Enterprises – A Synthesis of Evaluative Findings, World Bank Group, 2019, p. 6. Available at: https://openknowledge.worldbank.org/server/api/core/bitstreams/fde31bad-5fd9-562d-a409-4713f4932b56/content (Last accessed 23.08.2024)

[23] Commission Recommendation of 6 May 2003 concerning the definition of micro, mall and medium-sized enterprises, 2003/361/EC, published in the Official Journal of the European Union L 124, p. 36 of 20 May 2003, definition contained in its Annex at Article 2.

benefit from the protections that are demonstrably only made available for larger enterprises. Nevertheless, these definitions reveal that the difference in the size of enterprises comprising this category are quite large: a medium enterprise can be three times larger than a small one. Also, the differences in how SMEs are defined makes it difficult to obtain aggregate results of their participation in the transnational economy, which constitutes the topic of the next subchapter.

### 2.4. SMEs in the transnational economy and the small and medium-sized foreign investor

Evidence points to the fact that states have been interested in improving SMEs' participation in the global economy since at least the negotiations on the ICSID Convention in the 1960s.[24] Despite it being a topic for such a long time, progress has been slow-paced, as demonstrated by relevant figures. The participation of SMEs in the transnational economy was analysed by the United Nation ("UN") in 1993, in a report which concluded that two-thirds of total foreign direct investment by SMEs occurred after 1980.[25] According to a previous survey conducted in the United States, in 1982 SMEs represented 98 percent of all business entities, but only 20 percent of all multinationals in 1988, stating that less than 0.2 percent of SMEs had multinational operations.[26] Other data point to the fact that SMEs accounted for 2.7 percent of foreign assets, 3.4 percent of foreign sales, and 1.9 percent of foreign employment for the United States (1988); 0.8 percent of the book value of foreign direct investment of the United Kingdom (1981); 2 percent of employment in Swedish-owned foreign affiliates (1987); and 7.4 percent of employment and 6.2 percent of turnover in Italian transnational companies (1987).[27] A later study by the OECD recorded that SMEs contributed less than 10 percent of FDI.[28]

The notions of free market and free enterprise do not exclude the possibility of state involvement in the economy. Financing, often in the form of allocating public resources, with the purpose of incentivising growth, modernisation and internationalisation are not out-of-the-

[24] The History of the ICSID Convention, ICSID Publication, 2009, Volume II-1, p. 436.
[25] Peter J. Buckley, International Technology Transfer by Small and Medium-Sized Enterprises, Small Business Economics, Vol. 9, No. 1, Special Issue on Small and Medium-Sized Enterprises in the Global Economy (Feb., 1997), pp. 72–73, citing "UN Report on Small and Medium-Sized Transnational Corporation (1993), p. 53"
[26] Zoltan J. Acs, Randall Morck, J. Myles Shaver, Bernard Yeung, The Internationalization of Small and Medium-Sized Enterprises, in Zoltan J. Acs, Bernard Yeung (eds.), Small and Medium-Sized Enterprises in the Global Economy, The University of Michigan Press, Ann Arbor, 1999 (ebook).
[27] Data cited by Peter Buckley, International Technology Transfer by Small and Medium-Sized Enterprises, in Zoltan J. Acs, Bernard Yeung (eds.), Small and Medium-Sized Enterprises in the Global Economy, The University of Michigan Press, Ann Arbor, 1999 (ebook).
[28] OECD, Facilitating SMEs Access to International Markets, OECD Publications, Paris, 2004, p. 7.

ordinary phenomena in terms of economic policy. As alluded to previously, many such policies expressly feature SMEs as special targets of support programmes, in particular when it comes to supporting innovation, and investment into research and development. These areas merit particular attention, as it is widely acknowledged that "it's hard to develop new things in big organizations," and that "[n]ew technology tends to come from new ventures—startups."[29] But in an economic system that without a doubt favours large enterprises, where such companies are in the best position to gain more business, but also to profit from government support programmes, carve-outs can ensure SMEs have a chance to benefit from state support, can enhance access to funds, and overall do not get the rug pulled out from under them. SMEs would want to internationalise for the same reasons as larger companies would want to: they seek access to new markets, they seek better access to resources, and they seek efficiency.[30] States should have a vested interest in supporting SMEs in their efforts to invest abroad, as this can be „a powerful driving force for more robust and inclusive growth."[31]

Another aspect of this matter is that internationalisation is more-or-less an organic process, which comes about with the growth of a company. It may seem like a platitude, but there's more of a tendency for companies to internationalise once they outgrow their national economies. In other words, "[t]he larger the company, the more it tends to internationalise."[32] This may mean that by the time a company is ready to internationalise, it may already be well on its way to *outgrowing* the SME category. It is also the case, according to economists' conclusions drawn from previous studies, that SMEs engaging in foreign direct investment tend to be more profitable and more innovative.[33] More profitable means growth over time, once again resulting in more of a probability of outgrowing the SME category. When the numbers are broken down even further, they confirm that size does matter when it comes to investing abroad. According to the previously

[29] Peter Thiel, Blake Masters, Zero to One: Notes on startups, or how to build the future, Crown Business, New York, 2014, p. 10.
[30] Peter J. Buckley, International Technology Transfer by Small and Medium-Sized Enterprises, Small Business Economics, Vol. 9, No. 1, Special Issue on Small and Medium-Sized Enterprises in the Global Economy (Feb., 1997), pp. 72–73.
[31] Martina Lodrant, Lucian Cernat: SME Provisions in Trade Agreements and the Case of TTIP, in: Thilo Rensmann (ed.): Small and Medium-Sized Enterprises in International Economic Law, OUP 2017, pp. 165-166.
[32] See Internationalisation of European SMEs, European Commission Enterprise and Industry, EIM Business and Policy Research, 2010, p. 5.
[33] Zoltan J. Acs, Randall Morck, J. Myles Shaver, Bernard Yeung, The Internationalization of Small and Medium-Sized Enterprises, in Zoltan J. Acs, Bernard Yeung (eds.), Small and Medium-Sized Enterprises in the Global Economy, The University of Michigan Press, Ann Arbor, 1999 (ebook).

cited research, „[o]f all micro enterprises only 2% invested abroad in the period 2006-2008, whereas this [was] 6% for small and 16% for medium-sized enterprises."[34]

According to a research paper published in 2010 (and the most recent empirical research identified on the matter), an average of 2% of (the surveyed) SMEs in the 27 member states of the European Union *were active in foreign direct investment*.[35] It is a small proportion, but in view of the proportion of SMEs in national economies (about 99% of all companies), it means that in absolute terms the number of small and medium European companies that go international may be higher than that of larger companies. The cited paper estimates the number of European SMEs active in foreign direct investment at around half a million.[36] According to a survey done in 2015, about half of SMEs in the EU were involved in international business outside the internal market between 2012 and 2015.[37] The survey was done as part of an effort to internationalise SMEs, which is also buttressed by several policy measures.[38] The EU also launched the programme called Competitiveness of Small and Medium-sized Enterprises ("COSME"), later turned into the Single Market Programme, which also aims to improve the competitiveness of SMEs.[39] These policy measures are complemented by the EU's treaty policy which also places an emphasis on SMEs' participation in the single market, including in terms of accessing dispute resolution mechanisms.

Regional trade agreements increasingly often dedicate special provisions to SMEs, acknowledging in a sense both their potential, and their special needs, by providing various carve-outs or protections to them.[40] These are especially important for developing countries and least-developed countries where in certain areas of the economy there is still much potential for enterprises to grow.

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[34] Internationalisation of European SMEs, European Commission Enterprise and Industry, EIM Business and Policy Research, 2010, pp. 17, 38.
[35] Id., pp. 5, 47.
[36] Id., p. 21.
[37] Eurobarometer, Internationalisation of Small and Medium-Sized Enterprises, available at: https://europa.eu/eurobarometer/surveys/detail/2090 (Last accessed 23.08.2024)
[38] European Commission, SME Internationalisation Beyond the EU, details at: https://single-market-economy.ec.europa.eu/smes/sme-strategy/improving-smes-access-marktets/sme-internationalisation-beyond-eu_en (Last accessed 23.08.2024)
[39] European Commission, Single Market Programme (SMP), details at: https://single-market-economy.ec.europa.eu/sectors/tourism/eu-funding-and-businesses/funding-guide/single-market-programme-smp_en (Last accessed 23.08.2024)
[40] A detailed list of provisions in regional trade agreements that reference SMEs is provided by the WTO Secretariat: https://www.wto.org/english/tratop_e/msmesandtra_e/rtaprovisions_e.htm (Last accessed: 23.08.2024)

While there may be more to this matter than the seemingly simple question of size, it is clear that the limitation of available resources in the case of smaller companies constitutes the principal factor in the formation of further barriers to internationalisation. This is underpinned by research conducted in 2009 by the OECD, which demonstrates that financial limitations constitute the principal constraint to SME internationalisation.[41] This is then followed by informational and contact barriers, such as lack of information regarding opportunities, knowledge of foreign markets and a lack of contacts.[42] The limited knowledge and skills of SMEs' managers is also identified as a factor holding back their internationalisation.[43] It must be observed, however, that not one of these barriers is inherent to smaller enterprise, neither do they appear as insurmountable. Any of these barriers can be overcome, knowledge and information can be obtained, the only real barrier to obtaining these may be a lack of adequate material resources.

The same barriers to internationalisation were observed by economists conducting research on this topic. They argued that small and medium-sized enterprises faced barriers to entry which limited their capacity of engaging in operations abroad. From their point of view, barriers to entry––such as financial market imperfections, differences in legal systems, cultures and languages—are "systemically higher" for smaller companies than for larger ones.[44] In terms of access to financial markets, they argue that financial institutions have their specific ways of acquiring information, and smaller firms tend to have limited possibilities for establishing their reputation in ways that such financial institutions would find appropriate, resulting in an imperfect access to capital for such enterprises.[45] While the above are considered as general barriers to entry into a market, the authors opine that such barriers most likely represent "an even greater obstruction when international expansion is contemplated."[46] The cited paper also presents arguments pointing to the fact that poor protection of property rights may be critical in limiting the internationalisation of smaller companies, highlighting a supposed lack of protection of intangible assets such as patents or trademarks.[47] Two important observations must be made in this regard. First, at the time

[41] OECD (2009), Top Barriers and Drivers to SME Internationalisation, Report by the OECD Working Party on SMEs and Entrepreneurship, OECD, Paris, pp. 15–16.
[42] Id. pp. 18–19.
[43] Id. p. 20.
[44] Zoltan J. Acs, Randall Morck, J. Myles Shaver, Bernard Yeung, The Internationalization of Small and Medium-Sized Enterprises, in Zoltan J. Acs, Bernard Yeung (eds.), Small and Medium-Sized Enterprises in the Global Economy, The University of Michigan Press, Ann Arbor, 1999 (ebook).
[45] Id.
[46] Id.
[47] Id.

the mentioned paper came out, the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") while already in effect, probably only had a limited contribution to resolving this problem. Second, and even more important from the point of view of this research, is the observation on the poor protection of property rights. The international investment law regime was put in place precisely in order to grant supplementary protection to the property of investors abroad. Although it was much less popular in the 1990s than it is today, it appears that it is still not able to significantly contribute to a sense of security of investments abroad. And this, despite the fact that international investment agreements, often named by contracting states treaties for the promotion and protection of investments, are usually entered into with the express purpose of protecting the property rights of investors. One explanation would be the fact that this legal instrument was not well-known to investors.

States may further want to contemplate the beneficial impact a reduction in the rest of the mentioned barriers may have. Thus, pronounced differences in language and culture, as well as challenges in accessing information may be solved via internal reform: governments are able to create a regulatory environment that is more welcoming and enhances the ease of doing business. Indeed, the lack of availability of information is not a negligible factor, as economists' analysis of surveys on the topic previously concluded that smaller multinationals' foreign investments concentrating in developed countries may have been a consequence of a lack of information about "exotic countries."[48]

Indeed, there are a number of constraints affecting the ability of SMEs to internationalise, and the above-mentioned information barrier has been identified by Petra Butler and Georgia Whelan to also include the "uncertainty businesses face regarding international dispute resolution." While the mentioned scholars do recognise that this is not the principal barrier in the internationalisation of SMEs, according to their point of view "[b]usinesses are not confident in receiving access to justice should a dispute with an international business arise." This same logic applies to a dispute with the host state. The authors argue that this is especially true in the case of SMEs, as such enterprises have a more difficult time accessing resources necessary "to solve problems" than larger enterprises. Due to this asymmetry, Butler and Whelan contend that SMEs

[48] Acs et al., op. cit., citing UN Report on Transnational SMEs at page 51, table III. 1.

are hindered in "realising their full potential," and that "any reduction in trade barriers" contributes to SME development and growth.[49]

From the above it follows that access to justice sits as an important component in the internationalisation of SMEs. The importance of this component is not one of a pure theoretical exercise, access of SMEs to alternative modes of dispute resolution is now recognized by states, and has been made part of a new generation of international agreements. For example, Chapter 24 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership is dedicated to SMEs. This chapter of the Agreement specifically underlines the importance of access to dispute resolution, stating that Parties should "encourage and facilitate the use of arbitration and other means of alternative dispute resolution ("ADR") for the settlement of international commercial disputes between private parties."

Regarding the above, it must be noted that the point is made with reference to matters of international trade, where the disputes that arise are among private parties. As a general observation, in commercial matters, parties are free to enter into agreements as they see fit. Thus, any underlying inter-state agreement is only there to encourage parties to follow a particular route regarding dispute settlement, or—at most—to supplement the private agreements they enter into, in cases where dispute settlement is left out of the private contract. Accordingly, well-crafted cross-border contracts may contain this type of a compromissory clause, which steers dispute settlement away from domestic courts and towards arbitration or other forms of ADR. Butler and Whelan make a strong, evidence-based argument, that SMEs either lack sophistication when it comes to international contracting, or avoid recourse to the law and lawyers altogether,[50] which may ultimately justify the necessity of states intervening to supplement their (lack of) will in matters of dispute resolution.

In lieu of such intervention, Butler and Whelan argue that SMEs risk their disputes becoming the subject of either domestic or international litigation, both of which hold a number of disadvantages that weigh heavy on this category of enterprises.[51] The principal challenge identified in their research comes in the form of the "oft-repeated weaknesses" of "time and cost."[52]

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[49] Petra Butler, Georgia Whelan, Chapter 6: Does the Dispute Resolution Regime in Europe Really Serve MSMEs? In Ben Beaumont, Alexis Foucard, Fahira Brodlija, International Arbitration: Quo Vadis?, Kluwer Law International, 2022, p. 108.
[50] Id., p. 109.
[51] Ibid.
[52] Id., p. 110

The authors proceed to enumerate a number of other weaknesses: uncertainty of jurisdiction, uncertainty of judicial procedure, difficulties in enforcement, language barriers, lack of neutrality (courts favouring the home party), the risk of parallel proceedings, or the lack of expertise at the level of the judiciary.[53] These factors all add to the time it takes to resolve a dispute, and inflate the costs SMEs face in bringing disputes to a close.

While the above are noted in the context of trade, and the regular cross-border business relations of SMEs, it is in part applicable also to the case of investors seeking to establish cross-border business via physical presence, by making an investment. Considering the importance of SMEs in the overall economy of countries, it seems evident that states would do everything in their ability in order to improve the possibilities of such companies going international, and engaging in business abroad. Part of these measures is the signing of various trade and investment agreements that contribute to removing barriers to entry, and to reducing the risk and cost of business expansion. The incentive for this was very well noted by Professor of International Business, Peter J. Buckley, who remarked that "SMEs that do internationalise tend to be larger, more capital-rich, more productive and profitable," which then produces a "curious statistical artifact—SMEs which internationalise rapidly cease to be SMEs."[54]

States have indeed been making strides to improve the flow of foreign direct investment. And recognizing the importance of SMEs, states have engaged in the application of policies and promotional measures not only to encourage the creation of new enterprises through the support of entrepreneurship and innovation, but also to attract companies from abroad. Policy measures such as cutting red tape below a certain size, abolishing minimum investment value thresholds, or introducing fiscal incentives have been reported on over three decades ago.[55]

Similarly, treaties for the promotion and protection of foreign investment have been around for over half a century. Such international agreements are an important means for guaranteeing the safety of property rights, and protection against political risk. IIAs, entered into with the purpose of promoting and protecting foreign investment, are thus meant to further cross-border economic prosperity and development. They stimulate foreign direct investment by liberalizing its regime. Investment agreements advance these aims by establishing substantive standards of investment

[53] Id.
[54] Peter J. Buckley, International Technology Transfer by Small and Medium-Sized Enterprises, in Acs et al., op. cit. (ebook).
[55] See World Investment Report, UNCTAD, 1993, pp. 219–220.

protection that legally bind host states. Investor-state arbitration is essential for the policing of host state compliance with the protection standards that are set up in IIAs, offering the possibility of review of host state conduct when necessary.[56] There is much debate over whether or not IIAs actually do make a difference in terms of attracting foreign investment.[57] What is certain, is that these agreements constitute one out of a number of actions states can take in order to make themselves more attractive to investors from abroad. Trade and investment regimes have been identified as constituting some of the external barriers for SMEs in becoming international investors.[58] IIAs offer some clarity, and safety in terms of the treatment of foreign investors. This is one reason that even Brazil, an outlier in terms of participating in the classic IIA system, and still not friendly to granting access to classic ISDS,[59] has started entering into agreements for the promotion and protection of investments, aiming to also protect its own investors abroad.[60] It is questionable, however, whether or not the existence of IIAs makes a significant difference for SMIs specifically.[61]

Providing more possibilities for SMEs to engage in the transnational economy, especially in the form of investment, is not at all a novel concept, as demonstrated above. However,

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[56] Joachim Karl, The Treatment of Small and Medium-Sized Enterprises in International Investment Law, in Thilo Rensmann (ed.), Small and Medium-Sized Enterprises in International Economic Law, OUP, Oxford, 2017, p. 250.

[57] There is an entire collection of papers on this topic contained in Karl P. Sauvant, Lisa E. Sachs, The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows, OUP, New York, 2009, esp. pp. 109–460; see also Srividya Jandhyala, Robert J Weiner, Institutions sans frontières: International agreements and foreign investment, Journal of International Business Studies, Vol. 45, No. 6, Special Issue: Advancing Interdisciplinary Research in International Business: Integrative Knowledge and Transformative Theories (August 2014), pp. 649–669, arguing that they in fact reduce the costs of foreign investment projects; Axel Berger, Matthias Busse, Peter Nunnenkamp & Martin Roy, Do trade and investment agreements lead to more FDI? Accounting for key provisions inside the black box, International Economics and Economic Policy, Vol. 10, 2013, pp. 247–275; UNCTAD, The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries, United Nations, New York and Geneva, 2009; Peter Egger, Alain Pirotte, Catharine Titi, International investment agreements and foreign direct investment: A survey, The World Economy 46(6), 2023, pp. 1524–1565.

[58] Martina Lodrant and Lucian Cernat, SME Provisions in Trade Agreements and the Case of TTIP, in Thilo Rensmann (ed.), Small and Medium-Sized Enterprises in International Economic Law, OUP, Oxford, 2017, p. 167.

[59] It must also be noted that Brazil is the second largest source of ICC arbitrations in the world, and one fifth of these cases involve state entities. See Cesar A. Guimarães Pereira, Leonardo F. Souza-McMurtrie, BRAMIA: An Alternative to ISDS, Kluwer Arbitration Blog, 05.12.2023. Available at: https://arbitrationblog.kluwerarbitration.com/2023/12/05/bramia-an-alternative-to-isds/ (Last accessed 23.08.2024)

[60] Despite not having IIAs, Brazil has been very successful at attracting FDI. About the Brazilian model of Cooperation and Facilitation Investment Agreements ("CIFA"), the dispute prevention model, ombudsmen, see Thiago Ferreira Almeida, From Protection to Facilitation Agreements: Contributions of The Pan-African Investment Code, the Brazilian Model, and the New Regional and Multilateral Foreign Investments Agreements, TDM, 2022, pp. 16–19.

[61] In research conducted by UNCTAD in 2009, it was noted that "BITs *may* matter as a special protection for small and medium-sized enterprises" [emphasis added]. See UNCTAD, The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries, United Nations, New York and Geneva, 2009, p. 34.

policymakers are somewhat limited in terms of the options regarding policy measures that have a positive impact, including international treaty policy, toward enhancing SMEs' participation as foreign investors. The barriers have indeed been identified. But solutions appear to be scarcer. Notwithstanding the various barriers, SMEs do participate in the transnational economy. While proportionally to a vastly lower degree, in absolute terms it is safe to say that there are many SMEs who invest abroad. And these companies should be able to benefit from the protections they are offered by IIAs.

The ICSID Convention was also put in place in order to encourage, facilitate and promote cross-border economic cooperation and development, which is reflected in its Preamble. What is more, at the time the ICSID Convention was being negotiated, the matter of encouraging SMEs to invest abroad was also brought up. The delegate of the Federal Republic of Germany, during discussions on the apportionment of costs of proceedings, mentioned that encouraging SMEs' investment in foreign countries was "particularly important."[62] So why then did this not translate into workable solutions that enhance access to ICSID? Why the failure in providing equal access to the benefits provided by IIAs?

### 2.5. Separating micro from small from medium: The object of this analysis

Definitions for SMEs are numerous, and change in accordance with different criteria, as previously shown. Although there are many different definitions, or descriptions as to what an SME is, depending on the purpose for which it is needed, one may fairly easily find the best fitting set of criteria to define them, tailoring it to the purposes it is meant for.

Scholars who have previously looked at the question of SMIs' access to ISDS have also been confronted with the problem of defining the object of their analysis. Is it the investor that should be small or medium? The investment itself should be small or medium? Or is it the claim that is small or medium?

The International Bar Association's Report uses US$50 million, or €50 million as the maximum threshold under which it considers a claim as being small. This is somewhat in line with the definition of SME in terms of the monetary threshold of an annual turnover of less than €50 million used by the EU. The Report also states that "[a]lthough SMEs and individuals tend to be

[62] The History of the ICSID Convention, ICSID Publication, 2009, Volume II-1, p. 436.

the claimants in small value claims, such claims are not the exclusive purview of SMEs or individuals."[63] Indeed, a small value claim may be brough by both a large and a small business entity. And while costs may pose a challenge for any claimant, bringing such a claim may only pose genuine difficulty for a vulnerable investor, which is more likely to be an SMI. Perry S. Bechky illustrates this best, when he argues that "[w]hile a loss of US$5 million would give rise to 'bet the company' litigation for many companies, the same loss only gives rise to an 'ordinary business dispute' for larger companies."[64] However, finding information on the claimants themselves is a difficult task, as noted in a recent empirical study. The researchers were hardly able to obtain data on the claimants, but where some data was made available (from the part of the Permanent Court of Arbitration or PCA), it suggested that of the claimants filing small value claims, less than half were SMEs, and six claims were brought by individuals.[65] Regarding individuals, the same logic applies: there are high net-worth individuals who act as investors, and there are those who are less resourceful.

The IBA Report, with its threshold established, requested information from some of the principal institutions that accommodate ISA proceedings, and found that approximately 20 per cent to 40 per cent of cases contained claims of under US$50 million or €50 million:

> "ICSID reported 394 investment cases registered between 1 January 2010 and 31 December 2021, in which the amount claimed could be identified. Of these, 108 cases (approximately 27 per cent) involved claims below US$50m, broken down as follows:
>
> • 21 cases (approximately 5 per cent) concerned claims of US$10m or less;
>
> • 32 cases (approximately 8 per cent) concerned claims between US$10m and US$20m; and
>
> • 55 cases (approximately 14 per cent) concerned claims between US$20m and US$50m.
>
> The PCA reported 184 investment cases registered between 1 January 2010 and 31 December 2021 in which the amount claimed could be identified. Of these, 42 cases (approximately 23 per cent) involved claims below US$50m, as follows:
>
> • 17 cases (approximately 9 per cent) concerned claims below US$10m;
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> • 9 cases (approximately 5 per cent) concerned claims between US$10 and US$25m; and

[63] IBA Report, Arbitrating Small Value Claims in Investment Arbitration, 2022, p. 8.
[64] Perry S. Bechky, Microinvestment Disputes, in Thilo Rensmann (ed.), Small and Medium-Sized Enterprises in International Economic Law, OUP, 2017, p. 269.
[65] IBA Report, Arbitrating Small Value Claims in Investment Arbitration, 2022, p. 13

• 16 cases (approximately 9 per cent) concerned claims between US$25 and US$50m.

The SCC reported a total of 54 investment cases registered between 1 January 2010 and 31 December 2021 in which the amount claimed could identified. Of these, 23 cases (approximately 43 per cent) involved claims below €50m, as follows:

• 13 cases (24 per cent) concerned claims below €10m;

• 4 cases (7 per cent) concerned claims between €10m and €25m; and

• 6 cases (11 per cent) concerned claims between €25m and €50m."[66]

An earlier empirical study also revealed interesting figures concerning SMEs involved in international arbitration. For the purposes of the research, claimants were divided into five categories: (1) small and medium-sized enterprises (SMEs); (2) large multinational enterprises (MNEs); (3) extra-large MNEs; (4) 2014 Fortune Global 500 (Global 500) companies; and (5) states. The researchers looked at 147 ISDS cases, out of which 27 cases have been brought by SMEs and 119 have been brought by large and extra-large MNEs, and Fortune Global 500 companies. Out of the 147 cases, 110 were fully resolved at the time the research was conducted. The overall success rate of the claimants was 30%. SMEs won in 36% of the cases, interestingly enough, while large MNEs won 24%, extra-large MNEs won 29% and Global 500 claimants won 50% of their cases. The author concluded that the size of the claimant might not have any bearing on the outcome of the dispute. However, the research also demonstrated that the majority of claims are being initiated by large and extra-large MNEs, while SMEs remain a minority in claim initiation.[67]

One of the earlier studies that addressed the matter of small and medium-sized investors' access to investor-state arbitration was a study done by the OECD, which analysed 95 cases, and arguably came up with a myth-busting result: "Far from supporting the view that smaller claimants are excluded from ISDS, the survey shows that 22% of the claimants in both ICSID and UNCITRAL cases are either individuals or very small corporations with limited foreign operations

[66] IBA Report, Arbitrating Small Value Claims in Investment Arbitration, 2022, pp. 10–12.

[67] Daniel Behn, Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art, Georgetown Journal of International Law 46(2), 2015, pp. 384–386.

(only one or two foreign projects)."[68] Also, "[m]edium and large multinational enterprises account[ed] for about half of the cases surveyed."[69]

Another data-driven research on the topic of ISDS was conducted on 105 cases filed at ICSID by US investors. The research found that "two-thirds of the participants in the arbitrations were individuals or SMEs."[70] Albeit, this used the US Small Business Administration's simplified classification for what is considered an SME, which defines it according to a single factor: number of employees. Accordingly, businesses with fewer than 500 employees are accounted for as SMEs. Such a definition departs greatly from the one used by the World Bank Group or by the European Union.

Claimants will regularly attempt to maximise the amount of compensation sought in arbitration. Nevertheless, the damages awarded are quite telling as to the actual losses incurred. While there are several factors which influence outcomes, looking only at the damages awarded may give us an idea about the size of the investment from which the dispute had arisen. In a widely cited empirical research paper by Professor Susan Franck it is revealed that there are indeed quite a number of awards that point to claims that were meritoriously small. In 25 arbitration claims in which the investor prevailed, four awards granted between US$5 and US$10 million in compensation, with 13 awards granting less than US$5 million in compensation.[71]

Perry S. Bechky, rather focuses on claims arising out of *microinvestments*, which—relying on some of the above mentioned empirical data as well—he describes as "an investment worth $5 million made by an individual, a microenterprise, or a small or medium enterprise."[72] He notes that this definition is tied to the size of both the investment and the investor, not to the amount in controversy, but that data on the size of the investment and that of the investor is difficult to come by, which is why the amount of the claim is used as proxy, assuming that most cases allege the destruction of the entire investment.

The fact that small and medium-sized enterprises constitute the backbone of any economy is quite evident from the data presented herein. It is also important to note that SME is an umbrella

[68] OECD, Government perspectives on investor-state dispute settlement: a progress report, Freedom of Investment Roundtable, Paris, 2012, p. 7.
[69] Ibidem.
[70] Scott Miller, Gregory N. Hicks, Investor-State Dispute Settlement – A Reality Check, Center for Strategic & International Studies, 2015, p. 10.
[71] Susan Franck, Empirically Evaluating Claims About Investment Treaty Arbitration, North Carolian Law Review Vol. 86, p. 60.
[72] Perry S. Bechky, Microinvestment Disputes, 45 Vanderbilt Journal of Transnational Law, 2021, pp. 1047, 1048.

term, and the companies that fit into this category may differ greatly in terms of their structure, number of employees and levels of economic activity.[73] This may also mean that the three principal components of this category of enterprises may experience varied opportunities and possibilities in becoming investors abroad as a consequence of their size, and in view of their sophistication, which may in many cases be correlated. The empirical research cited herein, aside from pointing out interesting facts, demonstrates the difficulty of choosing a particular definition for what a small and medium-sized investor should be for the purposes of a particular research endeavour. It is also the case that SME may be considered as being one large category, or it may be broken up into its parts.

Within the category of small business, micro-enterprises appeared as a concept in the 1970s. Research by the WBG indicates that SMEs may face challenges that micro-enterprises and large enterprises are not exposed to in the same fashion, such as stronger obligations regarding taxes and regulations.[74] In terms of their participation in the transnational economy, the category of micro-enterprise appears as an evident outlier. Their possibility of becoming foreign investors is very limited. From the viewpoint of FDI, micro-enterprises are not of particular interest, meaning that they might genuinely be too small to be a relevant factor. The lack of sophistication stemming from their small size basically renders them ineffective in terms of becoming active investors in a foreign country. However, it may well happen that a foreign venture of a company starts out as a microenterprise, thus constituting a small investment of a company with more capacity (a medium or large company). This circles back to the question of whether the size of the investor or that of the investment (or rather that of the claim itself) is the most relevant consideration when categorising an ISA claim as being lodged by an SMI.

Size is without a doubt of value when it comes to FDI. SMEs are often highlighted in international agreements for the promotion and protection of foreign investments, and targeted with provisions meant to facilitate their access to markets. Due to their size, which consequently limits their economic impact, SMEs are hardly able to present themselves as having an impactful

[73] In this regard, see also George Papadopoulos, Samuli Rikama, Pekka Alajääskö, Ziade Salah-Eddine, Aarno Airaksinen, Henri Luomaranta, Statistics on small and medium-sized enterprises, Eurostat, 2018, available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Statistics_on_small_and_medium-sized_enterprises&oldid=393653 (Last accessed 23.08.2024)

[74] World Bank Group Support for Small and Medium Enterprises – A Synthesis of Evaluative Findings, World Bank Group, 2019, p. 2. Available at: https://openknowledge.worldbank.org/server/api/core/bitstreams/fde31bad-5fd9-562d-a409-4713f4932b56/content (Last accessed 23.08.2024)

position, which would grant them the bargaining power that large companies tend to have.[75] This leaves SMEs in a more vulnerable position as compared to their larger peers, including here vulnerability to political risk. Considering that ISDS has been developed as a tool to address disputes arising principally out of political risk, it may be argued that SMEs are more in need of this dispute settlement mechanism than larger enterprises.

Thus, when it comes to breaking up SMEs into its parts, the details are quite revealing. Due to the costs involved, Daniel Behn contended that claims of less than $5 million were "unfeasible."[76] This is in line with the observation made by the European Commission, which observed that micro-enterprises are "practically deprived from this dispute resolution route, given the average costs."[77]

Of the above definitions for SMEs, it is probably best to stick to the ones used by international organisation such as the World Bank Group. However, it is also clear that no matter the definition used, analysing the issue of *SMIs' access to ISDS* is rather a matter of principle than precision: the current ISDS system, dominated by ISA, appears to be accessible only to larger investors. While empirical research in which one threshold, or definition, is chosen over another, may reveal the various nuances to such an affirmation, this asymmetry in accessing justice through ISDS will remain a challenge to be solved.

In unravelling the intricacies of investor-state arbitration, the clarity afforded by the cited definitions for small and medium-sized enterprises, and their role in delineating the various categories of enterprises is undeniable. The empirical research subsequently cited is highly revealing itself. Nevertheless, the crux of the matter lies in the challenge arising from the inadequacy of publicly available data that could reveal the actual size of the investor itself. While the size of the submitted claim might hint at the scale of the investment, it remains a flawed approach, susceptible to misinterpretation if, for example, the investor is affiliated with a larger conglomerate. There is a wide range of variables that can easily derail any theorising based upon a particular case. This inherent uncertainty highlights the necessity for a qualitative approach to this research, rather than a quantitative empirical assessment.

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[75] *Ibidem*.

[76] Daniel Behn, Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art, Georgetown Journal of International Law, 46(2), 2015, p. 386.

[77] European Commission, Commission Staff Working Document, Impact Assessment, Multilateral reform of investment dispute resolution, SWD(2017) 302 final, Brussels, 13.09.2017, p. 15.

While small claims in the above sense are surely brought, the issue of SMIs' access to ISDS persists. It is definitely more difficult to empirically analyse the number of cases brought by vulnerable claimants. But some of the above cited data does not suggest, nor was it meant to suggest that access to ISDS is actually not a challenge for SMIs. It is from a qualitative perspective that further issues are identified, and further solutions should be sought. This research proposes to answer both the *why* and the *how* of this matter, by analysing rules, regulations, jurisprudence, and recent proposals that have been put forward, in an attempt to get closer to answering the questions *do* and *should* SMIs have access to ISDS?

## 2.6. The importance of SMIs' access to justice

### 2.6.1. The concept of access to justice

Access to justice is a *sine qua non* element of the rule of law, without which rights and freedoms cannot be properly protected and enforced. Legal literature attributes three principal meanings to the concept of access to justice.[78] It is typically used to express the possibility of bringing a claim before a court and having a court adjudicate it. It is also described as the right to having one's case heard and adjudicated in accordance with substantive standards of fairness and justice, thereby actually constituting a standard of review. Finally, in a narrower sense, access to justice is used to describe the right to legal assistance for those in need who, because of their material situation, would not be able to appear in front of a court or tribunal. Thus, this last mode of interpreting access to justice relates to solutions being sought out to limit the effects of, or overcome factors that, have a prohibitive effect on the equality of rights and freedoms.

Regarding the matter of investment arbitration as a means of access to justice, two further questions merit exploration. One relates to the concept of justice: how do we define it, or when is it achieved? The other one relates to the matter of access: addressing the various barriers that might prevent those in need of effectively utilising a system that is meant to resolve disputes and enforce their rights. Of course, the principal point of view for exploring this matter is that of international law.

[78] See Francesco Francioni, The Rights of Access to Justice under Customary International Law, in: Francesco Francioni (ed.): Access to Justice as a Human Right, Oxford University Press, New York, (2007), pp. 64–65.

In customary international law the principle of access to justice is an integral part of the minimum standard of treatment reserved to aliens. According to Francesco Francioni, "[t]his is confirmed by a customary rule which requires the prior exhaustion of local remedies as a precondition of diplomatic protection." Exhausting local remedies requires access to courts be granted to aliens and the administration of justice be ensured in accordance with "minimum standards of fairness and due process." However, in accordance with this standard, the right of access to justice only extended to local courts or administrative agencies in the host state, pursuant to its domestic laws. This standard did not produce rights in terms of international procedure.[79] Failing to provide adequate protection under this standard left the foreign investor with the possibility of lobbying their home state to exercise diplomatic espousal in order to extend protection to the investor's interests abroad. This basically meant that investor protection under customary international law was ensured through the principles of diplomatic protection and state responsibility.[80] This, of course, is a more cumbersome way to protect investors, in which home states had to consider their own wider interests before entering into complex discussions with the host state concerning the economic interests of private entities. When interests converged, it would not be uncommon for the military to get involved, in what is called *gunboat diplomacy*. In the case of smaller stakes, or lower value investments, investors would have arguably had a more difficult time convincing their home state to engage in state-to-state dispute settlement in their interest.[81]

Investment protection which relied on the courts of host states and the diplomatic protection of home states did not promise adequate results. In the legalistic post-World War II period a new system had to be devised. International trade started out on a multilateral path through the adoption of the General Agreement on Tariffs and Trade ("GATT") in 1947. But a multilateral system for the protection of foreign investment did not muster enough support. Instead, a system principally made up of bilateral investment treaties, but also plurilateral or regional treaties, constitutes the web of protection of investments abroad. These treaties are mostly based on the agreement proposal put forward by the International Chamber of Commerce ("ICC"), and the so-called Abs-Shawcross Draft Convention on Investments Abroad. The main goal at that time was to ensure that

[79] Francesco Francioni, Access to Justice, Denial of Justice and International Investment Law, The European Journal of International Law Vol. 20 no. 3, 2009, p. 731.
[80] Muthucumaraswamy Sornarajah, The International Law on Foreign Investment, Fifth Edition, Cambridge University Press, Cambridge, New York, 2021, (ebook) Chapter 1.1.1.
[81] UNCTAD, World Investment Report 2015, Reforming International Investment Governance, United Nations, Geneva, 2015, p. 153.

developing countries' demand for capital was met with the *appropriate* protection of foreign property, so that this demand could be met by private capital—as opposed to publicly sourced capital, usually given through foreign aid and government loans.[82] The mentioned Draft Convention was used as a model in the first ever bilateral investment treaty ("BIT") entered into by two states with the express aim of ensuring the protection of private foreign capital.[83] Bilateral investment treaties were created in order to guarantee a reasonable level of protection that pertains to rule-of-law states, also referred to as a minimum standard of economic constitutionalism.[84] The large number of such treaties make up the seemingly convoluted system for the protection of foreign direct investments, with over three thousand having been signed until present day.[85] The importance of these international agreements lies in the fact that they grant the possibility for the foreign investor to initiate proceedings directly against the host state, most often, without having to go through the domestic courts of the host state, without the requirement to exhaust local remedies, and without the need to petition or lobby their home state to seek diplomatic protection.[86]

It must be observed that the different methods of resolving disputes arising out of the violation of the interests of foreign investors will continue to be present. Accordingly, access to ISA, which is probably the more widely used form for ISDS, is presented as an option, rather than an obligation. In this sense, it is very much different from an arbitration clause in a contract, which obliges parties to go to arbitration. Instead, it may be argued that in case an investor cannot afford to go to arbitration, it would still have other options at its disposal, and the principle of access to justice would not suffer injury. However, such a line of thought would involve accepting that all manners of access to dispute settlement are equal, which then poses the difficult question whether ISA in its current form is really needed. It would also mean that ISA, a system that arguably ended up becoming the privilege of larger enterprises, is acceptable in its current form.

