

BACKGROUND PAPER

Contract-Based ICSID Arbitration

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EXECUTIVE SUMMARY

1. This paper on Contract-Based ICSID Arbitration is a comprehensive analytical guide and a practical reference for investors, States, and State entities or agencies on contract-based dispute resolution under the ICSID Convention and the Additional Facility Rules (“**AF Rules**”). It is intended to draw attention to practical considerations when drafting dispute resolution clauses, preparing for contract-based proceedings, and managing a case.
2. Drawing on ICSID’s institutional experience, the paper explains how contract-based investment dispute resolution has functioned in practice at ICSID, what parties can expect from ICSID proceedings, and the benefits of including a clause submitting disputes to ICSID in contracts. It is accompanied by a special issue of [ICSID Caseload – Statistics – Special Focus – Contract-Based Cases](#), reflecting data up to December 31, 2025, and a new set of ICSID [Model Clauses for Contracts](#) with ready-to-use drafting language.
3. The ICSID Convention was designed to promote international investment by establishing a neutral mechanism for resolving investment disputes between States and foreign investors. Disputes were originally solely submitted on the basis of ICSID dispute resolution clauses in contracts: from 1972, when the first contract-based arbitration case registered, through the mid-1980s, all ICSID cases were contract-based. The paper serves as a timely reminder that the ICSID Convention offers significant advantages for contract-based arbitration. These include the enforceability of awards in all Contracting States (Article 54), insulation from political interference (Article 27), and immunity from review by domestic courts (Article 53). Additional features of ICSID contract-based arbitration are summarized below.
4. While treaty-based dispute resolution currently dominates the ICSID caseload, contract-based proceedings continue to grow in absolute terms. As of December 31, 2025, 175 contract-based cases had been registered under the ICSID Convention and the AF Rules. Contract-based arbitration and conciliation currently account for 16% of ICSID’s total caseload. Of that share, arbitration proceedings represent 93% and conciliation proceedings the remaining 7%, with the vast majority of these proceedings brought under the ICSID Convention.
5. Contract-based arbitration is particularly prominent in certain regions. Almost half (49%) of arbitrations based on a contract involve a State party from Africa, while States from

*This paper does not constitute legal advice. The paper was published on June 30, 2026 with data and statistics as of December 31, 2025.

South America account for 21% of the contract-based caseload. By sector, the oil, gas, and mining sectors account for 47% of all contract-based cases, significantly higher than their 26% share of the overall ICSID caseload, while electric power and other energy sectors contribute a further 16% of contract-based cases.

Jurisdiction

6. While parties cannot contract around jurisdictional requirements under Article 25 of the ICSID Convention, they retain a certain autonomy to anticipate and address them through careful drafting. Although there are jurisdictional objections in contract-based cases, they are upheld less often than in treaty-based cases: 14% of contract-based awards declined jurisdiction, compared to 20% across the overall caseload.
7. *Investment.* Article 25(1) requires that the dispute arises directly out of an investment. The inclusion of an ICSID dispute resolution clause in a contract creates a strong presumption that the transaction qualifies as an investment under Article 25. Where a project involves multiple interrelated contracts, a single tribunal may assert jurisdiction over all contracts under the “unity of investment” doctrine, provided the relevant dispute resolution clauses are compatible.
8. *Parties.* Contract-based ICSID cases may be brought by investors and States alike. Under Article 25, the dispute must involve a national of a Contracting State against another Contracting State or one of its Constituent Subdivisions or Agencies (“CSAs”). In practice, claimants are almost exclusively juridical persons, whose nationality is generally determined by their place of incorporation or registered seat. Article 25(2)(b) allows a locally incorporated entity to be treated as a foreign national by agreement. That provision, coupled with a contractual clause setting forth such an agreement, was invoked in 45% of all contract-based cases studied, making the inclusion of language reflecting such an agreement in a contract one of the most consequential drafting choices available to contracting parties. CSAs have participated in 18% of ICSID contract-based arbitrations, primarily as respondents. Where a CSA is involved, specific designation, consent, and approval requirement under Article 25(3) must be satisfied. Multiplicity of parties is a notable feature of the contract-based caseload, with approximately 27% of such cases involving at least two claimants, and 11% involving at least two respondents.
9. *Consent.* Article 25 requires that the disputing parties consent in writing to submit the dispute to ICSID. Such consent may be direct (given in the contract itself), indirect (by reference to another document), or conditional (materializing upon the occurrence of a future event). Consent must be expressed unambiguously. Contract-based arbitrations have

been frequently initiated by or brought against entities not signatory to the contract in question. Tribunals have asserted jurisdiction over such entities where they were explicitly identified in the contract, actively involved in its negotiation and performance, or where consent was transferred through succession or assignment.

Merits

10. *Applicable law.* Under Article 42 of the ICSID Convention, the parties can choose the law applicable to their dispute, including domestic law, international law, or non-State rules. Where no choice is made, Article 42 requires tribunals to apply the host State's law, supplemented by applicable rules of international law. Decisions based on equity are permitted only where parties explicitly authorize them.
11. *Claims.* The most typical claim, or counterclaim, in contract-based arbitration is non-performance of the contract or breach of specific contractual obligations. Stabilization clauses are a recurring feature of investment contracts, particularly in cases involving tax regimes and long-term resource extraction agreements. These take two main forms: freezing clauses, which fix the legal framework at the time of contracting, and economic equilibrium clauses, which trigger renegotiation or compensation upon regulatory change. Counterclaims are raised in 26% of contract-based arbitrations and succeed in approximately 31% of those.
12. *Outcomes.* Contract-based ICSID cases also show a higher rate of settlement and discontinuance compared to the overall ICSID caseload. Of the 140 concluded contract-based arbitrations, 43% were settled or otherwise discontinued, compared to 34% for the general caseload. Among cases decided by a tribunal, awards upheld claims in whole or in part in 66% of the contract-based arbitrations, compared to 49% of awards across the overall caseload. Contract-based arbitrations also conclude more quickly, averaging 40 months from registration to conclusion against an overall average of 47 months.
13. *Remedies.* Remedies in contract-based ICSID cases depend on the applicable law, the terms of the contract and the relief sought by the parties. Claimants succeed on liability and damages in 62% of contract-based awards, compared to 45% across the overall ICSID caseload. Fewer contract-based arbitrations terminate with a ruling awarding no damages (38% compared to 55% of the overall caseload), and in awards at the high end of amounts awarded, *i.e.*, damages awarded above USD 50 million, prevailing parties in contract-based arbitrations are slightly more successful compared to the general caseload. Specific performance is rarely ordered. Declaratory relief is also available and occasionally sought and granted as a primary remedy.

14. *Post-award remedies.* Eighty-eight awards in contract-based cases were rendered under the ICSID Convention, and 28 annulment proceedings were concluded. Among the concluded contract-based annulment proceedings, 12 decisions of *ad hoc* committees rejected applications for annulment, 7 decisions annulled the award (6 in part and 1 in full), and 9 annulment proceedings were discontinued. As a result, the rate of annulment of contract-based ICSID Convention awards is 8%.
15. *Compliance.* Contract-based ICSID awards show a high rate of compliance, consistent with the strong compliance record observed for ICSID Convention awards more broadly. Ninety-two percent of awards with known outcomes were voluntarily complied with or settled.

Procedure

16. The paper also examines the interplay between the ICSID Convention's self-contained framework and the broad procedural flexibility available to parties. Contracts allow parties to design a fit-for-purpose dispute resolution mechanism at the drafting stage, covering tribunal constitution, language, place of proceedings, cost allocation, cooling-off periods, and provisional measures.
17. The 2022 ICSID Rules have further modernized the system by introducing updated tools to manage complex disputes with greater efficiency and transparency. These include consolidation (merging related cases into a single proceeding) and coordination (aligning procedural steps across separate cases). The 2022 ICSID Rules also offer expedited arbitration to parties seeking faster resolution.
18. Careful drafting of the dispute settlement clause is essential. Parties entering into long-term investment contracts should treat that clause as a strategic legal instrument rather than a procedural formality. In this respect, ICSID's new Model Clauses for Contracts provide practical guidance. When selecting a forum for resolving contract-based investment disputes, parties would do well to consider the distinctive advantages of the ICSID Convention system, including the unique enforceability of awards in all ICSID Contracting States.

Conclusion

19. Taken together, the data and analysis presented in the paper underscore the role and the value of the ICSID framework in contract-based investment dispute resolution. The paper finds that contract-based arbitrations at ICSID differ from the general caseload across several metrics, including jurisdictional objections, duration of proceedings, and claimant

success rates, although there is no significant difference in how the ICSID Convention has been interpreted. These outcomes reflect the degree of legal certainty and predictability that careful contract drafting, combined with the institutional framework of the ICSID Convention, can provide to both investors and States. The introduction of the 2022 ICSID Rules, with provisions for expedited proceedings, consolidation, and coordination, further strengthens the framework's capacity to meet the evolving needs of international investment projects.

