Advances in Investor-State Arbitration

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The Department of Investment has been in charge of promoting foreign investment in Morocco since 1996. Beyond its mandate to provide information on the country’s potential, the Department creates and implements investment promotion strategies targeting specific sectors to promote the realization of projects. Its plan of action revolves around four main axes:

• Identifying different categories of investors and countries initiating foreign investment;
• Promoting priority sectors such as tourism, NTIC, electronic and automobile components, textiles, aeronautics and the agro-alimentary industry;
• Coordinating between national institutions and international organizations in the field of investment; and
• Locating projects according to the opportunities offered in the different regions of Morocco, in collaboration with the Regional Investment Centres.

In order to further the government’s investment policy, while carrying out its mission, the Department of Investment is organized along two main poles, namely cross-sectional and sector-oriented:

• Two divisions cover investment promotion, communication and cooperation, research and regulations;
• Two other divisions are dedicated to activities in priority sectors, agriculture and industry on one hand, tourism and services on the other.

To maximize efficiency, these structures benefit from the support of offices in charge of human resources and general affairs. The Department of Investment, along with its initial mandate, also steers the Inter-Ministerial Investment Commission, an appeal and arbitration body presided by the Prime Minister. The Department of Investment plans to establish an independent agency dealing specifically with promotion in early 2009.
This paper provides a brief overview of developments that have occurred in investor-state arbitration procedures in the last few years and their implications for host states. It looks at changes in the international arbitration rules which govern these proceedings, as well as advances in the dispute settlement provisions of investment treaties and in the arbitrations themselves. Of particular note, the three sets of arbitration rules most frequently used in investor-state arbitration have each been revised or are being revised at present. However, across the board - in the rules, the treaties and the cases themselves - there have been a number of developments that host states may wish to take note of.

I. Developments in the arbitration rules

According to the figures of the United Nations Conference on Trade and Development (UNCTAD), by the end of 2007, there had been at least 290 known treaty-based investor-state arbitrations.\(^1\) 182 of these disputes (62%) had been filed at the International Centre for Settlement of Investment Disputes (ICSID) or its Additional Facility. Eighty disputes (28%) had been commenced under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). A further fourteen disputes (5%) were filed with the Stockholm Chamber of Commerce, five disputes (2%) at the International Chamber of Commerce, five disputes (2%) by way of ad-hoc arbitration and another four disputes (1%) at miscellaneous venues.\(^2\)

Of these arbitration venues, the three most-used - ICSID, UNCITRAL and the Stockholm Chamber of Commerce - have each undergone a revision process in the last three years. Some of the more significant amendments, and their implications for host states, are outlined below. While ICSID is designed specifically for investor-state disputes, the arbitration rules of both UNCITRAL and the Stockholm Chamber of Commerce are used in various types of arbitration, investor-state being just one. Thus, for those rules, the amendments of significance in the investor state context are noted.

a. ICSID

The ICSID Convention was the 1960’s brainchild of the Executive Directors of the World Bank. It was intended to provide a procedural framework for the impartial resolution of investment disputes between

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member countries and investors of other member countries. The Convention entered force in 1966 and is supplemented by more detailed Regulations and Rules adopted in 1967.

In 1978 ICSID introduced, originally on a trial basis, a further set of rules known as the Additional Facility Rules. These rules were to be used for the settlement of investment disputes between States and foreign nationals where either the host state or the investor’s home state is not a member of ICSID. The first arbitration under the Additional Facility Rules was not registered until 1997.

The ICSID Regulations have been amended several times since their adoption in 1967. In early 2006 the ICSID Administrative Council concluded voting on a further round of amendments and these entered into effect on 10 April 2006. These amendments followed growing criticism from civil society groups and others at the lack of transparency or possibility for the public to be heard in cases that may affect them. The amendments dealt with seven aspects: (i) the possibility for non-parties to be present at hearings; (ii) a procedure for non-parties to make written submissions; (iii) improved disclosure of awards; (iv) an expanded obligation of arbitrator independence; (v) a limit on arbitrators’ fees; (vi) a fast-track procedure for interim relief and (vii) a more streamlined procedure to dispose of unmerited claims. These are each briefly outlined below.

Unless otherwise agreed by the parties, an ICSID arbitration proceeding is conducted in accordance with the arbitration rules in effect on the date on which the parties consented to arbitration. This means that unless the host state and the investor expressly agree otherwise, these amendments will apply to all future ICSID arbitrations.