The classic argument behind the reason for the existence of ISA is the need for a direct means of dispute resolution, bypassing host state courts and diplomatic protection, in which

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[82] See Georg Schwarzenberger, The Abs-Shawcross Draft Convention on Investments Abroad, Current Legal Problems, Volume 14, Issue 1, 1961, pp. 213–214.
[83] The 1959 Federal Republic of Germany–Pakistan Bilateral Investment Treaty.
[84] Csongor István Nagy: "*There is nothing in a caterpillar that tells you it is going to be a butterfly": proposal for the reconceptualization of international investment protection law.* Georgetown Journal of International Law, Vol. 51, 2020, p. 898.
[85] For precise numbers see the International Investment Agreements Navigator of UNCTAD: https://investmentpolicy.unctad.org/international-investment-agreements (Last accessed 23.08.2024)
[86] This does not mean that diplomacy is not employed in the 21st Century, but they are without a doubt less in number. See the case of Italy v. Cuba: https://www.italaw.com/cases/580 (Last accessed 23.08.2024)

foreign investors are treated fairly and on equal footing with the host state, without raising doubts as to their impartiality, and capacity to be objective.[87] An impartial system through which investors can directly seek legal remedy in case non-commercial risk occurs which jeopardises the investment is most welcome. The fact that international arbitration became the principal instrument of ISDS has to do with features inherent to the functioning of international arbitration: the fact that such systems are able to guarantee the impartiality and independence needed for effective access to justice to be accomplished. Part and parcel of this is the process of selecting arbitrators, which is more likely to result in a tribunal that is able to adequately apply the substantive protection standards included in the IIAs, and appears to be adequately impartial.

This remedy, granted exclusively and specifically to foreign investors in cases where their home state and the state hosting the investment entered into an international agreement granting this possibility, is quite remarkable. As also noted by a tribunal regarding the dispute resolution provision in the Energy Charter Treaty: "Article 26 of the ECT provides to a covered investor an almost unprecedented remedy for its claims against a host state." The tribunal continues by stating that "[b]y any standards, Article 26 is a very important feature of the ECT which is itself a very significant treaty for investors, marking another step in their transition from objects to subjects of international law."[88] According to this, by granting foreign investors access to independent arbitral tribunals to initiate proceedings directly against the host state, investors effectively become subjects of international law. Access to investor-state arbitration consequently elevates the investor to a position that was previously, as a rule, reserved exclusively for states.[89] Indeed, it was remarked by the *founding father* of ICSID, Aron Broches, "[t]his capacity of individuals to appear with States on a footing of equality before international conciliation commissions and arbitral tribunals is a further recognition of the status of the individual as a subject of international law."[90]

As previously noted, access to ISA does not constitute the sole means of providing access to justice for foreign investors. There are other elements or avenues that contribute to the overall concept of justice for foreign investors, but arbitration is the one that principally comes under

[87] Christoph Schreuer, Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration, The Law and Practice of International Courts and Tribunals 4(1), 2005, p. 1.
[88] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24. Decision on Jurisdiction, para. 141.
[89] Carmen E. Pavel, Law Beyond the State: Dynamic Coordination, State Consent and Binding International Law. OUP, 2021. pp. 101–102.
[90] Aron Broches, Convention on the settlement of investment disputes: Some observations on jurisdiction, Columbia Journal of Transnational Law, 5(2), 1966, p. 265.

scrutiny in the current research, as it is the avenue that is seemingly open to all, but in fact it seems to only be accessible for the larger few.

### 2.6.2. Investor-State Arbitration as Access to Justice

The topic of investor-state dispute settlement attracts much attention, for reasons spanning from the magnitude of claims investors sometimes celebratorily announce, to the curious nature of the construct itself, which opponents often hang on to in their criticism dubbing it *private justice*. It must be noted that ISDS, and its most often criticised means, which is ISA, can only take place if the host state agreed to resolve disputes in this way. The adherence to such a form of dispute resolution regularly happens via three avenues: domestic law pertaining to foreign investments which contains an appropriate provision,[91] investment contracts with a compromissory clause pointing to ISA, and international investment agreements.[92]

Arbitration, it may be argued, holds the lot of the classic elements of access to justice associated with courts, such as independence, impartiality, fairness, and enforceability. These are some of the elements that dispute parties will surely seek, and that are commonly regarded as components of access to justice. However, not everyone is in agreement that arbitration ensures the same level of access to justice as courts do. In the opinion of Leonardo V. P. de Oliveira, the simple transfer of elements of access to justice from courts to arbitral tribunals is not sufficient. He argues that elements of procedural justice such as "judicial protection, impartiality, guarantee of court instances and respect for previously formed precedents" could not be met by arbitration simply because of its private nature.[93]

Access to investment arbitration does not limit the rights of investors to access the courts of the host state, which represents the traditional medium of access to justice when this principle is considered within a constitutional framework. Consequently, foreign investors have the right to

[91] A broad empirical analysis on the topic of domestic laws on foreign investment containing reference to investor-state arbitration shows that of the 74 laws examined 42 contained such a provision. See: Tarald Laudal Berge, Taylor St John, Asymmetric diffusion: World Bank 'best practice' and the spread of arbitration in national investment law, Review of International Political Economy 28(3), 2021, pp. 584–610.

[92] For a detailed analysis of all three see Jeswald Salacuse, The Three Laws of International Investment, Oxford University Press, Oxford, 2013.

[93] Leonardo V.P. de Oliveira, To What Degree Should Access to Justice Be Secured in Arbitration? In: Leonardo V.P. de Oliveira, Sara Hourani (eds.) Access to Justice in Arbitration, Kluwer Law International, Alphen aan den Rijn, 2021 (e-book), p. 52, citing also Jaunius Gumbis, Miglė Pekevičienė, Application of selected elements of procedural justice in arbitration, in Marianne Roth, Michael Geistlinger (eds.): Yearbook of International Arbitration and ADR vol. V. Neuer Wissentschaftlicher Verlag, 2017, p. 43.

choose between going to court or lodging an investment arbitration claim, or even doing both.[94] There is a case to be made that the special avenue of access to justice via ISA is imbalanced, as it is only made available to foreign investors, while domestic investors would only have recourse to the domestic courts. But the ISDS regime was expressly developed to protect the rights of foreign investors, a category which, because of the foreignness, may find themselves in a more vulnerable position. Continuing, it may also be stated that while access to arbitration, in a sense, provides access to justice, declining access to arbitration does not necessarily mean that the right of access to justice is violated. It may appear unfounded to affirm that lack of access to investment arbitration equates to a situation of denial of justice, when addressing the matter through the lens of the foreign investor. Access to justice often appears as a counterpart to the issue of denial of justice. Article 9 of the Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners Prepared by Harvard Law School (1929) stated the following regarding denial of justice:

> "denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice."[95]

This notwithstanding, the system of ISDS was set up in a way that the role of the state was reduced to negotiating the IIA, with distrust of host states' courts excluding, to a large degree, any role of such courts in resolving disputes brought by foreign investors.

It has also been noted in legal scholarship that denial of justice, as a concept, now goes beyond the refusal of access to courts and includes also manifestly unjust decisions, or

[94] It must be mentioned that some international investment agreements contain so-called *fork-in-the-road* clauses which prevent claimants from initiating simultaneous proceedings before domestic courts, as well as international arbitral tribunals, essentially requiring them to choose one. For more details, see Sergiy A. Voitovich, Fork in the Road in Investment Disputes, Indian Journal of Arbitration Law, 9(1), 2020, pp. 39–59.

[95] Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners Prepared by Harvard Law School (1929), available at: https://jusmundi.com/en/document/rule/en-draft-convention-on-responsibility-of-states-for-damage-done-in-their-territory-to-the-person-or-property-of-foreigners-prepared-by-harvard-law-school-1929-draft-convention-on-responsibility-of-states-for-damage-done-in-their-territory-to-the-person-or-property-of-foreigners-1929 (Last accessed 01.03.2024)

governmental interference with the administration of justice.[96] An important part of the reasoning behind granting foreign investors direct recourse against states for the occurrence of non-commercial risk affecting their investment is largely that of avoiding unjust decisions, avoiding a potential lack of impartiality, or the possible government interference with domestic courts. ISDS was put in place so that foreign investors would avoid the risk of confronting a situation of denial of justice in both the narrower and the broader sense. In addition, the discourse regarding the need for ISA often contains arguments about the potential for corruption, the issue of the inefficiency of courts, and their lengthy proceedings. Lastly, there is also the argument that there are certain limitations within domestic legal systems regarding the access of foreigners to certain procedures, which can be found not only in developing countries, but also in developed countries' systems.[97] From the above we may observer the emergence of a framework illustrating the reasons why the expectations shifted from avoiding the narrower denial of justice, to that of providing a fair and efficient system of justice. It is not enough to abide by a general obligation not to deny justice, but it becomes necessary to provide effective means of asserting claims and enforcing rights.[98] Which is what the ISDS system is supposed to offer.

While the standard of access to justice was made part of the first ever IIA signed between the Federal Republic of Germany and Pakistan in 1959, it only stated that investors would have a right of "free access to courts."[99] IIAs have since evolved. Some IIAs include the obligation to provide guarantees for access to justice as part of their substantive norms, or as part of the host state's obligation to provide fair and equitable treatment. An example of this is the 2012 US Model BIT which in Article 5(2) expressly states that fair and equitable treatment includes the obligation *not to deny justice*.[100] In this sense, an investor encountering a case of denial of justice may turn to ISA claiming a violation of the fair and equitable treatment standard.[101] This notwithstanding,

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[96] Mavluda Sattorova, Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct. The international and Comparative Law Quarterly 61(1), 2012, p. 225.

[97] Stephan W. Schill, In Defense of International Investment Law, in Marc Bungenberg et. al. (eds.), European Yearbook of International Economic Law 2016, Springer, Switzerland, 2016, pp. 315–316.

[98] Sattorova, *op. cit.*, p. 236.

[99] Pakistan and the Federal Republic of Germany. Treaty for the Promotion and Protection of Investments, 1959, at Protocol (1).

[100] Similar provisions may be found in the United States-Mexico-Canada Agreement (USMCA), Article 14.6; Comprehensive and Progressive Agreement of Trans-Pacific Partnership (CPTPP), Article 9.6; CETA, Article 8.10.5.; EU–Singapore IPA, Article 2.4.2.; Oman-Hungary BIT, Article 2(3)(a).

[101] In the case Azinian v. Mexico, it was retained that: "A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way." But denial of justice also occurs when there is a "clear and malicious misapplication of the law." See Robert Azinian,

it must be noted once again that the prohibition of denial of justice appears as narrower than a treaty obligation to provide effective means which encompass access to justice.[102]

Alternative dispute resolution mechanisms are founded on notions of greater access to justice, where parties are able to choose the best means for resolving their disputes. However, this is conditioned by the existence of a well-functioning legal system governed by the rule of law.[103] Considering that from the viewpoint of foreign investors the possibility of *choosing the best means* may not exist, providing access to ISA may be the only guarantee of having proper access to justice. According to Jan Paulsson, ISA and indeed ISDS in general, based on investment treaties or contracts, is a *new* jurisdictional foundation.[104] Consequently, it may be argued that is not actually a matter of whether or not access to ISA can be equated to access to justice, but that ISA is a *new* measure of access to justice.[105] In this sense, ISA is meant to *enhance* access to justice. According to Stephan W. Schill, "ISDS responds to the fundamental rule of law postulate found in international human rights law and many domestic constitutions that government action must be reviewable as to its legality by independent and impartial adjudicatory institutions [citations omitted]." In his view this makes ISDS a form of granting access to justice, which serves to ensure the compliance of states with their obligations under IIAs.[106]

As a conclusion, investor-state arbitration should be regarded as another dimension of access to justice, and, it may be argued, that it is the only genuine means of access to justice that foreign investors have when they incur non-commercial risk. The principal arguments for this consist in the principal features of ISA, especially that it provides for an impartial venue, and the enforceable awards.

### 2.6.3. SMI Access to Investor-State Arbitration

Kenneth Davitian, & Ellen Baca v. The United Mexican States, ICSID Case No. ARB (AF)/97/2, Award of 6 October 1999, paras. 102–103.

[102] Francioni, *op. cit.*, p. 731.

[103] John P. Gaffney, The Rule of Law and Alternatives to Investment Arbitration, European Investment Law and Arbitration Review Online, 1(1), 2016, p. 270.

[104] Jan Paulsson, The Public Interest in International Arbitration, American Society of International Law Proceedings 106, 2012, pp. 301–302.

[105] With the added observation, of course, that it has been around for a few decades now.

[106] Stephan W. Schill, In Defense of International Investment Law, in Marc Bungenberg et. al. (eds.), European Yearbook of International Economic Law 2016, Springer, Switzerland, 2016, p. 314.

There are three principal avenues to accessing ISA.[107] Two of them include the consent of the state that is given unilaterally, by affirming such right of access to arbitration via either a domestic law on foreign investments containing a provision that grants access to ISA, or via an international investment agreement that contains such a provision. In this way, the state basically makes a unilateral offer to arbitrate to certain (or all) foreign investors. The third avenue is via investment contracts that contain an ISDS clause.

Due to practical reasons, this third option may not present viable solutions for SMIs. The challenge of including dispute resolution clauses in contracts was noted quite early on:

> "The Soviets insist on arbitration before a Soviet arbitral body if it is at all possible to get it into a contract. However, this is a matter of a bargaining position. If the foreign corporation has a poor bargaining position, the Soviets will be more successful in achieving acceptance of Moscow arbitration, although if the Soviets have great need of a product offered by a corporation, they may agree to arbitration outside the Soviet Government's control."[108]

While domestic laws and IIAs may contain limitations regarding the size of the investor, such provisions have yet to be identified. The research engaged in during the writing of this thesis has not produced any evidence of express limitations of access to ISDS in terms of the size of the investment or that of the investor becoming a precondition to gaining *ius standi*. Consequently, these instruments continue to be important means for granting indiscriminate access to ISDS.

On the contrary, the third category of instruments, the investment contract, is essentially a contract through which an investor is given the chance to carve out any preferential treatment for itself. While there are no specific rules on this matter, it is evident that such contracts are usually entered into between states and larger economic actors. In this sense, it was correctly noted that "large-scale investment contracts have always contained arbitration, choice of law, stabilisation, or internationalisation clauses".[109] This is in effect the consequence of the large investor having a

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[107] Jeswald W. Salacuse, The Three Laws of International Investment – National, Contractual and International Frameworks for Foreign Capital, OUP, 2013.

[108] George Cochran Doub et al., The Settlement of Disputes by Arbitration, Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969), Vol. 55 April 27-29, 1961, p. 70.

[109] Stephan W. Schill, In Defense of International Investment Law, in Marc Bungenberg et al. (eds), European Yearbook of International Economic Law, Springer, 2016, p. 317. *Codigo organico de la produccion, comercio e inversiones* of Ecuador contains a provision (Article 16.2.) which essentially provides that for investment contracts of over US$10 million, the contracts should include a dispute resolution clause pointing to national or international arbitration.

better bargaining position. On the other side, smaller investments need "good rules and institutions to attract them en masse."[110] This basically translates into IIAs or domestic laws that provide appropriate substantive and procedural protection so that foreign investors that do not rely on a contractual relationship with the host state (or its subdivisions), including in this category especially SMIs, are provided with other options of access to justice besides that of domestic courts. The importance of BITs for SMIs was also noted in a 2009 study by UNCTAD: "It has been argued that while BITs may be of little relevance to large powerful TNCs able to secure a satisfactory protection of their interests in direct contracts with host country governments, they matter much more for smaller investors that cannot rely on such contracts. There is anecdotal evidence from a number of home countries that SMEs are particularly interested in BITs."[111]

Bargaining power is of course relative. In the case of large investments, one phenomenon that is often mentioned is that of "obsolescing bargains," which expresses the situation when an investor accumulates significant amounts of fixed assets within the host state, thereby making itself vulnerable to unfavourable decisions of the government. The concept is meant to express change in bargaining power.[112] A situation for which safeguards become necessary. This is remindful of another interesting debate that often is often only featured one-sidedly. Some scholars argue that the state has become powerless in front of the transnational corporation.[113] This is a view that is in line with a more critical approach towards multinational corporations, where such companies become the root of all evil, and the state is either a helpless victim, or a corrupt accomplice. Still, others have noted that "a sovereign country, no matter how small, is superior in status to a private business firm, no matter how large."[114] According to this, the state, wielding sovereignty, is all powerful and on its own territory may engage in any acts it deems necessary, regardless of the consequences. Of course, nothing exists in a vacuum: all actions have consequences. And while companies are not forced to rely on diplomatic protection from their home states, it is not unheard of that home states exercise some degree of influence on host states, favouring their own investors.

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[110] Perry S. Bechky, Microinvestment Disputes, in Thilo Rensmann (ed.), Small and Medium-Sized Enterprises in International Economic Law, OUP, 2017, p. 287.
[111] UNCTAD, The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries, United Nations, New York and Geneva, 2009, p. 52.
[112] J. W. Salacuse, op. cit., p. 27.
[113] Francesco Galgano, Globalizáció a jog tükrében, HVG Orac, Budapest, 2006.
[114] J. W. Salacuse, op. cit., p. 189. See *Id.* at p. 188, noting that "[m]ultinational corporations, while having a vast pool of capital and technology at their command, do not have these kinds of powers [referring to states' extensive privileges and immunities – author's note]. The result, as a senior executive at a giant global pharmaceutical company once said, is that even 'the smallest governments can jerk you around.'"

In a less conspiratorial note, the truth is somewhere in the middle: countries need investment, and investors need opportunities to expand. Consequently, both will be inclined to find mutually beneficial ways to cooperate. But international investment law and ISDS will be there to provide the rules and tools for when harmonious cooperation ceases to be a priority.

This line of thought is also familiar when considering the principal rationale for establishing ICSID. The advantage of size in terms of granting companies a better bargaining position was expressly highlighted during negotiations. In this regard, the negotiation history of ICSID mentions that "some investors, mostly large corporations […] have been able to negotiate arbitration agreements with host Governments."[115] It also underlines the fact that "only a few investors can be in a position to negotiate such agreements",[116] alluding to the fact that most investors, especially small and medium-sized investors, who do not have such an advantage in terms of bargaining power, are also most in need of protection.

The delegate of South Africa, Mr. Gould expressed his view that while the provision on jurisdiction (Section 2 of Article IV on Jurisdiction) was useful for major investments, "there was room for further consideration of the position of the smaller investor," as this category provided much of the foreign capital needed by developing countries.[117] Mr. Gould underlined the importance of granting access to arbitration to smaller investors.[118] The delegate of China, Mr. Tsai however affirmed that "[w]hat countries wished to attract were large investments."[119] These positions reflect the difference in the way in which delegates approached the topic of investment protection. Mr. Gould seemed more concerned with the situation that was developing during the time the negotiations were going on, while Mr. Tsai expressed a more future-oriented view. But these views also reflect a difference in terms of what delegates' priorities were for the soon-to-be established ICSID. The delegate of China evidently expressed a point of view that ISDS at ICSID should focus on larger investors, while others disagreed.

It may be assumed that having less of a pull, SMIs have less of a possibility to force states into negotiations, and thus to reach a possible settlement. The fact that SMIs tend to have a worse position when it comes to negotiating a settlement is demonstrated also by empirical evidence.

[115] History of ICSID, Vol. II-1, p. 1.
[116] History of ICSID, Vol. II-1, p. 2.
[117] History of ICSID, Vol. II-1, p. 405.
[118] Ibid.
[119] History of ICSID, Vol. II-1, p. 497.

One of the more important outcomes of a research published by the Center for Strategic and International Studies has to do with the fact that individuals and SMEs (companies with fewer than 500 employees according to their threshold, and using the US standard), appeared to reach a settlement "less often than other claims".[120] Another empirical study on the matter revealed that out of the 147 cases that were researched, cases in which large and extra-large MNEs were involved have been discontinued or settled at a higher rate, than those of SMEs. The author of the later paper, Daniel Behn, concluded that the reason for this is that SMEs are more rarely in a position to force a settlement.[121] These papers basically buttress the commonsensical assumption that larger investors are able to bring states to the negotiating table, while SMIs less so.

The fact that larger enterprises have a better bargaining position (which in itself does not preclude the necessity of initiating ISA proceedings), is an important observation not only in terms of the matter of gaining access to ISA, but also to other alternative dispute resolution methods. It may be concluded from the above that amicable (or negotiation-based) ISDS, such as mediation or conciliation, while theoretically a better solution for SMIs, especially in terms of the reduced costs, may be more difficult to attain as a consequence of their lesser bargaining position. The vulnerable position of SMIs which thusly unfolds comes into play in any question of ISDS where rules and regulations allow for the parties to decide on the application of different measures (as is the case in some of the new IIAs of the EU).

# CHAPTER 3 – IMPEDIMENTS TO ACCESSING ISDS

## 3.1. Questions of Jurisdiction as Potential Impediments to SMI Access to ISA

As a general rule, cases arising out of an investment are admissible to be heard in investment arbitration. The arbitral tribunal will hear arguments regarding admissibility,[122] which may also concern whether the case itself arises from an investment. While IIAs often contain provisions to determine what an investment is, who may benefit from protection under it, tribunals

[120] Scott Miller, Gregory N. Hicks, Investor-State Dispute Settlement – A Reality Check, Center for Strategic & International Studies, 2015, p. 10.
[121] Daniel Behn, Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art, Georgetown Journal of International Law 46(2), 2015, p. 385.
[122] Admissibility in investment arbitration is most often used in relation to matters concerning the tribunal's jurisdiction, but sometimes also with regard to the merits of the case. See Christer Söderlund, Elena Burova, Is there such a thing as admissibility in investment arbitration? ICSID Review Vol. 33 no. 2 (2018), pp. 525–559.

often also turn to arbitral case law to for more guidance. The outcomes are highly debated, not least because of their consequences from smaller investments.

Once an IIA establishes the possibility for engaging in ISDS in the form of ISA, theoretically, there is no impediment to accessing this means of dispute resolution. Most IIAs include provisions regarding ISDS which allow for a choice between amicable dispute resolution methods, such as consultation, negotiation or mediation. Sometimes they provide for such attempts at an amicable resolution of a dispute as a preliminary proceeding before turning to an adversarial dispute resolution method, which is regularly arbitration. When turning to arbitration, IIAs regularly provide a choice of submitting the dispute to either an ad-hoc tribunal or to ICSID, under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL), or the ICSID Arbitration Rules. Other venues may also be featured as options, such as the International Chamber of Commerce, the Vienna International Arbitration Center, or the Stockholm Chamber of Commerce. IIAs do not feature any minimum thresholds for submitting a case to arbitration, nor do they discriminate in any way as to the size of the investor in terms of granting them access to ISDS.[123]

As an institution established with the precise purpose of providing for ISDS, ICSID is one of the most utilised venues for investment arbitration. The ICSID Convention's Article 36 provides that a request for arbitration may be addressed by "[a]ny Contracting State or any national of a Contracting State." This means that, at least in theory, there is no restriction, a claimant can be a natural or legal person, as long as they have the necessary nationality. Matters of dual or multiple citizenship have come up as a potential matter of discussion as early as the Abs-Shawcross Draft Convention started being circulated.[124] However important this question may be, especially in terms of the effect of what is called round-tripping on jurisdiction, this matter falls outside of the focus of this research.

International investment agreements may regulate the sphere of those who are granted *ius standi* in arbitration, but generally it is the case that investors, or its shareholders, in principle, all have the right to initiate arbitral proceedings in the international investment protection system. Investments and investors come in many forms. When establishing jurisdiction, questions concerning the nationality of an investor, especially in cases of double or multiple nationalities

[123] No such provision was encountered in the consulted IIAs during this research.
[124] Schwarzenberger, *op. cit.*, p. 218.

might constitute a challenge. There is also the case of wholly or partly privately- or state-owned investments. Investors can be natural persons or legal persons, taking the shape of joint-stock companies, partnerships, limited liability companies etc. While these may all pose interesting questions for research, the focus of this thesis is that of the *size* of the investment, and its effects on accessing ISDS. While on the face of it there is no threshold in terms of size, there have been cases where the size, or the nature of the investment has posed an impediment in terms of accessing ISA. Which is why the next chapter attempts to define what an investment is, for the purposes of ISA, and what impediments it may face in gaining access to ISA, with a special view to SMEs.

## 3.2. Defining Investment – Treaties

### 3.2.1. ICSID Convention

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which entered into force in 1966, is the treaty which established the International Centre for Settlement of Investment Disputes. ICSID is the sole international institution which came into existence with the precise purpose of providing an institution where investor-state disputes could be settled.

ICSID tribunals have accepted jurisdiction over a wide variety of economic activities, including civil engineering and construction projects and activities involving hotels, hospital wards, fertilizer factories, housing units, cotton mills, aluminium smelters, cable TV systems, the production of plastic bottles and weapons, the exploration and distribution of natural resources, agricultural projects, investments in state bonds, or banking activities including loans.[125] The term *investment* is not defined within the ICSID Convention. This is the outcome of a deliberate decision was deliberate, with the underlying consideration of "[preserving] its integrity and flexibility and [allowing] for future progressive development of international law on the topic of investment."[126] This prompted numerous attempts from the part of arbitral tribunals to bridge the gap, which resulted in certain developments in the case law that have sometimes been followed by other tribunals, despite the lack of formal rules of *stare decisis*.[127]

[125] Christoph H. Schreuer – Loretta Malintoppi – August Reinisch – Anthony Sinclair: The ICSID Convention – A Commentary (Second Edition). Cambridge University Press, 2009. pp.125–128.
[126] Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, Award of 15 March 2022, para. 33.
[127] On *de facto stare decisis*, see: Lucy Reed, The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management, ICSID Review – Foreign Investment Law Journal, Vol. 25., Iss. 1., 2010.

At the time that the ICSID Convention was undergoing negotiation, there were debates regarding whether or not it would best sever the Convention's purposes to make it clear what types of disputes would have recourse to conciliation or arbitration under the auspices of the Centre.[128] Some proposals were put forward, but negotiators were not in agreement over them. A proposal was made to define the term in the following way: "'investment' means any contribution of money or other asset of economic value for an indefinite period or, if the period be defined, for not less than five years".[129] Further developing the meaning of the term, the Secretariat additionally suggested the following definition:

> "The term 'investment' means the acquisition of (i) property rights or contractual rights (including rights under a concession) for the establishment or in the conduct of an industrial, commercial, agricultural, financial or service enterprise; (ii) participations or shares in any such enterprise; or (iii) financial obligations of a public or private entity other than obligations arising out of short-term banking or credit facilities."[130]

In Paragraph 27 of the Report of the Executive Directors on the Convention for Settlement of Investment Disputes Between States and Nationals of other States of 18 March 1965, this decision is expressly referenced:

> "No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4))."[131]

However, attempts were made, as shown above, and as also noted in the commentary by Christoph Schreuer. At the time, Aron Broches did not find the proposed definitions as acceptable, and stated that although defining the term may be difficult, an investment was in fact *readily recognisable*. The above text was a compromise agreement in terms of what should appear in the Report, but it is revealed that attempts were in fact made, they were just not found to be suitable.[132]

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[128] History of ICSID, Vol. II-1, p. 54.
[129] History of ICSID, Vol. II-1, p. 623.
[130] History of ICSID, Vol. II-2, p. 844.
[131] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between State and Nationals of Other States, International Bank for Reconstruction and Development, March 18, 1965, para. 27, available at: https://icsid.worldbank.org/sites/default/files/Report_Executive_Directors.pdf (Last accessed 23.08.2024)
[132] Schill et al. (eds.), Schreuer's Commentary on the ICSID Convention, Third Edition, CUP, Cambridge, 2022, p. 157.

In any case, the lack of definition of the term *investment* must not be interpreted in the sense that anything may be considered an investment if the disputing parties agreed to it. Such an interpretation would overly extend the scope of the ICSID Convention. For this reason, a set of objective criteria were included in Article 25 of the Convention.

Chapter II of the ICSID Convention contains rules regarding the jurisdiction of the Centre. It begins with Article 25, the first paragraph of which reads as follows:

> "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. When the parties have given their consent, no party may withdraw its consent unilaterally."

In accordance with the so-called "double keyhole" approach or "double barrelled" test, in case ICSID is chosen for the settlement of the dispute, it must not only ensure that the rights in dispute constitute an investment under Article 25 of the ICSID Convention, but also under the provisions of the applicable IIA.[133] IIAs regularly have a wide approach to defining an investment, with none containing thresholds in terms of size. Neither does the ICSID Convention contain such a threshold.

The draft Convention presented to delegates discussing the establishment of ICSID did contain a limit set in terms of the amount of the claim. Specifically, Article IV. titled "Jurisdiction of the Center", in Section 1. Paragraph (3), contained the following: "Except as otherwise agreed between the parties, the Center shall not exercise jurisdiction in respect of disputes involving claims of less than the equivalent of one hundred thousand United States dollars determined as of the time of submission of the dispute." In the comment accompanying this section it was noted that this monetary limit on claims was introduced considering the fact that arbitration is "not an inexpensive procedure."[134] This double negative appears as quite the understatement in consideration of the time that has since passed, and the figures that have emerged as to the costs of investment arbitration. It is worth highlighting that the comment also added that "parties should

[133] In this regard, see Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, para. 44.
[134] History of ICSID, Vol. II-1, pp. 33–34.

not be forced to have resort to [arbitration] if the amount claimed remains below a certain limit," at that time set at US$100,000 *only* "for purposes of illustration".[135] It means that the proposal for a threshold was not one of a strong barrier to accessing ISA, but rather appeared as a recognition of the fact that arbitration under a certain value (which adjusted would be approximately US$1 million today) would be overly costly.

The subsequent discussions on this matter reveal interesting views shared by the delegates. The ideas expressed generally revolved around solutions for avoiding the burdening of the Center with *frivolous* or *insignificant* claims. In this regard, views were expressed in favour of limiting jurisdiction either by establishing a lower limit in terms of the value of the investment or that of the claim. Others suggested that such claims be avoided not by setting monetary value-based threshold, but by conditioning claims on the consent of either the Chairman of the Administrative Council, the Secretary General, or that of the investor's home state.[136]

During the discussions, the delegate from China Mr. Tsai expressed the view that the "Convention should also require a minimum amount of investment," and referred to the previous suggestion of setting this at US$100,000. He also argued that it would be more useful in terms of limiting the number of requests for arbitration if "a limit was set on the amount of the investment rather than on the value of the dispute."[137] The delegate from Israel, Mr. Heth expressed his view that there should be a limit to jurisdiction that would serve for the "elimination of insignificant matters," but did not agree that setting this limit in terms of a pecuniary value would best serve this purpose.[138] The Chairman did not agree with such a view, and preferred leaving it up to the signatory states whether they would want to limit the use of ICSID to exclude small investments. In his view, any attempt at defining limits to accessing ICSID would bear "serious difficulties," and should thus be left to the will of the signatories.[139] He later clarified that certain limitations would indeed be desirable, but expressly referred to the matter of "the size of the investments" as a limitation that should be left to the parties to determine.[140]

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[135] *Id.*
[136] History of ICSID, Vol. II-1, p. 567.
[137] History of ICSID, Vol. II-1, p. 497.
[138] History of ICSID, Vol. II-1, p. 498.
[139] The Chairman was not in favour of setting a minimum limit on jurisdiction, stating that "[i]f a country felt that it did not want to use the facilities of the Center for small investment, it could so state in advance." History of ICSID, Vol. II-1, p. 497.
[140] History of ICSID, Vol. II-1, p. 499.

Ultimately, just as the matter of defining the term investment, also the requirement of a minimum amount of the claim, or the suggested minimum amount of investment to be set as a threshold for gaining access to ICSID were dropped. While the ICSID Convention chose to use the term *investment* loosely, states entering into IIAs have often chosen to include some provisions that at least circumscribe this term, or make "what is an investment" more facile to recognise. For this reason, the next section will analyse some of the IIAs which contain such provisions and are susceptible of being interpreted as setting limits in terms of an investment's size.

The ICSID Convention does have this *outer limit*, however, which is a marker of the Centre's special purpose, that is not found in other arbitration rules. The Decision on Jurisdiction and Admissibility in the *Rompetrol v Romania* case also reflects this argument stating that "Article 25 [of the ICSID Convention] reflect objective 'outer limits' beyond which party consent would be ineffective."[141] According to the foremost commentary on the ICSID Convention, Article 25 should be viewed as settling *general jurisdiction*, as it "defines the objective range and outer limits of the Centre's competence as an international organization administering concrete dispute settlement proceedings."[142] This is in line with the *travaux preparatoires* which indicate that such provisions were not meant "to define the circumstances in which recourse to the facilities of the Center would in fact occur, but rather to indicate the outer limits within which the Center would have jurisdiction provided the parties' consent had been attained."[143]

In the case of the ICSID Additional Facility Rules, its provision in Article 2(a), according to Schreuer's Commentary, "should be given an independent meaning, namely one that corresponds in substance to how the notion of investment in Article 25(1) of the ICSID Convention is understood and applied."[144] In addition, the ICSID Additional Facility Rules may also be used in cases under Article 2(b), where the "transaction does not meet the requirements of an 'investment' under the Convention."[145] This hinges upon the approval of

[141] The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision on Jurisdiction and Admissibility, 18 April 2008, para. 80.
[142] Stephan W. Schill et al. (eds.), Schreuer's Commentary on the ICSID Convention, Third Edition, CUP, Cambridge, 2022, p. 99.
[143] History of the ICSID Convention, Volume II-1, p. 566.
[144] Schill et al., *op. cit.*, 2022, p. 263.
[145] Id., p. 264.

the Secretary General of ICSID, which an interested party should be able to obtain if its transaction is ”more than an ordinary commercial transaction.”[146]

### 3.2.2. International Investment Agreements

In addition to the discussions as to what constitutes an investment in accordance with Article 25(1) of the ICSID Convention, tribunals in ISA cases must also look at the instrument expressing consent to arbitration to see about its conditions, or possible limitations in terms of the characteristics of investments that would fall under the protection of the applicable agreement.

Beyond arbitration rules, however, definitions contained in IIAs can be highly varied, and may include numerous details. While most IIAs use the term loosely they tend to attach conditions to it, aiming to make clear what investments may benefit from their protection.

One of the most convoluted definitions found during this research is contained in the Model Text for the Indian Bilateral Investment Treaty. This model BIT focuses on the legality aspects of an investment. Similar to other IIAs, it does not establish objectively what an investment is, but what an economic activity must be in order to be considered an investment under the treaty. Consequently, an investment has to be constituted, organised and operated in compliance with the law of the host state, but it must also observe a number of obligations contained in the BIT, under Articles 9, 10, 11 and 12. These provisions contain lengthy enumerations on the obligation of the investor to refrain from acts of corruption, to disclose an inordinate amount of information, to pay their taxes, and to comply with all laws of the host state, including recognising the traditions and customs of local communities and indigenous peoples. Having such a convoluted and complex set of criteria is doubtful to be conducive to more foreign investment, as it may make it much easier for arguments to be put forward that a particular foreign investment should not enjoy the protections under such a BIT. Failing to abide by any of the requirements set out within it thus leads to a denial of benefits under the agreement. It is nevertheless noteworthy that even a model text containing such a detailed set of requirements for enjoying its protections, does not contain any provisions conditioning benefits on the size of the investment. Consequently, there is a

[146] Id, pp. 264–265.

willingness to extend treaty benefits to investors of any size, if they are able to respect all of the conditions that have only briefly been mentioned above. Considering the numerous conditions laid out in the model BIT, it may also be noted that for a smaller investor it would be much more challenging to take not and abide by all of them, making such lists of conditions perilous for this category of investors.