I. INTRODUCTION

1. Contracts remain a central feature of international investment. They define the relationship between States or State entities and foreign investors. They set out rights and obligations and provide the framework for the implementation of investment projects. Dispute settlement clauses are a key component of these arrangements. They provide a mechanism for resolving disputes in a predictable and effective manner. This in turn supports investment stability and continuity.
2. *Purpose.* The International Centre for Settlement of Investment Disputes (“ICSID”) has administered more than 1,100 cases over its 60-year history and stands as the world’s leading institution for international investment dispute resolution, offering arbitration, conciliation, mediation and fact-finding services for investor-State disputes. The purposes of this paper are twofold: first, to provide a comprehensive analytical guide to contract-based dispute resolution under the ICSID Convention and the Additional Facility Rules (“AF Rules”) and, second, to call the attention of investors, States and State entities or agencies to the practical considerations when drafting dispute resolution clauses, preparing for a contract-based arbitration, and managing a case.
3. *ICSID and contract-based dispute resolution.* As of December 31, 2025, ICSID had administered 175 cases¹ where the parties’ consent to conciliation or arbitration was established through a clause included in a contract (contract-based cases), including 29 pending cases and 146 concluded cases. These cases account for 16% of all ICSID cases. The majority of contract-based cases are arbitrations (93%), with the remainder being conciliations (7%). All but three of the 175 cases were submitted under the ICSID Convention; three contract-based cases were brought under the AF Rules.²

¹ This figure includes cases in which a contract was the sole instrument of consent (143 cases) as well as cases where both a contract and another instrument of consent, such as a treaty and/or a law, were invoked (27 cases). It also includes two cases where the parties agreed to arbitrate their existing dispute through a *compromis*, plus one case where the parties invoked a specific arbitration agreement in addition to a treaty, as well as two cases initiated on the basis of both an investment treaty and an *ad hoc* international agreement concluded to regulate a specific investment operation between States and foreign investors. See also Annex I for information on the instruments of consent of all the cases discussed in this paper.

² One Additional Facility arbitration (*EnviroGold (Las Lagunas) Limited v. Dominican Republic* (ICSID Case No. ARB(AF)/20/1)), and two Additional Facility conciliations (*Hess Equatorial Guinea, Inc. and Tullow Equatorial Guinea Limited v. Republic of Equatorial Guinea* (ICSID Case No. CONC(AF)/12/1) (“**Hess and Tullow v. Equatorial Guinea**”) and *Republic of Equatorial Guinea v. CMS Energy Corporation and others* (ICSID Case No. CONC(AF)/12/2) (“**Equatorial Guinea v. CMS Energy**”). In addition to the 175 contract-based ICSID cases addressed in this paper, it also discusses one contract-based arbitration initiated under

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4. *Methodology and data.* This paper draws on the ICSID Secretariat’s review of the records of the 175 contract-based cases, including procedural orders, decisions, and awards, as well as parties’ pleadings.³ The Secretariat also reviewed contractual provisions applicable in these cases, namely the arbitration clauses that established consent to ICSID. The paper refers only to materials from these 175 cases that have been made public.⁴
5. *ICSID Model Clauses for Contracts.* ICSID has issued a revised set of [Model Clauses for Contracts](#). They are intended for parties who wish to draft contract clauses that would submit disputes to ICSID. This paper complements the Model Clauses. The Model Clauses provide ready-to-use drafting language, while this paper explains how contract-based investment arbitration has functioned in practice, what parties can expect from ICSID proceedings, and the benefits of including a clause submitting disputes to ICSID in contracts.
6. *Outline of this paper.* This paper reviews contract cases under the ICSID Convention.⁵ Section II outlines the distinctive features of investor-State contract disputes and proceedings under the ICSID Convention. It also highlights the importance of contract-based arbitration at ICSID, outlining core characteristics and key empirical data. Section III analyzes how the ICSID Convention’s jurisdictional requirements apply to contract-based arbitrations, underscoring the central role of the parties’ agreement in establishing jurisdiction. Section IV reviews contract disputes brought to ICSID, the remedies available to parties, and ICSID case law⁶ on determining the applicable law under the Convention. Section V addresses common procedural issues in contract-based arbitrations and explains how these matters are handled in proceedings under the ICSID Convention. Annex I lists all cases referenced in this paper and their public sources.

non-ICSID arbitration rules and administered by ICSID (i.e., *Gardabani Holdings B.V., Inter RAO UES PJSC, Telasi JSC v. Government of Georgia, Ministry of Economy and Sustainable Development of Georgia, State Service Bureau Ltd* (ICSID Case No. ADM/18/1 and SCC Case No. V2018/039) (“*Gardabani Holdings v. Georgia II*”)).

³ The research conducted for this paper is based on 175 contract-based cases registered at ICSID by December 31, 2025. It takes into account pending contract-based cases and those that concluded either by way of an award or a discontinuance order. Empirical data from these cases is indicated in the aggregate across a heterogeneous set of ICSID cases. The research further contains comparisons between contract-based cases on the one hand and the entire ICSID caseload on the other, with the latter comprising cases commenced on the basis of contracts, treaties and investment laws.

⁴ “Public cases” refers to materials have been made available to the public on the ICSID website or through any external database.

⁵ As noted in footnote 2, there have been only three contract cases under the AF Rules, two of which were conciliations.

⁶ References to “case law” in this publication relate to orders, decisions, and awards rendered by ICSID tribunals and do not imply any view on their possible precedential value.

II. THE RELEVANCE OF ICSID FOR CONTRACT-BASED DISPUTES

A. THE SPECIFICITY OF INVESTMENT CONTRACT-BASED DISPUTES

7. *Investment contracts.* When undertaking cross-border investment operations, investors may enter into contracts with the State in whose territory the investment is made (the “**host State**”) or with its entities or agencies. These contracts – often referred to as investment contracts or State Contracts, though rarely titled as such – may take various forms, spanning a wide range of projects across all economic sectors.
8. Examples of investment contracts include:
 - In the extractive sector, such as oil, gas, and minerals, traditional **concession agreements** (which grant a private operator exclusive rights for the exploration, development and exploitation of natural resources over a long-term period in exchange for fees or royalties based on the resources extracted with the government retaining ownership of the underlying resource); **production sharing agreements** (where the resource is owned by the State, the private operator bears all exploration and development costs and risks, recovers those costs from production, and the remaining production is split between the State and the contractor according to agreed percentages); and **license agreements** (where the licensee holds title to the extracted resource and pays royalties and applicable taxes to the State).⁷
 - Concession agreements in fields such as transportation, water or waste management, as well as public-private partnerships (“**PPPs**”). PPPs are long-term contractual arrangements between a government and a private operator, used to leverage private capital, where the operator bears significant risk and management responsibility, and remuneration is linked to performance. The private party typically designs, builds, finances, and operates the asset; payment can come from user fees; and ownership of the asset usually reverts to the public sector at the end of the contract period.
 - Power purchase agreements (“**PPAs**”) (electricity), energy purchase and sale agreements (gas, oil, etc.).

⁷ Some investments are made through permits (administrative authorizations issued unilaterally by a competent public authority granting the right to conduct specific activities such as exploration or drilling within a defined area and period, the terms of which are set by regulation rather than negotiation). Permits are not contracts, although some might be negotiated. Disputes arising out of permits can be submitted to, and administered by ICSID, for instance, through domestic investment laws to which the permits refer or, where the permit forms part of a larger investment, the relevant facts may fall within the scope of an arbitration clause contained in a related contract.

- Construction contracts (including turnkey contracts or Engineering, Procurement, and Construction (“EPC”) contracts) for all types of industries or projects (water management, transportation, tourism, etc.); and operation and maintenance contracts.
 - Other infrastructure and utility agreements (used in various types of industries, such as energy, water, telecommunication, transportation, and waste management).
 - Project-finance arrangements (including loan agreements, financial restructurings, guarantee and consolidation agreements), service agreements, and lease agreements.
 - Equity and participation instruments, such as purchase agreements (enabling investors to acquire shares in an existing company, such as a public utility holding rights relevant to the investment); shareholders’ agreements or joint venture agreements (establishing a mixed company or joint venture between public and private parties to carry out investment activities); and participation agreements (whereby a party acquires an interest or stake in a project or venture typically without establishing a separate legal entity).
9. As economic activity and financing techniques continue to develop, investment contract types will continue to evolve in response to changing circumstances and needs.
 10. *The need for a specialized forum and a fit-for-purpose dispute settlement mechanism.* The ICSID Convention was specifically designed to promote international investment by creating a neutral mechanism for resolving investment disputes between States and foreign investors. The drafters of the ICSID Convention recognized that providing a neutral forum for dispute resolution is crucial for States seeking to attract foreign investment, as robust dispute resolution mechanisms build investors’ confidence and encourage investments in the host State.
 11. Effective, impartial dispute resolution strengthens investors’ and States’ confidence and enhances predictability – core pillars of a favorable investment climate. For inbound foreign direct investment (“FDI”), ICSID membership signals a State’s openness to arbitration, conciliation, and mediation for investor-State disputes. It reassures investors that disputes will be resolved in a respected, neutral, and cost-effective forum under an international convention.⁸ For outbound FDI, investors in a foreign State would benefit

⁸ ICSID membership typically forms part of a broader set of FDI policies adopted by a State to attract and retain investment and should not be considered in a silo. See Dreher, Mikosch, and Voigt, *Membership has its Privileges – The Effect of Membership in International Organizations on FDI* (World Development, Vol. 66, 2015), pp. 346-358, a study examining how membership in certain international organizations – including the International Finance Corporation (“IFC”), ICSID, and the Multilateral Investment Guarantee Agency (“MIGA”) – affects FDI inflows. Their analysis found that being a member of “IOs does indeed

from access to a specialized dispute resolution system, reducing political and regulatory risks associated with foreign investment.