(i) The possibility for non-parties to be present at hearings

Under the 2006 ICSID Arbitration Rules, unless either party objects, the tribunal, after consultation with the ICSID Secretary-General, may allow observers to attend all or part of the hearings, subject to appropriate logistical arrangements. The tribunal is to establish procedures for the protection of proprietary or privileged information for such cases. Under the previous version of the Rules, the parties had to give their consent before observers were allowed to attend the hearings.

During the negotiation of the 2006 amendments, it had been proposed that the tribunal be entitled to open the hearings after only consulting the parties, i.e. without the parties having a right of veto. Ultimately this was

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3 In 1984 the ICSID Administrative Council amended the Regulations and Rules. In late 2002 the Administrative Council adopted further amendments, this time to both the ICSID Regulations and Rules and the Additional Facility Rules, and these entered into force on 1 January 2003.
4 Article 44, ICSID Convention.
5 Rule 32(2), ICSID Arbitration Rules 2006. Article 39(2) ICSID Additional Facility Rules, Schedule C is identical.
not accepted and the progress made from the old to the new rules is slight, a small change in presumption rather than anything more - under the old rules, the tribunal could admit no other persons unless the parties consented; under the 2006 Rules, the tribunal may allow other persons unless either party objects.

(ii) Written submissions by non-parties

A more substantial advance in the ICSID Rules was the explicit inclusion of a power for tribunals to allow a non-disputing party to file a written submission regarding a matter within the scope of the dispute. That tribunals had the power to allow submissions from non-disputing parties, also known as “friends of the court” or “amicus curiae”, was already accepted in practice, however the new rule makes the power express. The tribunal must consult the parties before allowing a non-party to file a submission, but parties have no right of veto. In determining whether to allow such a filing, the tribunal will consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
(b) the non-disputing party submission would address a matter within the scope of the dispute;
(c) the non-disputing party has a significant interest in the proceeding.

Under the new rule the tribunal must ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.7

To date, written submissions by civil society groups, and now by the European Commission in one instance, have been made in at least eight different arbitrations. In at least two, the submissions have been cited with approval by the tribunals.

(iii) Provisional measures

The 2006 amendments make it possible for either party to request provisional measures for the preservation of its rights as soon as the proceedings are instituted, that is, without having to wait for the tribunal to be constituted.8 If a party makes a request for provisional measures before the constitution of the tribunal, the Secretary-General will, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the tribunal promptly upon its constitution.9 This new feature has not been taken into the Additional Facility Rules, so that parties using those rules will still have to wait for the tribunal to be constituted.

7 Rule 37(2) ICSID Arbitration Rules. Article 41(3) ICSID Additional Facility Rules, Schedule C is identical.
8 Rule 39(1) ICSID Arbitration Rules.
9 Rule 39(5) ICSID Arbitration Rules.
(iv) Preliminary objections

For host states faced with a groundless or spurious claim, the 2006 amendments to the ICSID Rules added an expedited procedure for making a preliminary objection that an investor’s claim is without merit. Under the new rule, a party may, no later than 30 days after the constitution of the tribunal and before the first session of the tribunal, file an objection that a claim is manifestly without legal merit. The tribunal, after giving the parties the opportunity to present their observations on the objection, will, at its first session or promptly thereafter, notify the parties of its decision on the objection.\(^\text{10}\) If the tribunal decides that all claims are manifestly without legal merit, it will render an award to that effect.\(^\text{11}\) This means that if a tribunal decides that just some claims are without legal merit, it is not required to render an award. This is relevant because an award can be immediately subject to annulment or enforcement proceedings. The Additional Facility Rules have been amended in an identical way.\(^\text{12}\)

(v) Disclosure of the award

Under the ICSID Convention, the ICSID secretariat can only publish the full award with the consent of both parties.\(^\text{13}\) This was not changed by the 2006 amendments. There has been some progress however. Under the previous version of the ICSID Arbitration Rules, although the award itself could not be published without consent, the ICSID secretariat was required to promptly publish excerpts of the legal rules applied by the tribunal.\(^\text{14}\) Following the 2006 amendment, this has been expanded so that the ICSID is required to publish excerpts of the tribunal’s legal reasoning. The Additional Facility Rules have been amended in the same manner.\(^\text{15}\) Although there is no strict doctrine of precedent in investment arbitration, it is hoped that better disclosure will lead to more consistent tribunal decision-making and thus more certainty for host states and investors alike.

(vi) Arbitrators’ independence

Arbitrators were required to sign a declaration of independence under the old Arbitration Rules, but the 2006 amendments expand this in two respects. First, as well as attaching a statement of past and present professional, business and other relationships with the parties (required by the previous rules) the arbitrator must now also state any other circumstance that might cause his or her reliability for independent judgment to be questioned by a party.\(^\text{16}\) Second, the arbitrator must acknowledge that by signing the declaration, he or she assumes a continuing obligation promptly to notify the ICSID Secretary-General any such relationship or...