The Netherlands Model Investment Agreement (2019), in Article 1(a) circumscribes *investment* in quite broad terms: "every kind of asset that has the characteristics of an investment, which includes a certain duration, the commitment of capital or other resources, the expectation of gain or profit, and the assumption of risk." It then proceeds to enumerate in a non-exhaustive list the various forms an investment may take. However, the interesting provisions are those in Article 1(b), which state that an investor is "any legal person constituted under the law of that Contracting Party and *having substantial business activities* in the territory of that Contracting Party" [emphasis added]. It is noteworthy that the *substantial business activity* has to be met by the investor in its home state, and not in the territory of the host state. Consequently, it may be argued that the investment itself may be of a smaller size, but the investor must have substantial business activity in its home state. A more obvious interpretation of this provision points to the fact that the activity must be of considerable size. However, Article 1(c) contains a provision on what indicates that an investor has *substantive* business activity, which according to dictionary meaning is principally related to the *reality* of the business activity. This limitation, while at a first glance may appear to deal with matters of size, it actually has the main purpose of avoiding situations in which an investment is structured in a manner that serves the sole purpose of gaining the benefits of a certain IIA. Nevertheless, it may be somewhat confusing, as the model BIT uses both the word substantial and substantive. While *substantial* may be understood as being a reference to size, the use of the term *substantive* clarifies the fact that it is about having a properly built business in the host state, to exclude creative investors who structure their ventures through shell companies to gain the benefits of certain IIAs.

According to the Agreement between the United States of America, the United Mexican States, and Canada ("USMCA"), Article 14.1 "investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources,

the expectation of gain or profit, or the assumption of risk." This treaty text contains some indication that may assist in identifying an investment, but its non-exhaustive enumeration focuses on just a few characteristics. It does not include, for example the criterion of *duration*. Once again, there is no mention of any particular condition in terms of the size of the investment.

As a matter of treaty policy, the smarter choice may be to maintain IIAs' provisions concerning what constitutes an investment, more as a guidance, rather than a prescriptive guideline. Including a rigid set of criteria, thus denying benefits to certain investments, would not serve the larger purpose of these treaties, which is to promote investment by offering protection.

In addition to the provisions contained in BITs, and especially in lieu of such a definition in the ICSID Convention, arbitral tribunals have also made quite notable contributions to circumscribing what qualifies as an investment. Although there is a degree of consistency in tribunals' findings, there are also numerous nuances in the arbitral jurisprudence. The nature of the investment in a particular case, as may be expected, heavily affects the approach of the tribunal. Nonetheless, there was also ample debate on the same case, with arbitrators at times expressing different viewpoints regarding the very same facts. Some of these are presented in the subsections below.

### 3.2.3. Defining Investment – Developments in Jurisprudence

In establishing jurisdiction *ratione materiae*, the tribunal in *Mihaly v Sri Lanka* interpreted Article 25(1) of the ICSID Convention, stating that there are four requirements for establishing jurisdiction: first, that there is a dispute; second, that the dispute is a legal one; third, that the dispute arises directly and not indirectly out of an investment; and fourth, that there was an investment out of which a legal dispute has directly arisen.[147] However, it is still not precisely clear what is to be considered an investment. In this sense, another tribunal made a notorious attempt at giving a set of criteria for identifying an investment.

[147] Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, Award of 15 March 2022, para. 31.

The tribunal in the case *Salini v Morocco* interpreted Article 25(1) of the ICSID Convention identifying what in its view were some of the underlying elements that make up an *investment*. In what have since been called the *Salini criteria*, this tribunal noted the following in its attempt at describing the components of an investment:

> "The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction […]. In reading the Convention's preamble, one may add the contribution to the economic development of the host state of the investment as an additional condition.
>
> "In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here."[148]

Recalling that the tribunal highlighted the fact that the criteria noted in the *Salini v Morocco* case were to be analysed *globally*, Perry S. Bechky noted in his seminal work on the matter that later tribunals rather made use of these criteria as a four-part test.[149] This set of criteria, and this way of identifying an investment, dubbed as the *Salini test* has since been applied to analyse whether or not a Tribunal has jurisdiction in a particular case. However, not everyone is in agreement regarding their utility. While some contribution, a certain duration, and assuming a certain degree of risk appear as natural components of an investment, it is the last criterion that is debated. The fourth condition, which regards the contribution to the host State's development, may be interpreted in ways that could preclude smaller investments from accessing ICSID arbitration. The Salini tribunal itself ties this criterion to the special purpose that ICSID has been established to serve, as per its Preamble, which affirms that contracting states entered the ICSID agreement "[c]onsidering the need for international cooperation for *economic development*, and the role of private international investment therein" [emphasis added]. Arbitral tribunals frequently refer to this section of the Preamble. In CSOB v. Slovak Republic the tribunal, noted: "[t]his language permits an inference that an international transaction which contributes to cooperation designed to

[148] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, para. 52.
[149] Perry S. Bechky, Microinvestment Disputes, in Thilo Rensmann (ed.) Small and Medium-Sized Enterprises in International Economic Law, OUP, Oxford, 2017, p. 268.

promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention."[150] *Development* thus appears to be coded into the Convention, and some tribunals have used it as a foundation for setting an additional condition in order for jurisdiction to be retained.

Scholars, on the other hand, have warned that a "test that turns on the contribution to the host State's development should be treated with particular care".[151] The Salini test is considered by many as quite controversial. As is well documented, the ICSID Convention does not include a definition of investment, and much discussion and debate led to this choice in codification. Albeit this choice was rather driven by the inability to agree on a definition,[152] the emergence of a *test* to determine if an investment is *truly* an investment under the Convention, as well as its subsequent, often inflexible application, risks arbitrarily excluding certain business ventures from the jurisdiction of the Centre. A narrow interpretation of the Convention would contradict the spirit in which it was adopted, which expressly left room for contracting parties to determine if they would want to set any particular conditions for gaining access to it. For this reason, arbitral tribunals have considered that a more flexible and pragmatic approach is warranted in determining the meaning of investment, which may include the Salini test, but also all other relevant circumstances of the particular case as well.[153] In this spirit, according to one tribunal, even if it was demonstrated that a certain business venture failed to satisfy *any or all* of the Salini criteria, this would in itself not be sufficient for a decision denying jurisdiction.[154]

Despite the controversy regarding what qualifies as an investment, the foremost commentary on the ICSID Convention also references the Salini test, briefly introducing its parts: a contribution by the investor, a certain duration, the assumption of risk, and a contribution to host State development. While it does note that the contribution is a controversial requirement, the Commentary also highlights that these criteria circumscribe certain typical characteristics of the concept of investment under Article 25(1) of the ICSID Convention, but should not be elevated to

[150] Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, para. 64.
[151] Schill et al. (eds.), Schreuer's Commentary on the ICSID Convention, Third Edition, CUP, Cambridge, 2022, p. 192.
[152] Schill et al., op. cit., p. 101.
[153] See Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, paras. 310–317. Also, Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award on Jurisdiction, para. 91 *et seq*.
[154] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, para. 318.

jurisdictional requirements.[155] Such a conclusion may be warranted in consideration of some of the botched applications of the Salini test. A stiff-necked approach to the Salini criteria may leave smaller investors without access to ICSID arbitration, severely impacting their right of access to justice.

Such is the case of Joy Mining Machinery Ltd., which entered into an agreement with the General Organization for Industrial and Mining Projects of the Arab Republic of Egypt ("IMC"), valued at UK£13.3mn, later reduced to UK£9.6mn, seeking to install a so-called Longwall Mining System that would serve the extraction of phosphate.[156] The contracting parties faced issues from the beginning, which led to the adjustment of the initial agreement. The Claimant delivered part of the contract, and IMC paid for the equipment, but it refused to release the bank guarantees arguing that there were delays in commissioning and testing, which were not carried out. The Claimant did not deny this, but rather placed responsibility onto IMC, and rather than engaging in further negotiation, it lodged a claim on the basis of the UK–Egypt BIT of 1976. The Claimant argued that its contract was an investment protected by the BIT, and that the non-release of the bank guarantees was a violation of it. The Claimant alleged that the Respondent IMC took measures in respect of the bank guarantees that had an equivalent effect to expropriation. It also alleged that it was prevented from freely transferring funds, that it had faced discrimination, and that it was not accorded fair and equitable treatment and full protection and security. The Claimant requested damages be paid in the amount of UK£2.5mn plus interest and the full value of the bank guarantees if not released, an order that Egypt release any claims to the guarantees and pay arbitration costs and expenses. The Respondent raised three objections to jurisdiction, most importantly that the claim did not fulfil the requirements for it to be considered an investment. In the Respondent's view, the agreement between the parties was nothing more than an ordinary commercial contract for the supply of equipment. The Claimant argued that the contract was more than that, as it entailed the replacement of equipment, and the engineering, design and supply of a completely new Longwall system. It argued that the overall operation it was involved in should be accounted for as an investment.[157] Despite the numerous elements of the contract, the Tribunal

[155] Most notably, the word *controversial* is used in Schill et al., op. cit., p. 175. See also Christoph Schreuer et al., The ICSID Convention – A Commentary, Second Edition, CUP, Cambridge, 2009, p. 128.
[156] Joy Mining Case -- Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11.
[157] Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, paras. 31–40.

considered it to be nothing more than a contract for the supply of complex equipment.[158] Furthermore, the Tribunal opined that the bank guarantee was a contingent liability, rather than an asset, and thus was not an investment under the BIT.[159]

The Tribunal quickly went through the Salini test in one single paragraph, with the aim of distinguishing the object of the claim from what it considered an investment was supposed to be.[160] Despite the four-year presence of the Claimant[161] and the (minimum) ten-year obligation to produce and maintain spare parts on the contract,[162] the Tribunal argued that because the price was paid at an early stage, the duration of the commitment was "not particularly significant". This also made the regularity of profit and return a moot question in the Tribunal's view. In terms of risk assumed by the Claimant, the Tribunal likened it to the risks entailed in the case of any regular commercial contract. While it took note of the amount of the price and the bank guarantees, as well as that of the contribution to the development of the mining operation as being "relatively substantial", the Tribunal also noted that these constituted only "a small fraction of the Project". The Tribunal then added: "[c]ertainly there is nothing here to be compared with the concept of 'contrats de développement económique' or even contracts entailing the concession of public services."[163] Ticking the boxes one-by-one the Tribunal used the Salini test to buttress its decision that it lacked jurisdiction to hear the claim, as the claim did not rise out of an investment.

In another case, the Tribunal concluded that following the Salini criteria was not necessary due to the fact that the contracting states of the BIT included in it the requirements for what qualifies as an investment: "[i]nvestments are understood to have specific characteristics such as commitment of capital or other resources, or the expectation of gain or profit, or the assumption of risk."[164] The BIT provision is followed by a non-exhaustive illustration of what is included in the notion of investment under the treaty. While much of the Award in this case is redacted for confidentiality, brief unredacted snippets contain clues as to the reasoning of the Tribunal. It noted that even if an ordinary sale of goods contract meets the above criteria, it "does not automatically

[158] Id., para. 55.
[159] Id., paras. 44–45.
[160] Id., para. 57.
[161] Id., para. 40.
[162] Id., para. 37.
[163] Id., para. 57.
[164] Alois Schönberger v. Republic of Tajikistan, ICSID Case No. ARB(AF)/19/1, Award, para. 229. The Claimant maintained in its Request for Arbitration that its contract meets the Salini test for an investment, at paras. 32–33. A description that is very similar to the previously mentioned USMCA provision.

make it an investment transaction, i.e., an investment under the BIT."[165] The Tribunal opined that these criteria must be observed in conjunction with the "true nature" of the transaction.[166] On this basis, after having "carefully considered the nature" of the contracts, the Tribunal concluded that "they constitute[d] an ordinary purchase of goods transaction" and did not qualify as an investment protected under the BIT.[167] The dissenting arbitrator objected *inter alia* to the majority's focusing on the "true nature" of the transaction, without giving proper weight to the above-cited criteria for an investment contained in the BIT.[168]

One of the cases that holds much relevance to the research conducted herein, and may be viewed as quite controversial is *Malaysian Historical Salvors v Malaysia*.[169] The reason for which it is so interesting is that it gives ample opportunity to reflect on the meaning of the term *investment* under the ICSID Convention, from the perspective of a small claim. This case will also be used to separately analyse the elements of the Salini test, and reflect upon what these may entail for smaller investments.

The Claimant in this case, Malaysian Historical Salvors Sdn Bhd, a company incorporated in Malaysia by a national of the United Kingdom, Mr. Dorian Ball, had engaged in massive efforts to locate and salvage the cargo of a 19th Century ship called the Diana. The ship sank off the coast of Malaysia in the Strait of Malacca with 18 tons of cargo. The Claimant and Malaysia, the Respondent in the case, entered into a contract for this purpose on 3 August 1991.[170] Under this "no finds-no pay" contract, the Claimant had the obligation to use its expertise to salvage the cargo, assuming all obligations and risks in this regard. Under a second contract, the Claimant was to auction off the recovered items, with the proceeds it would receive being expressed in a percentage of the auction sale value.[171]

The salvage contract's initial duration was set at 18 months, but was subsequently extended by mutual consent, the operation taking nearly four years to complete.[172] The Claimant managed

[165] Ibid., para. 213.
[166] Idem.
[167] Ibid., para. 218.
[168] Alois Schönberger v. Republic of Tajikistan, ICSID Case No. ARB(AF)/19/1, Dissenting Opinion by Arbitrator Thomas Webster, paras. 23–24.
[169] Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10.
[170] Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on jurisdiction, paras. 2–7.
[171] Id., paras. 8–11.
[172] Id., para. 110.

to salvage around 24,000 items, which were subsequently sold for US$2.98 million.[173] The dispute arose out of the fact that the Respondent did not pay the Claimant in accordance with the contract.

Pursuant to the contract, the Claimant first turned to arbitration in Kuala Lumpur, but was not successful. Its subsequent appeal was also unsuccessful. The Claimant then turned to ICSID as an *ultima ratio* solution.[174] Upon submitting its claim, the Respondent retorted by contesting the jurisdiction of the tribunal formed under ICSID rules. The most noteworthy of the challenges posed by the Respondent, and most interesting from the point of view of this research, had to do with what constituted an investment under Article 25 of the ICSID Convention.

The Tribunal, constituted of a sole arbitrator, proceeded to apply a five pronged test to determine whether the salvage contract constituted an investment: (1) regularity of profit and return; (2) the investor's contribution to the host State; (3) duration of the contract; (4) assumption of risks; and (5) economic development of the host State.[175] The Tribunal ultimately decided that the salvage contract was not to be considered an investment for the purposes of the ICSID Convention, and in the below sections, its reasoning will serve as the backbone of the analysis of the Salini test.

As other tribunals before it, the tribunal in the case Malaysian Historical Salvors v Malaysia, also added an additional criterion to test, that of *regular profit and return*. In this regard, the tribunal was in agreement with the Claimant that there was a "regular and steady accretion of investment", stemming from the continuous salvaging of items. It concluded that *regular profit and returns* was not an essential characteristic of *investment*, and "the absence of this hallmark is immaterial".[176] In a sense, the tribunal chose to analyse this feature,[177] but it immediately admitted to being in an odd spot: the salvage contract, while it may have appeared to be one, was in fact not an *uno ictu* contract. This also constitutes a great example as to the way in which the complexity of business transactions is able to easily overwrite theoretical expectations.

The tribunal then turned to the well-known hallmarks, also contained in the Salini test.

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[173] Id., para. 13.
[174] Id., paras. 15–16.
[175] John P. Given, Malaysia Historical Salvors Revisited, 42(3) Loyola of Los Angeles International and Comparative Law Review, p. 349.
[176] Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on jurisdiction, para. 108. See also Given, op. cit., p. 349.
[177] Pursuant to the Commentary by Professor Christoph Schreuer, cf. Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on jurisdiction, para. 44.

### A. Contribution

Tribunals have acknowledged a diverse range of assets as eligible investments for satisfying the criterion for *contribution*. These contributions may encompass not only financial resources but also, as stated in prominent legal scholarship, anything possessing economic value, "such as know-how, management, equipment, material, personnel, labour, and services."[178] In a sense, by maintaining the will of the drafters of the ICSID Convention, a minimum value was not identified. However, arbitral jurisprudence reveals that contributions of a symbolic nature would not suffice.[179] This would be in line with the Latin adage *de minimis non curat lex*: the principle that the law is not concerned with minor matters.[180]

Regarding the test of contribution, the Tribunal in Malaysian Historical Salvors v Malaysia concluded that while the transaction was indeed small in size, it was sufficient to meet the requirement. Scholars noted that it was an odd remark to have the contract compared to infrastructure developments (as in the case from which the Salini test derives), as the tribunal has done.[181] The Tribunal also made an important remark noting that the contributions were "largely similar" to those under a commercial salvage contract.[182]

What is a contribution that may be considered as being symbolic would be determined on a case-by-case basis. In the case *Abaclat and others v. Argentina*, where multiple small claims were brought in a *mass claim*, regarding the Salini criteria, specifically that of the *contribution*, the Tribunal stated that if the Claimants' contributions "would not qualify as investment under Article 25 ICSID Convention," they would not be given protection under the ICSID Convention. The tribunal noted that such a conclusion would be contradictory to the Convention's aim. The Tribunal did "not see any merit in following and copying the *Salini* criteria" as they were never included in the ICSID Convention, and their application is controversial and varied. Instead, the Tribunal

[178] Rudolf Dolzer, Ursula Kriebaum, Christoph Schreuer, Principles of International Investment Law, Third Edition, OUP, Oxford, 2022, p. 92.
[179] Id. citing Mihaly v Sri Lanka, Award, 15 March 2002, para. 51; Mitchell v DR Congo, Award, 9 February 2004, Para. 56 and Decision on Annulment, 1 November 2006, para. 33; Pantechniki v Albania, Award, 30 July 2009, para. 45; Fakes v Turkey, Award, 14 July 2010, para. 112, fn. 73; Doutremepuich v Mauritius, Award on Jurisdiction, 23 August 2019, para. 126. See also Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire, ICSID Case No. ARB/03/08, Award of 10 January 2005, para. 14(i).
[180] See "De minimis non curat lex." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/de%20minimis%20non%20curat%20lex (Last accessed 23.08.2024)
[181] Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, para. 109. See also Given, op. cit., p. 350.
[182] Id., para. 109.

considered the intent behind the applicable BIT. It argued that the contribution in the form of purchase of security entitlements in Argentinean bonds constituted a contribution which created a value that was protected under the BIT, and qualified as an investment under Article 25 ICSID Convention.[183] While it may be viewed as an outlier due to the nature of the case, and the fact that the small investors brought their claim collectively, it would have been interesting to see how the claim of one single bondholder would have held up vis-à-vis this criterion of the Salini test.

The Tribunal in the LESI-DIPENTA case stated that "there can be no investment unless a portion of the contribution is made in the country concerned and brings with it economic value."[184] According to this, even a smaller investment should qualify for this criterion of *contribution*. Establishing physical presence, renting an office, employing some personnel and kick-starting commercial activity all involve expenses. Having these expenses overcome the status of being purely symbolic should also be considered in the light of the intention of the investor. If in a particular case the investor's expenses point to a genuine intention of making an investment, this criterion should be considered as having been fulfilled.

While the case Mihaly v. Sri Lanka was previously cited for its interpretation of what an investment was, the award in this case actually narrowed down the scope of what should be considered an investment. The tribunal ultimately decided that the pre-contractual expenditures of the claimant were not an investment within the meaning of Article 25(1) of the ICSID Convention.[185] But in deciding thusly, the tribunal made the observation that "the question whether an expenditure constitutes an investment or not is hardly to be governed by whether or not the expenditure is large or small."[186] It may be argued that in a sense the tribunal made an important note of the fact that it is not the size, but rather the nature of the business relations that are ultimately determinative as to whether or not there is an investment in a certain case. However, we have seen how a focus on the *nature* of the business may also result in a decision that is not favourable to the claimant.[187]

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[183] Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, paras. 362–367.
[184] Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire, ICSID Case No. ARB/03/08, Award of 10 January 2005, para. 14(i).
[185] Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, Award, paras. 60, 61.
[186] Id., para. 51.
[187] Alois Schönberger v. Republic of Tajikistan, ICSID Case No. ARB(AF)/19/1, Dissenting Opinion by Arbitrator Thomas Webster, paras. 23–24.

The Annulment Committee in Malaysian Historical Salvors v Malaysia did note expressly, once again reaching back to the negotiations on the ICSID Convention, that the drafters did not have any intention to exclude claimants advancing claims of minor financial dimension.[188]

### B. Duration

The distinction between an investment and a one-time transaction, such as a simple sale of goods, lies in the duration involved. Unlike a singular transaction, an investment typically spans a certain period, although, again, there is no consensus, no universally defined minimum duration. Certain complex sales contracts may also involve years of business involvement, but in some cases have ultimately fallen short of what the tribunal considered an investment should be.[189] Research into this matter reveals that some tribunals have suggested a minimum timeframe ranging from one to five years.[190] For construction cases, the duration of the contract itself was considered sufficient proof.[191]

When determining the duration of an investment, tribunals have previously considered various factors, including the time taken for tender processes, interruptions in work, renegotiation, extension maintenance, and the duration of a contractor's guarantee.[192] According to Rudolf Dolzer *et al.*, the primary consideration is the intended duration of the investment, which should not be affected by any premature termination that may occur.[193] As a consequence, it is argued that a

[188] Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, para. 82.
[189] See Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, para. 57.
[190] Dolzer, Kriebaum, Schreuer, op. cit., p. 93, citing RFCC v Morocco, Decision on Jurisdiction, 16 July 2001, para. 62; Salini v Morocco, Decision on Jurisdiction, 16 July 2001, para. 54; Jan de Nul v Egypt, Decision on Jurisdiction, 16 June 2006, paras. 93–95; Malaysian Historical Salvors v Malaysia, Award on Jurisdiction, 17 May 2007, paras. 110, 111.
[191] Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire, ICSID Case No. ARB/03/08, Award of 10 January 2005, para. 14(ii).
[192] Id. citing Bayindir v Pakistan, Decision on Jurisdiction, 14 November 2005, para. 133; Jan de Nul v Egypt, Decision on Jurisdiction, 16 June 2006, paras. 94, 95; LESI & ASTALDI v Algeria, Decision on Jurisdiction, 12 July 2006, para. 73(ii); Saipem v Bangladesh, Decision on Jurisdiction, 21 March 2007, paras. 101, 102; Toto v Lebanon, Decision on Jurisdiction, 11 September 2009, para. 86(c); Deutsche Bank v Sri Lanka, Award, 31 October 2012, para. 304.
[193] Dolzer, Kriebaum, Schreuer, op. cit., p. 93, citing ABCI v Tunisia, Decision on Jurisdiction, 18 February 2011, para. 62; Mason v Korea, Decision on Preliminary Objections, 22 December 2019, paras. 226–248; Adamakopoulos v Cyprus, Decision on Jurisdiction, 7 February 2020, para. 295.

short-term transaction cannot be classified as an investment only because there was an accidental delay in the sale of assets.[194]

The Tribunal in Malaysian Historical Salvors v Malaysia, analysing the salvage contract, chose to regard the fact that the salvage operation took four years, as satisfying the two to five years minimum length observed in the Salini case, but only in a quantitative sense. The Tribunal noted that the duration of the original contract, which was 18 months, and the fact that its subsequent extension was a *matter of fortuity*, meant that the duration test was not actually satisfied in a qualitative sense.[195] The Tribunal also tied its observation regarding the duration of the contract to the development criterion, stating that the salvage contract did no promote "the economy and the development of the host State as the criterion of duration is not satisfied in the qualitative sense envisaged by ICSID jurisprudence."[196] The combination of the development criterion with that of the duration is another twist that may unnecessarily imperil access to ICSID arbitration.

### C. Risk

Investment arbitration is often mentioned as a means of obtaining compensation that is due as a consequence of some form of political risk which has emerged, and caused harm to the interests of the investor. Venturing into a foreign country to establish an investment is inherently a risky endeavour. While commercial risk is a component of doing business, political risk should not be. This is the type of risk for which ISDS was devised. Rudolf Dolzer *et al.* argue that commercial, operational, and sovereign risk are all part of the typical features of an investment even though not all of them may materialize in every investment.[197] Jurisprudence also establishes that this criterion should not be interpreted restrictively so as to limit access to ICSID exclusively "to contracts containing a risk element, as in the case of insurance contracts, or […] certain loan contracts."[198] Consequently, the criterion of risk refers to the risk inherent to business ventures, whereby one may be outcompeted on the market.

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[194] Id. citing KT Asia v Kazakhstan, Award, 17 October 2013, paras. 207–216; Kim v Uzbekistan, Decision on Jurisdiction, 8 March 2017, paras. 340–343.
[195] Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on jurisdiction, paras. 110–111. See also Given, op. cit., p. 350.
[196] Id., para. 111
[197] Dolzer, Kriebaum, Schreuer, op. cit., p. 94.
[198] Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire, ICSID Case No. ARB/03/08, Award of 10 January 2005, para. 14(iii).

It is reasonable to assume that anyone would be interested in at least observing (if not owning) an investment in which there is no inherent risk involved. While this author's knowledge and experience is humble in this regard, it might still be safe to assume that such a venture has not yet been devised. In turning to questions that are more relevant to the greater topic at hand, it is quite evident that the risks faced by SMIs regarding their own ventures abroad, may expose them to losses that are able to immediately reveal the precarious situation they find themselves in. The cumbersome nature of recourse to investment arbitration adds a further risk in their case: that of not being able to recover their losses.

In analysing the matter of *risks assumed*, the tribunal in Malaysian Historical Salvors v Malaysia basically looked at the nature of the contract, and retained that the "no finds-no pay" type arrangement in the salvage contract (once again) only satisfied this hallmark in a quantitative, but not a qualitative sense. The tribunal opined that the risk assumed by the Claimant was a normal commercial risk inherent to such contracts.[199] In this context, it is difficult to understand what type of risk the tribunal would have expected to be assumed *qualitatively* by the investor.

### D. Contribution to development

The fourth part of the Salini test, also called the *development prong*, has also been the most controversial, as previously mentioned. The preamble of the ICSID Convention does indicate the role of investment in achieving economic development. In this regard, Schreuer's Commentary remarks the ICSID Convention's "object and purpose indicate that there should be some positive impact on development."[200] While all investment contributes to development, the magnitude of the contribution may be questioned, as has happened in some cases. Such an approach may be perilous in the case of smaller investments, risking the tribunal refusing jurisdiction.

It may easily be argued that any foreign direct investment brings a contribution to development: investing capital, bringing know-how, spurring competition, offering employment etc. Thus, the size of the investment should not have any bearing on this matter, as there is no minimum amount of contribution to development that is set as a condition. The fact that a contribution is made in accordance with the first criterion, this is made for a certain period and

[199] Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on jurisdiction, para. 112. See also Given, op. cit., p. 350.
[200] Schill et al., op. cit., p. 175.

with the assumption of a degree of risk, may already imply covering this fourth prong as well. What is more, if the size, or rather the significance of the contribution would be measured in context, in accordance with the size of the economy in which the investment is made, this would open up a whole new set of discussions and difficulties in determining access to ICSID. Going further along this line of thought, the difficulty of ascertaining whether or not a contribution to development has been made may become an increasingly difficult task. Scholars have noted that "an international transaction that is designed to promote the host State's development enjoys the presumption of being an investment. But it does not follow that an activity that does not obviously contribute to economic development must be excluded from the Convention's protection."[201]

The case from which the development prong originates does not contain a detailed analysis of what a contribution to the economic development of the host state should entail. In that case, the tribunal found it evident that there was a contribution to development, as the dispute arose in relation to the building of a highway. The construction of the highway served the public interest, and provided the host state with know-how, thus the contribution of this investment to the host country's economic development, the tribunal observed, "cannot seriously be questioned."[202]

Concerning the matter of a contribution to the economic development of the host state, the Tribunal in Malaysian Historical Salvors v Malaysia engaged in a lengthier analysis. The principal question addressed in relation to the matter of contribution to development was whether it had to be *significant* or not. The tribunal, while recognising that in some cases an analysis pertaining to the contribution's significance would be superfluous (mentioning the decisions in the Salini v Morocco and LESI-DIPENTA v Algeria cases), in the case at hand, it considered such an analysis as being pertinent. The tribunal cited the Bayindir case as providing the interpretation that this contribution may not in all cases be subsumed under the other hallmarks.[203] Considering that the other hallmarks were not only superficially fulfilled, the Tribunal considered it justified that this

[201] Schill et al., op. cit., pp. 186, 187, citing Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision on Jurisdiction, paras. 64, 88, 91.
[202] Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, para. 57.
[203] Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on jurisdiction, paras. 113–115. It must be noted that the tribunal in the case Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, had no qualms about using the Salini test at the request of the parties, see Award on Jurisdiction, para. 130 *et seq*. But it did note that the condition on development was *often* "already included in the three classical conditions set out in the 'Salini' test."

hallmark come under more strict scrutiny.[204] The *significance* of the contribution was thus brought up by the tribunal, and it was to be analysed together with the other hallmarks to determine whether or not the salvage contract was an investment, as it was not a "readily recognizable investment".[205] It considered that there is indeed a requirement of a "significant contribution to be made to the host State's economy."[206] The Tribunal ultimately decided that the salvage contract was not an investment within the meaning of Article 25(1) of the ICSID Convention.[207] In another case, just a few months after the decision in the Malaysian Historical Salvors case, a different tribunal also considered it necessary to examine if the investment met the requirements it "deemed necessary": "a contribution by the investor, a profitability risk, a significant duration and a substantial contribution to the State's economic development."[208] In a manner similar to that of the tribunal in the Salini case, this tribunal also considered this criterion to be met considering that the "project at hand is a major construction work that will facilitate land transportation (…) thus increas[ing] Lebanon's position as a transit country for goods from and to Middle East countries."[209] If we consider the Salini and Toto cases, the development criterion would be very difficult to fulfil in the case of smaller investments, as demonstrated by the tribunal in the Malaysian Historical Salvors case. It is also the case that, risk being inherent to investment, the business might not work out as expected, and the contribution thus would definitely be insignificant. One way out of this would be to consider this criterion in a flexible manner, and accept that all investment in a sense contribute to the development of the host country.[210]

Regarding these criteria, in the Mitchell v Congo case, which also concerns a smaller investment, the tribunal noted that the concept of investment does include "'smaller' investments of shorter duration, and with more limited benefit to the host State's economy".[211] In this case, the Claimant's property and staff were detained, the state effectively expropriating its law firm. The

[204] Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on jurisdiction, paras. 123, 124, 130. Given, op. cit., p. 350.
[205] Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on jurisdiction, para. 128.
[206] Id., para. 123.
[207] Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on jurisdiction, para. 146.
[208] Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, para. 86.
[209] Ibid.
[210] Some tribunals choose not to examine this at all. A case involving a relatively small investment where the Salini test was not applied is Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6.
[211] Mr. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Award, para. 56.

tribunal considered that this property, the resources and activities of the firm, qualified as an investment under the ICSID Convention and the applicable BIT.[212] Furthermore, the tribunal admitted that the law firm was an investment, regardless of it having the necessary permits to work as such under the law of the host state.[213]

The fact that a contribution had to be significant, and that the operations of what—by the size of the contract, and the number of employees[214]—may be considered a small enterprise, did not satisfy this criterion, creates uncertainty in terms of other small claims' admissibility. One of the more worrisome observations of the Tribunal in the Malaysian Historical Salvors case underlines this concern: "[w]ere there not the requirement of significance, any contract which enhances the Gross Domestic Product of an economy by any amount, however small, would qualify as an 'investment.'"[215] The Tribunal returns, however, and notes that "[i]t should not be thought that investments of relatively small cash sums can never amount to an 'investment'", proceeding to mention that an economic contribution to development may be made in the shape of human capital, or intellectual property rights.[216] This back-and-forth on what may or may not qualify as an investment, and under what conditions are certain criteria either relevant or less relevant, demonstrates the inner struggles this tribunal had in threading the needle on this matter. Ultimately, the Tribunal's view that the salvage contract was "merely a contract for services" rather than an *investment contract*, was joined by the aforementioned arguments in supporting the refusal to retain jurisdiction.[217]

Similarly, in the Mitchell v Congo case, the annulment committee considered it important to analyse the "parameter of contributing to the economic development of the host State", as has always been done, independent of the "agreements between parties or the relevant bilateral treaty."[218] The annulment committee proceeded to argue that the condition of contributing to the economic development of the host state did exist pursuant to the ICSID Convention's Preamble.[219] But then it also turned to the applicable Bilateral Treaty between the Democratic Republic of

[212] Id., para. 57.
[213] Id., para. 51.
[214] For number of employees see, Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, para. 133.
[215] Id., para. 123.
[216] Id., para. 139.
[217] Id., para. 137.
[218] Mr. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, para. 29.
[219] Id., paras. 30, 31.

Congo and the United States, citing its Preamble: "that agreement upon the treatment to be accorded to such investment will stimulate the flow of private capital and the economic development of both Parties."[220] The annulment committee then noted that this was a standard provision appearing in the 2004 United States Model BIT.[221] It viewed the existence of "a contribution to the economic development of the host State as an essential—although not sufficient—characteristic, or unquestionable criterion of the investment", but highlighted that this observation did not mean "that this contribution must always be sizable or successful".[222] However, the annulment committee considered that "a legal consulting firm [was a] somewhat uncommon operation from the standpoint of the concept of investment".[223] It also found that the Award was "tainted by a failure to state reasons" adequately, which "seriously [affected] the coherence of the reasoning as to the existence of an investment" under both the ICSID Convention and the US–Congo BIT.[224]

On the contrary, in the Malaysian Historical Salvors case, hearing arguments for the annulment of the award, the annulment committee was not in agreement with the approach of the tribunal in the award on jurisdiction. The Applicant (previously Claimant) took the opportunity to argue, *inter alia*, that the tribunal wrongly elevated the characteristic-based test for investment to the level of jurisdictional conditions, narrowing the meaning of *investment* in a manner that was inconsistent with the ICSID Convention's drafting history.[225] Analysing whether or not the salvage contract was an investment under the applicable BIT, it arrived at the conclusion that it was. Stressing its viewpoint the annulment committee stated that "[t]here is not room for another conclusion."[226] The annulment committee ultimately decided to annul the initial award on

[220] As cited in Mr. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, para. 32.
[221] Id. It must be noted that this provision is contained in the Preamble of the 2012 US Model BIT, and it is highly likely that it was there also in the 1984 US Model BIT, which coincides with the year that the BIT between the United States and the Democratic Republic of Congo was adopted, see: Treaty between the United States of America and the Republic of Zaire concerning the Reciprocal Encouragement and Protection of Investment, https://jusmundi.com/en/document/treaty/en-treaty-between-the-united-states-of-america-and-the-republic-of-zaire-concerning-the-reciprocal-encouragement-and-protection-of-investment-democratic-republic-of-the-congo-usa-bit-1984-friday-3rd-august-1984 (Last accessed: 23.08.2024)
[222] Mr. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, para. 33.
[223] Id., para. 39.
[224] Id., para. 41.
[225] Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, paras. 28, 29.
[226] Id., para. 61.

jurisdiction, arguing that the tribunal exceeded its powers by failing to exercise its properly invoked jurisdiction.[227] However, the Claimant did not file a subsequent claim at ICSID.[228] Considering the costs of such proceedings as against the value of the claim, it is doubtful that it would have been materially worthwhile for the Claimant to pursue yet another claim.

The thorough analysis engaged in by the annulment committee noted that the salvage contract involved intellectual property rights, and that the rights granted under the contract (to salvage the wreck) may be treated as a business concession, thus making it an investment.[229]

The tribunal in *Phoenix Action v Czechia* took issue with the fact that "the contribution of an international investment to the development of the host State is impossible to ascertain – the more so as there are highly diverging views on what constitutes 'development'." It rather recommended a less ambitious approach "centred on the contribution of an international investment to the economy of the host State," which it viewed as inherent to the concept of investment.[230] It added that this would be a presumption, which could in turn be reversed, especially in cases where there's no economic activity carried out.[231]

Still, another tribunal found issue with the fact that development was noted as a criterion for defining investment under the ICSID Convention, stating that development is actually not a requirement, but rather an expected consequence of an international investment.[232] This tribunal criticised both scholarship and arbitral practice which notes that the size of an investment should somehow play a role, stating that "small investments are covered by the ICSID Convention in the same way as large investments."[233] Making the case for interpreting words in terms of their ordinary meaning, the tribunal argued:

> "[a]n investment can be large or small, or it can be profitable or unprofitable, or it can contribute or not to the economic development of a country. All those propositions make sense and neither the size nor the profitability or the usefulness of investments are included in the ordinary meaning of the word."[234]

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[227] Id., para. 80. See also, Bechky, op. cit., p. 282.
[228] Given, op. cit., p. 353.
[229] Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, paras. 60, 61.
[230] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, para. 85.
[231] Id., para. 86.
[232] Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, para. 111.
[233] Id., para. 112, fn. 73.
[234] Ibidem.

The Decision on Annulment in the Malaysian Historic Salvors case had a dissenting opinion by Judge Mohamed Shahabuddeen, who basically agreed with the award on jurisdiction stating that the law was not to the effect that "an infinitesimally small development suffices to convert the whole outlay into an ICSID investment which is designed to foster the economic development of the host State".[235] The Judge considered that the award on jurisdiction correctly looked at the substance of the transaction and not just its form when it determined the law, referencing the Latin adage *ex re sed non ex nomine*.[236] In his view, the investigation conducted by the tribunal that handed down the award on jurisdiction was done in good faith, and considered that such a decision may arise from the fact that there are outer limits to an ICSID investment, and jurisdiction did not depend on consent alone.[237]

As noted during the drafting negotiations of the ICSID Convention, a Contracting State that prefers to limit the scope of the Centre's jurisdiction should be able to do so, and the Convention gives this opportunity by making the declaration provided for in Article 25(4). Alongside thusly declared limits, and in addition to the threshold posed by the ICSID Convention's Article 25(1) provision, the agreement expressing consent to arbitration may also include conditions as to what should be considered an investment. In the aforementioned Model Text for the Indian BIT, Article 12.2. contains provisions which resemble the development prong, mandating that investors and their investment strive to contribute to the development objectives of the host state. However, there is an important observation that this contribution be made via *management policies and practices* that recognise the rights, traditions and customs of locals. In comparison with such a requirement of contribution to development, an *economic* contribution to development, or *a contribution to the economy*, may seem easier to determine. It is important to observe that while these limits may be imposed, the minimum requirement contained in the ICSID Convention, may not be *agreed away*. Thus, the jurisdiction of ICSID cannot be opened "to any operation" parties to an agreement "might arbitrarily qualify as an investment," the ICSID Convention thus having "supremacy over an agreement between the parties or a BIT."[238]

[235] Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Dissent Opinion of Judge Mohamed Shahabuddeen, para. 36.
[236] Ibid.
[237] Id., para. 5.
[238] Mr. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, para. 31.