12. In addition, investment projects often have features that set them apart from commercial transactions. These include asymmetries in the parties' status and powers, the high-risk and capital-intensive nature of the projects, their long-term character and significance for the host State (such as the utilization of natural resources and/or public funds), the public interest and their broader impacts on public policy and international relations.
13. These distinctive features are so pronounced – and can be so polarizing – that they require specialized dispute settlement rules. They call for a stable and predictable legal framework with rules that take into account the specificities of investor-State disputes, offer balanced procedural protections which can be equally accepted by private parties as well as States and State entities managing public funds, and which ensure that two parties who may hold very different positions in domestic and international legal systems are placed on an equal footing.
14. As early as 1960, it was recognized that “a separate arbitral body not identified with a commercial approach might be more readily acceptable to governments of some capital-receiving countries in matters involving the rights and assets of foreign investors.”⁹ The priority was then to offer a dispute settlement forum that investors could trust and States would accept.
15. The drafters of the ICSID Convention had specifically contract-based arbitration and conciliation in mind when designing the ICSID framework.¹⁰ At that time, only a few bilateral investment treaties (“BITs”) had been concluded, and none included provisions for investor-State arbitration, although the drafters anticipated it could be an option.

increase inflows of FDI”. When looking into the impact of the different IOs, it concluded that “FDI increases with membership in the GATT/WTO, the ratification of the ICSID and membership in the WIPO and the MIGA, at least at the 5% level of significance.” In contrast, “[r]atification of the New York Convention also increases FDI, but at the 1% level of significance.” Therefore, while FDI inflows are influenced by multiple factors, empirical evidence suggests that membership in international organizations, such as ICSID, can positively impact a State's ability to attract and retain FDI, reinforcing the notion that access to established dispute resolution mechanisms and risk mitigation frameworks fosters greater investor confidence.

⁹ Parra, *The History of ICSID*, 2nd ed. (Oxford University Press, 2017) (“Parra, *The History of ICSID*”), p. 16 citing United Nations Economic and Social Council, *The promotion of the International Flow of Private Capital: Progress Report by the Secretary General* (E/3325, February 8, 1960), pp. 80-81.

¹⁰ International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (March 18, 1965) (“ED Report”), para. 24 stating “[c]onsent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a *compromis* regarding a dispute which has already arisen.”

16. Since the 1960s, States – acting in both commercial and governmental capacities – have increasingly entered into contracts with investors and routinely included arbitration clauses. In this environment, ICSID is the only specialized institution for the settlement of contractual disputes involving a State and a private counterpart when the dispute relates to an investment. ICSID’s rules and procedures are specifically tailored to investment disputes involving States and provide safeguards that go beyond those found in commercial arbitration frameworks, as explained below.

B. KEY FEATURES OF THE ICSID CONVENTION FOR CONTRACT-BASED DISPUTES

17. The legal foundation for ICSID conciliation and arbitration is the ICSID Convention, a multilateral treaty that creates binding international obligations for Contracting States. Today, ICSID’s legal framework is widely considered the gold standard for the resolution on investment disputes because it (i) offers a self-contained stable and predictable legal framework with an effective enforcement mechanism, (ii) balances the interests of investors and States, and (iii) has been modernized over time to reflect best practices in investor-State dispute settlement. ICSID offers a specialized and unique framework designed to address the specific characteristics of investor-State disputes, including contractual disputes.
18. *A specialized and neutral institution.* ICSID is an intergovernmental organization, that forms part of the World Bank Group, the leading global development institution. ICSID specializes in the settlement of investment disputes between States (or States’ constituent subdivisions or agencies) and foreign investors. It has administered the vast majority of known investor-State dispute settlement (“ISDS”) cases, with over 1,100 cases registered, over half of which since 2016.
19. *A depoliticized system.* ICSID proceedings remove investment disputes from the realm of diplomatic protection and political negotiation, ensuring a legal, depoliticized process. Once a dispute is submitted to ICSID, the investor’s home State is barred from exercising diplomatic protection until the award is rendered, in the event that the State party to the dispute, against which the award is rendered, fails to comply with it (Article 27 of the ICSID Convention). This is unique to the ICSID Convention.
20. *A system based on international treaty obligations.* The comprehensive treaty framework underpinning ICSID dispute settlement ensures that the undertaking to arbitrate has an

irrevocable quality.¹¹ Once consent is given it cannot be unilaterally withdrawn.¹² This stands in contrast to commercial arbitration rules, which do not establish any international obligations, and rely solely on the voluntary agreement of the parties to the dispute.¹³ ICSID Convention proceedings are governed by international rules, rather than the arbitration laws of the seat, ensuring uniformity and predictability. The Contracting States' domestic laws cannot alter the regime applicable to ICSID Convention proceedings.

21. *A balanced system.* The ICSID Convention is supplemented by the ICSID Arbitration Rules and Regulations, adopted by the ICSID Administrative Council.¹⁴ ICSID rules and procedures are tailored to the nature and complexities of investment cases. The paramount objective of the ICSID Convention is to “maintain a careful balance between the interests of investors and those of host States.”¹⁵ **This balanced framework provides procedural safeguards for both investors and States that are better suited for investor-State disputes than commercial arbitration rules:**

- On the one hand, ICSID offers core safeguards to investors, compared to commercial arbitration: the validity of the arbitration agreement and post-award remedies are not governed by domestic law, and awards are not subject to review by domestic courts. This limits the impact of a State's potential reliance on its own legal system – such as lawmaking authority over arbitration, potential influence over its judiciary, or judicial immunities – before, during or after the arbitration proceeding.
- On the other hand, ICSID provides States with safeguards tailored to their sovereign status and distinctive needs. The Convention and successive rule amendments – most recently in 2022 – have been shaped through extensive Member State consultation, ensuring procedures reflect States' needs while maintaining fairness for both parties.

¹¹ Parra, *The History of ICSID*, pp. 14-15 referring to the historic Anglo-Iranian Oil Company arbitration with Iran.

¹² Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“[ICSID Convention](#)”), Article 25; ED Report, para. 11. The [ICSID Arbitration Rules](#) were last amended as of July 1, 2022.

¹³ In most legal systems, commercial arbitration agreements are subject to the law of a State (such as the law of the State party to the dispute). As a result, changes to domestic law can affect the validity of these agreements.

¹⁴ The Administrative Council is ICSID's governing body, composed of one representative from each Contracting State, with the World Bank President serving as its Chairman. It oversees the Centre's administration, adopts rules and regulations, approves the budget, and elects the Secretary-General.

¹⁵ ED Report, para. 13. *See also* Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Collected Courses of the Hague Academy of International Law, Vol. 136, 1972) (“**Broches, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States**”), pp. 348-349 on the “policy” of balance which permeates the ICSID Convention's design.

For example, the Convention includes a screening mechanism for requests for conciliation and arbitration: under Article 36, the Secretary-General must register a request unless, based solely on the request itself, the dispute is manifestly outside ICSID's jurisdiction as defined in Article 25 (*see* Section III, paragraph 62). The Secretary-General's screening power applies to all requests for arbitration and conciliation received by the Centre, without exception. It operates independently of the respondent's conduct. If the screening result is negative, the proceeding does not commence and no information about the request is published on the Centre's website. This screening power helps prevent clear misuse of the ICSID process and spares States the embarrassment and cost of defending cases that fall plainly outside ICSID's jurisdiction.¹⁶

22. Another distinctive safeguard of the ICSID system is that under the ICSID Convention, parties need not agree on an arbitration seat, eliminating the need to submit to the jurisdiction of a foreign State's courts for matters such as annulment, arbitrator appointments, or challenges – issues that arise in other arbitration systems. This respects State sovereignty and dispenses with the usually contentious question of the choice of the seat.
23. *A self-contained system.* The ICSID Convention establishes a uniquely comprehensive and self-contained legal framework. Its provisions address every stage of the process, from the institution of proceedings, jurisdiction, and the procedure, to post-award remedies and recognition and enforcement of awards. The Convention creates a delocalized system, independent of domestic laws and judicial intervention or control from domestic courts.
24. Under the Convention, once parties to a dispute have consented to ICSID arbitration, neither can unilaterally withdraw consent. This ensures the process cannot be frustrated by one party's refusal to participate. The rule that neither party may unilaterally withdraw its consent once given derives directly from Article 25, and is binding as a matter of international law, independently of any domestic arbitration law (*see* Section III.F(iv)).
25. During the proceeding, ICSID tribunals have exclusive jurisdiction over a dispute covered by an ICSID arbitration agreement unless the parties agree otherwise. Once consent to ICSID has been given, the ICSID proceeding is insulated from any form of judicial intervention or control.¹⁷ None of the parties can bring legal action before another tribunal. As a result, Contracting States have an international obligation to stay domestic

¹⁶ Parra, *The Institution of ICSID Arbitration Proceedings* ([News from ICSID, Vol. 20, No. 2, 2003](#)), pp. 12-13.

¹⁷ Shihata, *Towards a greater depoliticization of investment disputes: the roles of ICSID and MIGA* (1992), p. 10.

proceedings which, on the face of the facts of the case, fall within ICSID jurisdiction. If a court in a Contracting State fails to observe the rule, that State might be exposed to international claims under Article 64 of the ICSID Convention.