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\(^{10}\) Rule 41(5) ICSID Arbitration Rules.
\(^{11}\) Rule 41(6) ICSID Arbitration Rules.
\(^{12}\) Article 45(6) and 45(7), Additional Facility Rules.
\(^{13}\) Article 48(5) ICSID Convention.
\(^{14}\) Rule 48(4) ICSID Arbitration Rules.
\(^{15}\) Article 53(3) Additional Facility Rules.
\(^{16}\) Rule 6(2) ICSID Arbitration Rules.
circumstance that subsequently arises during this proceeding. The Additional Facility Rules have been amended in the same two respects. Interestingly under ICSID, arbitrators are only required to disclose any interests only after the tribunal has been constituted. Under the UNCITRAL Rules, this must occur before the tribunal is constituted.

(vii) Arbitrators’ costs
The 2006 amendments take a step to prevent arbitrators demanding higher fees than those set from time to time by ICSID. Unless otherwise agreed by the disputing parties and the tribunal in advance, each member of the tribunal will receive a fee for each day in which he or she participates in tribunal meetings and a fee for the equivalent of each eight-hour day of other work performed in connection with the proceedings. The amounts of the fees above are determined from time to time by the ICSID Secretary-General, with the approval of the Chairman (the President of the World Bank). The need to place a curb on tribunals unilaterally extracting higher fees arose in response to parties feeling under pressure in some cases to agree to the tribunal’s demands. Under the 2006 amendment, any request by a tribunal for a higher amount must be made through the Secretary-General. This also applies in respect of arbitration proceedings brought under the Additional Facility Rules.

b. Stockholm Chamber of Commerce

In early 2006 a committee of Swedish arbitration specialists began work to revise the existing Arbitration Rules of the Stockholm Chamber of Commerce (SCC). Draft revisions were circulated for public comment in autumn 2006. The rules were approved by the SCC Board in November 2006. The 2007 SCC Rules apply to all cases filed after 1 January 2007.

(i) Payment of the advance on costs
Under the SCC Rules, payment of the required advance on costs is a prerequisite for transferring the file to the arbitrators. In the past, there had been cases where the respondent, who either objected to the jurisdiction

17 Rule 6(2) ICSID Arbitration Rules.
18 Article 13(2), Additional Facility Rules.
20 Article 60(2) ICSID Convention: “Nothing in paragraph (1) of this Article shall preclude the parties from agreeing in advance with the Commission or Tribunal concerned upon the fees and expenses of its members.”
21 Regulation 14, ICSID Administrative and Financial Regulations.
23 Regulation 14, ICSID Administrative and Financial Regulations
24 Article 5, ICSID Additional Facility Rules provides that Regulation 14 of the Administrative and Financial Regulations shall apply, mutatis mutandis, in respect of arbitration proceedings under the Additional Facility Rules.
of the SCC or did not want to be party to the arbitral proceedings, refused to pay its share of the advance on costs.\textsuperscript{26} In such cases it was unclear as to whether the claimant could pay the full advance on costs to get the arbitration underway and later request the tribunal to order the respondent to repay its share of the advance. Under the 2007 Rules, the claimant may now request the arbitral tribunal to order the respondent to reimburse the claimant the amount it has paid on the respondent’s behalf.\textsuperscript{27} This removes the possibility of a host state avoiding arbitration by not paying its share of the advance on costs.

(ii) Arbitrators’ independence and qualifications
Since 2000, the SCC Arbitration Institute has required arbitrators to complete a written form in which they confirm their impartiality and independence, as well disclose any circumstance which may give rise to justifiable doubts as to their impartiality or independence.\textsuperscript{28} This requirement is now set out in the rules.\textsuperscript{29} Like ICSID, the arbitrator only completes the form once he or she has been appointed by a party, in contrast to UNCITRAL which requires it in the opposite order.\textsuperscript{30}

The 2007 SCC Rules also include a new ground upon which to challenge an arbitrator during an arbitral proceeding, namely that the arbitrator lacks qualifications agreed by the parties. A party may challenge an arbitrator in whose appointment it has participated, only for reasons of which it becomes aware after the appointment was made.\textsuperscript{31}

(iii) Interim measures
Under the old SCC Rules the arbitral tribunal could order specific performance for the purpose of securing the claim. The revised rule has been expanded to allow the arbitral tribunal to “grant any interim measures it deems appropriate” at the request of a party.\textsuperscript{32} The revision committee chose not to lay down the standards to be applied when determining whether interim measures are justified, leaving the tribunal with considerable discretion. The parties are also still free to apply to national courts for interim measures should they so choose.\textsuperscript{33}