In the LESI-DIPENTA case, the tribunal was called upon to decide whether or not the claim involved an investment under Article 25(1) of the ICSID Convention.[239] The tribunal, reacting to the invocation of the Salini and other similar cases that contain "fairly broadly, what can constitute an investment,"[240] stated that these decisions do not provide a clear guideline, but do provide some objective criteria that may be applied. While there is no *stare decisis* in arbitration, tribunals tend to follow jurisprudence in order to ensure that here is a degree of consistency within the system. Such consistency is necessary to ensure that such a dispute resolution system continues to be perceived as a legitimate one. The tribunal in the LESI-DIPENTA case enumerated three conditions that an investment has to fulfil in order to be considered as such in accordance with the ICSID Convention: "a) the contracting party has made contributions in the host country; b) those contributions had a certain duration; and c) they involved some risks for the contributor."[241] These three criteria match with the first three of the Salini criteria. The tribunal apparently dismissed the *development prong* noting that "it is not necessary that the investment contribute more specifically to the host country's economic development, something that is difficult to ascertain and that is implicitly covered by the other three criteria."[242] Nevertheless, the tribunal did reiterate the development prong when analysing the matter of *duration*, stating: "[i]n order to speak of an investment in the meaning of the Convention, there must be economic commitments of significant value, sufficient at least that one may agree that the operation is of a nature to promote the economy and development of the country concerned."[243]

In his seminal work examining the situation of microinvestments in ISDS, Perry S. Bechky reminds us at the very beginning of the "conscious rejection of proposals excluding small disputes and small investments from the Centre's reach."[244] Recalling the contents of the four-part test in the Salini v Morocco case, Perry S. Bechky proceeds to analyse the development prong through

[239] Consortium Groupement L.E.S.I.- DIPENTA v. République Algérienne démocratique et populaire, ICSID Case No. ARB/03/08, Award of 10 January 2005, para. 13.
[240] Id. invoking specifically: Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision on jurisdiction; Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision on jurisdiction; SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on jurisdiction; SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction.
[241] Consortium Groupement L.E.S.I.- DIPENTA v. République Algérienne démocratique et populaire, ICSID Case No. ARB/03/08, Award of 10 January 2005, para. 13(iv).
[242] Id.
[243] Id., para. 14(ii).
[244] Perry S. Bechky, Microinvestment Disputes, in Thilo Rensmann (ed.) Small and Medium-Sized Enterprises in International Economic Law, OUP, Oxford, 2017, p. 267.

the lens of microinvestments. He argues that the development prong essentially "imposes a backdoor size requirement that inhibits access to ICSID by micro-investors".[245] In the view of Perry S. Bechky, precluding small investors' access to ICSID actually harms its "ability to fulfil its objectives, including development promotion."[246] Reverting to the original idea behind interpreting the *contribution to development* as a condition for an investment in the light of the ICSID Convention's preamble, it is actually ICSID's contribution to development that it protects investors through a rule of law system—no matter their size.

### 3.3. Costs as an Impediment of SMI Access to ISA

A trusted instrument for the resolution of disputes between investors and states, the use of ISA has grown rapidly, especially starting with the beginning of the 2000s. The growth in complex, high value investments, was in part spurred by the opening of new markets in the 1990s. It is also the case that ISA by that time was already tried and tested, consolidating the position of arbitration as a trustworthy method of cross-border dispute resolution mechanism. Since then, ISA has grown massively.[247] In its position as the leading mechanism for the settling of investor-state disputes, arbitration is truly unrivalled. This, in spite of recurring concerns about escalating costs and delays, and eroding legitimacy, which prompted a series of reform efforts, that will be examined in due course herein.

All forms of dispute resolution implicate some costs. And it is also a recurring theme that arbitration presents advantages in terms of celerity and cost-effectiveness. For complex cases, however, these advantages are sometimes difficult to notice. As one keen observer stated, "[a]rbitration becomes a lottery of inconsistent and unpredictable results without some investment of the time and money required for a rigorous search for facts and law in which litigants receive a meaningful opportunity to present their case."[248] But a rigorous search for fact and law often

[245] Id., pp. 268, 283, 284.
[246] Id., p. 269.
[247] For statistics see United Nations Conference on Trade and Development (UNCTAD), Investment Dispute Settlement Navigator, available at https://investmentpolicy.unctad.org/investment-dispute-settlement (Last accessed 23.08.2024)
[248] William W. Park, Truth-Seeking in International Arbitration, in Wirth et al. (eds), The Search for "Truth" in Arbitration: Is Finding the Truth What Dispute Resolution is About?, ASA Special Series No. 35, Juris Net LLC, 2011, p. 3.

manifests itself in ways that are detrimental to overall duration of the proceedings, and often involve very high costs.

Duration and costs are usually strongly present alongside flexibility and expertise (or specialisation), as classic advantages of arbitration (at least over litigation). In recent years, professionals and scholars alike, have quite often qualified the time and costs arguments, by adding a brief disclaimer in the sense that this has become *less of an advantage, maybe*. In investor-state arbitration time and costs advantages might have never actually been present. The special nature of these dispute settlement cases, dealing fundamentally with public international law obligations, is seemingly incompatible with an expeditious and—consequently—inexpensive procedure. In terms of the measure to which its flexibility and specialization have actually managed to serve its good reputation, this matter has largely been addressed by the work done at UNCITRAL's Working Group III, where all criticism, in particular those related to the system's legitimacy, have been thoroughly dished out. The cost of proceedings is definitely one issue that damages the reputation of ISA. It was noted almost twenty years ago as constituting a particular problem "for the low-income countries, and for a few small companies, which cannot afford being represented by the most experienced and sophisticated law firms in the field, as claimants usually are."[249]

It is not only scholars that criticise ISA, but this deeply specialised field of international law has also at one point or another apparently piqued the interest of the public at large. Part of this were campaigns engaged in by civil society organisations criticising the negotiations on the Transatlantic Trade and Investment Partnership ("TTIP"), which ultimately failed to materialise as an agreement.[250] The European Commission took this opportunity (also after confidential documents regarding negotiation were leaked) to bring the matter of ISDS and investment protection in front of the general public in a 2014 public consultation, which reflected "huge scepticism against the ISDS instrument", as noted at the time.[251] The public consultation consisted

[249] Opening remarks by Secretary General of ICSID, Roberto Dañino, at symposium co-organised by ICSID, OECD and UNCTAD, titled Making the most of international investment agreements: A common agenda, p. 3. Available at: https://www.oecd.org/investment/internationalinvestmentagreements/36053800.pdf (Last accessed 23.08.2024)

[250] Opposed by wide campaigns such as those of the "STOP TTIP Alliance" movement, or the Transnational Institute. The latter published the highly critical report on ISDS titled "Profiting from injustice – How law firms, arbitrators and financiers are fuelling an investment arbitration boom" [Published by Corporate Europe Observatory and the Transnational Institute, Brussels/Amsterdam, 2012, and available at: https://www.tni.org/en/publication/profiting-from-injustice (Last accessed: 23.08.2024)]

[251] See European Commission Press Release, Report presented today: Consultation on investment protection in EU-US trade talks, Strasbourg, 13 January 2015. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_15_3201 (Last accessed 23.08.2024)

of an online form that anyone could fill out. The fact that 95% of the responses to the consultation were made by supporters of a particular civil society organisation, signalling the effective hijacking of the consultation,[252] was not considered relevant by the Commission.[253] Quite the opposite, the Commission basically interpreted the consultation's results as giving it a mandate to further pursue "the improvements [it] seeks to bring to the existing system."[254] This resulted in a concept paper published on 5 May 2015 titled "Investment in TTIP and beyond – the path for reform", which included *inter alia* the concept of an Investment Court.[255] The EU then proceeded to channel the improvements it sought into the reform process that was later initiated at UNCITRAL, announcing in 2017 its intention to start negotiations towards the creation of a multilateral investment court.[256] Part of this reform process is the reduction of costs and the improvement of SME access to ISDS, which will be addressed in more detail herein.

There is also a recurring interplay between time and costs, as if the two factors were inseparable.[257] Observing these two factors together may bring observers to the seemingly intuitive presumption that less time equals lower costs, while more time spent in arbitration translates into higher costs.[258] This presumption may be confirmed as a rule, especially by way of observation

[252] As noted in the press by Robin Emmott, Philip Blenkinsop, Exclusive: Online protest delays EU plan to resolve U.S. trade row, Reuters, 26 November 2014, available at https://www.reuters.com/article/us-eu-usa-trade-idUSKCN0JA0YA20141126/ (Last accessed 23.08.2024)

[253] Nowhere in the mentioned European Commission Press Release of 13 January 2015 were these facts mentioned.

[254] The Press Release notes: "The consultation questionnaire explained in detail the EU's approach on 12 issues concerning investment protection and ISDS in TTIP. The approach builds on the improvements the EU seeks to bring to the existing system."

[255] The concept paper cannot be accessed on the webpage of the European Commission, though it appears in a link at the end of the Press Release of 16 September 2015 "Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations". However, it is accessible via the website of the House of Representatives of the Netherlands: https://www.tweedekamer.nl/downloads/document?id=2015D17383 (Last accessed 23.08.2024)

[256] European Commission, Press Release, State of the Union 2017 – Trade Package: Commission unveils initiatives for a balanced and progressive trade policy, 14 September 2017, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_3182 (Last accessed 23.08.2024)

[257] See e. g. International Chamber of Commerce (ICC) Commission Report – Techniques for Controlling Time and Costs in Arbitration, March 2018, available at https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration/ (Last accessed 23.08.2024); or The London Court of International Arbitration (LCIA) Analysis on Costs and Duration: 2013-2016. https://www.lcia.org/News/lcia-releases-updated-costs-and-duration-analysis.aspx (Last accessed 23.08.2024); Time and costs are also addressed together by UNCITRAL Working Group III: Possible reform of investor-State dispute settlement (ISDS) — cost and duration. Document no. A/CN.9/WG.III/WP.153, 31 August 2018.

[258] This has been affirmed in one of the most comprehensive empirical studies on costs conducted by Professor Susan D. Franck. See Susan D. Franck, Arbitration Costs – Myths and Realities in Investment Treaty Arbitration, OUP, 2019, Chapter 4, pp. 136–137 and pp. 267–268. Regarding duration see Franck, op. cit., pp. 121–124, the author's research suggests that duration from submitting a claim to handing down the award is in the median 40 months, but also observes that over time the duration of proceedings tended to ebb and flow. Another empirical research on the matter demonstrates that there is an increase in recent years in the duration of the proceedings while costs have not been

that it only supports few exceptions.[259] As noted in the above quote by Professor Park, time and money need to be spent on arbitration in order to ensure that parties are able to present their case, the facts, the evidence, and make their arguments. In the case of investor-state arbitration the need for a *complete* arbitration is even more acute, due to the public interest which regularly underlie such cases.

Arbitration is often also said to be preferred due to the control parties retain over the proceedings, and the flexibility it affords to conduct a case in accordance with parties' agreement. One important consequence of such control (and flexibility) is that the disputing parties will ultimately foot the bill for all costs. Curious clients will surely inquire about this important aspect, and counsel will scramble to provide reliable information in the relentless pursuit of maintaining a good reputation.[260] Costs will surely constitute an important part in weighing the opportunity for lodging a case, economic considerations bearing much weight in this regard. Indeed, the 2006, 2015, and 2018 surveys done at the Queen Mary University London demonstrate that stakeholders have labelled costs as the worst characteristic of international arbitration.[261] In the complex and highly specialized ISA proceedings, numerous factors may extend the duration of the proceedings and add to their costs, especially the fact that the parties are debating matters of public interest. This translates into extended and expensive proceedings, in which the arbitrators and parties' representatives hash out all the details of the case, likely look at the evidence beyond what is necessary, go through great lengths to ascertain the facts, and pull out all possible tricks to finally arrive at *the truth*. Such truth-seeking really does require time and money.[262] Professor Susan D. Franck notes that discussing costs constitutes a "defining moment in [investment treaty arbitration], providing the opportunity to reflect norms about access to justice, equality of arms,

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shown conclusively to increase in a correlated manner. See Hodgson et al., Empirical Study: Costs, Damages and Duration in Investor-State Arbitration. British Institute of International and Comparative Law, Allen & Overy, 2021, p. 23. Available at: https://www.biicl.org/documents/136_isds-costs-damages-duration.pdf (Last accessed 23.08.2024).

[259] As argued by Bottini et al., Excessive Costs and Recoverability of Costs Awards in Investment Arbitration, 21 Journal of World Investment & Trade 2020, pp. 251–299, at p. 266.

[260] Indeed, in their attempts to provide reliable information, legal services providers have set up *cost calculators*, to give relevant estimates to anxious clients: https://www.international-arbitration-attorney.com/full-international-arbitration-cost-calculators/ (Last accessed 01.03.2024).

[261] Queen Mary University of London, School of International Arbitration–White & Case: 2018 International Arbitration Survey: The Evolution of International Arbitration, pp. 7-8.

[262] Park, op. cit., p. 2.

and procedural legitimacy."[263] The research conducted herein attempts to address precisely such questions.

Considering the importance of costs, and their effect on SMI access to ISA, the following chapters will delve into some detail regarding the various facets of *costs* in ISA.

### 3.3.1. Components of *Costs*

Arbitration costs, as a generalizing term, usually include all costs, fees and expenses that emerge throughout the duration of an arbitration. Scholars usually split these into two principal categories: parties' costs and tribunal costs.[264] Parties' costs, also referred to as legal costs, usually include fees and expenses related to legal representation, the hiring of experts, the bringing of evidence such as witnesses, and other related expenses. Tribunal costs, also referred to as costs of the arbitration, include the fees and expenses of the arbitrators, as well as the administrative costs made with the arbitral institution, the venue, and the services involved. More specifically, such tribunal costs may include rental fees, secretarial services, and translation and transcription services.

A different way of categorizing costs is in accordance with the way they are incurred. Costs with legal representation, arbitrators, venue fees, secretariat fees, among others, may also be referred to as direct costs, as they are in direct correlation with the proceedings. Conversely, there are indirect costs, which are usually incurred as an indirect consequence of the arbitration, such as staff hours and other resources spent as a consequence of the arbitration.[265] Such costs were considered as recoverable in the case CSOB v. Slovakia, where the Tribunal highlighted the fact that the Claimant's staff *"*had prepared specific contributions that were caused by the proceeding, including several statements*"*, which ultimately justified the Claimant's request for recovery of associated costs.[266]

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[263] Franck, op. cit., p. 183.
[264] Bottini et al. op. cit., p. 255. Behn et al. Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?, 21 Journal of World Investment & Trade, 2020, p. 197. Wendy Miles uses the terms arbitration costs and legal costs, see Wendy Miles, Costs Allocation in Investor-State Arbitration, 80(4) Arbitration, 2014, p. 414. Professor Franck uses the terminology *parties' own legal costs* (PLC) and *tribunal and institutional administrative expenses for conducting the arbitration* (TCE). See Franck, op. cit., p. 135.
[265] Philippe Cavalieros, In-house counsel costs and other internal party costs in international commercial arbitration, 30(1) The Journal of the London Court of International Arbitration, 2014, p. 146.
[266] Ceskoslovenska Obchodni Banka, AS v. The Slovak Republic, Case No. ARB/97/4, Award, para. 371.

Costs have also been categorised in accordance with their opportunity. While some costs may be justified, or at least justifiable, some of them may appear as excessive.[267] Whether costs are excessive may be determined in terms of their necessity for a fair and efficient resolution of the dispute, taking into account all the circumstances of the case and from the point of view of an objective third party. Conversely, justified costs are those incurred during the proceedings, deemed as being objectively necessary to ensure due process during the resolution of the dispute.

### 3.3.2. Costs in arbitration rules

Costs are generally a matter of evidence. Which means parties must present and plead their cases, providing the evidence they collected regarding the costs they incurred. Arbitration rules have lax regulation regarding this question, in the sense that the matter is addressed by the arbitral tribunal with a large degree of autonomy. The lack of detailed rules regarding costs has resulted in a wide variety of decisions on costs. At the outset, many tribunals addressed the matter in a superficial manner, but as many other aspects of ISA, this has seen an evolution as well, with attention to details on costs improving over the years.

As the most widely used venue for investment arbitration, ICSID also has a number of rules related to costs. Provisions on the matter are contained in the ICSID Convention, the ICSID Arbitration Rules, the ICSID Additional Facility Rules and the ICSID Financial Regulations. The costs of proceedings according to the ICSID Arbitration Rules at Article 61.2. consist of three elements: (1) the charges for the use of the facilities and expenses of the Centre; (2) the fees and expenses of the conciliators or arbitrators; and (3) expenses incurred by the parties in connection with the proceedings.[268]

Article 59 of the ICSID Convention contains the rules regarding the charges for the use of the facilities of the Centre, which are "determined by the Secretary General in accordance with the regulations adopted by the Administrative Council" and are contained in the Administrative and Financial Regulations. Under these Regulations the charges themselves are set out in the Schedule of Fees.[269] The charges for the use of the facilities of the Centre consist in the lodging fee, the

[267] Bottini et al., op. cit., pp. 254 and 266.
[268] Schreuer et al., The ICSID Convention: A Commentary, OUP, 2009, p. 1214. Miles, op. cit., p. 414. This is similar to the text of the amended ICSID Arbitration Rules, Rule 50.
[269] The Schedule of Fees effective July 1, 2023 can be found here:

administrative charges, and expenses covered by periodic advance payments by the parties.[270] The Convention provides that in cases where the expenditure of the Centre is not covered by the above charges, "the excess shall be borne by Contracting States" of the Convention.[271]

It has been noted that the administrative budget of ICSID is met in full by the World Bank, meaning that the operations of ICSID are supported and subsidized by the World Bank.[272] Empirical studies also demonstrate that ICSID proceedings usually hold lower costs, however, the difference as compared to other institutions or *ad hoc* arbitration is not that significant, as will be shown further below. The explanation lies in the lower administrative costs and in the way the fees of arbitrators are determined, with a cap on arbitrators' fees made part of the ICSID rules.[273]

Article 60 of the ICSID Convention allows for the parties and the tribunal to come to an agreement regarding the fees and expenses of the members of the tribunal, agreement which is free of any limitations regarding its sums. In the absence of such an agreement these fees and expenses are determined by the tribunal within the limits established by the Administrative Council and after consultation with the Secretary-General (in the Schedule of Fees), in accordance with the provisions of Regulation 14 of the Administrative and Financial Regulations, entitled *Direct Costs of Individual Proceedings*. For the calculation of entitlements consisting in fees, *per diem* subsistence allowances, travel and other expense reimbursements, a Memorandum on the Fees and Expenses has been put in place.[274] It has been noted that theoretically the Memorandum on the Fees and Expenses contains the limits within which the tribunal can determine the fees of its members in lieu of an agreement of the parties in this sense, but in practice these fees are usually regarded as automatically applicable.[275] All such payments to arbitrators, witnesses, interpreters, secretaries are made by the Centre in the course of the administration of the proceedings, thus avoiding any appearance of financial dependence on the parties.[276] In the case of ICSID arbitration, hearings are generally conducted at its headquarters at the World Bank in Washington, D.C.

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https://icsid.worldbank.org/services/cost-of-proceedings/schedule-fees/2023 (Last accessed 01.03.2024)
[270] Schreuer et al., op. cit., pp. 1215–1216.
[271] Article 17 of the ICSID Convention.
[272] Schreuer et al., op. cit., p. 1217.
[273] Schreuer et al., op. cit., p. 1214.
[274] See Memorandum on the Fees and Expenses: https://icsid.worldbank.org/services/cost-of-proceedings/memorandum-fees-expenses/2022 (Last accessed 23.08.2024)
[275] Schreuer et al., op. cit., p. 1220.
[276] Id. p. 1222.

During the negotiations of ICSID, the Chairman noted that the administrative charges for the use of the Centre's facilities would not be very high, but the fees and expenses of arbitrators or conciliators "might well be high", with objections being received in the interest of small investors and small states.[277] It is interesting how the matter of costs of legal representation was not featured as an issue at that time.

While in an ICSID arbitration one must contend with a number of rules and regulations, as shown above, the second most popular arbitration rules in ISA appear somewhat simpler. The UNCITRAL Arbitration Rules (2013) provides for something like a list, which is open-ended, stating in Article 40 that costs include

> "only: (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41; (b) The reasonable travel and other expenses incurred by the arbitrators; (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal; (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal; (e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; (f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA."

In accordance with the above rules there is much room for the tribunal to set its own fees, however, in case parties make use of an appointing authority for the selection of arbitrators, the tribunal must pay the fees and expenses of the Secretary-General of the Permanent Court of Arbitration ("PCA") called to designate the appointing authority. The hearings in arbitration cases that are conducted under UNCITRAL Rules take place at the venue chosen by the parties together with the tribunal. The rental costs are paid either by the parties directly, or through the tribunal.

According to the Singapore International Arbitration Centre ("SIAC") Investment Rules (2017) the Tribunal's award shall address both the parties' costs and other costs, including the costs of the arbitration. In accordance with Article 33.2., the term *costs of the arbitration* includes

> "a. the Tribunal's fees and expenses and the Emergency Arbitrator's fees and expenses where applicable; b. SIAC's administrative fees and expenses; and c. the costs

[277] History of ICSID, Vol. II-1, p. 437.

of any expert appointed by the Tribunal and of any other assistance reasonably required by the Tribunal."

Detailed rules on costs are contained in the Vienna International Arbitration Court ("VIAC") Rules on Investment Arbitration and Mediation 2021. Art. 44 of the VIAC Rules provide that the costs of the arbitration consist of:

> "1.1 the administrative fees of VIAC, the arbitrators' fees and the reasonable expenses (such as arbitrators' or tribunal secretary's travel and subsistence costs, costs for sending of communications, rent, court reporter fees), including any applicable value-added tax; as well as well as
>
> 1.2 the parties' costs, i.e. the reasonable expenses of the parties for their legal representation; and
>
> 1.3 other expenses related to the arbitration, in particular those listed in Article 43 paragraph 1."

These other expenses include, among others, "the appointment of experts, interpreters, or translators, a verbatim transcript of the proceedings, a site visit, or relocation of the hearing."

The Arbitration Rules of the Court of the International Chamber of Commerce ("ICC Arbitration Rules") (2021) address costs briefly and to the point. It must be mentioned that at the ICC tribunal costs are determined in correlation with the amounts claimed. Article 38(1) provides the following regarding what costs entail:

> "fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration."

The Arbitration Rules of the Stockholm Chamber of Commerce provides a Schedule of Costs (Appendix IV) which can help parties determine tribunal costs. Articles 49 and 50 contain provisions on the costs of the arbitration and costs incurred by the parties:

> "The Costs of the Arbitration consist of: (i) the Fees of the Arbitral Tribunal; (ii) the Administrative Fee; and (iii) the expenses of the Arbitral Tribunal and the SCC";
>
> while costs incurred by the parties include "any reasonable costs incurred by another party, including costs for legal representation."

The above cited rules all tend to demonstrate that arbitration rules in general are less detailed regarding costs—in a way keeping with arbitration's reputation as a flexible dispute settlement mechanism. It is notable that some of the recently revised rules provide a slight bit more detail on the matter. But as a rule, it is still up to the parties to put forward the evidence, and for the tribunal to determine the costs' validity.[278]

Generally, costs may become a topic of debate between the parties at any moment of the proceedings, but they are necessarily addressed at the beginning of the proceedings and in the final award. Some of the costs, usually those pertaining to the costs of the tribunal (arbitrators' fees), administrative fees and other expenses, are estimated in advance, and must be paid by the parties, as a precondition for commencing and maintaining the proceedings. Such advance costs are usually split between the claimant and the respondent. If one of the parties fails to meet its obligations for the payment of the advance on costs, the arbitral proceedings may be suspended (or stayed, in the language of ICSID) and even terminated (or discontinued, in the language of ICSID).[279] It must be noted that current ICSID Rules do not contain express provisions mandating the staying or discontinuing of proceedings due to a failure to pay costs, but its jurisprudence provides examples of both.[280] This notwithstanding, Regulation 16(2) of the ICSID Administrative and Financial Regulations provides that the Secretary-General *may* send out notification for payment with a deadline, in case of non-payment *may* suspend proceedings, and after a 90 day period *may* discontinue suspended proceedings.[281] Arbitral tribunals also have the authority to request the payment of some costs *in advance*, during the proceedings, and make security for costs orders. The advance payments made by the parties will also form part of the final award which will decide who ultimately bears the costs.[282]

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[278] While not investment arbitration rules *per se*, it is notable that the Australian Centre for International Commercial Arbitration's ACICA Rules 2021, in Rule 48, include reasonable third-party funding costs, with the condition that they are claimed during the arbitration proceedings.

[279] After a number of extensions, the tribunal decided to terminate the proceedings without prejudice in the case Simplex Projects Ltd. v. Libya (conducted under UNCITRAL Arbitration Rules 1976), after the Claimant failed to meet its share of the total advance on costs, in accordance with art. 41(4) of the Rules.

[280] Such suspension occurred in the case Donatas Aleksandravicius v. Kingdom of Denmark, ICSID Case No. ARB/20/30, pursuant to ICSID Administrative and Financial Regulation 14(3)(d). Discontinuance of the proceedings occurred in the case Macro Trading Co., Ltd. v. People's Republic of China, ICSID Case No. ARB/20/22.

[281] The case SIA Baltjura-Serviss v. Kingdom of Norway, ICSID Case No. ARB/23/7 was discontinued pursuant to ICSID Administrative and Financial Regulation 16(2)(c), despite Claimant's request that it be waived or request of payment be delayed, as indicated in: Lisa Bohmer, ICSID discontinues snow crab arbitration against Norway, rejecting SME's plea for a waiver of its fees; parties debate whether case could be refiled under now-terminated treaty, IAReporter, 27 June 2024.

[282] See ICSID Arbitration Rules, Rule 28.

While administrative fees are not the highest cost item, for some claimants such fees may be quite burdensome. In terms of accessibility by claimants facing financial difficulties, administrative fees are also the cost item that arbitral institutions are able to directly decide upon. Venues such as the SCC Arbitration Institute determine administrative fees on a scale, based on the amount in dispute, which can be estimated with the help of their cost calculator.[283] The World Intellectual Property Organization ("WIPO") Arbitration and Mediation Center offers disputing parties a 25% reduction on its fees, when the dispute involves an SME, i.e. an entity with less than 250 employees. It also recommends SMEs use mediation or expedited arbitration to resolve their disputes.[284]

What is noteworthy in terms of small (or rather, impecunious) claimants is that there is no rule dealing with the inability to afford such advance costs, or in general arbitration costs. In a case in front of the Warsaw Court of Appeals, one of the parties to a shareholder and investment agreement containing a compromissory clause turned to the courts in order to obtain a waiver from the obligation to resolve any dispute via arbitration. While it is a case of commercial arbitration, its lessons are worth mentioning in the context of investment arbitration as well. The claimant argued that the waiver for applying the compromissory clause was mandated by the fact that it did not have sufficient funds to initiate arbitration. The claimant's request was rejected, and the appeal was also dismissed. According to a report on the case the court explained that "by deciding on arbitration, the parties had accepted this means of dispute resolution with its pros and cons", whereby they exchanged the procedural guarantees of state court litigation with the expeditiousness provided by arbitration.[285] The authors also emphasized the fact that the court considered that allowing such a practice would also allow for the possibility of a party to "unfairly diminish its financial situation to prevent arbitration."[286] French courts have a more nuanced view, whereby, they would first have parties bound by an arbitration agreement make an attempt at resolving their dispute through arbitration, and only if they failed at such attempt would they have

[283] SCC Arbitration Institute, Cost calculator, available at: https://sccarbitrationinstitute.se/en/our-services/cost-calculator (Last accessed 23.08.2024)
[284] WIPO Mediation and Arbitration for SMEs, available at: https://www.wipo.int/amc/en/center/specific-sectors/smes/index.html (Last accessed 23.08.2024)
[285] See Maciej Durbas, Rafal Kos, Lack of funds does not enable parties to escape arbitration, Lexology, 21 January 2021, available at: https://www.lexology.com/commentary/arbitration-adr/poland/kubas-kos-gakowski/lack-of-funds-does-not-enable-parties-to-escape-arbitration#1 (Last accessed 23.08.2024)
[286] Ibid.

a valid recourse to state courts. The recourse to state courts should thus be allowed in order to protect the impecunious party from a denial of justice.[287]

In the above cases of commercial arbitration, by choosing arbitration as their means for resolving their disputes, the parties effectively restricted their avenues for access to justice. However, the French courts considered that such a restriction should not have the extreme consequence of denial of justice. In an ISA case, if parties cannot afford to lodge an arbitration claim, they still have the rather unappealing choice of lodging a claim in front of the domestic courts of the host state. Their loss of access to justice may be viewed, in a sense, as only being partial. If we consider the *raison d'être* of ISA, which is that of providing a truly impartial dispute settlement mechanism, having to resort to domestic courts may well equal denial of justice.

### 3.3.3. The numbers

A variety of factors can influence the cost of proceedings in ISA. The more complex a case gets, the more issues an arbitral tribunal will have to consider, the more expertise needs to be involved, obviously resulting in the accumulation of more costs. While claims of a larger value may be judged as more complex, it is not evident that smaller claims will be less complex. The costs are generally influenced by factors such as the size of the tribunal, the number of counsels hired, the duration of the proceeding, the need for travel, the amount and sophistication of the evidence put forward, the use of experts, the use of interpreters and translators, and numerous other factors which might come up in a specific case.[288] By far the largest component of costs in investment arbitration cases is that of legal representation and experts. These costs are also the most difficult to predict. Costs with legal representation often swell with major undertakings such as discovery often taking up too much time to *leave no stone unturned*. Expert reports have also

[287] France's Cour de Cassation, in the case *Carrefour Proximité France*, available at: https://www.courdecassation.fr/decision/6333e9c1e5004d05dab7c04e, as cited in Florian Renaux, Karin Zein, Arbitration 2022 Year in Review – France, Daily Jus, 20 February 2023, available at: https://dailyjus.com/world/2023/02/arbitration-2022-year-in-review-france#:~:text=2022%20proved%20to%20be%20another,the%20most%20preferred%20arbitral%20institution (Last accessed: 23.08.2024)

[288] Schreuer et al., op. cit., pp. 1214–1215.

been automatically made part of the process, sometimes with limited utility.[289] The purpose of this section is to get an idea about what the actual figures reveal in terms of concrete costs in ISA cases. Comparing such costs figures to the previously noted parameters of determining what is a small and a medium-sized enterprise will be revealing in terms of the actual possibility of SMIs to gain access to investor-state arbitration.

The matter of costs has constituted the topic of only a small number of empirical research studies, each with its own limitations. However, each is highly revealing in its own right, and provides much needed information for the purposes of this research.

The results of the research done on final awards handed down in both ICSID and UNCITRAL proceedings between 2011 and 2017, has found that the average costs of the claimant in both types of proceedings are slightly above US$6 million. The costs of the respondent were slightly above US$5.2 million in ICSID cases and around US$4.6 million in UNCITRAL cases.[290] Average party costs in annulment proceedings have been around US$1.4 million. The authors cite other relevant research with similar results. Tribunal fees have averaged around US$1 million for proceedings conducted under both ICSID and UNCITRAL rules.[291]

A more recent empirical study of costs based on over 400 ISDS cases conducted under different arbitration rules, and over 70 ICSID annulment decisions, gives us a comprehensive account of the costs involved in these proceedings and the allocation of costs by the tribunals.[292]

This study includes mean and median figures. There is a significant difference between these, as some of the larger figures have the effect of distorting the results. This is why the median figures are considered as presenting a more accurate picture of what costs an average claimant or respondent will likely incur. As to the parties' costs (legal costs), the research shows that the mean costs incurred in ISDS proceedings are around US$4.7 million, while the median figure is US$2.6 million for respondent states. For investors, the mean costs are slightly above US$6.4 million,

[289] One particular tribunal chose to give voice to its dissatisfaction with the quantum report, stating that it was "of limited utility". See Mathias Kruck and others v. Kingdom of Spain, ICSID Case No. ARB/15/23, Award of 6 October 2023, para. 79. In the case Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41, Professor Philippe Sands made a "Declaration on Costs" in which he stated that from the expert opinions which cost around $2.9mn "the Tribunal obtained no assistance" (para. 7).
[290] Behn et al., Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?, 21 Journal of World Investment & Trade, 2020, pp. 197–199.
[291] Ibid.
[292] Hodgson et al. 2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration. British Institute of International and Comparative Law, Allen & Overy, 2021. Available at: https://www.biicl.org/documents/136_isds-costs-damages-duration.pdf (Last accessed 23.08.2024)

while the median figure is at US$3.8 million. The research found no significant difference in the arbitration costs (tribunal costs) incurred by parties in ICSID and UNCITRAL proceedings. In ICSID proceedings the mean costs were calculated at US$958,000, and in the case of UNCITRAL proceedings at US$1.05 million, with median figures at US$745,000 and US$775,000, respectively.

The above figures may objectively be viewed as large by any measure. It is plain to see why ISA might realistically not be available for any and all foreign investors. For those who do engage in ISA, the question of how costs will be allocated, whether or not, and to what degree they will be adjusted will rightly gain importance.

### 3.3.4. Who bears the costs?

Generally, when ISA proceedings are initiated, the tribunal first establishes jurisdiction, then the parties make their case on the merits, together with a request ascertaining the quantum of the damages owed for the breach of the applicable investment treaty or contract. With this request, parties can also advance their demands regarding costs. The tribunal may also give costs orders, which are decisions on costs handed down during the proceedings. Arbitration (tribunal) costs are generally paid during the proceedings, when parties are asked to pay the administrative fees and advances on arbitrators' costs. Nonetheless, the matter of who bears the costs will in all cases be addressed in a final award. This final award contains the obligations of the disputing parties vis-à-vis all costs incurred during the entirety of the arbitral proceedings, including any and all costs-related obligations faced by parties during the proceedings in the form of costs orders.

The decision on costs represents the decision on what has been admitted by the tribunal as the total costs incurred by the parties during the proceedings, and who ultimately bears these costs. At this stage the tribunal will also decide the way in which the costs are going to be distributed or apportioned between the parties. The term used to describe this process is *cost-shifting*.[293]

The two principal rules around costs, that are also used in ISA, are the *costs follow the event* rule, also called the loser pays rule, and the *pay your own way* rule, also called allocation *pro rata*, or pay as you go. The loser pays rule is also referred to as the "English Rule", even though it

[293] For an in-depth look at cost-shifting and how it has been applied with respect to tribunal costs and legal costs, see Franck, op. cit., pp. 212–219.

is prevalent in the procedural rules of most civil law systems. This rule means that the party which lost the case will have to cover the arbitration costs in their entirety, including both tribunal costs and the opposing (and prevailing) party's costs.[294] Using this rule exclusively, results in a complete cost shifting.[295] According to the pay your own way rule, which is also called the American Rule, each party to the arbitration bears its own costs, while the tribunal costs are distributed equally between the parties.[296] In this case there is no cost-shifting.[297] While the American Rule used to be applied more frequently in costs decisions, nowadays neither of the two is prevalent in ISA awards. Rather, a third approach is taken more often, whereby both parties have to cover some of the costs, with the losing party usually paying more than the prevailing party. This results in partial cost shifting, and has been called the *factor-dependent approach*.[298] This approach is used by tribunals to promote good procedural conduct between the parties. It is afforded to tribunals by the wide margin of appreciation arbitration rules accord to them in making decisions on costs. Tribunals are thus able to sanction procedural misconduct that causes delays or is otherwise improper, to incentivize settlement, and avoid "pernicious dispute resolution strategies".[299]

While the cited arbitration rules do not mandate the use of one rule over the other, and there is no consistent use of either the pay your own way, or the loser pays rule,[300] empirical research has revealed that there was a steady increase in the proportion of cases in which the unsuccessful party was ordered to pay at least some portion of the costs of the prevailing party.[301] Article 61 of the ICSID Convention allows for parties to select the use of cost-shifting rules in their proceedings. However, for this, parties would have to come to an agreement, which is not always easy. Generally, the choice presented by Article 61 is not taken up, as parties regularly choose to leave this matter up to the decision of the tribunal.[302] What is more, even in cases where parties' requests regarding cost shifting did converge, it did not guarantee its application by the tribunal, leading to

[294] See Walter Olson, David Bernstein, Loser-Pays: Where Next, 4 Maryland Law Review, 1996, pp. 1161–1162.
[295] Franck, op. cit., p. 191.
[296] See Olson et al. , op. cit., pp. 1161–1162.
[297] Franck, op. cit., p. 191.
[298] Ibid.
[299] See id., p. 192. Professor Franck gives credit to Professor Welamson from Sweden for this approach.
[300] Behn et al., op. cit., pp. 203–204.
[301] The QMUL Empirical Study from 2021 concluded that "75% of all costs orders published between 2017 and 2020 are adjustment orders, requiring the unsuccessful party to bear at least some portion of the costs of the successful party. This compares with just 43% as at the 2013 Study, and 64% between 2013 and 2017", at p. 5.
[302] Franck, op. cit., p. 188.

the conclusion that if there is no express and precise agreement on the matter, tribunals will not take notice of the separate requests.[303]

In cases where parties thusly agree, a *Calderbank* offer may be made. This is a practice through which parties are able to significantly reduce arbitration costs. The *Calderbank* offer is a settlement offer by one of the parties to a dispute made "without prejudice save as to costs", which, if refused by the winning party, will have the latter bear the costs of the offering side, in case the outcome achieved is less favourable than what was offered.[304]

### 3.3.5. Cost shifting in IIAs

Cost shifting has also been made part of some investment treaties. Despite being an important and expensive component of ISA, and scholars noting states' disadvantage in the rate of cost allocation in ISA,[305] this has not resulted in any coherent treaty policies that would demonstrate a change in states' approaches. Wider criticism against ISA sparked a reform process at UNCITRAL. Criticism of the substantive provisions of IIAs, pursuant to their interpretation by tribunals, has also had some effect, as for example many BITs started limiting the applicability of the fair and equitable treatment standard ("FET"). But the question of costs may indeed appear as less significant compared to *the perils of an unfettered Fair and Equitable Treatment ('FET') standard*. Especially as states hold the magic pen of redrafting treaties.