26. Under Article 53(1) of the Convention, awards are final and binding on the parties. They are not subject to appeal or any other remedy except those provided in Articles 49 to 52 of the Convention (namely, rectification, supplementary decision, interpretation, revision, and annulment). Post-award remedies are administered exclusively by ICSID, to the exclusion of any other forum.¹⁸ Annulment proceedings are heard by *ad hoc* committees, while decisions supplementing, rectifying, interpreting or revising an award are decided, to the extent possible, by the original tribunals. Domestic courts do not play a role in any post-award proceedings under the Convention, other than for enforcement of awards.
27. *A simplified and strong enforcement mechanism.* The ICSID Convention establishes a unique enforcement mechanism for awards rendered under the Convention. Article 54(1) requires each Contracting State to “recognize an award rendered pursuant to [the ICSID] Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.” The Convention does not provide any grounds for refusing recognition or enforcement of an ICSID award. It only requires a party seeking recognition or enforcement to present a copy of the award certified by the Secretary-General for courts to verify its authenticity (Article 54(2) of the Convention).
28. The ICSID Convention regime for recognition and enforcement of awards differs from the regime under the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “**New York Convention**”). The New York Convention requires the party applying for recognition and enforcement to provide the enforcing court with the duly authenticated original award and the original arbitration agreement or duly certified copies thereof. Recognition and enforcement under the New York Convention are subject to exceptions set out in Article V, including the invalidity of the arbitration agreement and violation of public policy, which are not in the ICSID Convention. The grounds for refusal of enforcement set forth in Article V of the New York Convention closely mirror the annulment grounds found in most domestic arbitration laws – particularly those modelled on the UNCITRAL Model Law. Parties seeking enforcement of an award under that regime may therefore be required to litigate substantially the same issues across multiple national courts in each jurisdiction where recognition is sought. This

¹⁸ ICSID Convention, Articles 26, 49-53. See also [ICSID Updated Background Paper on Annulment](#) (2024) for a survey of the drafting history of the Convention’s provisions on annulment, detailing how the annulment process works in practice and draws from over 50 years of data to highlight trends in annulment proceedings.

is a key advantage of the ICSID enforcement regime, which avoids the need for parallel proceedings in multiple fora on grounds that could otherwise overlap with those available in annulment proceedings.

29. Enforcement of ICSID awards in domestic courts is largely successful,¹⁹ subject only to immunity from execution under Article 55 of the Convention. Under Article 54(3) of the Convention, the execution of awards is governed by domestic law pertaining to execution of judgments in the State where their execution is sought, for example by attaching, freezing or seizing assets to satisfy the amounts owed under the awards. Specific data on enforcement of awards issued in contract-based proceedings are examined below at paragraph 58.
30. *A large membership.* The efficiency and predictability of the ICSID system (including the enforcement mechanism) is further enhanced by its expanding membership. Over the past 15 years, the number of Contracting States has grown from 143 to 158. The most recent States to ratify the Convention are Ecuador, the Kyrgyz Republic, Angola and Equatorial Guinea. Honduras recently rejoined the ICSID Convention on March 6, 2026, and became the 166th Signatory State to the ICSID Convention.
31. *Benefits of being an ICSID Contracting State.* ICSID membership does not require membership fees and all Contracting States enjoy equal representation on the ICSID Administrative Council – giving Contracting States a voice and vote in ICSID’s governance and rule-making. Contracting States may also designate individuals to the ICSID Panels of Arbitrators and Conciliators, and benefit from access to technical assistance on dispute prevention, preparedness, and management.
32. *State agencies as parties to proceedings.* The ICSID Convention offers ICSID conciliation and arbitration to States’ constituent subdivisions, such as municipalities, or State agencies, provided they have been designated and their consent has been approved by a State (*see* Section III.D). This proves particularly suited for contracts entered into between State agencies and foreign investors or local entities under foreign control.
33. *State-owned entities (“SOEs”) as parties to proceedings.* According to the Organisation for Economic Co-operation and Development (“OECD”), an SOE is a legally distinct entity, incorporated under company law or a specific enabling statute, that generates the

¹⁹ See [ICSID Background Paper on Compliance with and Enforcement of ICSID Awards](#) (2024) for a detailed analysis of the effectiveness of the ICSID Convention’s compliance and enforcement regime. The study shows that, after excluding damages awards for which the outcome of enforcement actions was unavailable at the time of the study (either because the enforcement was pending, not pursued or the outcome unavailable), satisfaction was obtained in 97% of damages awards. Also, considering voluntary compliance, settlement and enforcement data with known outcomes, satisfaction was obtained in 83% of costs awards.

bulk of its revenues from commercial activities even if it simultaneously pursues public policy objectives, and is under State control through full, majority or significant minority ownership.²⁰ SOEs have been claimants and respondents in ICSID cases. Whether they can appear as a national of another Contracting State (usually as a claimant) depends on the functional nature of their activities (*see* Section III.E, paragraph 125). Conversely, when they appear on the State side (usually as a respondent), they are considered State agencies for the purpose of the ICSID Convention. Accordingly, to be a party to a proceeding, they must have been designated under Article 25(1) of the Convention, and their consent must have been approved by the State under Article 25(3) of the Convention (*see* Section III.D, paragraph 91).

34. *Other proceedings administered by ICSID.* ICSID also administers contract-based conciliation and arbitration proceedings under the AF Rules and arbitrations under the UNCITRAL Arbitration Rules. The AF Rules provide a framework for arbitration and conciliation of disputes that fall outside the Convention's scope – specifically where one or both parties are not nationals of or ICSID Contracting States. As such, they have been designed to extend ICSID's services to a broader range of cases. The AF Rules closely mirror the procedural structure of ICSID Convention proceedings and, as such, can be seen as particularly relevant for contract-based investment disputes, particularly in States that are not ICSID Contracting States. ICSID can also administer non-ICSID arbitration and has significant experience administering cases under the UNCITRAL Arbitration Rules. **Awards rendered under the AF or the UNCITRAL Arbitration Rules are not governed by the ICSID Convention and therefore are subject to the law of the seat of the arbitration and to the New York Convention (if it applies).** ICSID also provides administration services for mediating investment disputes, as well as for fact-finding proceedings, offering a wide range of dispute resolution options parties may include in their contracts.
35. *Coordination of parallel proceedings under different rules.* ICSID can administer parallel cases under different sets of rules, such as the ICSID Convention Rules, the AF Rules, or the UNCITRAL Arbitration Rules. This flexibility benefits parties, for example, by allowing the parallel administration of a case under the Convention with a State and another case with a State agency that may not qualify under the ICSID Convention.²¹ Those

²⁰ OECD Guidelines on Corporate Governance of State-Owned Enterprises (2024), pp. 9-10. *See also* ICSID Review, Special Focus Issue: State-Owned Enterprises (ICSID Review - Foreign Investment Law Journal, Vol. 31, No. 1, 2016). ICSID does not collect or publish specific data on SOEs.

²¹ For example, because its consent to ICSID arbitration was not approved by the State pursuant to Article 25(3) of the Convention. *See below* Section III.D.

proceedings can be initiated under two different contracts, for example one signed at the State level and an implementation contract signed with a State agency.²²

36. *Secretariat's expert assistance.* The ICSID Secretariat offers unparalleled administrative and legal support to tribunals and parties. Each ICSID case is assigned a dedicated management team led by an experienced legal counsel and supported by paralegals and legal assistants. The team provides comprehensive services throughout the entire proceeding, guiding parties and decision-makers at every stage. Services are available in the Centre's three official languages (English, French, and Spanish), and any other language approved by the Secretary-General and the tribunal. A specialized finance and administration team manages all financial aspects of cases, as well as the planning and logistics of sessions and hearings. An administrative fee is paid annually by the parties, providing predictability, while arbitrators' fees are charged based on an hourly rate regulated by the Centre.²³
37. *Flexible hearing options and world-class facilities.* ICSID arranges hearing setups tailored to the needs of each case, offering in-person, virtual, and hybrid modalities. This flexibility allows parties and tribunals to conduct hearings and meetings anywhere in the world, in the most convenient and cost-effective manner. For contract-based cases with a regional focus, this adaptability is a particular advantage. Parties have access to state-of-the-art hearing centers at the World Bank's offices, including at its headquarters in Washington, D.C., and in more than 130 countries. ICSID has also established facilities cooperation agreements with 35 dispute settlement centers worldwide. All venues offer a full suite of services, including videoconferencing, interpretation, live-streaming, on-site catering, and dedicated technical support. Preferential rate agreements with leading institutions around the world ensure that parties have access to top-tier facilities at competitive costs when not utilizing the World Bank venues.

C. OVERVIEW OF CONTRACT-BASED ICSID CASES

38. This paper is accompanied by a special issue of statistics, [ICSID Caseload – Statistics – Special Focus – Contract-Based Cases](#), reflecting data up to December 31, 2025, and which contains charts and graphs providing a comparison of the caseload of all cases registered by ICSID with the caseload of cases registered by ICSID invoking a contract as the basis of consent since 1972.

²² E.g., *Gardabani Holdings B.V. and Silk Road Holdings B.V. v. Georgia* (ICSID Case No. ARB/17/29) (“*Gardabani Holdings v. Georgia I*”) and *Gardabani Holdings v. Georgia II*. See below Section V.C(iii).

²³ [ICSID Schedule of Fees](#) (2023) and [ICSID Memorandum on Fees and Expenses](#) (2022).

39. Until the mid-1980s, all cases registered at ICSID were contract-based, starting in 1972 with the case *Holiday Inns S.A. and others v. Kingdom of Morocco*. The first case based on an investment law was registered in 1984,²⁴ and the first case based on a BIT in 1987.²⁵ While the number of contract-based cases has decreased in relative terms with the sharp rise of treaty-based arbitration,²⁶ contract-based arbitration continues to grow in absolute terms.²⁷
40. *Caseload*. Up to December 31, 2025, 175 contract-based cases had been registered at ICSID. One hundred and sixty-one of these contract-based cases are ICSID Convention arbitrations, one case is an AF arbitration, 11 are ICSID Convention conciliations and two cases are AF conciliations. The 175 cases account for 16% of the total ICSID caseload. In 83% of these cases, the contractual instrument was the sole basis of consent. In the remaining 17%, there was a combination of instruments (contract, treaty, and/or law). (See Annex I and Chart 7 of the Statistics – Special Focus – Contract-Based Cases.)
41. *Economic sectors*. ICSID dispute resolution clauses are incorporated in a wide range of contracts across industries. The majority of contract-based cases involve the oil, gas and mining sector (47% of cases), whereas in ICSID’s total caseload, this sector accounts for 26% of cases. Cases involving the electric power and other energy sector make up the second largest segment in contract-based cases (16% of cases), which is broadly consistent with the entire ICSID caseload, where the electric power and other energy sector accounts for 17% of all cases.