(iv) Objection to jurisdiction
Under the old SCC Rules, it was not clear whether a party who failed to object to the jurisdiction of the SCC Institute in its first reply was prevented from later raising an objection before the tribunal.\textsuperscript{34} The 2007 SCC

\textsuperscript{26} Magnusson and Shaughnessy, page 64.
\textsuperscript{27} Article 45(4)
\textsuperscript{28} Magnusson and Shaughnessy, page 42.
\textsuperscript{29} Article 14.
\textsuperscript{30} Magnusson and Shaughnessy, page 42.
\textsuperscript{31} Article 15(1).
\textsuperscript{32} Article 32.
\textsuperscript{33} Magnusson and Shaughnessy, page 60.
\textsuperscript{34} Magnusson and Shaughnessy, page 44.
Rules now that a respondent is not precluded from raising an objection at any time up to and including the submission of the statement of defence.\textsuperscript{35} Under the old Rules, the Board of the SCC’s Arbitration Institute could dismiss a case if it considered that it manifestly lacked jurisdiction. The 2007 Rules adds a power for the Board to dismiss a case “in part”, if it considers that part of the case lies outside its jurisdiction.\textsuperscript{36}

(v) Consolidation of related proceedings

The possibility for proceedings to be consolidated has been introduced with the 2007 SCC Rules.\textsuperscript{37} However, in deference to the principle of party autonomy, the revision committee chose to take a fairly conservative approach.\textsuperscript{38} In particular, the new rule cannot be used to consolidate disputes where different investors are arbitrating against the same host state, as it only allows consolidation where several disputes arise between the same parties.

(vi) Production of evidence

The 2007 SCC Rules introduce a new provision stipulating that the tribunal may, at the request of a party, order a party to produce any evidence or documents that may be relevant to the outcome of the case.\textsuperscript{39} Notably, a party must request the tribunal to act, the tribunal cannot act on its own initiative.\textsuperscript{40} This may prove to be a useful tool for host states.

(vii) Hearings in private

The 2007 Rules contain a new provision specifying that unless agreed otherwise by the parties, hearings will be in private.\textsuperscript{41} Commentators note this is in keeping with existing practice.\textsuperscript{42}

(viii) Confidentiality of the arbitration and the award

During consultations on the draft revised rules, the revision committee circulated two possible provisions dealing with the confidentiality of the arbitration and the award. The short option was:

\textit{Unless agreed otherwise by the parties, the SCC Institute and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award.}

The long option would impose an obligation of confidentiality on the parties as well as the SCC and the tribunal. The Swedish Supreme Court has previously held that absent a specific agreement to that effect,

\begin{itemize}
\item Article 5(1)(i)
\item Article 10.
\item Article 11.
\item Magnusson and Shaughnessy, page 47.
\item Article 26(3).
\item Magnusson and Shaughnessy, page 55.
\item Article 27(3).
\item Magnusson and Shaughnessy, page 56.
\end{itemize}
parties in arbitration are not subject to an obligation of confidentiality. Of the two options, the short version has been adopted in the 2007 SCC Rules, thus there is no obligation of confidentiality on the parties.

(ix) The award
As well as providing that the award is final and binding on the parties, the new Rules stipulate that by agreeing to the SCC Rules the parties have undertaken to carry out any award without delay. The old SCC Rules did not specify a time period within which an award could be corrected. Under the 2007 Rules, any request for a correction or interpretation of an award must be made within 30 days of having received the award.

c. UNCITRAL

At its thirty-ninth session in 2006, the United Nations Commission on International Trade Law (UNCITRAL) agreed that its Working Group II (Arbitration and Conciliation) should undertake a revision of the UNCITRAL Arbitration Rules. At the Commission’s forty-first session in 2008, the Working Group sought guidance from the Commission as to whether it should consider treaty-based arbitration in further depth and, if so, which form that work should take. The Commission agreed that the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules. The Commission expressed the hope that the Working Group would complete its work on the revision of the UNCITRAL Arbitration Rules in their generic form, so that the final review and adoption of the revised Rules would take place at the forty-second session of the Commission, in 2009.

With a view to facilitating consideration of transparency in treaty-based arbitration by the Working Group at a future session, the Commission requested the Secretariat to undertake preliminary research and compile information regarding current practices. The Commission urged member States to contribute broad information to the Secretariat regarding their practices with respect to transparency in investor-State arbitration.