In any case, investment treaties of a newer generation contain some traces of attempts at regulating cost shifting. These developments may best be described as recommendations, attempting to encourage, rather than oblige, tribunals to apply a specific cost shifting rule. One of the notable examples is constituted by the Comprehensive Economic and Trade Agreement between the European Union and Canada ("CETA"), where Article 8.39.5. stipulates the *loser-pays rule*, but only *in principle*. This Article also provides tribunals with a generous margin of appreciation to consider the specifics of the case and determine if it would be appropriate to

[303] Franck, op. cit., pp. 193–194, citing the following cases: Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB (AF)/11/2, Award, paras. 951–960; Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011-17, Award, paras. 331–332 and 618–622.
[304] Bottini et al., op. cit., p. 269.
[305] Empirical research has shown that successful respondent states enjoy the benefits of cost-shifting less often than successful claimant investors. See Franck, op. cit., pp. 212 and 218–219.

apportion the costs in light of *exceptional circumstances*. Similar rules are contained in the EU–Singapore Investment Protection Agreement ("IPA") in Article 3.21, and the EU–Vietnam IPA in Article 3.53.4. The *loser pays rule* has often been cast as a deterrent for frivolous claims.[306] These rules will more likely serve as guidance until more firm language is introduced, something that the paragraphs following the above-mentioned treaty provisions allude to.[307]

In the case of other treaties, drafters fell short of including even the mentioned recommendation. The Comprehensive and Progressive Agreement on Trans-Pacific Partnership ("CPTPP"), for instance, expressly addresses the issue of costs in connection with frivolous claims (in Article 9.29.4.), but also uses a permissive language, providing that in such cases tribunals *may* award to the respondent reasonable costs and attorney's fees.[308] The Agreement between the United States of America, the United Mexican States, and Canada ("USMCA") contains even more permissive language, leaving it to the tribunal to decide how costs will be awarded. In addition, it also references the applicable arbitration rules, as guidance for costs decisions.[309]

Arbitration rules also contain some guidance as to the allocation of costs. However, similarly to the case of IIAs, arbitration rules generally give arbitral tribunals much leeway, by not providing any mandatory rules on costs. This is not to say that mandatory rules on costs should be the norm. Maintaining a degree of flexibility in arbitral proceedings is why arbitration is often chosen. However, in the case of ISA, this is an additional avenue, which promises improved access to justice. And while flexibility is still welcome in this process, additional rules may be in order that are more considerate of the precarious situation SMIs find themselves in when bringing a claim. There are several ways in which IIAs may address the matter of costs in ways that would help SMIs, the least of which would be to lay down rules that make any calculation on costs decisions more predictable.

As shown, several factors may influence the decision on costs. As the disclosure of at least the existence of third-party funding during proceedings seems to have become the norm, it may be expected that this will influence both final and interim costs decisions, and cost shifting.

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[306] Franck, op. cit., p. 191. See also André von Walter, Maria Luisa Andrisani, Resolution of Investment Disputes, in Makane Moïse Mbengue, Stefanie Schacherer (eds.), Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA), Springer, Cham, 2019, p. 195.
[307] The France Model BIT (2007), US Model BIT (2012) (also Japan–Jordan BIT, the Cabo Verde–Hungary BIT contain the pay-your-own-way rule for state-to-state cases).
[308] Similar provision in Article 9.23.6. of the CPTPP. The Australia–Indonesia Comprehensive Economic Partnership Agreement ("CEPA") Article 14.34. contains similar provisions.
[309] USMCA Article 14.D.13.4.

### 3.3.6. Arbitration rules on cost shifting

Arbitration rules do not contain clear-cut rules on the recoverability of costs in ISA. Arbitral tribunals, having a wide margin of discretion in deciding on this matter, have done so in a variety of ways, the result of which has been criticized as having led to incoherence in reasoning, and creating inconsistency.[310] While arbitration rules may—and regularly do—allow for the disputing parties to agree on the rules that should govern the costs decision of the tribunal, in lieu of such an agreement, the tribunals are only provided with a general set of principles to guide them. Thus, tribunals are given a wide margin of appreciation, without any nuance in terms of the size of a claim, or the material situation of the parties. Establishing additional principles that take into account such considerations would evidently be welcome, especially in the case of smaller claims, but also that of low-income countries.

Brief discussions on the apportionment of costs of proceedings are noted in the minutes of the negotiations on ICSID. It was put forward that "the draft followed the general principle of the equal apportionment of costs customary in international proceedings", with additional discretion granted to tribunals with a view to using apportionment to penalize parties "where proceedings had been instituted frivolously or in bad faith."[311] The delegate from Austria, Mr. Herndl proposed that the *loser pays* rule be included. The delegate from the Federal Republic of Germany Mr. Arnold took issue with the pay your own way rule as potentially discouraging small and medium-sized enterprises from submitting disputes.[312]

ICSID Convention Article 61.2. provides that the tribunal assesses the expenses incurred by the parties and decides *how and by whom* these shall be paid. Except for the case where parties agree otherwise, the tribunal is at liberty to decide however it sees fit in cases conducted under ICSID rules. ICSID Arbitration Rules and Additional Facility Rules provide broad discretion to tribunals in allocating the costs, without any clear rules as to the *how* and *why* this authority should be exercised.[313] The ICSID Additional Facility Rules provide that the tribunal may ask for

[310] Wendy J. Miles, Costs Allocation in Investor-State Arbitration, 80(4) Arbitration, 2014, p. 413.
[311] History of ICSID Vol. II-1, p. 436.
[312] Ibid.
[313] An issue pointed out by Professor Susan D. Franck in Franck, op. cit., p. 195.

information from the Secretariat and the parties when deciding on cost division.[314] Rule 28 of the ICSID Arbitration Rules provides that the tribunal may decide at any point during the proceedings the portion of the arbitration costs each party shall pay.

The ICSID Arbitration Rules have recently gone through a reform process and new rules have been drawn up taking effect on July 1, 2022. The amended rules call for more cost-effective proceedings and expeditiousness, and also establishes a few factors tribunals may take into consideration when assessing costs. The rules establish the *loser-pays* approach. However, this is only regulated as a recommendation, leaving the tribunal enough discretion to consider *special circumstances* for weighing the allocation of costs.[315] Rule 52 provides that the outcome of the proceedings, the complexity of the issues and the reasonableness of the costs claimed shall all be considered by the tribunal in the allocation of costs. In addition, it is also provided that the Tribunal shall consider the conduct of the parties, whether they acted in an expeditious and cost-effective manner, and their compliance with the Arbitration Rules and the Tribunal's decisions. The amended rules also provide that costs decisions must be reasoned.[316]

The 2013 UNCITRAL Arbitration Rules, at Article 42 establishes a rule in principle, stating that costs of an arbitration shall be borne by the unsuccessful party. However, this is far from an imperative *loser-pays* provision, as seen in the case of the rules under ICSID, pursuant to UNCITRAL Arbitration Rules, the tribunal also has wide discretion to distribute the costs *reasonably* taking into account the circumstances of the case. This was maintained in the 2021 UNCITRAL Arbitration Rules, together with the provision that costs may be decided in an award that is separate from the final award, at the discretion of the tribunal. The Arbitration Rules of the Permanent Court of Arbitration contain rules using almost indistinguishable language.

More or less similar rules, in the sense of a broad discretion granted to the tribunal on the decision regarding costs, are to be found in several other arbitration rules. According to Articles 49.6. and 50 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2017), when deciding on costs, both tribunal costs and costs incurred by the parties, the tribunal shall make the decision "having regard to the outcome of the case, each party's

[314] ICSID Additional Facility Rules art. 58.
[315] See ICSID Arbitration Rules, Rule 52(2).
[316] See ICSID Arbitration Rules, Rule 59(1)(j).

contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances."

Similarly, the ICC Arbitration Rules (2021) also require that the final award "fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion." Regarding the rationale, Article 38(5) provides that "[i]n making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner." By this, the ICC Arbitration Rules essentially ensure full discretion to the tribunal on the matter of costs.[317]

The SIAC Investment Rules (2017), in Articles 33 and 35 provides that the tribunal has "the authority to order in its Award that all or a part of the legal or other costs of a Party be paid by another Party", expressly mentioning that the tribunal may take into account "any third-party funding arrangements" in making its decision. The SIAC rules also provide expressly for the use of costs awards as sanctions against parties who do not adhere to the rules on confidentiality set out in Article 37.

The Vienna International Arbitration Centre (VIAC) Rules of Investment Arbitration and Mediation, at Article 38(2) provide for the tribunal to "decide on the allocation of costs according to its own discretion." As guidance, this Article of the Rules provides that the tribunal may take into consideration the conduct of the parties, and of their representatives, in particular "their contribution to the conduct of efficient and cost-effective proceedings". This means that tribunals under VIAC rules have the possibility to sanction conduct such as the application of dilatory tactics. Scholars have noted that the ICSID Convention also offers the possibility of using costs as a means of sanctioning procedural misconduct (Article 45), such as non-participation, or engaging in dilatory or otherwise improper conduct.[318] Such a possibility exists in proceedings conducted under the other rules as well, recommending that tribunals consider any circumstances relevant to the case, even expressly mentioning, for example, the consideration of "each party's contribution to the efficiency and expeditiousness of the arbitration,"[319] as shown above.

[317] As noted also by the tribunal in the case Olin Holdings Ltd v. Libya, ICC Case No. 20355/MCP, Award of 28 May 2018, paras. 543–546.
[318] Schreuer et al., op. cit., p. 1230.
[319] Articles 49.6 and 50 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2017).

Many of the above cited rules can in part be met with the criticism that was also lodged by Professor Franck, that they do not provide guidance on either how tribunals should exercise their discretion, what are the standards that should guide cost allocation, or how tribunals should determine the relevant circumstances when allocating costs.[320] However, there are changes that are notable. Some of the mentioned rules now contain provisions that parties may invoke, and tribunals will surely have to address. Despite this progress, the adaptation of the rules seems to just be following developments that have been there in the jurisprudence. These rules stop short of any bold reform in the area of costs.

None of the above provisions ensures that the successful party will receive a favourable costs award. Even the rules which allude to a *loser-pays* approach, do not guarantee the recovery of costs incurred by the successful party. In accordance with these lax rules and recommendations, arbitral tribunals have the possibility to address the matter of costs and distribute them however they see fit within the final award, or in any other costs award. Parties' conduct throughout the proceedings will matter just as much as the subjective perception of the arbitrators. The jurisprudence regarding costs shows a variety of approaches by arbitral tribunals in how they choose to allocate costs. This has been considered as being consistent with the discretionary approach arbitral rules take.[321]

### 3.3.7. Costs decisions

Considering the wide margin of appreciation left for arbitral tribunals, scholars offered their own perspectives on what should influence costs decisions. Professor Christoph Schreuer summed up four of the most important principles to underpin a decision on costs, based on the ICSID Convention's *travaux préparatoires*, and the practice of arbitral tribunals, which he considers as constituting "sufficient rational guidance to tribunals in making decisions on costs":

[320] Franck, op. cit., pp. 195–197.
[321] David D. Caron, Lee M. Caplan, The UNCITRAL Arbitration Rules (2nd Edition): A Commentary, OUP, Oxford, 2013, p. 869.

> "If a party has completely or overwhelmingly prevailed on the merits, the losing party may have to bear a major part or all of the costs of the arbitration and part or all of the expenses of the winning party.
>
> Misconduct by a party during the proceedings such as non-cooperation with the tribunal, disregard for a recommendation of provisional measures, default in participating in the proceedings or violation of the Centre's exclusive jurisdiction should be reflected in the award on costs.
>
> A party that is responsible for a particular part of the proceeding should bear the resulting costs.
>
> In the absence of reasons to decide otherwise, each party should bear half of the costs of the arbitration including the charges for the Centre's services and the fees and expenses of the arbitrators and should pay for its own expenses in preparing and presenting its case."[322]

This has been echoed in legal literature by Wendy J. Miles, who argues that tribunals, in exercising the broad discretion arbitration rules accord them with respect to costs allocation, should consider a number of factors

> "including the relative success or failure of the parties, the conduct of parties (including any vexatious or frivolous claims or conduct), the novelty of the issues or the questions of law and various considerations of equity; public interest, any settlement endeavours of the parties and the parties' sources of financing."[323]

Looking at the figures on costs, sanctioning claimants for bringing frivolous claims appears as an effective tool. In two cases (brought essentially by the same individual) the tribunal refused to grant monetary compensation for moral damages claimed by the respondent pursuant to the frivolous action brought by the claimant. The tribunal, due to the investor's acting in bad faith, did apply the *costs-follow-the-event* approach, highlighting the fact that the abusive conduct and fraudulent claim are appropriately sanctioned in this way.[324]

As mentioned earlier, even though parties may have an agreement regarding costs, the tribunal may still apply its discretion and adjust costs. In an often-cited case of contract-based

[322] Schreuer et al., op. cit., p. 1236.
[323] See Miles, op. cit. 2014, pp. 430–431.
[324] Europe Cement Investment & Trade SA v. Republic of Turkey, ICSID Case No. ARB(AF)/07/2, Award, paras. 181–186. Cementownia "Nowa Huta" S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/06/2, Award, paras. 176–178.

investment arbitration, the tribunal made a decision of additional payment in consideration of the above-mentioned factor of party conduct. The tribunal took note of the *pay-your-own-way* agreement of the parties and ordered the costs to be paid pursuant to that agreement. However, the tribunal noted a fact to which the claimant brought its attention, namely that the conduct of the respondent had caused "serious delays as well as additional costs" for the claimant. In view of this, the tribunal considered it equitable to order the payment of an additional sum of money by the respondent to the claimant.[325]

One case is never an indication as to the treatment of costs in another case. The specificities of the cases discussed have a large bearing on the variety in outcomes. In yet another case, after the tribunal had rejected four of the respondent's objections on jurisdiction, but admitted the fifth objection and thus dismissed all claims, it ordered that the parties split the costs of arbitration and bear their own legal costs.[326] The tribunal argued that some of the objections presented novel questions and "a point on which the existing jurisprudence is dramatically split".[327] In the annulment proceedings the tribunal rejected all grounds of annulment invoked by the applicant, and decided that the applicant should bear the costs of the proceedings.[328] As to parties' costs, the tribunal ordered that each party bear its own legal costs, due to the circumstances of the case, among others, in consideration of the fact that "the case involved a 'difficult and novel question of public importance' (*Vivendi I, paras. 117*) concerning the effects of concurring opinions in the formation of the majority, the deliberations and the reasoning of the award."[329] Such an approach may appear problematic in the case of SMIs claims as well. As noted previously, cases brought by SMIs, while lower in terms of value, may yet present novel issues, and challenging matters for a tribunal to debate on.

The possibility of an arbitral tribunal to apply the *costs-follow-the-event* principle is broken down well in one particular ICSID case. According to the tribunal "there is no reason in principle why a successful claimant in an investment treaty arbitration should not be paid its costs."[330]

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[325] See S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo, ICSID Case No. ARB/77/2, Award, paras. 4.124 to 4.129.
[326] Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award (22 August 2012), paras. 283–285.
[327] Ibid. para. 284.
[328] Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Decision on Annulment (7 January 2015), paras. 306–307.
[329] Id. para. 309.
[330] Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (3 March 2010), para. 689.

Buttressing its point of view, the tribunal turned to two other cases where arguments have been made supporting the reimbursement of costs by the unsuccessful party. The first case was supported by the reasoning that the respondent "made no attempt to honour its obligations under the bilateral investment treaty (BIT) in issue and had acted throughout with callous disregard of the claimants' contractual and financial rights."[331] The second case was one where the claimants were only partially successful, but the tribunal recognized their situation of having to turn to arbitration in seeking justice, ordering the respondent to bear 65% of the costs associated with the arbitration.[332] What is also noteworthy is that the tribunal dismissed the arguments of the respondent that the existence of a third-party funding agreement on the part of the claimants should in any way influence the allocation of costs.[333]

The conduct of the parties may have an effect on the decision of the tribunal in terms of the apportioning of costs. Some arbitration rules reflect this approach, as mentioned previously. However, it must be noted that this is accompanied by an interesting nuance. Scholars observed that the division of costs—in part—happened due to the fact that in ISA novel issues of international law are often brought before tribunals, the resolution of which cannot be easily predicted.[334] This also translates into a prolonging of the proceedings by revisiting "even relatively well established principles of investment treaty jurisprudence", which may result in an unfavourable costs decision burdening the party engaging in such endeavours.[335] In a sense, this means that in case counsel attempts to take a *creative* approach in defending its clients interests, its client will very likely foot the bill for that. In one particular case, the tribunal recognised that the conduct of the respondent caused delays in the resolution of the dispute. The disproportionately large costs incurred by the respondent in comparison with those of the claimant—although they did not appear as unjustified—were a result of the choices it had made during the proceedings. The tribunal argued that it is the result of the respondent's choices that there was such a massive difference between the costs incurred by the two parties.[336] It is for this reason that, even though

[331] Ibid. referring to the case ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16.
[332] Ibid. para. 690, referring to the case PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5.
[333] Ibid. para. 691.
[334] Caron and Caplan, fn. 63, p. 874.
[335] As seen in Louis Dreyfus Armateurs SAS v. Republic of India, PCA Case No. 2014-26, Award, para. 442.
[336] Id., para. 442. Similarly, delays were also considered by the tribunal when awarding costs in the case Joshua Dean Nelson and Jorge Blanco v. United Mexican States, ICSID Case No. UNCT/17/1, Award, paras. 394–395.

the investor's claims were dismissed in their entirety, the tribunal apportioned the arbitration costs 90% burdening the claimant and 10% burdening the respondent, the claimant having to reimburse *only* 70% of the legal costs claimed by the respondent.[337]

For an SMI that gets into a tight financial situation by initiating investment arbitration, such a decision signals potential risks: the respondent may very well run its costs up, with part of it potentially being borne by the claimant. In case a claimant attempts to argue its case, and the respondent engages in acts that prolong the arbitration, or unduly complicate it, and thus result in further costs, these costs should not burden the claimant, even if it loses the case. However, there is an important observation to be made here, which is that the parties have the right to engage in all meaningful efforts to argue their case, and running up the costs might be a secondary effect of this, but it may be necessary in order to ensure that the *truth* is arrived at. In such cases, and with the wide margin of appreciation they are afforded, arbitrators will have to carefully judge parties' conduct, so as to not potentially reward procedural conduct that runs up the costs.

More in line with this is an award that may well be considered the opposite of the one in which the respondent ran up its costs. In this case, the claimant was successful in obtaining compensation. However, the tribunal noted regarding the costs that there was a *substantial disproportion* between the total costs claimed by the parties, which led to its decision of ordering the respondent to pay only $2 million of the more than $15 million in total costs claimed.[338]

In a case, affecting a small investor, the decision considered the size of the investor, however it only partially adjusted its decision on costs. In the *Malaysian Historical Salvors v Malaysia* case, the Annulment Committee acknowledged the minor financial dimension of the case, and while it did decide in favour of the Applicant (previously Claimant, who had lost on jurisdiction grounds), it applied the loser pays rule in terms of the tribunal costs, and the pay your own way rule in terms of the costs of legal representation. It considered that if it had to apply the pay your own way rule for all costs, such a requirement would be of the nature as to bar small claims.[339]

[337] Louis Dreyfus Armateurs SAS v. Republic of India, PCA Case No. 2014-26, Award, paras. 444-445.
[338] See Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/04/16, Award, paras. 339, 344.
[339] Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, para. 82.

In another case affecting a small investment, the tribunal identified the (successful) claimant's costs as being US$206,560, ordering the respondent to cover US$95,000, with the rest being born by the claimant. Considering that the amount of the compensation (without interest) was set at US$750,000, the remaining costs that were not ordered to be covered by the respondent, would cost the claimant around 15% of the damages awarded.[340] However, this award was subsequently annulled, with the Annulment Committee deciding to apply the pay your own way rule, with a sharing of tribunal costs equally among the disputing parties.[341]

In another case, the tribunal argued that it "would be minded to follow the general practice in international arbitration, that […] successful party under an award should recover its legal costs […] such an approach would not be completely appropriate […] taking into account the situation in Zimbabwe in 2001/2002."[342] Thus, in a case where thirteen small claimants managed to receive just over eight million euros in compensation, were not awarded the costs of their representation in consideration of the situation of the respondent. The successful claimants ended up supporting the costs of their own representation, while tribunal and institutional costs fell on the respondent.[343]

As shown, the decisions on costs come in various forms and are often reliant on the particularities of the case in which they are handed down. Seeing the variation in these cases, it could be argued that stricter rules mandating a *costs-follow-the-event* approach might not be suitable for the complex cases brought in ISA proceedings. The flexibility in regulation, whereby tribunals can genuinely mould the decision on costs as they see fit, in accordance with the *circumstances of the case*, appears to better serve the proceedings more generally. Nevertheless, this also adds to the lack of predictability which does have an impact on the way in which the system is perceived. As an incremental improvement in the area of widening access to investor-state arbitration, it may be useful to have more predictable rules in cases brought by SMIs. While ISA appears quite expensive, and such costs are very likely to hinder access to it, a clear set of rules on recovering costs would make an important contribution to access to justice.

[340] Mr. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Award, paras. 98–102.
[341] Mr. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, para. 67.
[342] Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe, ICSID Case No. ARB/05/6, Award, para. 147.
[343] Ibid.

### 3.3.8. The matter of security for costs

The costs incurred during arbitration may well become an excessively large burden. As shown, the recovery of such costs may not be certain is most cases, with arbitration rules containing suggestions at best, and arbitral jurisprudence reflecting a variety of approaches. But even if a costs decision is favourable, recovering awarded costs is as difficult a task as any enforcement endeavour. Security for costs, or *cautio iudicatum solvi*, appear as one of the principal tools aimed at ensuring the recoverability of costs.

Enforceability is often presented as an advantageous feature of international arbitration in general. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or the New York Convention (1958) is a key instrument in this sense. Even more innovative is the provision in the ICSID Convention contained in Article 54, which essentially states that an ICSID award shall be recognised by all parties to the Convention "as if it were a final judgment of a court in that State."

Despite these widely ratified international agreements, enforcement in ISA cases continues to be a cumbersome procedure. Security for costs orders are there to ensure that the party favoured by such an order will be able to recover at least a part of its expenses incurred with the arbitration. Although this is its main function, security for costs orders have many more noteworthy implications.

In cases where the recovery of costs related to the arbitral proceedings is perceived as potentially becoming an issue, the respondent may request the tribunal to order the claimant provide a security guarantee. This is called the security for costs procedure. This constitutes an interim protection measure which may become useful for the respondent in case the arbitral tribunal awards costs against the claimant. When ordered, it is usually implemented via a bank guarantee, or a cash deposit into an escrow account.[344]

The request for such an order must be well reasoned. Tribunals often rely on evidence of *exceptional circumstances* when granting an order of security for costs.[345] This means that the

[344] See Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan, ICSID Case No. ARB/18/35, Decision on Security for Costs, Chapter VIII. Decision.

[345] See Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste, ICSID Case No. ARB/15/2, Procedural Order No. 2, paras. 58–64; a number of cases in which the existence of *extreme and exceptional circumstances* was required for a security for costs order were cited in South American Silver Limited v. Bolivia, PCA Case No. 2013-15, Procedural Order No. 10, para. 59.

granting of a security for costs order will carry a heavy burden of proof on the party requesting it. Orders for security for costs may be used by tribunals to address frivolous claims and to protect a party in situations where a claimant is insolvent, making them incapable of paying an unfavourable costs award.[346] Tribunals will require *sufficient evidence* of the potential inability of the claimant to pay an unfavourable costs award when deciding to make a security for costs order.[347] As the jurisprudence demonstrates, such an order is not at all simple to obtain. The potential default on a costs award, the insolvency of the claimant,[348] or the citing of previous (alleged) misconduct, will not necessarily be sufficient.[349]

Previously the question whether or not a tribunal has the authority to make a security for costs order was a controversial one. This was in part a consequence of the fact that there were no express provisions in the ICSID Rules.[350] The amended ICSID Arbitration Rules (specifically Rule 53) now provide for extensive rules on security for costs. This Rule takes a balanced approach, thus, either of the parties making such a request can do so, even before the constitution of the Tribunal. But in all cases the requesting party has to include the relevant circumstances and the supporting documents in its request. The decision on ordering security for costs has to be made in consideration of *all relevant circumstances*, including:

> "(a) that party's ability to comply with an adverse decision on costs; (b) that party's willingness to comply with an adverse decision on costs; (c) the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim; and (d) the conduct of the parties."

In the case of claimants that are SMIs, the respondent may be inclined to request a security for costs order, due to the increased risk of facing an impecunious claimant by the end of the

[346] Behn et al., op. cit., 2020, pp. 206–207.
[347] Ibid.
[348] After directing the Claimant (placed into bankruptcy) to post security for costs (buttressing this decision mainly on the terms of the third-party funding contract), this was revoked in consideration of the Claimant's inability to post it, in the case in Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan, ICSID Case No. ARB/18/35, as noted in Lisa Bohmer, ICSID arbitration against Turkmenistan concludes with award, IAReporter, 4 December 2023. In the case International Mining Company Invest, Inc. v. Kyrgyz Republic, ICSID Case No. ARB/22/25, however, it was reported that the tribunal granted security for costs in favour of the Respondent, in consideration of the third-party funding arrangements lack of provision covering for an adverse costs award, the claimant's bankruptcy, and that it had "no assets or value". See Lisa Bohmer, ICSID Tribunal Orders Claimant to Post Security for Costs, IAReporter, 29 November 2023.
[349] As seen in Lighthouse Corp. v. Timor-Leste, ICSID Case No. ARB/15/2, Procedural Order No. 2, paras. 58–63.
[350] See RSM Production Corp. v. St Lucia, ICSID Case No. ARB/12/10, Decision on St Lucia's Request for Security for Costs, paras. 54–56. In the same case, see Dissenting Opinion of Edward Nottingham, paras. 1 and 17–18.

proceedings. Thus, ordering a security for costs may result in further funds of an SMI being tied up.[351] The presented ICSID Rule, aware of the reality of such a scenario unfolding, requires tribunals to carefully analyse whether a security for costs order would jeopardise parties' ability "to pursue its claim or counterclaim". In a similar vein, UNCITRAL Working Group III also noted that excessively high security for costs may "limit access to justice for certain investors, particularly small and medium-sized enterprise."[352]

In cases conducted under UNCITRAL Rules (1976) debates emerged regarding security for costs orders. In such cases, tribunals confirmed their authority to order security for costs, arguing that Article 26 of the UNCITRAL Rules (1976) grants them the powers to make security for costs orders.[353] The amendment of these Rules in 2010 broadened the scope of interim measures tribunals may take. What is noteworthy in these rules is that in case the arbitral tribunal determines that the interim measures should not have been granted, the party that requested such measures will be liable for any costs and damages it caused.[354] While it may be helpful theoretically, such a provision may be of limited use to an SMI claimant having had to support the excessive burdens of a security for costs order. From this angle the situation of the SMI claimant is even more precarious: able to ill-afford the expenses of lodging ISA arbitration, confronted with an obligation to post security for costs, the SMI claimant's apparent impecuniosity may quickly become a reality. If it becomes impossible to see through the claim that it lodged, the SMI claimant may very well be late to enjoy any benefits of this corrective clause.

It is usually respondents who make requests for security for costs orders, however the amended ICSID Rules have opened up this possibility for both parties. It must be noted that such orders may constitute an undue burden on claimants who have a meritorious claim, but a precarious financial situation, such as small and medium-sized investors.[355] For such investors access to ISA is hindered by the burden of having to make supplementary arrangements, in addition to the

[351] An investment arbitration case under NAFTA stemmed from a domestic court's ordering of an excessive security for costs to be posted. The Claimant argued that this effectively hindered its access to justice, and thus violated the fair and equitable treatment standard under NAFTA. See Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3. The award of the tribunal dismissing the claim was heavily criticized in international legal scholarship. See Fulvio Maria Palombino, Fair and Equitable Treatment and the Fabric of General Principles, Asser Press/Springer, Hague, 2018, esp. p. 71.
[352] Report of Working Group III on the work of its thirty-ninth session, A/CN.9/1044, 10 November 2020, para. 64.
[353] Cf. Sergei Viktorovich Pugachev v. The Russian Federation, UNCITRAL, Interim Award, paras. 371–373.
[354] Cf. UNCITRAL Arbitration Rules 2021, Article 26(8).
[355] Such arguments were also advanced in Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan, ICSID Case No. ARB/18/35, Decision on Security for Costs, paras. 36–37.

advance payments towards the tribunal and the legal costs incurred. A possible solution could be third-party funding (or TPF) which has been gaining traction in the last decade.[356] However, the use of TPF has stirred up even more conversation on the necessity of security for costs orders.[357] A third-party funder will cover some (or all) of the costs of a claimant, but might not pick up the tab in case the claim fails and the tribunal applies the *costs-follow-the-event* rule. The new ICSID Arbitration Rules include an obligation to disclose third-party funding, which is a matter that—according to Rule 14—shall be considered by the tribunal when making a decision on security for costs.[358] The VIAC Rules of Investment Arbitration and Mediation (2021) also contain provisions regarding security for costs (at Article 33), where the requesting party must prove that there is a risk upon the recoverability of costs.

Express provisions on security for costs can also be found in the LCIA Arbitration Rules Article 25.2, or the SCC Arbitration Rules Article 38. In the case of the UNCITRAL Rules or the ICC Rules, it is up to the tribunal to decide on security for costs, based on the general provisions of the rules on interim or provisional measures. In the case of proceedings under ICSID rules, tribunals previously also had to rely on general rules, but after the amendments in force since 2022 there are now specific rules on security for costs that they are able to rely on.

Not complying with security for costs orders will result in the suspension and subsequent termination of the proceedings.[359] Both the VIAC and the amended ICSID rules contain express provisions to that end.

The matter of security for costs has been a debated question in front of tribunals due to the fact that arbitrators often consider that such a measure might open them up to challenges for potentially prejudging the case.[360] It must also be considered that a request for security for costs

[356] See ibid. where the tribunal also considered the fact that the claimant was backed by a third-party funder. For more on third-party funding.
[357] Behn et al., op. cit. 2020, pp. 206–207. In the case of final awards, as shown previously, the SIAC Investment Rules expressly mention that tribunals may take into account TPF.
[358] Indeed this is in line with the practice of some ICSID tribunals, as also shown in RSM Production Corp. v. St Lucia, ICSID Case No. ARB/12/10, Decision on St Lucia's Request for Security for Costs, paras. 83-84.
[359] Such was the situation in the case of Eugene Kazmin v. Republic of Latvia, ICSID Case No. ARB/17/5, where the tribunal terminated the proceedings due to the claimant's failure to comply with a security for costs order. The tribunal terminated the proceedings without prejudice, in the form of an award, also awarding full costs to the respondent. It must be noted that in this case concerns surrounding the business conduct of the claimant were decisive for ordering security for costs.
[360] As argued in the case Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Procedural Order No. 2, para. 21. Also cited among other cases by Schreuer et al., op. cit. 2009, p. 783. The dilemma of having a transparent order of security for costs, but risking to prejudge the claim was also addressed in Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda, ICSID Case No. ARB/18/21, paras. 54–55.

has to be drafted by counsel, responded to by opposing counsel and decided upon by the arbitral tribunal, which ultimately adds to the duration and the costs of the arbitral proceedings. For this reason, parties must carefully weigh the opportunity of lodging such a request.

### 3.3.9. Factors that drive up costs

The factors that are able to drive up the costs of arbitration are numerous. Next to the more-or-less fixed administrative costs, and the costs of the arbitrators, the factors that tend to drive up costs the most have to do with the complexity of the dispute underlying a case, with factors such as the number of parties involved, their conduct during the proceedings, the expertise—and experts—needed, and the amount of evidence that is presented, all play a major role. The element that is most costly is legal representation. Large law firms, working on a billable hours business model tend to dominate representation services in ISA. Add to this the reticence of arbitrators in limiting the length of submissions, and clients' expectation of their counsel to pull out all the stops, and we see the contours of a system in which *flexibility* and *expertise* have actually led to "endless over-lawyering."[361]

In the case of ISA, the above are exacerbated by the public interest implications of cases. This is especially so since transparency has been a rule in ISA proceedings. The stakes involved in such cases heavily influences party and counsel conduct, arbitrators' cautiousness (so-called *due process paranoia*), and ultimately drives a real or perceived need for excessive administration of evidence, (*leave no stone unturned*-type) discovery, document production requests, supplementary expert reports, and various procedural decisions that ultimately drive up costs (such as bifurcation, or various interim orders that contribute to delays or impose further burdens on the parties).

Further factors that come into play because of the public interest involving these cases, among which are the expectations of transparency, and the way in which a government is supposedly expected to, or perceives its role in the way an ISA case is defended. This may

[361] In the words of Jan Paulsson, as retained in Jack Ballantyne, Paulsson warns of "over-lawyering", Global Arbitration Review, 3 June 2024, available at: https://globalarbitrationreview.com/article/paulsson-warns-of-over-lawyering (Last accessed 23 August 2024)

determine whether or not a government is open to negotiating a settlement, or rather will seek the case until the very end, trying its luck in an annulment proceeding as well.

The duration of the investor-state arbitration proceedings also accumulates costs with both arbitrators and legal representation. This, in turn, creates a new set of challenges. Should tribunals proceed more rapidly with a case, parties may express doubts as to the thoroughness of the proceeding.

Progress in terms of the transparency in ISA cases has been welcomed by critics of the system. While the public's perception regarding the *secretive* nature of ISA proceedings is still somewhat present,[362] the actual truth is that there has been much progress on this front. Transparency, as a rule, has benefits that much outweigh the costs. But there are costs associated with transparency, nonetheless. Practitioners often talk about the fact that both the duration of proceedings and consequently also the costs tend to go up due to transparency obligations. Both investors and states have a degree of interest in controlling what is published in a particular ISDS case, which is why the continuous back-and-forth correspondence between the tribunal and the parties, via the tribunal secretary, ultimately adds to the costs of the arbitration.

Between arbitrators' obligation to act fairly, and in an impartial manner, to allow for the parties to present their cases, and render an enforceable award, on the one hand, and their obligation to act in an expeditious manner, and save time and costs, on the other hand, there is often a conflict that presents itself.[363] Investor-state arbitration cases are also regularly plagued by what is called *due process paranoia*. The term is used to describe "a reluctance by tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully."[364] The fact that tribunals often feel compelled to extend deadlines, admit further evidence, and cater to other demands of counsel, or their *disruptive behaviour,* have been attributed to the due process paranoia of arbitrators, and

[362] This perception is driven by critics who continue to use the *secretive* label when pointing to ISDS for developments that are scarcely even related. See UN Special Rapporteur on human rights and the environment David R. Boyd's press release titled "Investor-State dispute settlements have catastrophic consequences for the environment and human rights: UN expert", available at https://www.ohchr.org/en/press-releases/2023/10/investor-state-dispute-settlements-have-catastrophic-consequences (Last accessed 23.08.2024)

[363] Rutger Metsch, Rémy Gerbay, Prospect Theory and due process paranoia: what behavioural models say about arbitrators' assessment of risk and uncertainty, Arbitration International 36, 2020, pp. 235, 236.

[364] Queen Mary University of London, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, p. 10. Available at: https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf (Last accessed 23.08.2024)

faulted for extending the time and cost of arbitral proceedings.[365] The fact that in this context the *disruptive behaviour* of counsel is mentioned, again points to the fact that the accumulation of costs is in many cases the doing of counsel. The following practical examples of overly cautious case management decisions have been noted in scholarship: "(i) granting insufficiently justified extensions of time; (ii) accepting the belated introduction of new defences/claims or of fresh evidence; (iii) acceding to last-minute requests to reschedule oral hearings; (iv) granting overly generous disclosure orders; and (v) accepting the filing of superfluous submissions."[366]

The time and costs of transparency, while worth mentioning, are dwarfed in comparison to the way in which governments interpret their role in going about such proceedings. There is a great incentive for governments to prolong ongoing ISA cases as much as possible. As such cases generally fall outside the constant attention of the mass media and the public, due to their length and complexity, governments may be inclined to try their luck, as opposed to seeking settlement. A future and potential loss may be the responsibility of a future government, thus avoiding in large part the political cost of losing a case. An admission of fault and payment of a settlement would in all cases be pinned on the government in power. Such a calculation is most obvious, and should be considered as part of the potential incentives that governments may have to see cases through to their very end, regardless of the probability of success of such a strategy.