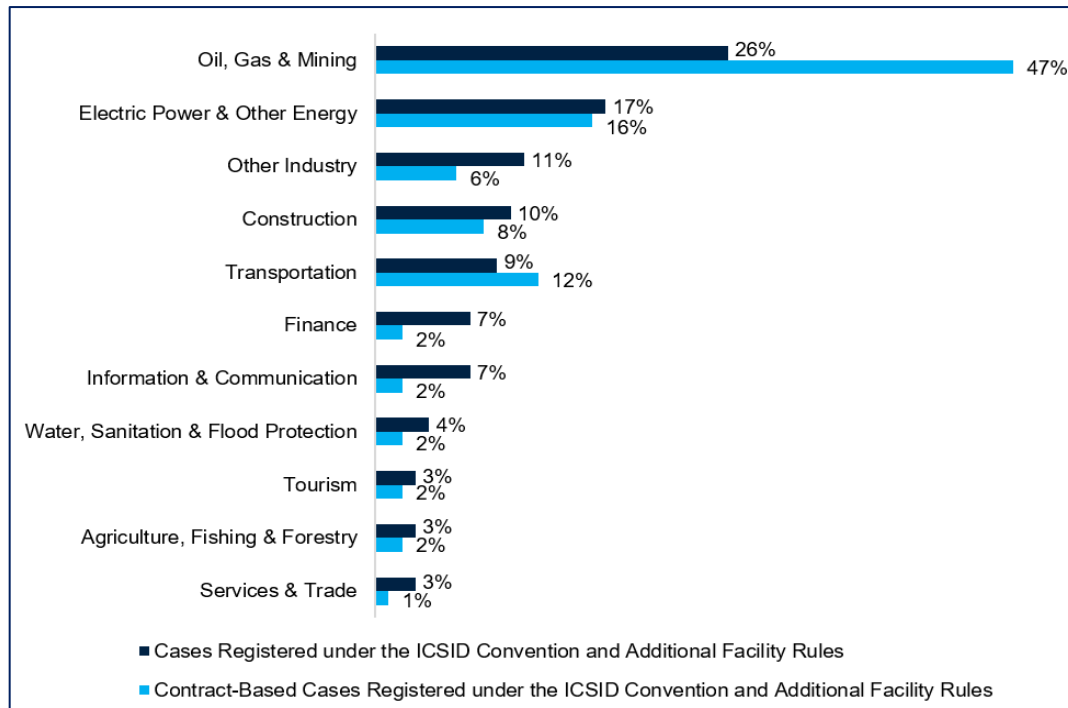
²⁴ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3).

²⁵ *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/87/3).

²⁶ As of December 31, 2025, treaty-based arbitration accounts for 78% of registered ICSID cases since 1972. See [The ICSID Caseload – Statistics \(Issue 2026-1\)](#), p. 8.

²⁷ From 1970 to 1980, nine cases were registered at ICSID, all of which were contractual. In the following decade (1981 to 1990), with 14 contract-based cases, the share of contract cases modestly decreased from 100% to 82%. From 1991-2000, when treaty-based arbitration began to grow significantly, the share of contract-based cases fell to 35%, but the number of cases continued to grow in absolute terms with 19 contract-based cases registered over that period. From 2001 to 2010, with a total of 40 contract-based cases registered, these cases accounted for 16% of ICSID cases. In the following decade (2011-2020), while the share of contract-based cases reached its lowest level at 12%, their number reached an all-time high with 58 cases. From January 1, 2021, to December 31, 2025, there have been 35 contract-based cases, 12% of the total number of ICSID cases registered over that period. See also, Figure 3 below, para. 42.

Figure 1: Distribution of All ICSID Cases and Contract-Based Cases Registered by Economic Sector



42. *Geographical distribution.* Contract-based cases at ICSID to date have mainly originated from Sub-Saharan Africa and South America. The largest share of contract-based cases (49%) involves African States comprising 46% from Sub-Saharan Africa and 3% from North-Africa. This stands in contrast to the overall ICSID caseload where African State parties account for only 21% of State parties, comprising 15% from Sub-Saharan Africa and 6% from North Africa. The second largest proportion of contract-based cases involves States from South America (21% of contract-based cases), which corresponds to the share of ICSID's overall caseload involving States from South America (also 21%). Contract-based cases involving South & East Asia & the Pacific represent 11% (compared to 6.9% for all ICSID cases), and other regions account for 10% or less of contract-based cases.

Figure 2: Distribution of All ICSID Cases and Contract-Based Cases Registered, by State Party or Regional Economic Integration Organization (REIO) Involved

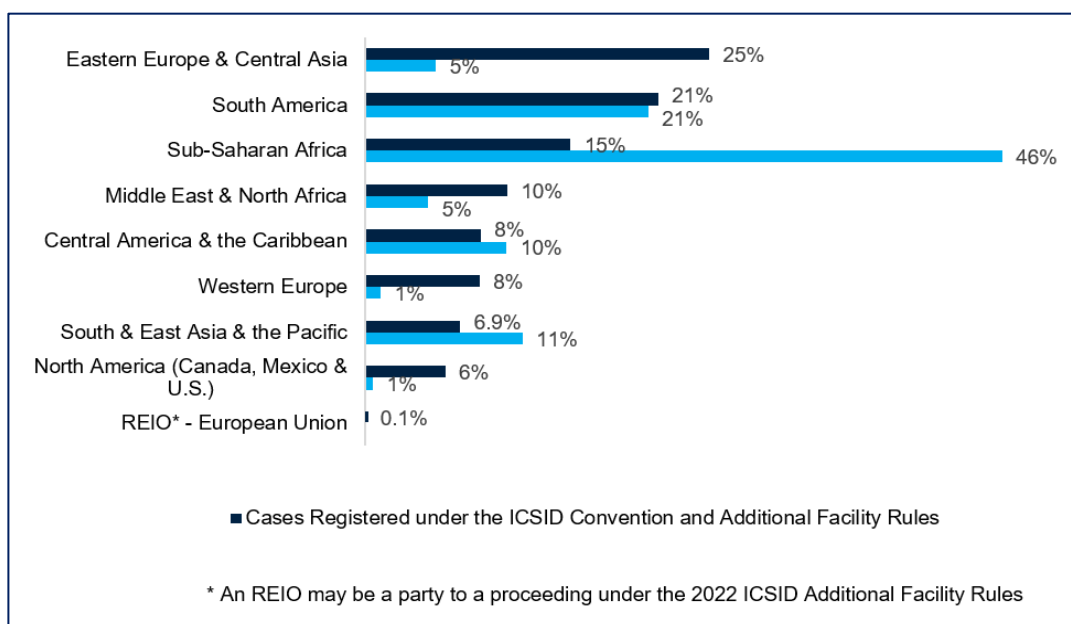


Figure 3: Distribution of Contract-Based Cases Registered by Decade by State Party Involved

Geographic Region	1972-1980	1981-1990	1991-2000	2001-2010	2011-2020	2021-2025	Total
Central America & the Caribbean	3	1	4	4	3	3	18
Eastern Europe & Central Asia	0	0	1	3	5	0	9
Middle East & North Africa	1	1	0	1	4	1	8
North America	0	0	0	0	1	0	1
South & East Asia & the Pacific	0	4	2	6	5	3	20
South America	0	0	2	11	11	12	36
Sub-Saharan Africa	4	7	10	15	29	16	81
Western Europe	1	1	0	0	0	0	2
Total	9	14	19	40	58	35	175

43. *Origins of the investors.* Considering the geographic distribution of contract-based cases, by investor party involved, 32% of cases involved investors from Western Europe, 18%

from Africa, with 17% of investors from Sub-Saharan Africa and 1% from North Africa, 17% of cases involved investors from North America, and 11% of cases comprised investors from South America. Thirty-three of the 175 contract-based cases involved investors of more than one geographic region.

44. Also of note as it relates to nationalities, investors in 45% of contract-based cases (*i.e.*, 79 cases) have invoked Article 25(2)(b) of the Convention such that the investors had the same nationality as the State party to the dispute (*i.e.*, the investor was a local company controlled by a foreign company). In those cases, the most frequently observed investor-controlling nationalities were U.S., French, British, Spanish, Luxembourg, Australian, Dutch, Belgian, Colombian, Danish, Malaysian and Italian. (*See* Charts 10 and 11 of the Statistics – Special Focus – Contract-Based Cases.)
45. *States as Claimants.* The ICSID Convention allows both investors and States to initiate arbitration. Specifically, Article 25 does not limit a State’s ability to act as claimant, and Article 36(1) confirms that a Contracting State may file a request for arbitration. To date, two ICSID arbitrations²⁸ and one conciliation²⁹ have been initiated by States based on contracts (*see* Section III.D).
46. *Constituent Subdivisions or Agencies (“CSAs”).* Twenty-nine contract-based arbitrations (17%) have involved State agencies. State agencies were involved in 26 cases as respondent or co-respondent and in three cases as claimant or co-claimant³⁰ (*see* Section III.D and Annex I).
47. *Duration.* Contract-based ICSID cases tend to be resolved more quickly than the overall average duration for all ICSID cases. From registration to conclusion, the average duration of a contract-based ICSID arbitration is 40 months, compared to 47 months for all ICSID cases.
48. *Conciliation.* Conciliation represents 7% of contract-based cases, amounting to 13 cases (11 ICSID Convention conciliations and two AF conciliations). This constitutes the vast majority of the 15 conciliation cases ever registered by ICSID. Half of these 13 contract-

²⁸ *Gabon v. Société Serete S.A.* (ICSID Case No. ARB/76/1) (“**Gabon v. Société Serete**”) and *Republic of Peru v. Caravelí Cotaruse Transmisora de Energía S.A.C.* (ICSID Case No. ARB/13/24) (“**Peru v. Caravelí**”) were initiated by States.