The Working Group is currently midway through its second reading of the draft revised rules. Although the UNCITRAL Rules are used in different types of arbitration, a number of the proposed revisions are particularly worth noting in the investor-state context.

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44 Article 40.
45 Article 41.
46 A/CN.9/646, para. 69.
48 Ibid.
(i) **Applicable version of the UNCITRAL Rules**

The draft revised Rules contain a provision specifying that:

> Unless the parties have agreed to apply another version of the Rules, the parties to an arbitration agreement concluded after [date of adoption by UNCITRAL of the revised version of the Rules] shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration. That presumption does not apply where the arbitration agreement has been concluded by accepting after [date of adoption by UNCITRAL of the revised version of the Rules] an offer made before that date.\(^49\)

The last sentence is particularly relevant for investor-state arbitrations. As the offer to resolve disputes through arbitration will be set out in the dispute resolution section of the BIT, it may very well predate the adoption of the revised UNCITRAL Rules. This will mean that the presumption will not apply but it is unclear what will happen instead. To date there is no guidance on this point, but it is possible to imagine three alternatives. First, there may be considered a reverse presumption of the old rules applying. Second, the decision as to the applicable version of the rules may be left to the disputing parties to agree between themselves at the start of the arbitration. Or third, the investor, as the party initiating the arbitration, may get to choose. The second scenario presents practical “chicken or egg” difficulties should the disputing parties quite predictably not agree.\(^50\) At present, it is not clear how this issue will be resolved.

(ii) **Arbitrators’ independence**

Under the draft revised Rules, the requirement to disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality is a continuing one.\(^51\) There are two new model statements of independence, one for arbitrators with no circumstances to disclose; the other for arbitrators with circumstances to disclose. The procedure for challenging an arbitrator has been refined in the draft revised Rules.\(^52\)

(iii) **Response to the notice of arbitration**

A new obligation imposed on the respondent by the draft revised Rules is the requirement to provide the claimant with a response to its notice of arbitration.\(^53\) The draft revised Rules specify a number of elements that must be contained in the response which must be communicated to the claimant within 30 days.

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\(^{49}\) Draft article 1(1bis), A/CN.9/WG.II/WP.151.

\(^{50}\) Arbitration rules govern the constitution of the tribunal, meaning that the tribunal cannot be constituted until the rules have been chosen, but if the parties cannot agree, there will be no tribunal to determine the point for them.

\(^{51}\) Draft article 9, A/CN.9/WG.II/WP.151.

\(^{52}\) Draft articles 10-12, A/CN.9/WG.II/WP.151.

\(^{53}\) Draft article 3, A/CN.9/WG.II/WP.151.
(iv) **Tribunal’s jurisdiction**

The draft revised Rules make it clear that the tribunal has the power to raise and decide upon issues regarding the existence and scope of its own jurisdiction.\(^{54}\) The Rules also clarify that a party is not precluded from objecting to the tribunal’s jurisdiction by the fact that it has participated in the appointment of an arbitrator.\(^ {55}\)

(v) **Conduct of the proceedings**

The draft revised Rules do not significantly alter the general provision contained in the current rules that empowers the tribunal, subject to the Rules, to conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that each party is given an opportunity of presenting its case.\(^ {56}\) A new addition is the requirement that the tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.\(^ {57}\) Also, the arbitral tribunal may, at any time, extend or abridge any period of time prescribed under the Rules or, after inviting the parties to express their views, any period of time agreed by the parties.\(^ {58}\)

(vi) **Interim measures**

The draft revised Rules contain a considerably expanded section on interim measures, drawing heavily in the recently revised UNCITRAL Model Law.\(^ {59}\) The tribunal may require the party requesting an interim measure to provide appropriate security and the party may be liable for any costs and damages caused by the measure if the tribunal later determines that the measure should not have been granted.

(vii) **Counter-claim and set-off**

The draft revised Rules propose to expand the scope for potential counter-claims or set-offs to either those arising out of the same legal relationship or those falling within the scope of the arbitration agreement. The Working Group has not yet decided which one of these options it prefers.\(^ {60}\)

(viii) **Hearings in private**

The proposed draft Rules do not change the current rule that hearings shall be held *in camera* unless the parties agree otherwise.\(^ {61}\)

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\(^{54}\) Draft article 21(1), A/CN.9/WG.II/WP.151/Add.1.

\(^{55}\) Draft article 21(2), A/CN.9/WG.II/WP.151/Add.1.

\(^{56}\) Draft article 15(1), A/CN.9/WG.II/WP.151.

\(^{57}\) Draft article 15(1), A/CN.9/WG.II/WP.151.

\(^{58}\) Draft article 15(1bis), A/CN.9/WG.II/WP.151.