The fundamentally public nature of these disputes may in turn be used to politically justify the fact that the government is required to do everything in its power to argue its case, and not give in to the demands of the claimant. It is without a doubt that in cases where the political parties dominating a government seek to mitigate any type of negative consequences stemming from the bare existence of an ISA case against it, will possibly adopt a procedural attitude that will result in more costs for both parties. The effects of driving up the costs of proceedings are evident in the case of small and medium-sized investors.

ISDS in the form of ISA bears massive costs by any measure. This is without a doubt the most important barrier to accessing this means of dispute resolution. The fact that there are no specific rules for recovering costs adds to the unpredictability which further discourages SMIs from viewing ISA as a means of access to justice. High costs and uncertainty regarding their recovery both act as a deterrent for lodging cases.

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[365] Ibid.
[366] R. Metsch, R. Gerbay, *op. cit.*, p. 235.

# CHAPTER 4 – PARTS OF THE SOLUTION

## 4.1. Some solutions, as reflected in IIAs

Some of the IIAs that could be argued belong to a new generation of such international agreements, actually acknowledge the fact that there are costs-related impediments for smaller investors in accessing investor-state arbitration.

The flow of foreign direct investments is facilitated principally via three categories of legal instruments: domestic laws pertaining to foreign investment, investment contracts entered into by an investor and a state, and international agreements, entered into between states. Their purpose is to promote and protect foreign investment. Any one of these may contain provisions regarding access to investor-state arbitration in cases of disputes coming under their purview. International investment agreements ("IIAs") have been regarded as the most important policy instruments relating to foreign investment, aimed principally at promoting and protecting foreign investors and their investments.[367] These instruments regularly grant access to arbitration, without the obligation to exhaust local remedies. Recent research demonstrates that dozens of domestic laws also provide foreign investors such direct access to arbitration.[368]

Access to arbitration is generally considered an essential component for both promoting and protecting foreign investment. What exactly comes under the purview of such instruments, what is an investment under a particular domestic law, or an investment agreement, is regularly left up to the decision of arbitral tribunals. These legal instruments tend to use the term investment loosely, preferring to avoid oversimplified or convoluted definitions that may interfere with their goals of promoting *investment*. It is at the protection stage that issues tend to arise. Some investments may end up not qualifying as investments under a particular instrument, and as a consequence are denied the protections that would otherwise be granted under it. But some investors also face insurmountable barriers in accessing the protection promised to them, and that would apply to them *ex lege*. In both instances, size matters, even though in principle the instruments for the promotion and protection of foreign investors cover all foreign investors

[367] J. Karl, op. cit., pp. 249–250.
[368] Tarald Laudal Berge, Taylor St John, Asymmetric diffusion: World Bank 'best practice' and the spread of arbitration in national investment laws, Review of International Political Economy 28(3), 2021, pp. 584–610.

regardless of their size, the reality emerging from a combination of factors is one in which smaller investors fall through the cracks.[369]

The issue of access of smaller enterprise to investment arbitration is widely recognised today. The proliferation of investment arbitration cases has put a spotlight on the regime, fuelling discussion and dialogue aimed at finding solutions to its shortcomings. Most notably, the United Nations Conference on International Trade Law, and its Working Group III which was tasked with conducting negotiations on the reform of investor-state dispute settlement. Treaty negotiators have also learned from the experience accumulated in the past (more or less two) decades, and international treaties negotiated recently contain provisions that appear to be aimed at closing gaps and making improvements. While the average IIA is not too sophisticated, and differences between most IIAs are not that evident, a new generation of treaties reflect states' increased sophistication in negotiating treaties that better reflect their interests. The European Union has made notable strides in this regard.

The EU entered into international economic agreements with several countries. Some of these are only at the level of agreements in principle, while others are currently in the process of ratification. Nevertheless, their provisions are publicly available and indicate interesting developments for the topic of this research. As such, these provisions have also been the subject of some analysis by scholars. What is noteworthy from the point of view of this research is that some of these agreements expressly mention, and attempt to provide solutions to enhance small and medium-sized investors' access to ISDS.[370]

The EU–Vietnam Investment Protection Agreement ("IPA"), as most treaties do, encourages the amicable settlement of disputes. In case such a settlement cannot be accomplished, the claimant alleging a breach of the investment protection provisions must first submit a request for consultations. The IPA provides that these "[c]onsultations may also take place by videoconference or other means, particularly if a small or medium-sized enterprise is involved."[371] This is a provision evidently meant to save on the expenses of the proceedings, an aspect especially important in the case of SMEs. However, it must be noted that it takes the agreement of the parties

[369] See also J. Karl, op. cit., p. 250.
[370] In the text of the mentioned agreements, they are addressed as small and medium-enterprises.
[371] EU-Vietnam IPA, Article 3.30 para. 3. Similar provisions are contained in the Canada–Taiwan Foreign Investment Promotion and Protection Agreement (FIPA) Paragraph 24(3), the Belgium-Luxembourg Economic Union Model BIT 2019, Article 19(B)(3), the Canada Model BIT 2021, Article 25(3).

to have consultations take place in a virtual setting. These consultations constitute a preliminary proceeding that is mandatory before filing a claim. The claim must then be filed within 18 months of submitting the request for consultations. Failing to do so, the claimant loses its right to submit a claim under the Agreement. The claims are submitted to the Tribunal formed under the Investment Tribunal System provided for in Sub-section 4 of the IPA.

According to Article 3.38 para. 9 of the EU–Vietnam IPA, when submitting a claim, the claimant may request that the case be heard by a tribunal formed of a sole Member.[372] This paragraph provides that the respondent shall give "sympathetic consideration" to such a request, especially in where it is made by an SME, or in a case related to a "relatively" low-value claim. Once again, the consent of the respondent must be sought.[373]

The Comprehensive Economic and Trade Agreement entered into between the EU and Canada ("CETA") also holds a few rules that are meant to lend a helping hand to small and medium-sized investors. This Agreement also contains a provision allowing for parties to agree upon holding consultation through videoconference "or other means where appropriate", especially in the case of small and medium-sized investors.[374] While the effort is truly laudable, this means of saving costs is likely to be less useful than it seems. The experience during the pandemic will likely show us that the costs saved with videoconferencing have been less significant than was hoped for.

The CETA Articles 8.23(5) and 8.27(9) also encourage proposing the claim be heard in front of a tribunal made up of a single member in claims initiated by SMEs or for relatively small amounts of compensation or damages claimed. This being successful is once again tied to the "sympathetic consideration" of the respondent.

Some treaties with investment provisions, such as the EU-Mexico Global Agreement, contain ISDS in the classic form, without any reference to improving SME access to ISDS. And others leave out ISDS completely, such as the Colombia–Ecuador–EU–Peru Trade Agreement, the EU–Kazakhstan Enhanced Partnership and Cooperation Agreement, the EU–Armenia Comprehensive and Enhanced Partnership Agreement, or the EU–Japan Economic Partnership

[372] Similar provision is contained in The Netherlands Model Investment Agreement 2021, Article 20(3).
[373] Identical provisions can be found in the EU-Singapore IPA Articles 3.3(7) and 3.9(9), as well as the Canada–Taiwan Foreign Investment Promotion and Protection Agreement (FIPA), Annex III, Article 9(9). Similar provision is contained in Belgium-Luxembourg Economic Union Model BIT 2019, Article 19(D)(6).
[374] CETA Article 8.19 paragraph 3.

Agreement. This may be a consequence of the parties having failed to reach consensus on what form ISDS should take, as the EU attempts to push the concept of a standing court via both bilateral and multilateral avenues. Such a development demonstrates that not all countries are in support of the EU's initiative, signalling that others may resist these changes as well.

Furthermore, expanding (or rather improving) access to ISDS may be a sensitive topic, but it may surely find sympathy in negotiations, as it would be odd to support limiting access to justice. However, the mould that access to justice is placed in is sometimes difficult to settle. An approximate reflection of this challenge can be found in the EU–Angola Sustainable Investment Facilitation Agreement ("SIFA"), which only includes a state-to-state arbitration clause. It further provides for a "problem-solving mechanism" to be established for solving private entities' *problems*. The Agreement adds that this mechanism must be established in a way that is easily accessible also for MSMEs.[375] While these provisions appear as oddly *original*, as opposed to the ones mentioned in the previous paragraph, this evidently leaves room for dispute settlement arrangements such as the ICS to be worked out later.

#### 4.1.1. The Investment Court System

The proposal for an investment tribunal is contained in new international agreements signed by the EU such as the EU–Vietnam IPA, or the CETA.[376] It is a solution that seeks to replace the current ISA-dominated system to have jurisdiction over all investment-related claims. The EU is the principal proponent of this dispute settlement mechanism, and it is making progress on it in bilateral treaties, such as the ones previously mentioned. In addition, the EU is also working on the creation of a multilateral investment court,[377] thus making an effort to take this project to a multilateral level, an effort principally undertaken within UNCITRAL Working Group III, where

[375] See Article 23 EU–Angola SIFA.
[376] See Chapter 3, sub-section 4 titled *Investment Tribunal System*, EU-Vietnam IPA; Chapter 8, Section F, of the CETA; Chapter 3, Section A of EU–Singapore IPA (esp. Articles 3.9–3.12); Chapter 10, Section D, EU–Chile Advanced Framework Agreement; Similarly found in the agreement in principle of the EU–Mexico Global Agreement.
[377] This is a consequence of its express empowerment the EU received from the Council of the European Union to conduct such negotiations through the European Commission. See Council of the European Union, Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, 12981/17 ADD 1, 1 March 2018, available at https://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf (Last accessed 01.03.2024)

the EU is certainly a proponent of systemic reform.[378] The multilateral investment court, once it is established, will expectedly replace the bilaterally established investment courts.[379]

The EU put the investment court system on the table in its other negotiations for similar international agreements with investment provisions. However, in some cases it suffered minor modification. Thus, the solution envisaged is not included in an identical way in all such international agreements. In the agreement between the EU and Japan, there are no provisions on investor-state dispute settlement, because of a lack of consensus between the parties.[380] This indicates that the idea of an investment court system and a subsequent multilateral investment court may yet prove to be a hard sell to some developed countries.

The purpose of this tribunal is to find solutions for the numerous critiques that have plagued investor-state arbitration. Such criticism has been featured extensively in scholarship, but has crossed over to mainstream media as well, which only accelerated a process of apparent loss of legitimacy of the investor-state arbitration system, as the classic means of investor-state dispute settlement. This prompted the Commission to propose the investment court system for the (by now failed) TTIP negotiations.[381] Nevertheless, the concept of the ICS remains a central piece in the EU's new-generation IPAs.

The principal feature of the investment court system is that it envisages a standing tribunal, with tenured judges and an appeals process. While a novel approach, it may resemble other standing bodies that resolve disputes between private and public parties.[382] The particularities of this system have been analysed extensively in legal literature,[383] and a detailed presentation would exceed the purposes of herein research. What is notable, however, in the case of such standing

[378] European Commision, Fact Sheet: A future multilateral investment court, Brussels, 13 December 2016, available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_4350 (Last accessed 23.08.2024)
[379] European Commission, The Investment Court System, https://trade.ec.europa.eu/access-to-markets/en/content/investment-court-system (Last accessed 23.08.2024)
[380] Agreement between the EU and Japan for an Economic Partnership, Chapter 8, Section B.
[381] European Commission, Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations, Press Release, Brussels, 16 September 2015. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5651 (Last accessed 23.08.2024)
[382] Such is the Iran-United States Claims Tribunal, pursuant to the Algiers Accords of 1981. This tribunal was actually envisaged to resolve both state-state disputes, and individual-state disputes.
[383] Makane Moïse Mbengue, Stefanie Schacherer (eds.), Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA), Springer, Cham, 2019; Céline Lévesque, The European Commission proposal for an Investment Court System: Out with the old, in with the new?, Centre for International Governance Innovation, Investor-State Arbitration Serier, Paper no. 10, September 2016.

bodies is their ability to settle claims that would otherwise be unviable, unable to be brought under existing ISA.[384]

In terms of the costs of the proceedings, two important points stand out regarding the proposal for an investment court system. First, the fact that the process may become less expensive in the case of a standing court. Parties theoretically would not have to foot the bill, as they do in the case of arbitration, for all expenses of the proceedings. They would, thus, at least save the *arbitration costs*. It must be noted, however, that someone does have to cover the costs of maintaining and functioning of such a body, and there's no one else but the contracting parties (the states themselves) that may be mandated to do so. Also, arbitration costs are regularly the smaller part of parties' costs, legal representation tends to run up the bill in a way larger proportion. Second, while the process within a such a court may appear less expensive than arbitration, the envisaged appeals mechanism may extend the duration of the proceedings, and thus add to the overall costs. The degree to which the costs would run up in the case of an appeal depends on matters such as, what the appeal extends to (*de novo* appeal, or one that is limited to manifest errors of fact), or the possibility and extent of remand.

Both the CETA and the EU-Vietnam IPA contain rules regarding time limits. CETA Article 8.39 paragraph 7 provides that the Tribunal and the disputing parties shall make every effort to ensure the dispute settlement process is carried out in a timely manner. The Tribunal shall issue its final award within 24 months of the date the claim is submitted, or if it requires more time, it shall provide to the parties the reasons for the delay. Article 3.53 and 3.54 of the EU-Vietnam IPA provide the rules on timing the award. First, the tribunal must issue its award in 18 months from the submission of the claim. This award may be appealed, which is why it is called a *provisional award*. A provisional award that is not appealed in 90 days becomes final. In case of appeal, the tribunal has 90 days to issue a revised award.[385] The envisaged time-limits appear very ambitious, considering that the general duration of ICSID proceedings is 56 months, and proceedings under UNCITRAL Arbitration Rules last an average of 51 months.[386]

[384] See Award number 483–Claims of less than US$250,000, US–Iran Claims Tribunal, concerning the settlement of approximately 2800 claims of less than US$250,000 each. It must be noted that this is a case in which these small claims have been espoused by the United States and filed on behalf of the Claimants with the Iran–United States Claims Tribunal.
[385] Similar provisions are contained in Article 3.18(4) of the EU–Singapore IPA.
[386] Hodgson et al, op. cit. (2021), p. 5.

In terms of the costs of these proceedings and their accessibility to smaller investors and individuals, the contracting parties did include some provisions that reference the fact that the issue was in discussion and known to them. However, the parties failed to include any measures that would categorically improve SMIs' access to this dispute settlement system. Instead, they included provisions to further discuss this matter and negotiate terms that serve this purpose, thus postponing a potential breakthrough in providing better access to ISDS for SMIs.

#### 4.1.2. Breakthrough postponed

In terms of decisions on costs, the CETA, the EU–Vietnam IPA both establish the *loser pays* rule in principle, with much room for tribunals to consider what would be an appropriate apportionment in particular cases. The Agreements also leave room for further regulatory innovation that may be crucial for smaller claimants.

According to Article 3.53 paragraph 5 of the EU–Vietnam IPA, the Committee set up by the Parties may adopt supplemental rules on costs, specifically on the amount of costs borne by unsuccessful disputing parties. If and when such rules are adopted, this provision mandates that they should be considerate of the "financial resources of a claimant who is a natural person or a small or medium-sized enterprise." The provision makes a recommendation that the Committee "endeavour to adopt" such rules no later than one year after the entry into force of the IPA. The text of the IPA opens the possibility of adopting such supplementing rules, with a recommendation for a timeline. This provision indicates intent, but it remains to be seen what the outcome will be. Considering that Article 3.53 paragraph 4 already leaves much room for tribunals to decide on how to apply the recommended *loser pays* rule, a more stringent requirement to consider the situation of SMEs when deciding on costs would have been welcome. Identical rules stating the supplemental rules that are *to be adopted* regarding costs decisions, are also contained in the EU–Singapore IPA, Article 3.21 paragraph 5.

Article 8.39 paragraph 5 of the CETA contains a similar provision establishing the *loser pays* rule in principle, leaving much leeway for tribunals to ultimately establish costs burdens. While paragraph 6 also provides a possibility for the adoption of supplemental rules that better take into consideration the situation of small and medium-sized investors, this provision is less limiting than the one in the EU-Vietnam IPA and EU–Singapore IPA. This paragraph actually refers to the creation of new rules by the CETA Joint Committee, that would be aimed at "reducing the

financial burden" on small and medium-sized claimants more generally. In a request for an opinion, the Kingdom of Belgium petitioned the Court of Justice of the European Union ("CJEU") about the compatibility of the CETA provisions on investor-state dispute settlement with EU Treaties and fundamental rights. In its Opinion 1/17 the CJEU states that this provision relates to an intention to reduce the financial burdens, which would principally cover the matter of costs decisions, related to both tribunal costs and legal costs.[387] Opinion 1/17 implicitly recognizes that this provision may be used for adopting more rules that would improve access to ISDS under CETA, by criticising the fact that this provision does not contain "any legally binding commitments relating to the financial accessibility of the envisaged tribunals for small and medium-sized investors."[388]

According to an explanatory brief made published by the European Commission, the implementation of the ICS awaits full ratification of the CETA, and in the meantime the Parties to the CETA are working on details pertaining to the access of small and medium-sized investors to the dispute settlement system.[389] Unfortunately I was not able to identify any details regarding concrete progress on this topic, despite a statement of undertaking to expedite the adoption of such rules.[390]

In a statement made by the Council of the European Union and the European Commission on investment protection and the ICS, a highly ambitious undertaking must be highlighted. According to this, the Commission, within the CETA Joint Committee, undertook to "propose appropriate measures of (co)-financing of actions of small and medium-sized enterprises before that Court and the provision of technical assistance."[391] This is an even more ambitious step towards improving SME access to ISDS, more akin to the proposal for an advisory centre on international investment dispute resolution, if it would be extended to benefit investor-claimants as well.[392] This commitment to improve accessibility to the envisaged ISDS mechanism for small

[387] Opinion 1/17 of the Court of Justice of the European Union, paras. 208–210.
[388] Id., paras. 214–216.
[389] See European Commission, The EU-Canada agreement explained, available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement/agreement-explained_en#investments (Accessed 23.08.2024.)
[390] Council of the European Union, Statement to the Council minutes – Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Brussels, 27 October 2016, 13463/1/16 REV1, p. 27.
[391] Ibid.
[392] At the closing of this manuscript on 23.08.2024 the proposal is to only extend the services of such a Centre to states.

and medium-sized investors was considered as being "sufficient justification" by the CJEU to conclude that the agreement was "compatible with the requirement that those tribunals should be accessible."[393]

However, what the treaty text and the CJEU's interpretation also mean is that the parties to the CETA actually postponed the expected breakthrough in creating an ISDS mechanism that is truly able to provide access to small and medium-sized investors as well. Even more important, the CJEU's Opinion 1/17 actually draws attention to this matter, by expressly conditioning the compatibility of this ISDS mechanism, *i.e.* the compatibility of the ICS with EU treaties and fundamental rights, to adopting further regulation which guarantees access to justice to all investors. According to the CJEU any ISDS mechanism must adhere to EU rules, especially the right to an effective remedy and to a fair trial, as contained in Article 47 of the Charter of Fundamental Rights of the European Union, and expressly in terms of ensuring *effective access to justice*.[394] In this regard, Opinion 1/17 expressly mentions the obligation to offer the possibility of granting legal aid to ensure access to justice, as being a right that also extends to enterprises, as was held in previous CJEU case law.[395]

There are no efforts if the EU related to the above that have been identified in either of these bilateral relations. The efforts of the EU seem to have been channelled into the reform process that is going on at the United Nations Commission on International Trade Law Working Group III, which will be addressed in the next chapter.

### 4.2. Solutions sought at UNCITRAL WG III

In the 50th session of the United Nations Commission on International Trade Law ("UNCITRAL"), Working Group III was entrusted "with a broad mandate to work on possible reform of investor-State dispute settlement."[396] This mandate consists of identifying and considering concerns regarding ISDS, considering whether reform was desirable in the light of any identified concerns, and develop solutions to be recommended to UNCITRAL.[397] At that time,

[393] Opinion 1/17, para. 219.
[394] See also Opinion 1/17, para. 214.
[395] Opinion 1/17, para. 58.
[396] Report of the United Nations Commission on International Trade Law, Fiftieth session (3-21 July 2017), para. 264.
[397] Ibid.

it was agreed that the reform endeavours be considered ”in a comprehensive manner”, with the general objective being to “restore confidence in the overall system.”[398]

While it is not the main purpose of the Working Group to enhance SMIs’ access to ISDS, the question is featured in relation to a number of topics, and prospective solutions that are addressed under the Working Group’s agenda. The matter of costs is thus featured prominently, and appeared as a major topic already in the first discussions of Working Group III under its new mandate.[399] In this context, the issue of costs playing a major role in small and medium-sized enterprises’ access to the system was expressly mentioned.[400] It is argued that the “significant costs of litigating a dispute, in particular in hiring specialised counsel, and the lengthy nature of litigation […] make the overall costs of bringing a claim under the existing system potentially prohibitive for a significant number of smaller and medium sized investors.”[401] The question of SMIs’ access to ISDS is featured in almost every session, if relevant to the discussions on particular topics, of course.

Two projects on the Working Group’s agenda appear as particularly important from the viewpoint of this research. Both may have a notable impact on SMIs access to ISDS, via their possibilities in terms of lowering access costs, and their inherent capacity of enhancing overall accessibility. These two proposals are that of a multilateral permanent investment court, and that of a multilateral advisory centre on international investment dispute resolution. These two are most relevant from the viewpoint of this research, which is why they will be addressed herein with a focus on their abilities to improve SMIs access to ISDS.

The multilateral instrument on ISDS reform (“MIIR”) is envisaged as the principal vehicle that would carry forward, amongst others, the above two instruments of reform, which will be featured in the form of protocols. The advisory centre holds many opportunities for improving access of SMIs to ISDS, but it is highly unlikely, as demonstrated, that in a first phase it will extend its services to SMIs. Considering that the largest expenses faced in ISA are those made with legal representation, having access to *subsidised*, thus less expensive legal representation would have great impact on the accessibility of ISDS. We will see what the future holds for such a multilateral

[398] Id., paras. 242, 243.
[399] See the 34th session of Working Group III of UNCITRAL.
[400] See paras. 41, 64 of Report of Working Group III on the work of its thirty-fourth session, A/CN.9/930/Rev.1, 19 December 2017.
[401] Submission from the European Union, A/CN.9/WG.III/WP.145, para. 34.

institution. In terms of the standing mechanism, there is still a potential to reduce costs to some degree. As noted, tribunal costs are not the largest item in terms of costs in an ISA proceeding, but they can still make a difference overall. Additionally, just by the way in which a standing court functions, it holds many features that are likely to reduce the efforts of counsel, and thus, indirectly, the costs of legal representation.

### 4.2.1. The proposal for an advisory centre on international investment dispute resolution

The idea for an advisory centre on international investment law appeared almost two decades ago, when the then Secretary-General of ICSID stated: "we are exploring the creation of a *pro bono* advisory service, most likely to be provided by private lawyers and law firms trough the Justice Reform unit in the Legal Department of the World Bank."[402] The idea evolved, and in the next ten years several proposals were put forward, both in the academic and the institutional sphere.

The proposals put forward in their publications by Eric Gottwald,[403] and that of Karl P. Sauvant and Federico Ortino[404] are based on the model provided by the Advisory Centre on World Trade Organization Law ("ACWL"), which is viewed as a success. Robert Schwieder also mentions initiatives put forward in collaboration of several institutions: the proposal of the UNCTAD and OECD, the proposal of UNCTAD with the Inter-American Development Bank, the Organization of American States, and the Columbia Program on International Investment, the project of the Union of South American Nations ("UNASUR"), and the initiative of Australia-New Zealand and the Association of Southeast Asian Nations.[405] What is common in the above is that

[402] Opening remarks by Secretary General of ICSID, Roberto Dañino, at symposium co-organised by ICSID, OECD and UNCTAD, titled Making the most of international investment agreements: A common agenda, 12 December 2005, p. 3. Available at: https://www.oecd.org/investment/internationalinvestmentagreements/36053800.pdf (Last accessed 23.08.2024)

[403] Eric Gottwald, Leveling the Playing Field: Is is Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?, American University International Law Review 22(2), 2007, pp. 237–275.

[404] Karl P. Sauvant, Federico Ortino, Improving the International Investment Law and Policy Regime: Options for the Future, Helsinki, Ministry for Foreign Affairs of Finland, 2013, available at: https://ccsi.columbia.edu/content/improving-international-investment-law-and-policy-regime-options-future (Last accessed: 23.08.2024); Another important proposal which some argues is "by far the most detailed" was put forward by Anna Joubin-Bret, titled "Establishing an International Advisory Centre on Investment Disputes?" (which the author was not able to locate), as cited in Robert Schwieder, Legal Aid and Investment Treaty Disputes: Lessons Learned from the Advisory Centre on WTO Law and Investment Experiences, Journal of World Investment & Trade 19, 2018, p. 637.

[405] Schwieder, op. cit., pp. 639–644.

their focus is on developing countries, and least-developed countries, and improving their access to ISDS. The idea of having an advisory centre that would also benefit SMIs scarcely appears in scholarly works.[406]

Modelled on the ACWL, the idea for an advisory centre on international investment law really took off in the UNICTRAL WGIII session of October 2019. A first draft of its provisions was put forward four years later.[407] The advisory centre on international investment dispute resolution ("advisory centre"), as it came to be called, is envisaged to come into existence in the form of an intergovernmental body with the purpose of providing "training, support and assistance with regard to international investment dispute resolution."[408]

The dispute settlement system under the WTO functions on a state-to-state basis, thus the ACWL provides "legal training, support and advice on WTO law and dispute settlement procedures to developing countries, in particular to the least developed among them, and to countries with economies in transition."[409] It follows that the ACWL aims to provide the above to the most in need of the WTO member states. Analogously, in the international investment setting, this would translate into an advisory centre that gives advice not only to developing countries, and least-developed countries, but also to investors who may find themselves in need of assistance.[410] Among such investors, without a doubt SMIs, who, as demonstrated herein, face significant barriers to accessing investor-state dispute settlement. SMIs aside, legal assistance would be of use to any investor that finds itself impecunious as a result of state action leaving it unable to bring a claim.[411]

Indeed, the fact that "micro-, small- and medium-sized enterprises (MSMEs) could benefit from the services of the [advisory] Centre" was an idea carried along in the discussions regarding

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[406] Schwieder, op. cit., p. 655; Marc Bungenberg, August Reinisch, From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court – Options Regarding the Institutionalization of Investor-State Dispute Settlement, Second Edition, Springer, Berlin, 2020, p. 21.

[407] The adoption in principle of the second draft proposal was featured as the topic for the next session as of the closing of this manuscript in March 2024. See Note by the Secretariat, Possible reform of investor-State dispute settlement, Draft statute of an advisory centre on international dispute resolution, A/CN.9/WG.III/WP.238, 7 February 2024.

[408] Draft statute, Article 2(1).

[409] The Agreement establishing the Advisory Centre on WTO Law, Article 2(1).

[410] For arguments on why legal assistance rather than financial assistance appears more suitable, see Katia Fach Gomez, Catharine Titi, Facilitating Access to Investor-State Dispute Settlement for Small and Medium-Sized Enterprises: Tracing the Path Forward, pp. 28–29. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4323775 (Last accessed 23.08.2024)

[411] See also Franck, op. cit., pp. 210–211.

this innovation.[412] The debates briefly presented in the reports of Working Group III reflect the difficulty of deciding the circle of beneficiaries of the advisory centre's services. Most importantly, the Working Group did not seem to manage to square the circle regarding the politically sensitive issue of states funding a body that would in turn assist investors in lodging claims against those very funders.[413] The arguments, however, reflect an even wider set of questions that crept up on the table regarding this point on the Working Group's agenda.

One of the main arguments against extending the advisory centre's services to SMIs relied on the very simplistic view that such investors could obtain support from elsewhere, highlighting third-party funding as a potential source of support. In this regard, it was noted that an argument had been made for third-party funding to be "completely prohibited" in ISDS, if the advisory centre's benefits would extend to claimants as well.[414] This type of an odd exchange of third-party funding for the advisory centre's services seems to lead nowhere. It questions the Working Group's willingness to genuinely expand access to this avenue of justice. The false choice that was presented in this tit-for-tat exchange would have resulted in one instrument that enhances access to justice being taken away in favour of another instrument that enhanced access to justice. But while third-party funding is in theory available to all, the services of the advisory centre should have excluded investors that fell outside of the definition of what an SME was (or would have been). The debate in this regard should have been more considerate of the underlying fact that

[412] See in Report of Working Group III on the work of its forty-sixth session (Vienna, 9–13 October 2023), A/CN.9/1160, para. 41; also in Report of Working Group III on the work of its forty-third session (Vienna, 5–16 September 2022), A/CN.9/1124, para. 64. This was also expected by outside researchers, see: EI–IILCC Study Group on ISDS Reform, Reform of Investor-State Dispute Settlement – Current State of Play at UNCITRAL, p. 20 https://doi.org/10.5771/1435-439X-2022-1-15 (Last accessed 23.08.2024). The European Union appeared as one of its principal supporters, see Comments from delegations on the Initial Draft on the Establishment of Advisory Centre, UNCITRAL Working Group III, pp. 12, 18, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_delegations_-_initial_draft_on_the_establishment_of_advisory_centre_0_1.pdf (Last accessed 23.08.2024)

[413] A matter also brought up by the delegation of Indonesia in Comments from delegations on the Initial Draft on the Establishment of Advisory Centre, UNCITRAL Working Group III, p. 25, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_delegations_-_initial_draft_on_the_establishment_of_advisory_centre_0_1.pdf (Last accessed 23.08.2024)

[414] Report of Working Group III on the work of its forty-sixth session (Vienna, 9–13 October 2023), A/CN.9/1160, para. 58. The delegations of Switzerland and Viet Nam submitted comments on the matter, the latter expressing the fact that SMEs were at an advantage by having access to third-party funding, thus excluding them as beneficiaries would not "adversely affect their access to justice". See Comments from delegations on the Initial Draft on the Establishment of Advisory Centre, UNCITRAL Working Group III, pp. 39, 42, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_delegations_-_initial_draft_on_the_establishment_of_advisory_centre_0_1.pdf (Last accessed 23.08.2024)

there is need for external funding in order to bring a claim in ISA, which signals that there is a severe access to justice issue in this area.

This takes us to a second challenge that the Working Group faced: defining an SME. In this regard it was only observed that there are several definitions that are used, with differing definitions depending on the jurisdiction.[415] As difficult as it may seem, it would have actually been easier to square this circle, by using the definition that is used by an international institution such as the World Bank Group.

There is an additional challenge regarding the potential beneficiaries of an advisory centre, pointing beyond the relatively simple hurdle posed by defining what an SME is. As also pointed out by Professors Titi and Fach Gomez, a focus on the lack of economic resources may be a better way to determine a need for assistance, as is done by other international courts.[416] They rightly suggest that there should be additional selection criteria which would ensure that such assistance is only granted to those who really needed, or as per the term they use, to those that appear as *vulnerable*. Such a differentiation is also in line with the fact that a *medium-sized enterprise* may have significantly more resources than a small enterprise or an individual. However, a medium-sized enterprise may also find itself in a vulnerable situation if it lost a significant proportion of its assets pursuant to the host state actions, basically leaving it unable to initiate action to aimed at compensating such loss.

Further, emphasis was also placed on the dispute *prevention* potential of offering "technical assistance and capacity-building to MSMEs".[417] Two other potential benefits were presented alongside that of dispute prevention.[418] One was that the participation of SMEs held potential as a source of financial contributions. This would imply the advisory centre providing capacity-

[415] Report of Working Group III on the work of its forty-sixth session (Vienna, 9–13 October 2023), A/CN.9/1160, para. 58. See also comments submitted by delegation of Republic of Korean in Comments from delegations on the Initial Draft on the Establishment of Advisory Centre, UNCITRAL Working Group III, pp. 34, 35, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_delegations_-_initial_draft_on_the_establishment_of_advisory_centre_0_1.pdf (Last accessed 23.08.2024)

[416] See Katia Fach Gomez, Catharine Titi, Facilitating Access to Investor-State Dispute Settlement for Small and Medium-Sized Enterprises: Tracing the Path Forward, p. 10. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4323775 (Last accessed 23.08.2024)

[417] Report of Working Group III on the work of its forty-sixth session (Vienna, 9–13 October 2023), A/CN.9/1160, para. 59. Supported also by Canada, in Comments from delegations on the Initial Draft on the Establishment of Advisory Centre, UNCITRAL Working Group III, p. 4, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_delegations_-_initial_draft_on_the_establishment_of_advisory_centre_0_1.pdf (Last accessed 23.08.2024)

[418] Ibid.

building at a level that was marketable, and able to compete in this area. Nevertheless, it is difficult to imagine a capacity-building system being set up for SMEs that would attract genuine attention from small investors who are not yet in the middle of a dispute.[419] The other was that by expanding the circle of beneficiaries to MSMEs, this would allow the advisory centre to "develop a balance approach reflecting the views of both respondent States and claimant investors."[420] Not allowing for MSMEs to benefit from either the services, or the capacity-building initiatives of the advisory centre, would under this observation implicitly mean that we may expect the advisory centre to be pronouncedly one-sided, basically acting in a tilted fashion, as a defender of states.

One point raised as a concern for the advisory centre's services being extended to both states and investors was that of a conflict of interest that may arise. Amongst the arguments presented previously, the question of a conflict of interest does stand out, as stated during the discussions in the Working Group, especially with regards to legal representation.[421] When it comes to selecting arbitrators in ISDS, parties, with the help of the tribunal secretary, go through a gruelling process, looking into all details of arbitrators' past, seeking to rule out the slightest indication of a conflict of interest that may trigger a challenge. Similarly, law firms providing legal representation, may try to avoid such situations, which is why some law firms choose to specialise in only providing legal representation in ISDS to either states or investors. However, there are firms that provide services to both, and they have their ways of managing conflicts of interest.[422] It may well be that an advisory centre that provides legal representation to both states and investors may face difficulties in terms of its credibility. This, in turn, could very well affect its prospects in terms of funding. Thus, in a more general sense, these are not good prospects.

This issue seems to be hanging on how conflict of interest is viewed. Looking at the matter of conflict of interest form the narrower viewpoint of a practical situation, it does not appear to

[419] As also noted by Johanna Braun, Philipp Reinhold, Chapter 3: An Advisory Centre for International Investment Law, in Julian Scheu (ed.), Creation and Implementation of a Multilateral Investment Court, Nomos, Baden-Baden, 2022, p. 98.
[420] Id.
[421] Report of Working Group III on the work of its forty-third session (Vienna, 5–16 September 2022), A/CN.9/1124, para. 64; Report of Working Group III on the work of its forty-seventh session (Vienna, 22–26 January 2024), A/CN.9/1161, para. 75, 76.
[422] This was also pointed out in the comments submitted by Corporate Counsel International Arbitration Group (CCIAG) and United States Council for International Business (USCIB), in Comments from delegations on the Initial Draft on the Establishment of Advisory Centre, UNCITRAL Working Group III, p. 44, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_delegations_-_initial_draft_on_the_establishment_of_advisory_centre_0_1.pdf (Last accessed 23.08.2024)

pose too much of a challenge.[423] Thinking of the example of a situation in which the advisory centre is requested to provide legal representation by both an SMI and a state concerning the very same case, regulation may provide priority for either one or the other, depending on how its founders choose to regulate it.[424] Also, in terms of its reputation, it may well happen that a state that is dissatisfied with the services offered by the advisory centre would renounce its membership and withdraw funding, if it so chose. From this point of view, the track record that the advisory centre would be able to build would speak for itself, and the choice of states and investors to choose its services is highly unlikely that it would be influenced by the fact that its services extend to both.

Despite the well-identified need for methods to increase the accessibility of ISDS to SMIs, the draft provisions on the advisory centre make clear the choice that was made. The objectives of the advisory centre in terms of capacity-building were limited to states and regional economic integration organisations:

> "The Advisory Centre aims to enhance the capacity of States and regional economic integration organizations in preventing and handling international investment disputes, in particular, least developed countries and developing countries."[425]

Furthermore, Article 2(1) states that "[t]he Advisory Centre aims to provide training, support and assistance with regard to international investment dispute resolution." However, this is also limited to benefit only states and regional economic integration organisations, as per draft Article 6.

Draft Article 4 provides details as to membership, which is to consist of state and regional economic integration organisations, and further references the categorisation of its members according to the proposed Annexes of the Draft Statute. In paragraph 4 it also limits non-Members under the Draft Statute as referring to states and regional economic integration organisations that are not parties to the "protocol". Article 7 than lays down the rules in terms of legal advice and support in ISDS in the following forms:

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[423] Argued also by delegations of Chile, Colombia and Mexico, in Comments from delegations on the Initial Draft on the Establishment of Advisory Centre, UNCITRAL Working Group III, p. 6, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_delegations_-_initial_draft_on_the_establishment_of_advisory_centre_0_1.pdf (Last accessed 23.08.2024)

[424] This concern was also voiced in the comments submitted by Armenia. See Comments from delegations on the Initial Draft on the Establishment of Advisory Centre, UNCITRAL Working Group III, p. 2, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_delegations_-_initial_draft_on_the_establishment_of_advisory_centre_0_1.pdf (Last accessed 23.08.2024)

[425] Id., Article 2(2).