²⁹ *Republic of Togo v. ContourGlobal Togo SA* (ICSID Case No. CONC/25/1) (“**Togo v. ContourGlobal**”).

³⁰ *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited* (ICSID Case No. ARB/98/8) (“**TANESCO v. IPTL**”), *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others* (ICSID Case No. ARB/07/3) (“**East Kalimantan v. PT Kaltim Prima Coal**”), and *Energy Utility Corporation Limited v. KivuWatt Limited* (ICSID Case No. ARB/19/3) (“**Energy Utility Corporation v. KivuWatt**”) were initiated by CSAs.

based conciliations were registered in or before the 2000s, while the remaining half are more recent. The most recent contract-based conciliation was registered in 2025 and concluded in 2026.

49. Not many details of the 13 conciliations are publicly available, and no documents relating to these cases have been published by ICSID. Without disclosing any confidential information, ICSID can indicate that, out of the 13 conciliations:
- One contract-based conciliation is pending as of June 2026;³¹
 - In two conciliations, the parties reached an agreement before the conciliation commission was constituted;³²
 - In three instances, it became publicly known that, following the conciliation, the parties chose to initiate ICSID arbitral proceedings,³³ and in one of these cases, the parties settled shortly after the initiation of the arbitration;³⁴ and
 - In the majority of the remaining seven instances, the conciliations were successful, with the parties reaching an amicable settlement of the dispute during or after the conciliation process.
50. *Composition of Tribunals and Commissions.* As of December 31, 2025, a total of 580 appointments had been made in contract-based conciliations, and arbitrations, including *ad hoc* committees. The nationality trends among appointees in these cases generally mirror those observed across the overall ICSID caseload. Regional groups such as Western Europe and North America remain the most represented, with France, the United Kingdom, Switzerland, and the United States of America being the most frequently observed nationalities of appointees in contract-based proceedings.

³¹ *Hess and Tullow v. Equatorial Guinea.*

³² *SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. Democratic Republic of Madagascar* (ICSID Case No. CONC/82/1); *TG World Petroleum Limited v. Republic of Niger* (ICSID Case No. CONC/03/1).

³³ Further to the conciliations in *Togo Electricité v. Republic of Togo* (ICSID Case No. CONC/05/1), *RSM Production Corporation v. Republic of Cameroon* (ICSID Case No. CONC/11/1), and *Société d’Energie et d’Eau du Gabon v. Gabonese Republic* (ICSID Case No. CONC/18/1), arbitration proceedings were subsequently initiated by the same parties or in connection to similar disputes, in *Togo Electricité and GDF-Suez Energie Services v. Republic of Togo* (ICSID Case No. ARB/06/7) (“**Togo Electricité v. Togo**”), *RSM Production Corporation v. Republic of Cameroon* (ICSID Case No. ARB/13/14), and *Société d’Energie et d’Eau du Gabon and Veolia Africa v. Gabonese Republic and Société de Patrimoine du service public de l’eau potable, de l’énergie électrique et de l’assainissement* (ICSID Case No. ARB/18/36) (“**Veolia v. Gabon**”). See also para. 159 and note 208 on multi-step clauses.

³⁴ *Veolia v. Gabon*, where the tribunal rendered an award embodying the parties’ settlement agreement approximately two months after its constitution.

51. *Procedural developments.* Tribunals in contract cases encounter many of the same procedural questions as encountered in ICSID's broader caseload and they routinely address matters such as preliminary objections and applications for provisional measures. That said, contract-based cases have generated some distinct legal and procedural issues – for example, the management of multi-party disputes, the joinder or consolidation of claims, and instances in which States appear as claimants. These issues are discussed throughout this paper, notably in Sections III, IV, and V.
52. Interestingly, provisional measures and counterclaims are common:
- Parties requested provisional measures in 54 contract-based cases, involving 42 arbitration and two conciliation cases, which represent 27% of the contract-based caseload. Tribunals have granted such requests, either partially or in-full, in 24 of the arbitrations, meaning that provisional measures applications have been upheld in 44% of contract-based arbitrations in which they were requested.³⁵ For conciliations, the ICSID Conciliation Rules authorizes a conciliation commission to issue status quo preservation recommendations.³⁶ One such request was granted and another is pending.
 - In 42 contract-based arbitrations, respondents raised counterclaims on the merits, in addition to possible jurisdictional objections. This represents 26% of the contract-based arbitration caseload. In other words, counterclaims are raised in about a quarter of contract-based arbitrations. Thirty-five of the 42 contract-based arbitrations in which counterclaims have been raised are concluded. Tribunals accepted jurisdiction over these counterclaims (or otherwise found them admissible) in 26 concluded arbitrations and upheld the counterclaims on the merits – whether in part or in full – in 11 concluded arbitrations.³⁷ Counterclaims have therefore been upheld in 31% of the concluded contract-based arbitrations in which they were raised.
 - Counterclaims appear more likely to succeed in contract-based arbitrations than in treaty- or investment law-based cases, where tribunals have rarely admitted them due to ongoing debates about their admissibility under the relevant instruments of consent.³⁸

³⁵ One case in which provisional measures have been requested was pending as of December 31, 2025.

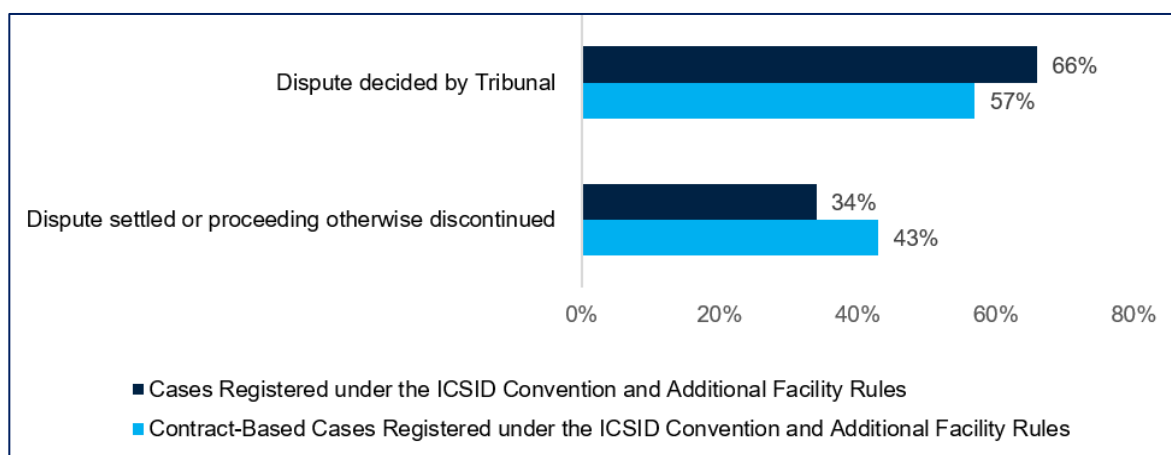
³⁶ See e.g., Rule 24(2)(b) in the [2022 ICSID Conciliation Rules](#).

³⁷ Seven cases in which counterclaims were raised were pending as of December 31, 2025.

³⁸ Brenninkmeijer & Gélinas, *Counterclaims in Investment Arbitration: Towards an Integrated Approach* (ICSID Review - Foreign Investment Law Journal, Vol. 38, No. 3, 2023), pp. 567-594, at p. 568, noting that

53. *Outcomes – Settlement or discontinuance.* Contract-based ICSID cases show a higher rate of settlement or discontinuance compared to the overall ICSID caseload. Of the 140 concluded contract-based arbitrations (including 3 resubmission proceedings), 57% were decided by a tribunal, while 43% were settled or otherwise discontinued. In contrast, the overall ICSID caseload typically sees a higher proportion of cases decided by tribunals (66%) as opposed to cases settled or discontinued (34%). This may suggest that parties to contract-based disputes are more likely to resolve their dispute through an amicable settlement. (See Charts 13 and 17 of the Statistics – Special Focus – Contract-Based Cases.)

Figure 4: ICSID Arbitrations and Contract-Based Arbitrations Concluded – Outcomes

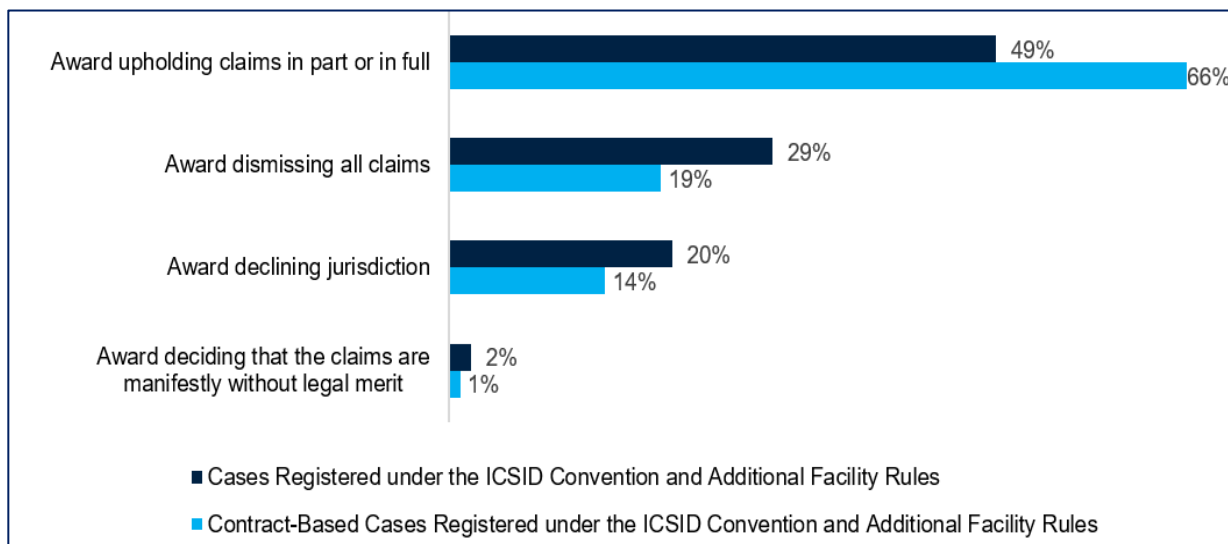


54. *Outcomes – Disputes decided by Tribunals.* 80 contract-based arbitrations concluded with a decision by a tribunal. The outcomes of these arbitrations are: 53 cases resulted in an award upholding the claimant’s claims in whole or in part (66% compared to 49% of awards upholding the claims in whole or in part in the overall ICSID caseload); 11 contract-based arbitrations resulted in an award declining jurisdiction (14% compared to 20% of awards for all ICSID arbitrations); 15 contract-based arbitrations resulted in an award