\(^{59}\) Draft article 26, A/CN.9/WG.II/WP.151/Add.1.

\(^{60}\) Draft article 19(3), A/CN.9/WG.II/WP.151/Add.1.

\(^{61}\) Article 25(4).
(ix) **Publication of the award**
Currently, an UNCITRAL award may be made public only with the consent of both parties. The proposed revised rule will also allow disclosure where and to the extent required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.

(x) **Waiver of appeal rights**
The existing UNCITRAL Rules stipulate that all awards shall be final and binding on the parties. The draft revised rules add a requirement that parties waive their right to any form of appeal. The proposed provision reads:

> *Insofar as such waiver can be validly made, the parties shall be deemed to have waived their right to any form of appeal, review or recourse to any court or other competent authority. The right to apply for setting aside an award may be waived only if the parties so expressly agree.*

(xi) **Exclusion of arbitrators’ liability**
The Working Group proposes to introduce a new provision that will exclude liability of participants in the arbitral process to the fullest extent permitted under the applicable law. The current draft provision states that the members of the arbitral tribunal, the appointing authority, the Secretary-General of the Permanent Court of Arbitration and experts appointed by the tribunal shall not be liable for any act or omission in connection with the arbitration, to the fullest extent permitted under the applicable law.

(xii) **Costs**
The draft revised Rules contain a number of new provisions designed to control arbitration costs. In the draft revised Rules, arbitrators’ and witnesses’ travel costs and other expenses and the costs of expert advice and other assistance required by the tribunal must be “reasonable”. Promptly after its constitution, the tribunal shall communicate the methodology which it proposes to follow for the determination of its fees to the parties. In its decision on costs, the tribunal must show the computation of the amount, consistent with that methodology. Any party may refer a costs decision or proposal, within 15 days, to the appointing authority for final determination.

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62 Article 32(5).  
64 Article 32(2).  
65 Draft article 32(2), A/CN.9/WG.II/WP.151/Add.1.  
66 A/CN.9/WG.II/WP.151/Add.1, para 44.  
67 Draft article 38(b)-38(d), A/CN.9/WG.II/WP.151/Add.1.  
The Working Group is also considering whether to retain the provision in the current UNCITRAL Rules which prevents the tribunal charging additional fees for the interpretation, correction or completion of its award.\textsuperscript{69}

II. Developments in investment treaties

Perhaps the most significant recent development in the dispute settlement provisions of investment treaties has been the introduction of clauses designed to improve transparency and the consideration of the public interest aspects of the investor-state arbitration process. As discussed below, such clauses have now been incorporated into several countries’ model BITs and recently signed BITs as well as the investment agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area.\textsuperscript{70}

The first treaty to take such steps was the North American Free Trade Agreement (NAFTA). In 2001, NAFTA Parties\textsuperscript{71} adopted notes of interpretation in which they agreed that, subject to limited exceptions, all documents in the proceedings should be made publicly available.\textsuperscript{72} On the occasion of the tenth anniversary of NAFTA in 2003, NAFTA Parties made a further statement declaring that no provision in NAFTA limits a tribunal’s discretion to accept written submissions from a person or entity that is not a disputing party.\textsuperscript{73} In the same period, the United States and Canada each issued statements affirming that they would consent to opening to the public hearings in Chapter 11 disputes to which either is a party, and to request the consent of disputing investors to such open hearings. Mexico subsequently joined the other NAFTA parties in supporting open hearings for investor-state disputes.\textsuperscript{74}

While the NAFTA statements have proven themselves valuable, the confidentiality order recently issued in a NAFTA case, Chemtura Corporation v. Canada, shows that unless transparency provisions are enshrined in the investment treaty itself, they may be overruled. In that case, Chemtura, a U.S. chemicals manufacturer, challenges Canada’s phase-out of the toxic agro-chemical, Lindane. Although Canada has stated its commitment to open hearings, the arbitration is being heard under the UNCITRAL Arbitration Rules which

\textsuperscript{69} A/CN.9/WG.II/WP.151/Add.1, para 41.
\textsuperscript{70} The COMESA agreement is not yet in force.
\textsuperscript{71} United States, Canada and Mexico.
provides for closed hearings unless both parties consent. The investor did not consent and obtained a confidentiality order from the tribunal requiring the hearing to be held in private.\textsuperscript{75}

The case of \textit{Bewater v. Tanzania} is another example. In that case, a U.K-German water consortium sought and was granted confidentiality orders against the wishes of Tanzania. The tribunal ordered the parties not to disclose the pleadings or other documents and to refrain from discussing the case beyond what was “necessary” for the duration of the proceeding.\textsuperscript{76}

The \textit{Bewater} and \textit{Chemtura} cases illustrate the need for such provisions to be included in the investment treaty itself and in language that is not voidable at the option of one of the disputing parties. As noted in the preceding discussion on the ICSID, Stockholm and UNCITRAL Rules, the ability for one party to veto access to documents and hearings will remain in all three revised sets of rules.