"1. Upon the request by a Member, the Advisory Centre shall provide legal support and advice with regard to an international investment dispute proceeding prior to and after its initiation, including by:

(a) Providing a preliminary assessment of the case, including the appropriate means to resolve the dispute;

(b) Assisting in the selection of mediators, arbitrators or other types of adjudicators (including any challenge) as well as experts, taking into account geographical diversity and gender balance;

(c) Supporting the preparation of statements, pleadings and evidence as well as other aspects of the proceeding;

(d) Representing the Member in the proceeding, including in a hearing, at the instruction of and in conjunction with a team of that Member;

(e) Facilitating the appointment of external legal representative; and

(f) Performing any other functions as assigned by the Governing Committee.

2. The provision of services in paragraph 1 is subject to the resources available to the Advisory Centre.

3. In providing the services in paragraph 1, the Advisory Centre shall, in principle, give priority to Members listed in Annex I followed by Members listed in Annex II in accordance with the regulations adopted by the Governing Committee. In the event that requests are received from Members in the same category, priority shall generally be given to the Member that requested the services first.

4. The Executive Director may allow a non-Member to request the services in paragraph 1 in accordance with the regulations adopted by the Governing Committee. Whether the requesting non-Member may benefit from the services and the extent of the services to be provided by the Advisory Centre shall be determined by the Governing Committee. In making the determination, the Governing Committee shall consider whether allowing a non-Member to benefit from the services contributes to the objectives of the Advisory Centre, whether the non-Member is in the process of becoming a Member, whether it creates any conflict of interest and the resource implications on the Advisory Centre."

While it would have been the most impactful effect of the advisory centre from the viewpoint of SMIs, depending on how it will be set up, such an institution may bring further benefits as well. In this regard it was stated that "certain services could be available to MSMEs and natural persons, such as access to databases, research tools and workshop resources, with limited budget implications."[426] While capacity-building also seems to be out of the question, acting on such a proposal may still open up some of the centre's resources to SMIs, granting them access to some of the other resources that were mentioned, such as databases and research tools.[427]

Beyond direct benefits, and as a possible consolation prize for not extending its services to SMIs, there may yet be further benefits to setting up the advisory centre that could indirectly benefit this category of vulnerable investors. In an interesting discussion on the matter at the Seventh Intersessional Meeting of UNCITRAL Working Group II on ISDS Reform, that took place under the Belgian Presidency of the Council of the Council of the European Union, on 7–8 March 2024, Professor Joost Pauwelyn made a point that is worth highlighting. Making a parallel with the ACWL, Professor Pauwelyn basically argued that the advisory centre, by its sheer participation as a provider of legal services in ISDS, could in time have the effect of diminishing the fees charged by law firms. At the ACWL this is done in cases where two countries entitled to receiving support are involved in the same proceedings. In such cases, the country not receiving assistance from the ACWL is offered a roster of external legal experts who provide support under the same terms as the ACWL.[428] Representing the bulk of the costs faced by parties in an ISDS proceeding, such a development would be welcome by all, especially by SMIs. This also depends on the financing that will be provided, as ISA is an expensive dispute settlement process, and just like the ACWL, it is highly unlikely that the advisory centre envisage by UNCITRAL will ever become financially self-sustaining.

As the negotiations on the advisory centre reach some type of finality, at least in terms of its beneficiaries, some conclusions may be drawn. It seems that states found it difficult to square the circle on having the advisory centre cater to both states and investors. One of the more difficult

[426] Report of Working Group III on the work of its forty-third session (Vienna, 5–16 September 2022), A/CN.9/1124, para. 64.
[427] The delegates of Panama and Canada expressed the view that such access should be granted in Comments from delegations on the Initial Draft on the Establishment of Advisory Centre, UNCITRAL Working Group III, pp. 3, 29, 30, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_delegations_-_initial_draft_on_the_establishment_of_advisory_centre_0_1.pdf (Last accessed 23.08.2024)
[428] Braun, Reinhold, *op. cit.*, p. 88.

questions here would have been that of a conflict of interest: the advisory centre potentially acting as counsel for and against the same state. A further difficulty is obtaining appropriate financing: ISA cases are very resource intensive, which means that extending the centre's services to investors would likely cost more than states would be willing to pay for.[429]

Consequently, SMIs did not make the cut as potential beneficiaries of the advisory centre's representation services. Of course, it is understandable that states would want to limit the number of claims against them, especially as ISDS is targeted by heavy criticism even in the mainstream media. However, as pointed out in several instances herein, submitting states' decisions to judicial (arbitral) scrutiny is a matter of rule of law, and all must be interested in having their states adhere to the rules they themselves create. The advisory centre, not acting as a profit-driven market player, may also act as a filter, scrutinising the cases that SMIs attempt to bring. Such a service would have a dual benefit: it could be a source of income, and it could sift through cases rooting out frivolous ones (or at least having the choice of not assisting them). While small and medium-sized enterprises are recognised for their economic contribution, as well as their *tremendous contribution* to the achievement of the 2030 Agenda and the Sustainable Development Goals, these appear as formal efforts, when compared to the effective support access to advisory centre services would mean. We shall see in the future if the mentioned advantages will be understood, and followed by expanding the services of the advisory centre to SMIs as well.

### 4.2.2. Proposal for a Multilateral Permanent Investment Court

The idea of an international investment court has been around since at least the 1960s, when the International Law Association's Committee on Nationalization and Foreign Property came forward with a draft statute for a "Foreign Investments Court".[430] Contemporary discussions on the establishment of the Multilateral Permanent Investment Court ("MPIC") started in 2020,[431] and have since evolved to the point that there is now a draft statute of a standing mechanism for the resolution of international investment disputes that has been put forward.[432]

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[429] A point also noted by Schwieder, op. cit., p. 655.
[430] August Reinisch, Protecting Individuals in International Investment Law: Plans for an Investment Court in the Past and Today, in Philipp B. Donath et al., Der Schutz des Individuums durch das Recht – Festschrift für Rainer Hofmann zum 70. Geburtstag, Springer, Cham, 2023, p. 677.
[431] Report of Working Group III on the work of its resumed thirty-eighth session, Vienna 20–24 January 2020, A/CN.9/1004/Add.1.
[432] Working Group III, Draft statute of a standing mechanism for the resolution of international investment disputes, 8 February 2024, A/CN.9/WG.III/WP.239.

The EU appears as the champion of this initiative. EU Member States have given a mandate for the negotiation of the MPIC. The EU's strategy to bolster its legitimacy revolves around offering a promise of independence of the Court, but also its accessibility, promising improved access to justice. However, promising access to the MPIC for vulnerable investors who have been sidelined from the benefits of the ISA system is one thing, while actually achieving it may be more difficult than just promising to reduce procedural costs.

One of the main ideas behind the relevance of such a mechanism for settling investor-state disputes from the viewpoint of SMIs is that such a construction would reduce some of the costs regularly categorised under *arbitration costs*. Indeed, the directives for negotiating a Convention establishing a multilateral investment court expressly addresses the matter of costs reduction, as one of the means for the facilitation of SMEs' access to it. This negotiating directive states that "[t]he Convention should include appropriate provisions aimed at ensuring the access of small and medium-sized enterprises and natural persons to the multilateral court by seeking, inter alia, to reduce costs."[433] However, there are several other features of a standing mechanism that may benefit SMIs in terms of reducing legal costs as well.

The degree to which such a construction is able to save costs for its users depends very much on its sources of financing and fee structures that would be introduced. It is without a doubt that a standing permanent institution, with a permanent staff is able to save some costs. However, in the overall scheme, these savings do appear as minimal, but they should count. In this sense it is worth highlighting the slight difference between costs of proceedings at ICSID and those done ad hoc. The advantages of having parts of the costs of a procedure at ICSID subsidised by the World Bank Group make a difference in this sense.

In the discussions within the Working Group, the matter of claims brought in relation to "investments made by small and medium-sized enterprises" was often stressed as one of the matters that should be considered when setting up a flexible reformed system.[434]

In a submission by the EU and its Member States it is stated that "[a] standing mechanism will lead to a reduction of the costs and duration of proceedings in a number of ways, which would contribute to ensure effective access for small and medium-sized enterprises to the standing

[433] Council of the European Union, Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, 12981/17 ADD 1, 1 March 2018, para. 17.
[434] Report of Working Group III on the work of its fortieth session (Vienna, 8–12 February 2021), A/CN.9/1050, para. 22.

mechanism."[435] The following paragraphs lay out the advantages of having tenured adjudicators: less time spent with selection, with challenges, and less incentives to prolong proceedings.[436]

In case an international court is set up, its activities will most likely be financed by its members, at least in part. This, in turn, would make a degree of difference in terms of costs for those who will be making use of the court's services. Amongst them, most notably, for SMIs. As always, the challenges remain in how the details will be worked out in its regulation. In terms of its financing, the views expressed in the Working Group contain some of the arguments why a mixed approach would be preferred.[437] Accordingly, Article 37 of the draft statute of a standing mechanism for the resolution of international investment disputes ("draft statute") provides in its first paragraph that "[t]he operation of the Standing Mechanism shall be funded by initial and annual contributions of the Contracting Parties, the fees for services provided by the Standing Mechanism and voluntary contributions."[438] The exact amount of contributions is for the Conference of the Contracting Parties to determine in accordance with proposed Article 37(2) and Article 4(2)(l), as is the fee structure, pursuant to Articles 37(3) and 4(2)(m). In addition, there is a possibility to make "voluntary contributions" to the Standing Mechanism, of a monetary nature or in-kind. This mode of financing results in a splitting of costs, meaning that Standing Mechanism will probably provide a less expensive means of dispute resolution, thus less expensive access to justice.[439]

This mode of financing is also in line with the principles laid out in Article 2 of the draft statute, where it is provided that "[t]he Standing Mechanism shall operate in a manner that is effective, *affordable*, *accessible* and financially sustainable" [emphasis added]. Whether and how this will be accomplished is to be seen when and if the proposal is implemented. It was highlighted that the fees payable by users of the Standing Mechanism "should not be so high as to become a hurdle for small and medium sized enterprises to bring a case."[440]

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[435] Submission from the European Union and its Member States, A/CN.9/WG.III/WP.159/Add.1, para. 51.
[436] Id. paras. 52–54.
[437] Report of Working Group III on the work of its resumed thirty-eighth session, Vienna 20–24 January 2020, A/CN.9/1004/Add.1, paras. 82–94.
[438] See Draft statute of a standing mechanism for the resolution of international investment disputes, Note by the Secretariat, A/CN.9/WG.III/WP.239, p. 15/17.
[439] The document "Financing of a standing mechanism – An outline" contains some of the details of how concrete calculations may be done. The document is available here: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/financing_of_a_standing_mechanism_sept.2023.pdf (Last accessed 23.08.2024)
[440] Submission from the European Union and its Member States, A/CN.9/WG.III/WP.159/Add.1, para. 33.

There are other advantages that may contribute to cost saving and that may thus have a positive influence on accessibility. Such is the fact that a Standing Mechanism may provide more consistency and predictability in its practice, which would make it more likely that disputing parties would tailor their arguments accordingly.[441] It is argued that "[o]nce a particular interpretation of a norm is established […], then it will not be relitigated."[442] This means less time and effort spent on particular arguments, which translates into less costly legal representation. However, it must be noted that this argument does not really take into account that there is a *de facto stare decisis* in ISDS, by which some degree of consistency is achieved through the fact that tribunals regularly cite other tribunals' decisions. The consistency and coherence that is thusly achieved did not seem to lower the costs of bringing a claim. What is more, even a Standing Mechanism would have to contend with the fact that there are thousands of IIAs which contain the substantive rules governing the rights of foreign investors. While many of these IIAs contain very similar provisions, different interpretations may still be warranted by the (sometimes only slight) difference in their wording.

In ensuring more consistency and thus predictability, the MPIC is envisioned as also having an appellate mechanism. For the losing party it may constitute an additional chance to correct the (possible) errors of proceedings in the first instance. However, especially in the case of states, it may well be that they will use this mechanism, due to a political pressure to exhaust all possible remedies. This, as previously noted, depending on how extensive the possibility for appeals will be, will add costs to the proceedings, thus creating challenges in terms of access by SMIs.

The costs with the proceedings themselves is only part of the issue, successful claimants may be faced with great challenges in the enforcement phase. Thus, depending on the choice of how enforcement will be regulated, SMIs may face further costs. Difficulties faced in enforcement proceedings may prompt successful claimants to reach for other solutions, such as selling the award at a discount on the secondary markets, thereby having to support further losses in their compensation. It may be worth noting that at the outset of the ICSID Convention the World Bank was envisaged as lending its authority in case an award is not complied with. This was believed to

[441] In this regard see also Katia Fach Gomez, Catharine Titi, Facilitating Access to Investor-State Dispute Settlement for Small and Medium-Sized Enterprises: Tracing the Path Forward, p. 37. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4323775 (Last accessed 23.08.2024); UNCTAD, World Investment Report 2015, Reforming International Investment Governance, United Nations, Geneva, 2015, p. 152.
[442] Submission from the European Union and its Member States, A/CN.9/WG.III/WP.159/Add.1, para. 55.

be problematic in terms of the actual tasks assigned to the World Bank. But it was thought to be effective, nonetheless, in cases where the trespassing state would require future assistance from the World Bank or affiliated institutions.[443] As these institutions outgrew the classical concept they were conceived in (FDI from developed countries flowing to developing countries), the pressure and authority from the World Bank do not seem to work that well either.[444] Such reluctance from the part of developed countries to abide by the rules spells out further risk and uncertainty for SMIs.

The proof, as always, is in the pudding. If and when such a court is established, we will see more clearly in terms of its accessibility. The judgment passed by seasoned scholars that are keen observers of the developments around this idea for a court cast a shadow on the realities of its accessibility for SMIs. While access of small and medium-sized enterprises to ISDS does feature prominently in the discussions withing Working Group III, the actual intentions point in a different direction. As argued by August Reinisch "debating the creation of a multilateral investment court primarily serves the purpose of curbing the rights and procedural remedies of private parties."[445] Granted, Professor Reinisch cites amongst the implicit reasons for this conclusion "various procedural hurdles" that may be included, but these may be the very ones that would disproportionately affects SMIs' access to this court.

### 4.3. Investor-State Mediation

Investor-state mediation ("ISM"),[446] *in theory*, may be the most cost-effective option for the settlement of disputes. *In theory*, because there is no available data yet on ISM proceedings, or the cost of such proceedings. Even so, ISM is presented as an alternative dispute resolution mechanism that is more affordable. In terms of duration, there is some data that is available. The

[443] Arghyrios A. Fatouros, The World Bank's Impact on International Law a Case-Study in the International Law of Cooperation, in Gabriel M. Wilner (ed.), Jus et Societas – Essays in Tribute to Wolfgang Friedmann, Martinus Nijhoff Publishers, The Hague, 1979, p. 75. (citing Aron Broches regarding this)
[444] Capital Madrid: Spain Tells World Bank It Will Not Pay €2-Billion ICSID Awards For Renewable Energy Debts, 26 April 2023, available at https://www.capitalmadrid.com/2023/4/26/64924/spain-tells-world-bank-it-will-not-pay-2-billion-icsid-awards-for-renewable-energy-debts.html (Last accessed 01.03.2024)
[445] August Reinisch, Protecting Individuals in International Investment Law: Plans for an Investment Court in the Past and Today, in Philipp B. Donath et al., Der Schutz des Individuums durch das Recht – Festschrift für Rainer Hofmann zum 70. Geburtstag, Springer, Cham, 2023, p. 680.
[446] Compelling arguments have been presented as to the dividing lines between mediation and conciliation that are becoming "increasingly blurred", resulting in some scholars using the two terms interchangeably. See Catherine Kessedjian et al., Mediation in Future Investor-State Dispute Settlement, Journal of International Dispute Settlement, 14(2), 2023, pp. 192–212 (particularly pp. 193–194).

median duration of ISM at ICSID was observed as being at 487 days.[447] Without a doubt, this is better than the vast majority of ISA cases. In spite of its advantages, and the spread of multi-tiered dispute resolution clauses which include mediation prior to arbitration, ISM has yet to really *take off*.[448]

The first ever ICSID conciliation case was in the 1980s, the total administrative costs, including the fees of the conciliator were reported at US$11,000.[449] From the viewpoint of SMIs, a cost-effective and relatively quick solution to a dispute is the next best thing to not having any disputes at all. But this thinking about dispute resolution rarely is reflected in a complex manner within IIAs. Deficiencies in treaty drafting customs once again come to the fore: an analysis of treaties demonstrates that an express reference to mediation is only contained in 1% of IIAs.[450] This, in spite of the fact that investors would be open to it: 64% of respondents in a survey stated that they favour the introduction of a mandatory requirement for mediation prior to arbitration.[451] Paradoxically, 49% of respondents were also of the view that it would increase cost and duration.[452]

States, the masters of international agreements that could have the largest influence on the proliferation of ISM, have been reticent in ratifying the Singapore Convention on Mediation, which aims to deliver international settlement agreements treatment similar to the one granted by the New York Convention to international arbitral awards.[453]

Cases where mediation (or conciliation) was used are also not numerous, with the caveat that there may have been more cases about which there is no information available.[454] This may actually be a sign that ISM is actually not reasonably practicable. Aside from the more general issues pertaining to mediation, such as the problem of its (un)enforceability, that of less

[447] Id., pp. 206–209.
[448] Luke R. Nottage, Cross-Fertilisation in International Commercial Arbitration, Investor-State Arbitration and Mediation: The Good, the Bad and the Ugly?, Monash University Law Review 50(3), forthcoming, p. 2, Available at SSRN: https://ssrn.com/abstract=4872129 (Last accessed 23.08.2024)
[449] Today that means just under US$32,000. For details see Lester Nurick, Stephen J. Schnably, The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago, ICSID Review - Foreign Investment Law Journal, Volume 1, Issue 2, Fall 1986, p. 343.
[450] The authors argue that cooling-off periods, present in over two-thirds of the 2,885 treaties analysed, may yet offer a chance to engage in mediation. See Catherine Kessedjian et al., Mediation in Future Investor-State Dispute Settlement, Journal of International Dispute Settlement, 2023, 14, pp. 197–198.
[451] 2020 QMUL-CCIAG Survey: Investors' Perceptions of ISDS, Queen Mary University of London, May 2020, p. 24. Available at: https://arbitration.qmul.ac.uk/media/arbitration/docs/QM-CCIAG-Survey-ISDS-2020.pdf (Last accessed 23.08.2024)
[452] Id, p. 25.
[453] While it currently boasts just 14 parties, the Convention has 57 signatories (as of 23 August 2024).
[454] Kessedjian et al., *op. cit.*, pp. 199–201.

transparency,[455] or dilemmas of political choice,[456] there are other issues which may be specific to SMIs in the ISM context.

In a survey regarding investors' perceptions on ISDS, one of the respondents stated that "mediation may not be appropriate where there is an imbalance of power between the parties, as could be the case for smaller sized investors".[457] The disproportion in bargaining power may be the largest impediment to having an effective mediation, aside from not having the appropriate means of enforcing such an accord. In case an SMI has no other alternative but mediation, and this fact is somehow revealed during such proceedings, the state party to the mediation would have a strong incentive to leave it.

Enforceability is another issue. While the United Nations Convention on International Settlement Agreements resulting from Mediation was adopted in December of 2018, and it did enter into force on 12 September 2020, its ratification record is still dismal.[458]

Once again, traces of progress may be found in some of the new IIAs (IPAs) entered into by the EU with Canada, Vietnam, and Singapore. The EU–Vietnam IPA, in Annex 10 contains rules for a Mediation Mechanism for the Resolution of Disputes between Investors and Parties. Article 8.20 of CETA also contains rules on mediation pursuant to the agreement of the parties, as does Article 3.4 of the EU–Singapore IPA. It is also contained in other recent IIAs, as noted in the IBA Report,[459] which is referenced as the mark of a type of evolution in this respect. Mediation Rules were also developed in recent years at ICSID, and draft provisions on mediation, with guidelines, were put forward at UNCITRAL Working Group III.[460] However, it may be worth

[455] Mentioned as one of four obstacles to mediation identified through anecdotal evidence in Kessedjian et al., *op. cit.*, pp. 203–204.
[456] Id., referring in a sense to the dilemma faced by a civil servant having to make a payment voluntarily, as an outcome of mediation, rather than being ordered to do it, as an outcome of arbitration.
[457] Id., p. 203.
[458] As of March 2024, there were 56 signatories and 13 countries that have ratified the Convention.
[459] See Arbitrating Small Value Claims in Investment Arbitration, IBA Report, p. 32, esp. fn. 139, 140, referencing the following IIAs: Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates, 2018, Article 20(1); Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China, 2019, Article 23(1); Free Trade Agreement between the Government of New Zealand and the Government of New Zealand and the Government of the People's Republic of China, 2008, Article 152; Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments, 2015, Article 23(1); Agreement between the Government of the United Arab Emirates and the Government of the Republic of Costa Rica for the Reciprocal Promotion and Protection of Investments, 2017, Article 14(3); Agreement between the Government of the United Arab Emirates and the Government of the Republic of Mauritius for the Promotion and Reciprocal Protection of Investments, 2015, Article 10(3).
[460] Draft provisions on mediation, Note by the Secretariat, UNCITRAL Working Group III Forty-fifth session, A/CN.9/WG.III/WP.226, available at

highlighting that even commentators regularly reference mediation in ISDS as having *potential*.[461] Basically, this means that ISM is yet to have arrived at any stable place within the ISDS universe, and still has a long path ahead of it, until it is taken up as a regular tool of dispute settlement.

A hybrid dispute resolution process, combining the more advantageous aspects of arbitration and mediation, called Arb-Med, may present a more attractive way to settle disputes of a smaller value.[462] Surely a first example of such a case will convince more practitioners of its potential. However, the use of Arb-Med, or Med-Arb also warrants their inclusion into the ISDS clauses of IIAs. Despite the extensive studies on what IIAs should include, states do not seem too eager to renegotiate existing ones. This means that change will come quite slowly on this front.[463]

While mediation has been promoted to some degree, its voluntary uptake by states is doubtful. It may be more likely in cases where there is a genuine threat of an arbitration being lodged or an arbitral award being enforced against the state. If it is the case that ISM is the only way in which an investor is able to bring a claim, i.e. the investor lacks the capacity to bring arbitration and the state knows that, the state may not feel it is compelled to engage in the mediation proceedings. In this sense it may be worth exploring in what ways would investors be able to exercise effective pressure on states to have them agree to mediation. It may well appear that having strong guarantees in place that states will engage in good faith in mediation, may actually do more for IIAs in terms of their potential to promote investment. It is states that need to adjust their IIAs, their domestic laws pertaining to FDI, but also, and perhaps more importantly, their internal decision-making processes that enable decision-makers to engage in and commit to mediation.

On the part of the states, having the appropriate protocols in place at the decision-making level may make a massive difference. For officials, there must be rules put in place which ultimately shield them from incurring backlash from political decision-makers. This may consist in rounds of consultations with specialists working within the government, or independent external

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https://documents.un.org/doc/undoc/ltd/v23/001/24/pdf/v2300124.pdf?token=ph6n6iADeMay6IhZWT&fe=true (Last accessed 23.08.2024); Draft guidelines on investment mediation, Note by the Secretariat, UNCITRAL Working Group III Forty-fifth Session, A/CN.9/WG.III/WP.227, available at https://documents.un.org/doc/undoc/ltd/v23/001/54/pdf/v2300154.pdf?token=ijMEsV7xvxyHl0Kija&fe=true (Last accessed 23.08.2024)

[461] See International Bar Association, Arbitrating Small Value Claims in Investment Arbitration, 2022, p. 32.

[462] L. R. Nottage, op. cit., p. 20.

[463] Med-Arb provisions are included in the Australia–Indonesia BIT, and the Hong Kong–United Arab Emirates BIT, as noted by L. R. Nottage, op. cit., p. 22.

counsel. The opinions thusly gathered may help state officials in making the appropriate decision. Nevertheless, political accountability, political liability may still be incurred by those in government. This is something that politicians will always have to mitigate. From the public's point of view, it surely will be seen as reprehensible that their representatives settle a dispute through mediation, expending public funds, while denying them full transparency. For the government, this will be a good way to reduce costs, and to attempt to control what information becomes public, while trying to dampen potential risks from public outrage.

### 4.4. Expedited proceedings

One of the often-cited arguments *for* arbitration is that it is *expeditious*, when compared to regular litigation.[464] However, there is always room, and apparently expectation, for more improvements in this regard. Expedited proceedings are aimed at lowering both the duration and costs of arbitral proceedings, and in recent years they also crept into the area of ISA. It has not been long since rules on expedited proceedings have been introduced into some of the most popular ISA rules, such as the ICSID Arbitration Rules, and the UNCITRAL Arbitration Rules.

Expedited arbitration rules can be generally characterised by a high degree of malleability. Parties may pick and choose between the different rules they want to see applied to their particular case. In a sense, choosing expedited rules basically means opting into a predetermined package of rules, which may be customized by the parties—at least in part. Thus, such rules may also be considered as a set of ideas from which parties may feel inspired to choose solutions, if they are able to agree un customising their proceedings.

In the case of the new ICSID Rules expedited arbitration was included expressly with a view to "small scale claims, to facilitate access of small and medium enterprises (SMEs) to international arbitration, or for cases with few factual issues in dispute."[465]

Expedited arbitration is recommended for claims under a certain value, but parties must make a choice regarding the application of such rules to their case. In this regard, Rule 75(1) of the ICSID Arbitration Rules provides that the parties to an arbitration may consent to expedite the arbitration at any time, by submitting a written joint notification in this sense to the Secretary-

[464] E.g. the "six *e*'s" regularly cited by Gary Born in: A conversation with Gary Born at Universidad de Chile, available here https://iei.uchile.cl/noticias/180544/a-conversation-with-gary-born (Last accessed 23.08.2024)
[465] Proposals for Amendment of the ICSID Rules, Working Paper #2, Volume 1, 2019, p. 301, para. 468. Available at: https://icsid.worldbank.org/sites/default/files/amendments/Vol_1.pdf (Last accessed 23.08.2024)

General of ICSID. The UNCITRAL Rules similarly allow for the parties to choose the application of expedited arbitration rules, and provide for the possibility of opting out at any time.[466] The expedited arbitration rules under the International Chamber of Commerce ("ICC") apply automatically in case the dispute does not exceed either US$2 million or US$3 million, depending on when the arbitration agreement was concluded.[467] Of course, parties to the arbitration may agree to opt out of the application of such rules.

Most expedited rules provide for the possibility of appointing a single arbitrator. Of course, this is preferred, as it reduces both the costs and the duration of appointment. With the purpose of reducing costs for SMIs, this is also present in the EU–Vietnam, EU–Singapore and CETA treaties, mentioned previously. However, ICSID Arbitration Rule 78 provides for a procedure to appoint a three-member tribunal as well, in addition to the procedure (contained in Rule 77) for the appointment of a sole arbitrator. In both cases, the procedure for appointing the arbitrator(s) is itself expeditious, with short time-limits for appointment either by the parties or by the Secretary-General of ICSID. The UNCITRAL Expedited Arbitration Rules at Article 7 also provide as a default a sole arbitrator to compose the tribunal, unless otherwise agreed by the parties.

Arbitration under expedited rules regularly provide means for streamlining the proceedings for parties opting in. Basically, these rules contain special provisions aimed at shortening the duration and saving costs in the proceedings. Some of these provisions contain rules for shortening time-limits for appointing arbitrators and making submissions, merging procedural steps, limiting document production, or even putting time-limits on the delivery of the award. As may be expected, there is variation to these rules. The ICSID Rules seem more suitable, as they should be, in the context of ISDS. A counter-example may demonstrate why that is. The UNCITRAL Expedited Arbitration Rules provide that the tribunal must deliver an award within six months,[468] but no later than nine months, with the rules then requiring parties to find consensus in how the proceedings should further be tailored, otherwise having to revert back to the regular rules.[469]

[466] A similar rule is contained in Article 1 and 2 of UNCITRAL Expedited Arbitration Rules.
[467] See Article 1, Appendix VI – Expedited Procedure Rules of the ICC Arbitration Rules 2021.
[468] Article 43 of the Stockholm Chamber of Commerce Expedited Arbitration Rules 2023 provides for a default of three months for delivering the award from when the case is referred to the arbitrator.
[469] Article 16 of UNCITRAL Expedited Arbitration Rules.

Following ICSID Expedited Arbitration Rules is expected to reduce the duration of an arbitration to 470-530 days.[470]

The types of arrangements that can be made in arbitral proceedings under different rules are quite similar, and their extensive presentation and comparison has been done previously, which is why this part only addressed a few of the more interesting provisions.[471] The fact that there are rules that enable disputing parties to save on time and costs is a welcome development. SMIs and low-income countries may well benefit from such arrangements. Even if they are not fully applied, parties may yet feel inspired to tailor their proceedings pursuant to some of these rules. Thus, they can at least serve as a source of ideas for improving the duration and costs aspects of arbitral proceedings. There are two notable limits to using these rules: the complexity of the case, and the consent of the parties.

A smaller claim does not necessarily mean that it is also less complex. Novel issues may appear that need more time and space for arguments to be laid out, more evidence to be presented, and more time for deliberations to be had. Rules on expedited proceedings may not be suitable in such cases. Indeed, complexity may just as well lend itself to a lower value case, as it would to a larger value case. Such complexity, in a sense, is at the root of the main expenses in the system, such as that of legal representation, which may only be afforded by stronger investors. With a view to ensuring that expedited proceedings are efficient, but also considerate of due process, parties may be inclined to choose a more seasoned arbitrator. This itself comes with a number of difficulties, at least in terms of costs and availability.

A more difficult issue is that of obtaining consent to expedited arbitration. While for an SMI this may appear as an important question, one that determines its ability to see through with its claim, states have an entirely different perspective. Indeed, saving costs may be in the interest of a state as well. However, for the state officials involved in an ISDS case, it may be very cumbersome process to make such a decision. It may be viewed as putting constraints on the ability of the state to present a comprehensive defence. It is highly unlikely that any state official would be comfortable with taking on the responsibility of such a decision. The costs of a comprehensive

[470] ICSID, Expedited Arbitration – ICSID Convention Arbitration (2022 Rules) Overview, available at: https://icsid.worldbank.org/procedures/arbitration/convention/expedited-arbitration/2022 (Last accessed 23.08.2024)
[471] For an extensive presentation and comparison see International Bar Association, Arbitrating Small Value Claims in Investment Arbitration, 2022, pp. 19–24, 62.

defence are that of the state, while the political costs of not allowing such a defence are potentially borne by the decision-makers, the individuals.

Giving *ex ante* consent to expedited arbitration may seemingly constitute a good solution, but would be binding also in the case of a smaller claim that is also complex and would necessitate more ample proceedings.[472] This is the reason why for the ICSID Expedited Arbitration Rules an opt-in model was chosen. The Canadian Model BIT (2021) Article 47 provides for the possibility of disputing parties to *consent to* expedite the arbitration when damages claimed do not exceed CAD$ 10 million.[473]

Additionally, there is an argument to be made in the sense that for the state party, a request by the claimant investor to engage in expedited arbitration may be viewed as a sign that it is unable to pursue *full-fledged* arbitration. In this case, the state may feel incentivised to refuse arbitration under expedited rules and just stick the course on regular proceedings.

### 4.5. Mass claims

Another potential avenue for SMIs for accessing ISA is to have a number of claimants band together, pool their resources, and initiate a *mass claim*. The individual small claim, which may not be brought due to high costs, is thus brought concomitantly with other similar (and possibly, but not necessarily, similarly small) claims.

Since the ICSID Rules and Regulations amendments which entered into force in 2006, there have been at least four notable mass claim-type cases. These cases all brought questions regarding admissibility of mass claims, and their consideration under ICSID Rules was a topic of debate, as the above paragraph briefly demonstrates. However, in the ICSID amendments process which resulted in amended rules entering into force in July 2022, mass claims were not regulated. The question had admittedly been brought up, but the Centre stated it would engage in further research and publish a set of "best practices".[474] In the view of the Centre, ICSID Rules already

[472] Proposals for Amendment of the ICSID Rules – Working Paper, Volume 3, ICSID Secretariat, 2018, p. 914, paras. 38–40. Franck, *op. cit.*, p. 301.
[473] Katia Fach Gomez, Catharine Titi, *op. cit.*, p. 32.
[474] Proposals for Amendment of the ICSID Rules – Working Paper, Volume 3, ICSID Secretariat, 2018, p. 835, para. 19. Available at: https://icsid.worldbank.org/sites/default/files/publications/WP1_Amendments_Vol_3_WP-updated-9.17.18.pdf (Last accessed 23.08.2024)

permit multiparty claims.[475] Multiparty claims are described as "claims brought by two or more claimants that initiate a single proceeding by jointly filing a single Request for arbitration."[476]

A basic condition of bringing a mass claim is finding cases where the same incident had similar effects on a number of investors. Then, these claimants have to agree on the details of how they would want to bring a case.[477] The claimants may still encounter some jurisdictional difficulties, however arbitral practice demonstrates that these can be overcome. Another potential effect of a claim being brought by multiple claimants is the bifurcation of the proceedings, which adds to the costs and the overall duration of the arbitral proceedings.[478] The claimants may also have to advance some costs pursuant to an order for security of costs, in consideration of the large number of claimants, and the difficulty that the respondent may face in pursuing the enforcement of a possible favourable costs award.[479]

The cases that are most often referenced in this regard are those brought against Argentina pursuant to the Argentine great depression in the early 2000s.[480] The situation of small investors being left out on a limb has been regarded as highly unjust.[481] While domestic investors were still left to support the losses, some of the foreign investors turned to investment arbitration. The individual claims were relatively small, ranging from US$50,000 to US$78,000, and amounted to millions and even billions of US dollars in damages claimed, but they all had nearly identical factual backgrounds.[482] Looking at the small value of the individual claims, an interesting discussion may come up in terms of the contribution factor, and the contribution to the economic development of the host state under the *Salini test*, but in the case *Abaclat and others v. Argentina* its application was avoided.[483]

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[475] Id., p. 833, para. 4.
[476] Id, p. 833, para. 6.
[477] International Bar Association, Arbitrating Small Value Claims in Investment Arbitration, 2022, p. 33.
[478] Ibid.
[479] Theodoros Adamakopoulos and others v. Republic of Cyprus, ICSID Case No. ARB/15/49, Decision on Jurisdiction, paras. 248, 264–266.
[480] The three cases often mentioned regarding mass claims will not be analysed here: Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5 (a case brought by approximately 60,000 bondholders); Giovanni Alemanni and Others v. The Argentine Republic, ICSID Case No. ARB/07/8; Ambiente Ufficio S.p.A. and others v. Argentine Republic, ICSID Case No. ARB/08/9.
[481] Ugo Mattei, Laura Nader, Plunder – When the Rule of Law is Illegal, Blackwell Publishing, Malden, 2008, pp. 37–38.
[482] International Bar Association, Arbitrating Small Value Claims in Investment Arbitration, 2022, p. 33.
[483] Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Award on Jurisdiction and Admissibility, paras. 362–364.