“[i]n the field of investment arbitration, however, counterclaims are less common. Unlike purely contractual arbitration or inter-State dispute settlement, investment arbitration is usually not based on the expression in a single instrument of the consent of both parties, but rather on the investor’s acceptance of an offer to arbitrate, most often made by the host State through an international investment treaty. The core problem with most of these investment treaties is their unilateral character vis-à-vis investors. The relevant treaty, in other words, imposes obligations on the host State towards the investor, but not obligations on the investor towards the State. Moreover, the agreement to arbitrate does not incorporate the treaty’s substantive provisions, nor does it make them applicable bilaterally. So what follows is that States cannot bring a counterclaim based on the alleged violation of a treaty obligation, simply because there are no such obligations on investors under the investment treaty.”

dismissing all claims (19% compared to 29% for all ICSID arbitrations); and one contract-based arbitration concluded with an award finding that the claims were manifestly without legal merit (1% compared to 2% for all ICSID arbitrations).

Figure 5: ICSID Arbitrations and Contract-Based Arbitrations Concluded – Disputes Decided by Tribunals



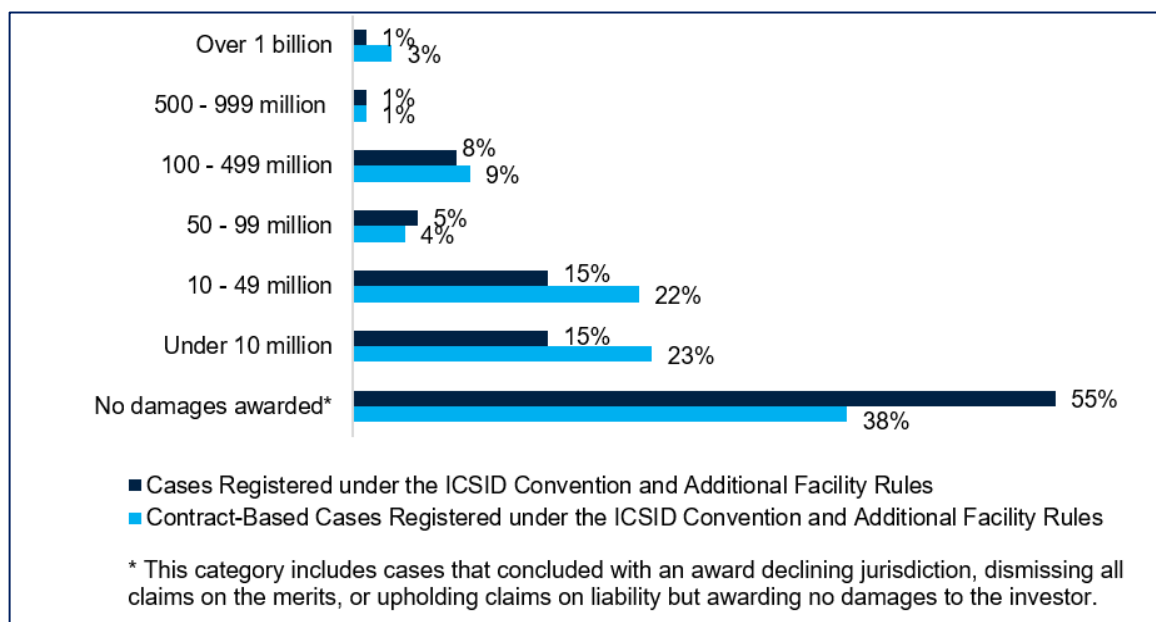
55. Based on this empirical data, it appears that:

- Successful challenges to jurisdiction are less common in contract-based arbitrations than in the overall ICSID caseload. In the overall ICSID caseload, 20% of awards decline jurisdiction, whereas this figure drops to 14% for contract-based cases. One possible explanation is that parties negotiating investment contracts often anticipate and incorporate the jurisdictional requirements of the ICSID Convention at the contract drafting stage. That said, respondents raised jurisdictional objections in at least 97 contract-based arbitrations, underscoring that jurisdictional questions remain present in contract-based disputes. The mere existence of a clause submitting disputes to ICSID in an investment contract between a State and an investor does not guarantee ICSID jurisdiction. Tribunals will still examine whether the jurisdictional requirements of Article 25 of the Convention – and any jurisdictional stipulations contained in the contract – are satisfied (*see* Section III).
- Contract-based claims have a greater likelihood of being upheld in whole or in part compared to the overall ICSID caseload: the share of contract-based cases resulting in an award, in which claims were upheld in part or in full (66%), is significantly higher than in the entire ICSID arbitration caseload (49%). One possible explanation for this difference might be that contractual obligations negotiated between the parties may

provide a more defined legal framework, compared to the broader, standards-based protections in investment treaties. Where a contract sets out specific, negotiated commitments, the threshold for establishing a breach may be clearer, whereas treaty standards may leave more room for interpretation by tribunals on scope and threshold for breaches.

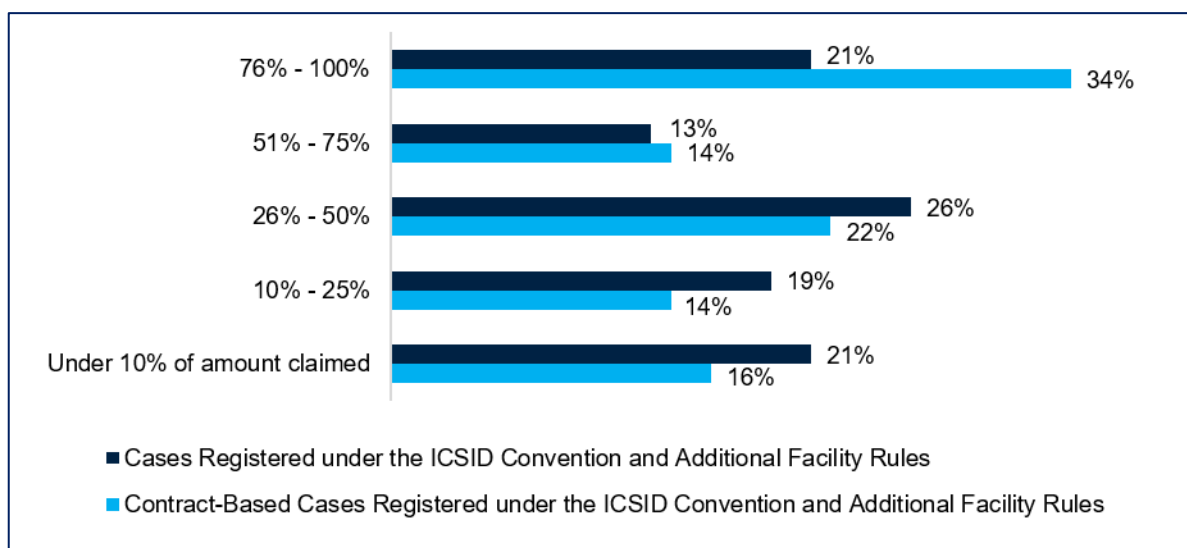
56. *Outcomes – Damages.* As noted above, in 66% of contract-based awards, the tribunal upheld the claimant’s claims. The data from the overall ICSID caseload indicates that 30% of awards granted damages under USD 50 million, whereas nearly half of the contract-cases (45%) decided by tribunals resulted in damages awards in this category, with 22% of awards in the USD 10-49 million range, and another 23% under USD 10 million. Seventeen percent of contract-based awards awarded damages above USD 50 million, compared to 15% of awards in ICSID’s overall caseload. Finally, 38% of contract-based awards concluded with no damages awarded, whereas in the overall arbitration caseload, this latter category encompasses 55% of awards. The data therefore indicates that claimants in contract-based arbitrations are more likely to succeed on liability and damages (62% of awards), compared to the overall ICSID caseload (45% of awards). At the high end of amounts awarded, *i.e.*, damages awarded above USD 50 million, prevailing parties to contract cases are slightly more successful compared to the overall caseload (17% compared to 15%), and fewer contract-based arbitrations terminate with a ruling awarding no damages (38% compared to 55%).