Provisions similar to the NAFTA statements are now part of the model BITs of Canada, the United States and most recently Norway.\textsuperscript{77} They have also been incorporated in a number of recent US and Canadian BITs with developing countries, such as Singapore,\textsuperscript{78} Peru\textsuperscript{79} and Chile.\textsuperscript{80}

The most advanced provisions, however, are found in the investment agreement for the COMESA Common Investment Area, not yet in force. Notably, it extends the requirements for transparency and public access to proceedings to disputes between Member States as well as between a Member State and an investor.

Under the COMESA investment agreement, all documents relating to proceedings are to be available to the public.\textsuperscript{81} Procedural and substantive oral hearings are to be open to the public.\textsuperscript{82} A tribunal can take such steps as necessary to protect confidential business information in written form or at oral hearings, but this should be way of exception.\textsuperscript{83} A process for the making of amicus curiae submissions is set out in Annex A to the agreement.\textsuperscript{84}

\textsuperscript{75} Investment Arbitration Reporter, 3 June 2008, “Schedule set for chemical company’s case against Canada; hearings to be closed to public”, Luke Peterson.
\textsuperscript{76} Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania (ICSID Case No. ARB/05/22), Procedural Order 3, 29 September 2006
\textsuperscript{78} United States-Singapore FTA 6 May 2003.
\textsuperscript{79} Canada-Peru FTA, 29 May 2008.
\textsuperscript{80} United States-Chile FTA, 6 June 2003.
\textsuperscript{81} Article 27(3), Article 28(5), COMESA CCIA.
\textsuperscript{82} Article 27(4), Article 28(6), COMESA CCIA.
\textsuperscript{83} Article 27(5), Article 28(7), COMESA CCIA.
\textsuperscript{84} Article 27(6), Article 28(8), COMESA CCIA.
In addition to the provisions of transparency, the COMESA agreement also aims to prevent investors having “two bites of the same cherry” by bringing similar claims against a host state in several different fora. The agreement requires an investor to make a definitive election of forum and it may not thereafter submit a claim relating to the same subject matter or underlying measure to other fora.  

The COMESA agreement also entitles a Member State facing an investor claim to assert as a defence, counterclaim or set-off, that the investor has not fulfilled its obligations under that agreement, including the obligations to comply with all applicable domestic measures and to take all reasonable steps to mitigate possible damages.

III. Developments in arbitral practice

a. Transparency and the public interest

Just as recent years have witnessed improved transparency in the ICSID Rules and the first investment treaties with provisions on transparency and non-disputing parties, there have been parallel developments in the arbitrations themselves. Interestingly, the developments in the cases began separately from the new provisions in the arbitration rules and the BITs and in fact predated them. In the earlier cases, tribunals used their general residual powers in the ICSID and UNCITRAL Rules to grant leave to non-disputing parties to make written submissions. More recently, however, cases have been decided under the new ICSID and treaty rules as well. These developments are demonstrated in a sample of four cases:

- In Methanex Corporation v. United States, the tribunal held as far back as 2001 that it was able to accept amicus briefs through its general power under article 15(1) of the UNCITRAL Rules. Although it held that it did not have the power to make the documents or hearings public, the parties later voluntarily agreed to do so.

- In Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic the tribunal held that its residual power in rule 44 of the ICSID Rules allowed it to accept amicus briefs. It considered, however, that under the ICSID Rules it was not able to allow the petitioners to attend the hearings unless the parties agreed. Although it noted that the Rules were

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85 Article 28(3), COMESA CCIA.
86 Article 28(9), COMESA CCIA.
87 Article 15(1) UNCITRAL Rules: “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.”
88 Rule 44 ICSID Rules: “...If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.”
89 Methanex Corporation v. United States of America, Decision of the tribunal on petitions from third persons to intervene as “amici curiae”, 15 January 2001
90 Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic, ICSID Case No ARB/03/19.
silent on the matter, it denied their application to access for the pleadings and other documents on the ground that they would be able to carry out their role to assist the tribunal as amicus curiae without such access.

- *Biwater v Tanzania* is an example of a case under the revised ICSID Rules (which now make express provision for amicus submissions).\(^90\) The tribunal granted three Tanzanian NGOs and two international NGOs leave to file a joint written submission, but refused to grant them access to the hearing or the pleadings and other documents on similar reasoning as the Suez tribunal above. The award has been made public in full.