Mass claims fall into a procedural grey area of ISA. During this research no IIA has been identified as containing any type of a provision related to *mass claims*, or any equivalent way of bringing claims. And, while there are no specific rules contained either in ICSID Arbitration Rules or in UNCITRAL Rules on the matter of mass claims, arbitral practice has allowed claims to be brought by a larger number of claimants in a single proceeding against the same respondent. In the case of ICSID arbitration, Article 44 of the ICSID Convention leaves it to the arbitral tribunal to decide in procedural questions that are not addressed either by the Convention, the arbitration rules, or parties' agreement. In the case *Abaclat and others v. Argentina*, the Tribunal concluded that the lack of regulation on mass claims was an unintended gap, that it "can and ought to fill".[484] This was considered as being too broad an interpretation by the tribunal in the *Adamakopoulos case*, which concluded that this provision does not allow a tribunal to invent its own procedural framework, and that a *mass claim* would have to be dealt with within the existing ICSID framework.[485]

While this research addresses the advantages held by mass claims for SMIs, the tribunal in the *Abaclat case* made the reverse argument, that in the case of 60,000 separate arbitral proceedings Argentina would face a much bigger challenge to its effective defence rights.[486] While this case did not go to the merits phase, there was an interesting solution that was found to verify the claims individually, which the tribunal managed to deploy seemingly efficiently. As was noted in scholarship, because the case did not progress to the merits phase, there was no longer the opportunity to "test the feasibility and practicability of the use of mass claims methods and techniques for the determination of the eligibility of large numbers of claims and for the assessment of the related loss or damage."[487]

In a case stemming from the financial crisis that affected Greece and Cyprus, and as a result of arrangements made in order to mitigate its effects through the merger of Laiki Bank and the Bank of Cyprus. Theodoros Adamakopoulos and the other 676 claimants sought compensation for

[484] Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction, paras. 525–528; Nobert Wühler, Abaclat v. Argentine Republic: When Investment Arbitration Met Mass Claims, in Philipp B. Donath et al., Der Schutz des Individuums durch das Recht – Festschrift für Rainer Hofmann zum 70. Geburtstag, Springer, Cham, 2023, p. 688.
[485] Theodoros Adamakopoulos and others v. Republic of Cyprus, ICSID Case No. ARB/15/49, Decision on Jurisdiction, paras. 245, 246.
[486] Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Award on Jurisdiction and Admissibility, para. 545; Wühler, op. cit., p. 689.
[487] Wühler, op. cit., p. 694. The author included a great description of the technical solutions deployed in this case in *id.*, pp. 689–694.

losses stemming from the Government of Cyprus' violation of its obligations towards their investments under the Cyprus–Greece BIT and the Cyprus–Belgium-Luxembourg Economic Union (BLEU) BIT.[488] The Tribunal describes the claim as a *mass claim* "in the sense that it is a claim brought by a large number of claimants within the scope of a single case against the Respondent." It then adds "[b]ut this does not imply that it is a representative claim, a class action, or a consolidation of claims, or that it is anything other than what it is – a substantial number of individuals bringing their claims against the Republic of Cyprus within a single case against the Republic." The Tribunal thus clarifies that it uses the term *mass claims* "as a convenient shorthand expression", without any consequences expected to flow from it.[489]

Flexibility in terms of joinder or consolidation of claims may also be warranted, beyond what would be considered a regular *mass claim*. In this sense, the two claims brought in the *von Pezold v. Zimbabwe*[490] and the *Border Timbers v. Zimbabwe*[491] case were handled exemplarily: the claimants seeking to make sure that they covered all possibilities, brought a claim as natural persons (indirect owners), but also as the family trusts (direct owners) of the real-estate in question. The tribunal noted that the proceeding was in fact "one part of a pair of arbitrations, heard together but with separate outcomes."[492] The two cases were hailed as proof of the benefits of ISDS for smaller claimants.[493] The *von Pezold case*, due to their similarity, was mentioned with the *Funnekotter case*, in which a number of thirteen claimants were successful in obtaining compensation of little over eight million euros in total.[494]

The consolidation of cases may be a helpful procedural development for SMIs. This is provided for in The Netherlands Model Investment Agreement Article 19(7) which provides the following:[495]

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[488] Theodoros Adamakopoulos and others v. Republic of Cyprus, ICSID Case No. ARB/15/49, Decision on Jurisdiction, para. 5.
[489] Adamakopoulos v. Cyprus, Decision on Jurisdiction, paras. 190, 191.
[490] Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15.
[491] Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe, ICSID Case No. ARB/10/25.
[492] Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, para. 936.
[493] Nikos Lavranos, The Proven Benefits of ISDS and BITs –Even for SMEs and Small Claims, Kluwer Arbitration Blog, 24 October 2017. Available at: https://arbitrationblog.kluwerarbitration.com/2017/10/24/proven-benefits-isds-bits-even-smes-small-claims/ (Last accessed 23.08.2024)
[494] Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe, ICSID Case No. ARB/05/6.
[495] As was also pointed out in the Submission by the European Federation for Investment Law and Arbitration (EFILA) to the UNCITRAL Working Group no. III on ISDS Reforms, Brussels, 15 July 2019, para. 64, fn. 51. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_efila.pdf (Last accessed 23.08.2024)

> "If two or more claims have been submitted separately to arbitration under this Article and the claims have a question of law or fact in common and arise out of the same events or circumstances, either party to the dispute may seek a consolidation order at either Tribunal. After giving all disputing parties the opportunity to be heard, the Tribunal shall in principle accept such request for consolidation, especially where the claimants are small and medium sized enterprises."

### 4.6. Third-party funding

As third-party funding ("TPF") made its way into international investment arbitration, crossing over from commercial arbitration, it has raised expectations as well as concerns. For this reason, its very permissibility was up for debate.[496] While its use in ISDS is a relatively recent phenomenon, it is now widespread, and its market is growing. As with anything that has a certain degree of popularity, this also attracted attention, with some claiming it constituted a danger to the legitimacy of the ISDS system as a whole.[497] Nevertheless, the demand for such financial services is growing. In addition, it is a high-yield investment opportunity, which is also relatively secure, due to the available information, and the evaluation cases go through before obtaining funding. These have contributed to the role of TPF being slowly but surely consolidated in ISA as well. A ban on such practices is now behind us, and will most likely never occur. The regulation of TPF in ISDS was expected to ensure efficiency, fairness and procedural integrity.[498] The current regulation that has come from this, has actually not made much of a splash.

The concept of TPF is today part of new-generation investment agreements, and arbitration rules. It has been recognized as a widely available means of providing important systemic benefits, such as enhancing access to arbitration for SMIs.[499] TPF has been defined as meaning any funding provided by a natural or legal person that is not a party to the dispute but enters into an agreement with a disputing party in order to finance part or all of the costs of the proceedings either through

[496] Anna Joubin-Bret, Spotlight on Third-Party Funding in Investor-State Arbitration, The Journal of World Investment & Trade, no. 16, 2015, p. 731.
[497] For an excellent review of arguments against TPF, see: Frank J. Garcia, Third-Party Funding as Exploitation of the Investment Treaty System, Boston College Law Review, 59 no. 8, November 2018, pp. 2911-2934.
[498] Sarah E. Moseley, Disclosing Third-Party Funding in International Investment Arbitration, Texas Law Review 97, no. 6, May 2019, p. 1181.
[499] Proposals for the amendment of the ICSID Rules, Working Paper 3, 295, para. 1.

a donation or grant, or in return for remuneration dependent on the outcome of the dispute.[500] Other definitions, or descriptions of TPF are more or less the same as this previously cited one.[501] This encompasses a wide range of means and ways in which bringing a claim may be supported.

In terms of determinative factors, the source of financing is a crucial point for the identification of the TPF's type. In this sense, one arbitrator had identified two main categories of third-party funders: an entity related to the claimant, or an entity that engages in third-party funding as a business.[502] The importance of such a distinction lies in the recognition that some TPF is occasional, based on personal ties, and some of it is done in a business context. Worries about the latter were recorded, as bringing the profit motive into the funding of claims would exacerbate its negative impact on ISDS. Scholars have also made a difference between commercial and non-commercial TPF, stating that as an economic concept it mainly applies to the financing of claimants, while financing respondents requires a different economic model, which is insurance.[503]

Indeed, there is a difference in the ability to obtain financing in ISDS, as by the nature of such proceedings, states tend to be respondents, with not much to gain that may attract a financier. To this effect, it must be noted that a small claim may also appear rather unappealing to a funder. This difference in the ability of the parties to an ISA proceeding to obtain TPF was also cited as a reason for not extending the services of the *advisory centre* to beneficiaries other than states and regional economic integration organisations.[504] Continuing, non-commercial TPF, meaning TPF accorded to states may also include funding engaged in by politically interested actors, including NGOs.[505] This would be a not-for-profit type TPF, as even in the case of obtaining a favourable award, the expenses of the parties (in this case the respondent state) are rarely recovered. This also

[500] CETA Chapter 8, Article 8.1. Definitions. A similar definition is contained in the EU-Vietnam Investment Protection Agreement, Article 3.28(i).
[501] It was also discussed whether or not *pro bono* assistance, funding for non-profit purposes, contingency arrangements and inter-corporate financing should be included in the definition of third-party funding. See Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session, A/CN.9/1004, p. 16.
[502] Arbitrator Gavan Griffith's Assenting Reasons in the ICSID Case No. ARB/12/10 RSM Production Corporation v. Saint Lucia *apud* A. Joubin-Bret, *op. cit.,* p. 730.
[503] David Gaukrodger, Kathryn Gordon, Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, No. 2012/03, p. 37 note 100, mentioning Steinitz as stating "Claim funding functions as a form of finance whereas defense funding functions as a form of insurance."
[504] See subchapter on the MPIC.
[505] *Id.*

means that even a well-regulated TPF system, would only profit states in very "limited instances".[506]

The analysis of access to justice fostered by TPF brings to the fore an issue that is quite controversial. In order to ensure that the return on investment will be as expected, funders may be prone to taking control over the claim, thus controlling whether or not a case will be settled in a negotiation or by an adjudicative decision of the tribunal, even having a say in the amount of a settlement, as well as refusing non-pecuniary settlements.[507] Such occurrences, however, would be difficult to track, and also to regulate.

SMIs could greatly benefit from TPF, passing the costs of ISDS on to investors, and promising to do so with part of their award as well.[508] TPF is commonly held by proponents as a great tool for promoting access to justice, as well as for levelling the playing field between states and SMIs.[509] Surely, access to funding may go a long way towards ensuring genuine *equality of arms* between the disputing parties. It must be noted that TPF is also useful for larger claimants, even if using TPF may only be a matter of regulating their balance sheets. However, the financial decisions faced by SMIs in such proceedings can prove to be of existential importance, due to the burdensome nature of the costs of bringing a claim.

Entities engaging in TPF regularly conduct their business in a highly profitable manner. This brings in additional factors to consider in terms of the outcome of a case. The rate of settlements in ISDS cases is quite high. But it has been argued that TPF can potentially reduce the rate of non-monetary settlements, as well as increase the chances of disagreement with regards to the amount of the claim, or the amount of a potential settlement.[510] Naturally, the amount of the claim is important to an investor, which could also mean that the high-cost low-return claims,

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[506] Investor-State Dispute Settlement (ISDS) Reform Submission by the Corporate Counsel International Arbitration Group (CCIAG) to UNCITRAL Working Group III (December 18, 2019), para. 67 *and* Report of Working Group III on the work of its thirty-eighth session, A/CN.9/1004, para. 81.
[507] D. Gaukrodger, K. Gordon, *op. cit.*, p. 40.
[508] Not only SMEs, but also natural persons, whose claims could also be organised into third-party-funded mass claims. However, this also poses an issue of control over the claim. In the case Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, it was noted that "Claimants are passive participants to the arbitration, all relevant decisions being made by [the funder] and [its selected counsel]" *apud* D. Gaukrodger, K. Gordon, *op. cit.*, p. 42.
[509] S.E. Moseley, *op. cit.*, p. 1189. On the contrary it has been stated that there are many risks respondent States are exposed to that investor claimants do not have to face, while the latter also having more means of recourse other than ISDS. Brook Guven, Lise Johnson, *The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement*, CCSI Working Paper 2019, p. 31. Available at: http://ccsi.columbia.edu/files/2017/11/The-Policy-Implications-of-Third-Party-Funding-in-Investor-State-Disptue-Settlement-FINAL.pdf (Last accessed 23.08.2024)
[510] D. Gaukrodger, K. Gordon, *op. cit.*, p. 39–40.

which would mostly be brought by SMIs, could potentially be sidelined in favour of bigger cases. It has been noted that the quantum of the claim "is likely to constitute the single most important criterion for a litigation funder." Its importance lay in the fact that the evaluation of a case may be just as costly and lengthy in the case of a smaller claim as it is in the case of a larger one.[511]

Companies offering TPF for ISDS claims usually employ a staff of professionals well versed in this highly specialised field of international law. They engage in high quality due diligence when evaluating the monetary and success potential of a claim. Making sure that the claim would be a success, and securing a return on their investment is of fundamental importance for their success. This success has to be calculable, nonetheless. An in-depth analysis of this field found that funders would only look at high value claims, primarily those seeking monetary relief.[512] Considering the average costs of ISA faced by claimants, and the fact that the 1:10 ratio[513] is often used to project the expected earnings of a dispute, it may easily result in numerous small claims not being fundable. This issue appears as quite evident, and should appear as such to anyone genuinely preoccupied by the question of access to justice for SMIs. Looking at it through this lens, it may well appear unjustified that access to the *advisory centre* was denied for SMIs by citing their possibilities to rely on TPF.

The increase of TPF in ISDS was said to potentially increase the number of frivolous claims, which is why it was sought that it be strictly regulated so that only substantiated claims may be brought.[514] Having a claim go through this deep analysis also has the potential to reduce the number of frivolous claims, obviating that investors would not have an interest in funding cases which would not produce returns. However, concerns have been voiced with regards to what is called the *investment portfolio model*, whereby funders would also test cases to see if other similar cases would be worth financing. This is said to incentivise the taking of more chances with weaker and riskier claims, as the risk would be spread out, thus potentially increasing rather than decreasing the occurrence of frivolous claims.[515] This, it was argued, would increase the number

[511] Jonas von Goeler, Third-Party Funding in international Arbitration and its Impact on Procedure, Kluwer Law International, 2016, p. 19.
[512] Id, p. 20.
[513] Report of the ICCA–Queen Mary Task Force on Third-Party Funding in International Arbitration, April 2018, The ICCA Report No. 4, pp. 25–26.
[514] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-third session, Vienna, 5–16 September 2022, A/CN.9/1124, paras. 125–126.
[515] S.E. Moseley, *op. cit.*, p. 1191; F. J. Garcia, *op. cit.*, p. 2921.

of ISDS cases, and consequently further exacerbate concerns about undue regulatory chill.[516] This was argued by some as a sufficient reason for the banning of third-party financing, such a ban aiming to reduce these potential effects.[517] Such arguments ignore the fact that more access to justice, and more scrutiny of state decisions brings about better regulation, and improves the rule of law. It is also the case that the respondent in an ISA case may request the dismissal of an unmeritorious case at a preliminary stage.[518] In such a case, the tribunal will have the chance to dismiss unmeritorious, frivolous claims early on, keeping costs at a minimum.

The question then is, what claims are financed? In terms of the value of the claim, a report on the topic found that the value of the claims that are regularly financed is of at least US$50 million.[519] According to such calculation it is plain to see how claims of some SMIs would not find interest with third-party funders. While there may be a chance that a claim raised by an SME would find the sympathy of someone willing to make a charitable donation, it would not be a sustainable way of ensuring SMI access.[520] It may also be argued that this observation does not consider the effects of portfolio investments, where smaller claims might be funded not just for profit, but also for their potential future precedential value.[521] This only seems to buttress the fact that smaller claims would have to face the unwillingness of the markets to have their claims funded, unless their case contains some type of a breakthrough in jurisprudence, the key to unlocking further claims. It is evident why in such a market SMIs supporting claims that do not promise substantial returns will have a difficult time finding sources of funding. Nevertheless, the

[516] Brooke Guven, Lise Johnson, The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement, CCSI Working Paper 2019, p. 33. For more details on regulatory chill, see Zoltán Víg, Gábor Hajdu, CETA and Regulatory Chill, in Márta Görög, Péter Mezei (eds.) A szellemi tulajdonvédelem és a szabadkereskedelem aktuális kérdései, Iurisperitus Kiadó, Szeged, 2018, pp. 44–54.
[517] Briefing submitted to Working Group III of UNCITRAL, by ClientEarth: Potential Solutions for Phase 3: Aligning the objectives of UNCITRAL Working Group III with States' International Obligations to Combat Climate Change, Authors: Amandine Van den Berghe and Kyla Tienhaara, p. 9.
[518] Such is ICSID Arbitration Rule 41(5).
[519] Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, International Council for Commercial Arbitration, April 2018, at p. 252, available at https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf (Last accessed 23.08.2024)
[520] As also suggested by Katia Fach Gomez, Catharine Titi, Facilitating Access to Investor-State Dispute Settlement for Small and Medium-Sized Enterprises: Tracing the Path Forward, p. 30, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4323775 (Last accessed 01.03.2024)
[521] Apparently, there is some controversy regarding, as it has been regarded as "whitewashing" TPF in ISDS, see F.J. Garcia, *op. cit.*, p. 2914, fn. 11.

development of this niche has produced funders that focus specifically on smaller claims.[522] Healthy competition between funders may also result in more interest towards smaller claims.

There is no doubt that the high returns[523] constitute a great incentive for investors to engage in TPF, potentially encouraging them to take more risk as well. To counter this, some have argued for the adoption of disincentive regulation, proposing that treaty provisions make it mandatory for arbitral tribunals to order security for costs, in order to ensure that the investor-claimant will pay the costs incurred by the respondent if the latter is to prevail.[524] The SIAC Investment Rules (2017), in Articles 33 and 35 do recommend that tribunals consider TPF when allocating costs. It may be expected that costs allocation in arbitration cases conducted under certain IIAs and certain arbitration rules may also be influence by TPF, as provisions on transparency vis-à-vis TPF arrangements are now prevalent. Rules on transparency around TPF, combined with provisions on the allocation of costs that are meant to sanction procedural misconduct and the bringing of frivolous claims, should provide plenty disincentive for those that would attempt to bring non-meritorious claims.

Furthermore, there have been cases (granted not ISDS cases) where third-party funders have faced the obligation of paying the costs of the successful respondent.[525] In the opinion of a scholar *justice demands liability* for adverse costs in cases where TPF is involved and the funded party loses.[526] ISA tribunals have also taken up this issue, in a particular case one of the arbitrators had criticised TPF arrangements likening them to the "gambler's Nirvana: Heads I win and Tails I do not lose".[527] This was recently echoed by Professor Philippe Sands lamenting that third-party funders may speculate on ISDS "without any possibility of making costs awards against [them]."

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[522] While evidence for this is purely anecdotal, this researcher has heard of such companies operating in the realm of international commercial arbitration. It may only be a question of time until we see smaller claims receiving funding in the realm of ISA.

[523] Some have estimated the returns at 30-50% on a portfolio basis. – F.J. Garcia, *op. cit.*, p. 2915. "An example of this was recently reported by Burford Capital, which in 2017 realized a 736% return on its investment following the sale of its interest in an investment arbitration claim in Teinver v Argentina." – F.J. Garcia, *op. cit.*, pp. 2915–2916. Also, there have been figures of between 20% and 50%, or a cap at a multiple of the legal costs advanced by the funder – D. Gaukrodger, K. Gordon, *op. cit.*, p. 36.

[524] F.J. Garcia, *op. cit.*, p. 2934.

[525] In the cases brought as examples by the authors, the different domestic courts have ordered not only the disclosure of the existence of TPF, but also the identity of the funders, as well as the amount of funding received. See D. Gaukrodger, K. Gordon, *op. cit.*, p. 41.

[526] Sir Rupert Jackson – Akin Arbitration Lecture 2019 – para. 5.2, available at: https://www.4newsquare.com/wp-content/uploads/2019/11/SECURITY-FOR-COSTS-IN-INTERNATIONAL-ARBITRATION-AND-OTHER-INTERIM-MEASURES.pdf (Last accessed 23.08.2024)

[527] Arbitrator Gavan Griffith's Assenting Reasons (para. 13), Decision on Saint Lucia's Request for Security for Costs, in the case RSM Production Corporation v Saint Lucia, ICSID Case No. ARB/12/10.

He also noted that their "involvement may add to the costs of the proceedings".[528] There are cases such as *Eco Oro* where criticism may be due. Criticising TPF may also do it good in terms of the reform of ISDS. But criticism should be put to good use, and "throwing the baby out with the bathwater" should be avoided. Any reform must be contemplated on realist grounds, and in the case of TPF, it must be acknowledged that getting rid of it completely is a quixotic endeavour, due to the many different forms it may take.

An interesting discussion during the negotiation of ICSID is remindful of the above. During the negotiations, the delegate from Ceylon, Mr. Wanasundera pointed out the asymmetry between the states as parties to the Convention on the one hand, and the individual investor on the other. He argued that there was an asymmetry in terms of the obligations assumed by both, and pointed out that "[i]f an investor obtained an award against the State he would no doubt obtain satisfaction," but that "[i]f the award was against the investor, the State would not have the same certainty of obtaining satisfaction from an investor who might, for instance, become insolvent or dispose of his assets before they could be reached."[529] This asymmetry is even more pronounced when the claimant is supported by a funder, with security for costs orders representing a partial solution, albeit a highly disadvantageous one for SMIs.

In the larger context of criticism aimed at the investor-state arbitration system in general, it has been stated that third-party funding constitutes an exploitation, because in the context of the current system it constitutes a case of unfair advantage-taking.[530] It has been argued that leaving third-party funding unregulated could undermine the integrity of the investment arbitration system and undercut public confidence in it.[531] In supporting this argument it has been stated that states have to support their costs from public funding, thus taking funds away from *more important things*.[532] For this reason some have called for the application of the precautionary principle – a guideline of international environmental law for the protection of the public – in taking measures to ban third-party funding.[533] In view of these arguments the fact of bringing a claim is the inherently bad part, not the fact that the need had arisen for bringing such a case. Considering the

[528] Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41, Declaration on Costs of Professor Philippe Sands, para. 12.
[529] History of ICSID, Vol. II-1, p. 501.
[530] F.J. Garcia, *op. cit.*, pp. 2930–2931.
[531] S.E. Moseley, *op. cit.*, p. 1189.
[532] *Id.*, p. 1191.
[533] F.J. Garcia, *op. cit.*, pp. 2930–2931.

costs aspect of bringing an ISA case, it is very unlikely that a non-meritorious claim would find funding. The difficulty faced by smaller claimants in gaining access to ISA may also mean that there are cases where, although it would have been warranted, a claim could not be brought.

Scholars and practitioners alike are in agreement that the regulation of TPF must include provisions on transparency, in order to avoid situations of conflict of interest, or to "ensure that arbitrators do not unknowingly have inappropriate relationships with third-party funders of cases they are deciding".[534] Some argue that disclosing the existence of TPF and the identity of the funder is sufficient in order to avoid conflicts of interest,[535] while others have argued that all details of the agreement should be disclosed.[536] A wider scope of the disclosure obligation would also make for more suitable decisions regarding the costs allocations burdening the claimant in cases where its claim is dismissed.[537] A balanced approach has prevailed in most ISA rules that regulate TPF. The need for transparency of TPF is also revealed in arbitral practice. In one case it was shown that without the voluntary admission of one of the parties that it had received third-party funding, essentially, the tribunal would not have granted security for costs, thus revealing the influence of TPF disclosure on the arbitration process.[538]

The CETA has provided for specific regulation concerning TPF, stating that in cases where it is used, the beneficiary has to disclose to the other disputing party and also to the tribunal the name and address of the third-party funder. This has to be done at the time of the submission of a claim or as soon as the agreement on TPF is concluded.[539] The SIAC Rules provide for more detail, and the possibility for the tribunal to order more than just the pure existence of the TPF arrangement be revealed. In SIAC Rule 24.l. the tribunal is granted authority to "order the disclosure of the existence of a Party's third-party funding arrangement and/or the identity of the

[534] D. Gaukrodger, K. Gordon, *op. cit.*, p. 40.
[535] S.E. Moseley, *op. cit*. See also the Submission by the Corporate Counsel International Arbitration Group (CCIAG) to UNCITRAL Working Group III from December 18, 2019, para. 67. See also D. Gaukrodger, K. Gordon, *op. cit.*, p. 40.
[536] F.J. Garcia, *op. cit.*, p. 2933.
[537] See Report of the ICCA-QM Task Force.
[538] ICSID Case No. ARB/12/10 RSM Production Corporation v. Saint Lucia. One of the questions in this case with regards to TPF was whether or not the third-party funder would also support costs in case the award favored the respondent. The fact that the claimant had previous cases in which it had not acquitted costs thusly incurred, revealing a "repeat complainant", who was also relying on TPF. This had prompted the tribunal to grant security for costs. One of the arbitrators stated that in such a case third-party funding "places an unfunded RSM and the third-party funder(s) in the inequitable position of benefiting from any award in their favour yet avoiding responsibility for a contrary award".
[539] Article 8.26 of the Comprehensive Economic and Trade Agreement between Canada and the European Union, Similar provision is contained in the Netherlands Model Investment Agreement, at Article 19.8.

third-party funder and, where appropriate, details of the third-party funder's interest in the outcome of the proceedings, and/or whether or not the third-party funder has committed to undertake adverse costs liability". The EU-Vietnam IPA also has similar provisions to the CETA about the disclosure of "the existence and nature of the funding arrangement, and the name and address of the third party funder", as well as on the moment the disclosure is to be done. These rules also recommend the tribunal take into account TPF in applying security for costs orders, as well in its decision on the costs of proceedings.[540] In so doing, disclosing TPF may affect the allocation of costs in the final award, [541] especially in terms of adverse costs, thus possibly having a deterrent effect on the funding of frivolous claims.[542] It has been suggested that other, more general provisions concerning disclosure, which are not specifically designed to address third-party funding, could also apply to them with the purpose of ensuring transparency.[543]

The 2022 ICSID Arbitration Rules (as well as the Conciliation Rules) provide for disclosure of TPF, also allowing the tribunal (or commission) to order the disclosure of further details as they deem fit.[544] Although there have been calls for the introduction of automatically ordering security for costs, this idea has been abandoned, arguing that such a provision "could unreasonably impede access to ICSID dispute resolution mechanisms, particularly for SMEs."[545] ICSID Arbitration Rule 53(4) expressly mentions TPF as an aspect that tribunals *shall consider* in ordering security for costs.

### 4.6.1. Contingency fee arrangements

The costs of legal representation constitute bay far the largest part of the costs incurred by parties in ISDS proceedings, massively outweighing any other costs. Thus, an arrangement

[540] EU-Vietnam Investment Protection Agreement Article 3.37.
[541] Such provision exists in the SIAC IA Rule 31.1. which provides that "[t]he Tribunal may take into account any third-party funding arrangements in apportioning the costs of the arbitration." Also, SIAC IA Rule 35 provides that "[t]he Tribunal may take into account any third-party funding arrangements in ordering in its Award that all or a part of the legal or other costs of a Party be paid by another Party."
[542] Report by the International Bar Association Arbitration Subcommittee on Investment: Consistency, efficiency and transparency in investment treaty arbitration, November 2018, p. 64.
[543] F.J. Garcia, *op. cit.,* p. 2933, holds that such a power of the tribunal under the SIAC IA Rules is also provided by Rule 23.1(b). in accordance with which "the Tribunal may require a Party to give any expert appointed under Rule 23.1(a) any relevant information, or to produce or provide access to any relevant documents, goods or property for inspection." In accordance with the maxim *generalia specialibus derogant* it may be considered that Rule 24.l. should apply to cases of TPF under the SIAC IA Rules.
[544] Rule 12 of ICSID Conciliation Rules and Rule 14 of ICSID Arbitration Rules.
[545] Proposals for the amendment of the ICSID Rules, Working Paper 3, 334, para. 133.

allowing for these costs to be supported (at least in part) by the legal representatives until such time as the case is successful would surely be welcome by SMI claimants as an effective means of gaining access to justice. However, there are several questions which may arise.

First, there are jurisdictions where contingency fee arrangements exclusively linked to the outcome of the case are in principle forbidden.[546] This is a notable difference in the way in which lawyers' roles have evolved in Europe and the US.[547] Contingency fees are forbidden only in principle, because in some cases regulation may allow for the establishment of a *success rate*, or a kind of partial contingency fee arrangement, whereby only the larger part of the attorneys' fees would be paid contingent on the outcome of the case. In any case, strict regulation on attorneys' rates (effectively, on freedom of contract) may constitute an impediment to gaining access to legal representation, and, consequently, gaining access to justice.

Second, it is questionable how much manpower, and how many hours a law firm is able to afford to put into a case. This involves a risk calculation that is left to the management of the law firm, and a decision that they will have to calculate in terms of the potential cost and duration of the specific claim they plan to bring.

### 4.6.2. Alternative ways of funding through crowdsourcing

Aside from typical third-party funding, where an investment is made by a specialised company, hiring specialised staff, auditing a claim for what its realistic potential is, and (most importantly) in case of a positive outcome, receiving a return, there are other alternative methods of funding a claim.

Crowdfunding may be considered as an alternative, through which multiple supporters step in to shoulder the costs of arbitration in a non-profit manner.[548] When done in exchange for a return, it is arguable whether there would be any notable difference between crowdfunding and *for profit* third-party funding. There are several companies offering dedicated platforms for raising funds. Some of them work as an investment scheme, connecting investors with a particular case.[549]

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[546] E.g. Romania, where Article 130 of the Attorney's Professional Statute expressly forbids *quota litis* arrangements. (*Statut din 2011 al profesiei de avocat, Adoptat prin Hotărârea Consiliului U.N.B.R. nr. 64/2011 privind adoptarea Statutului profesiei de avocat, M. Of. nr. 898 din 19 decembrie 2011*).

[547] A comparative presentation of the regulation of cotingency fees can be found in Csongor István Nagy, Collective Actions in Europe, A Comparative, Economic and Transsystemic Analysis, Springer, Cham, 2019, pp. 49–50.

[548] Crowdfunding website GoFundMe already offers tips on setting up a fundraiser to pay for legal fees: https://www.gofundme.com/c/blog/how-to-pay-for-lawyer (Last accessed 23.08.2024)

[549] E.g. LexShares: https://www.lexshares.com/ (Last accessed 23.08.2024)

Others work as a platform to gather donations.[550] An ISA case that promises great returns for its investors may be of interest to the big litigation funding companies. However, an SMI with more modest perspectives may get lucky and receive funding with the help of such online platforms.

There are also other creative ways to accumulate funds. In the age of *crypto-mania* there have also been attempts at gathering funds via an alternative investment vehicle. It is thus, that "the world's first arbitration membership token" was launched, promising a "fractional ownership of up to 80% of the potential award." [551]

The principal question in all cases is ensuring that the funding ends up where it has to end up, and funding crowds are not scammed. For this reason, websites that offer control over managing the funds, some promising to only give the funds straight to the attorneys, or commit to returning funds if the targets are not met.

There are, as presented, several alternative tools available for funding the claim of an SMI. The question is whether the case is salient, and if so, is it also marketable.[552] While the benefits may be calculable, the value of such a contribution is, in a sense, in the eye of the beholder.

# CHAPTER 5 – CONCLUSIONS

The inception of investor-state dispute settlement and international investment agreements in their current form is shrouded in multiple narratives, each offering a distinct perspective on their origins and purpose. These narratives, like parallel threads weaving through the fabric of international law, shed light on contrasting motivations and outcomes.

One prevalent narrative traces the roots of ISDS to the post-colonial era, characterized by the dismantling of imperial structures and the emergence of mechanisms aimed at safeguarding private property in a shifting global order. This narrative highlights the imperative to protect

[550] E.g. CrowdJustice: https://www.crowdjustice.com/ (Last accessed 23.08.2024)
[551] Sebastian Perry, Mining company markets crypto tokens to fund ICSID claim, Global Arbitration Review, 22 March 2022, available at: https://globalarbitrationreview.com/mining-company-markets-crypto-tokens-fund-icsid-claim (Last accessed 01.03.2024). The initiative was short-lived, as the uncertainties around cryptocurrencies were bad for business, as per the announcement of the company: General European Strategic Investments Inc. Terminates Arbitration Token Initiative, Yahoo!Finance, 1 September 2022, available at: https://finance.yahoo.com/news/general-european-strategic-investments-inc-145500000.html? (Last accessed 23.08.2024)
[552] For extensive empirical research on the dimensions of litigation crowdfunding and the drivers of a succesful litigation crowdfunding campaign more generally, see: Viju Raghupathi, Jie Ren, Wullianallur Raghupathi, Understanding the nature and dimensions of litigation crowdfunding: A visual analytics approach, 2021 PLoS ONE 16(4).

dominium in a world undergoing profound geopolitical transformations. It underscores how ISDS emerged as a shield for investors, particularly from the Global North, seeking to preserve their interests, often presented as inordinate enterprises, in the Global South.

Contrastingly, another narrative portrays ISDS as a catalyst for development, facilitating the influx of foreign direct investment (FDI) into regions strapped for capital infusion. In this narrative, ISDS is depicted as a tool designed not merely to serve the interests of capitalists but to foster economic growth and prosperity in developing nations. It emphasizes the need for a framework that not only attracts capital but also ensures its security, framing ISDS as a mechanism for mutually beneficial engagement between states and investors.

However, viewing ISDS through either lens presents a skewed perspective, akin to a Rorschach test in international law, wherein interpretation varies based on preconceived notions. Delving deeper, a myriad of questions surface, challenging the efficacy and fairness of the existing system. One such question probes whether ISDS genuinely incentivizes FDI inflows or merely perpetuates a cycle of exploitation. Responses to this question diverge, often reflecting ideological predispositions towards the system itself. If the system is viewed as part of a machine of plunder, of continued exploitation of the Global South by the Global North, evidence will be cited that the system does not actually serve its genuine purpose of attracting capital. If it is viewed as a system that this type of protection of aliens' property is a precondition to investment flows, evidence will be cited that the system does promote the flow of capital.

Central to the research at hand is the issue of equitable access to ISDS. Should all stakeholders, irrespective of size or economic power, have equal recourse to its protections? Here, the debate oscillates between rectifying perceived injustices embedded within the system and extending its benefits beyond larger enterprises. If the system itself has unjust roots, and it is not promoting FDI, its use should not be encouraged. If the system was established with a view to helping developing countries, while also protecting foreign investment, making this protection accessible to all foreign investors who theoretically should have such access, is a matter of resolving a situation of severe imbalance. Ongoing reform efforts grapple with reconciling these divergent perspectives, aiming to address concerns regarding legitimacy, consistency, coherence, and the balance of power between states and investors.

The complexity of the ISDS framework exacerbates challenges related to access to justice, particularly for small and medium-sized investors. The prohibitive costs of legal representation

underscore systemic inequalities, raising fundamental questions about the fairness of the process. While ostensibly treating states and investors equally in a procedural sense, the inherent power asymmetry tilts the scales in favour of states, highlighting the need for systemic recalibration. However, looking at the reform process, if we ask ourselves whom does the system empower, it rather seems to be turning away from investors. As states hold the golden pen of drafting their own agreements, investors will have to work within the system that will result from the reform process. It is questionable, however, that despite citing issues of SMIs' access to ISDS, the frameworks that are slowly emerging—at least as it is currently sketched out—will actually reach for the most obvious solutions to ensure accessibility. Such accessibility is also important considering the often-cited rule of law deficit plaguing our era. This endorses ISDS as a relevant remedy.

Some scholars argue for a coexistence of several investor-state dispute settlement mechanisms.[553] It is very likely that the MPIC will coexist with ad-hoc arbitration, and mediation, and with other ISDS mechanisms. It is reasonable to expect that this happens. Any additions to the current system must also balance reduced duration and costs with ensuring due process. However, from the outside, from a legitimacy point of view, it will add to the complexity of ISDS, it will confuse the public, and may bring about more criticism.

At the heart of ISDS lies the enforceability of arbitral awards, a cornerstone of its efficacy. Yet, there is a reliance on state goodwill, which exposes vulnerabilities, particularly in cases where states contest judgments or resist compliance. The spectre of reputational damage looms large, but the quest for accountability necessitates a deeper examination of who truly benefits from the system.

Does ISDS empower investors at the expense of state sovereignty, or does it strike a balance between protecting investments and upholding public interest objectives? This fundamental question underscores broader debates surrounding the role of states in regulating economic activities within their borders. Aligning the objectives of ISDS with principles of sustainable development and the rule of law remains imperative, but it may not be entirely useful to follow these objectives while sacrificing foreign investors' access to justice. Its drawbacks may outweigh its benefits. Maintaining impediments to SMIs access to the system does not improve it. Limiting

[553] Stephan W. Schill, Geraldo Vidigal, Designing Investment Dispute Settlement à la Carte: Insights from Comparative Institutional Design Analysis. The Law & Practice of International Courts and Tribunals, 18(3), 2020, pp. 314-344.

state liability through a system that makes it difficult for SMIs to gain access to justice, does not bring any improvements either. The most important aspect of the issue of access to justice in this area, is the impediment posed by the (un)affordability of legal representation. The need for appropriate legal representation is a direct consequence of the system's complexity. The proposal for the advisory centre would have had the capacity to bridge the gap in access to ISDS, and the issue of equality of arms. It is questionable that market actors or other means of gaining legal representation will be as efficient in bridging this gap.

Third-party funding in its various forms presents a great opportunity for improving access to justice, however, reliance on the market for solving this challenge will surely leave it with shortcomings. The discussions in the past decade around the permissibility of TPF in ISDS are telling of one thing: the spirit seems to be more towards barring investors from accessing ISDS. The lack of access to TPF may have impeded access to justice, but attempting to regulate its impermissibility would have surely been a failure. Thus, vulnerable investors are left with a system in which market players may ultimately decide who gets access to justice.

In view of the sensitive nature of ISDS, it may appear important to draw a line in terms of the magnitude of cases that would be allowed such recourse. It is plain to see that no state would venture into dealing with such a difficult question. For such purposes, leaving the system as is would be more conducive to it, as the number of cases that can actually be brought is naturally kept low as a consequence of the way in which the system has evolved. This effectively means that a lack of broad access was encoded into the system. If states agree to foot the bill, at least in part, for cases brought against them, they will have to contend with this. States might have to agree on some type of a threshold, due to the costs that would accumulate by bringing minor cases. As put by one author: one person's access to justice is another person's compensation culture.[554]

The current reform efforts at UNCITRAL Working Group III often do cite the issue of access of SMIs to ISDS. These references are an admission of the fact that there really is an issue to be solved here. But even though these references are present, the proposals chalked up so far do not appear to do much in remedying this issue. It seems, rather, that the parties dominating the process at the level of the Working Group have adopted this language to legitimise their own work, while actual progress in terms of enhancing SMI access is hardly palpable.

[554] John Peysner, Access to Justice, Palgrave Macmillan, London, 2014, p. 21.

In navigating the complexities of ISDS reform, Adam Smith's cautionary insight resonates: the pursuit of state interests must not come at the expense of individual rights.[555] As stakeholders navigate this intricate terrain, recalibrating the ISDS framework to foster inclusive growth, equitable justice, and sustainable development emerges as a collective imperative.

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[555] "The persons entrusted with the great interests of the state may, even without any corrupt views, sometimes imagine it necessary to sacrifice to those interests the rights of a private man." Adam Smith, Wealth of Nations, Book Five, Chapter I, Part 2.

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