- Lastly, *Glamis Gold Ltd v. United States* puts the NAFTA Parties statements on non-disputing party submissions, open hearings and access to documents into effect. The local indigenous community, two environmental NGOs and the national mining association were granted leave to file written submissions as non-disputing parties. All pleadings are publicly available and the hearings in September 2007 were open to the public.

These cases demonstrate that progress has been made regarding the role on non-disputing parties and the publication of awards, but there are still obstacles under the ICSID and UNCITRAL Rules regarding access to documents and open hearings.

### b. Costs awards to the host state

A number of studies have concluded that whilst tribunals frequently award successful claimants their legal costs, they very rarely award successful host states theirs.\(^91\) The apparent rationale for such a differentiated approach is that investor claimants in effect provide the enforcement mechanism for international investment law, and they should not be punished for their good faith attempts in doing so.\(^92\)

In his dissenting opinion in the *International Thunderbird v. Mexico* case, Professor Thomas Wälde annexed a table summarizing the cost decisions in twenty-six investor-state arbitration awards where the investor had failed in its claim. Of the twenty-six awards, the tribunal had awarded the successful host state its legal costs and/or its share of the arbitration costs in only seven cases.\(^93\) To these, one can add the recently issued award

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\(^{90}\) *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22).

\(^{91}\) For example the Buehler, Rubens and Gotanda surveys cited by Professor Thomas Wälde in his dissenting opinion in *International Thunderbird Gaming Corporation v. Mexico*, para 127.


in *Plama Consortium Limited v. Bulgaria*.\(^{94}\) In that case the tribunal held that the plaintiff was guilty of fraudulent misrepresentation in obtaining its investment in Bulgaria and denied its claim for that reason. The tribunal held that the claimant should reimburse Bulgaria US$460,000 for its shares of the tribunal costs as well as US$7 million as a reasonable proportion of Bulgaria’s legal fees and other costs. The common theme amongst these cases is that the plaintiff was not only unsuccessful in its claim, but there were additional aggravating factors. For example, the claim was of a frivolous or spurious nature or the plaintiff had acted in bad faith or otherwise objectionably.

Based on the above, cost awards to a successful host state where no plaintiff misconduct is involved still seem unlikely. However, if a tribunal considers the claimant has engaged in some form of misconduct, costs may flow to the host state after all.

IV. **Conclusion**

This paper provides a brief overview of recent developments in the investor-state arbitration process. The last few years have been particularly rich in this regard, with the revision of the three sets of arbitration rules most commonly used in investor-state disputes.

In the treaties, the main development has been the introduction of provisions on transparency and the possibility of submissions from non-parties. In this regard, the investment agreement of the COMESA Common Investment Area is the most advanced thus far, with strong provisions on transparency in both investor-state and state-state disputes. Such developments parallel the recognition by tribunals in a number of cases that such measures enhance its decision-making and in the wider context, the legitimacy of the investor-state arbitration process itself.\(^{95}\) At the same time, several confidentiality orders issued by tribunals against the wishes of host states reinforce the need to include transparency provisions in the treaties themselves.

Host states whose investment treaty dispute resolution provisions refer to the arbitration rules of either ICSID, UNCITRAL or the Stockholm Chamber of Commerce would do well to take careful note of the revisions to those rules. In some cases, the changes may prove to be positive for host states. In particular the ICSID amendments fall into this category, namely its more streamlined procedures for obtaining preliminary measures or objecting to a meritless claim, its slightly improved transparency provisions including the publication of the legal reasoning of awards, its express provision allowing amicus curiae, its greater focus

\(^{94}\) *Plama Consortium Limited v. Bulgaria*, ICSID Case No ARB/03/24, Award, September 2008.

\(^{95}\) E.g. *Methanex Corporation v. United States* and *Suez and Others v. Argentina*.  

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on arbitrator independence and its limit on arbitrators fees. UNCITRAL and the Stockholm Chamber of Commerce have also introduced some provisions that may benefit host states, whilst some of their other changes are more concerning. On the positive side are UNCITRAL’s proposed emphasis on arbitrator independence, its wider scope for counter-claim and set-off, its more extensive interim measures and new controls on arbitration costs. The Stockholm Chamber of Commerce revision has also stressed arbitrator independence, expanded interim measures and introduced a new ground for arbitrator challenge and a request for the production of evidence. On the other hand, its new rule on costs advances and UNCITRAL’s proposed exclusion of arbitrator liability and waiver of appeal rights will likely be less pleasing to host states.