Figure 6: ICSID Arbitrations and Contract-Based Arbitrations Concluded – Damages Outcomes (in USD)



57. *Damages – Ratio Awarded.* The review of the ratio of damages claimed compared to damages awarded shows that in about one third (34%) of the contract-based arbitrations in which an award is issued, tribunals award 75% or more of the amounts claimed. Adding to that figure the portion of contract-based awards where tribunals awarded between 51-75% of the amounts claimed (14%), the data indicates that claimants are awarded more than 50% of the amounts claimed in 48% of contract-based arbitrations in which an award is issued, whereas these two categories combined amount to 34% of awards in ICSID’s overall caseload. Looking at the ratio between amounts awarded under 25% of damages claimed, about 30% of contract-based cases resulting in awards fall within this category compared to 40% of awards in ICSID’s overall caseload. Compared to the overall ICSID caseload, contract-based cases show a greater tendency toward higher ratios of damages awarded relative to the amounts claimed.

Figure 7: ICSID Arbitrations and Contract-Based Arbitrations Decided by Tribunals – Ratio of Damages Awarded to Damages Claimed (in USD)



58. *Compliance with contract-based awards.* Contract-based ICSID awards show a high rate of compliance, consistent with the compliance that has been observed for ICSID Convention awards more broadly. The research for the ICSID’s 2024 Background Paper on Compliance with and Enforcement of ICSID Awards has been expanded to include contract-based awards rendered under the ICSID Convention as of December 31, 2025.³⁹

³⁹ The methodology for this research is outlined in the [Background Paper on Compliance with and Enforcement of ICSID Awards](#) at Section II(A). Because the ICSID Convention does not give the Secretariat a mechanism

Of the 140 concluded contract-based arbitrations, ICSID researched 48 contract-based ICSID Convention awards that ordered the payment of damages and obtained compliance or enforcement-related information for 44 of them. Of those 44 awards, 80% were voluntarily complied with or resulted in a post-award settlement,⁴⁰ and enforcement proceedings were pursued for a further 14%, half of which were pending at the time of the research. Among the 38 awards with known outcomes, (*i.e.*, excluding awards where the outcome was unknown, either because enforcement was pending or had not been pursued or the outcome was otherwise unavailable), 92% were voluntarily complied with or settled, and a further 3% were successfully enforced, resulting in satisfaction of 95% of contract-based damages awards with known outcomes.

59. *Annulment*.⁴¹ As of December 31, 2025, 88 ICSID Convention awards were rendered in contract-based arbitrations, 28 annulment proceedings were concluded, and 2 were pending. Of the 28 concluded annulment proceedings, one resulted in an annulment of the award⁴² and in six instances, the award was annulled in part.⁴³ In other words, seven (8%) of the contract-based Convention awards have been annulled in full or in part. (*See* Chart 19 of the Special Focus – Contract-Based Cases.)

to monitor compliance with and enforcement of awards, the data is based on publicly available sources and information provided by award creditors on a confidential basis. Cases that were subject to a pending post-award remedy at the time of this paper’s publication have been excluded from the research.

⁴⁰ As described in paragraph 21 of the Background Paper on Compliance with and Enforcement of ICSID Awards, this encompasses “[v]oluntary compliance by the award debtor and any post-award settlement between the parties, whether before or after the initiation of annulment or enforcement proceedings. No distinction was made between full or partial satisfaction of the Award, if the award creditor considered itself satisfied.”

⁴¹ *See* generally ICSID Updated Background Paper on Annulment (2024).

⁴² *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2) (“*Klöckner v. Cameroon*”), Decision of the *ad hoc* Committee (“*Decision on Annulment*”), May 3, 1985.

⁴³ *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1) (“*Amco v. Indonesia*”) with two annulment proceedings – *Ad hoc* Committee Decision on the Application for Annulment, May 16, 1986, and Decision on the Application for Annulment of the Second Award and Application for Annulment of the Supplemental Award (“*Decision on Annulment (Resubmission)*”), December 17, 1992, rejecting the application of the second award but annulling the supplemental award; *Maritime International Nominees Establishment (MINE) v. Republic of Guinea* (ICSID Case No. ARB/84/4) (“*MINE v. Guinea*”), Decision on the Application for Partial Annulment of the Arbitral Award (“*Decision on Annulment*”), December 22, 1989; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11) (“*Occidental v. Ecuador*”), Decision on Annulment of Award, November 2, 2015; *RSM Production Corporation v. Saint Lucia* (ICSID Case ARB No. ARB/12/10) (“*RSM Production v. Saint Lucia*”), Decision on Annulment, April 29, 2019; *Perenco Ecuador Limited v. Republic of Ecuador* (ICSID Case No. ARB/08/6) (“*Perenco v. Ecuador*”), Decision on Annulment, May 28, 2021.

60. *Procedural languages.* At the end of December 2025, English was used in 45% of the contract cases (versus 53.5% in all cases); French in 23% (versus 7% in all cases) and Spanish in 17% (versus 10% in all cases). Bilingual proceedings were conducted in English/French in 7% of contract-based cases (versus 4% in all cases) and 9% of the contract-based cases featured the English/Spanish combination (versus 25% in all cases).

III. JURISDICTION IN CONTRACT-BASED ICSID CONVENTION ARBITRATION

61. Article 25 of the Convention outlines the jurisdictional conditions that must be met for all disputes brought to ICSID, irrespective of the basis of consent. Pursuant to Article 25(1), there must be a “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 to submit to the Centre”.
62. While tribunals ultimately determine whether the requirements of Article 25 are satisfied, the ICSID Secretary-General conducts a summary review of these requirements at the time of the registration of a request for arbitration.⁴⁴ Under Article 36(3) of the Convention, a request is registered “on the basis of the information contained in the request” unless the Secretary-General finds “that the dispute is manifestly outside the jurisdiction of the Centre.”
63. Disputing parties cannot opt out of, or contract around, the requirements of Article 25,⁴⁵ but they can include contract terms that tribunals may consider when determining jurisdiction.
64. The following Sections examine how ICSID tribunals have interpreted the jurisdictional requirements of Article 25 in contract-based arbitrations.⁴⁶

⁴⁴ See [How to file a Request for Arbitration - ICSID Convention Arbitration \(2022 Rules\)](#).

⁴⁵ Schreuer’s Commentary on the ICSID Convention, 3rd ed., Schill et al. eds., Vol. I (Cambridge University Press, 2022) (“**Schreuer**”), Article 25, para. 8.

⁴⁶ While the points discussed in this paper are not always specific to contract-based cases, the cases discussed herein are contract-based. Past cases considering the scope and effect of Article 25 of the ICSID Convention arising out of treaty-based disputes remain applicable.

A. LAW APPLICABLE TO JURISDICTION

65. Questions of jurisdiction are governed by Article 25 of the Convention. Article 42 – on the applicable law on the merits (*see* Section IV.A) – does not govern jurisdiction.⁴⁷
66. Tribunals have interpreted the jurisdictional requirements of Article 25 as matters of international law, to be interpreted in accordance with the criteria set in the Vienna Convention on the Law of the Treaties.⁴⁸ Consequently, undefined terms in Article 25(1) – such as “legal dispute”⁴⁹ and “investment”⁵⁰, and “foreign control”⁵¹ in Article 25(2)(b) – have been construed primarily by reference to the text, purpose and structure of the Convention, as well as prior ICSID awards and decisions. Consent to ICSID arbitration is likewise primarily governed by Article 25 and principles of international law,⁵² and interpreted in accordance with the principles developed in ICSID case law.⁵³

⁴⁷ See e.g., *Noble Energy Inc. and MachalaPower Cia. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad* (ICSID Case No. ARB/05/12) (“**Noble Energy v. Ecuador**”), Decision on Jurisdiction, March 5, 2008, para. 57 quoting *Československa obchodní banka, a.s. v. Slovak Republic* (ICSID Case No. ARB/97/4) (“**CSOB v. Slovakia**”), Decision of the Tribunal on Objections to Jurisdiction (“**Decision on Jurisdiction**”), May 24, 1999, para. 35. See also *BSG Resources Limited (in administration), BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v. Republic of Guinea* (ICSID Case No. ARB/14/22) (“**BSGR v. Guinea**”), Award, May 18, 2022, paras. 256, 291; *WalAm Energy Inc. v. Republic of Kenya* (ICSID Case No. ARB/15/7) (“**WalAm v. Kenya**”), Award, July 10, 2020, paras. 349-350; *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru* (ICSID Case No. ARB/03/28) (“**Duke v. Peru**”), Decision of the *ad hoc* Committee (“**Decision on Annulment**”), March 1, 2011, para. 127.

⁴⁸ E.g., *Rasia FZE and Joseph K. Borkowski v. Republic of Armenia* (ICSID Case No. ARB/18/28) (“**Rasia v. Armenia**”), Award, January 20, 2023, paras. 361-362.

⁴⁹ Schreuer, Article 25, para. 69 noting that “it is appropriate carefully to draw on the interpretations of the notions of ‘dispute’ or ‘legal dispute’ in [...] other treaties, in particular in Art. 36(2) of the ICJ Statute, in order to get an understanding of the same term in the ICSID Convention” and that ICSID tribunals have relied on the definition of disputes found by the PCIJ or the ICJ.

⁵⁰ See e.g., *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award, September 20, 2021, paras. 328-329; *Qatar National Bank (Q.P.S.C.) v. Republic of South Sudan and Bank of South Sudan* (ICSID Case No. ARB/20/40) (“**QNB v. South Sudan**”), Decision on Jurisdiction and Liability, January 5, 2024, paras. 109, 205.

⁵¹ See e.g., *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan* (ICSID Case No. ARB/13/13) (“**Caratube v. Kazakhstan II**”), Award, September 27, 2017, para. 612; *Compagnie d’Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic* (ICSID Case No. ARB/04/5) (“**Transgabonais v. Gabon**”), Decision on Jurisdiction, December 19, 2005, para. 35 where the tribunal stated that the inquiry into foreign control is independent of the host State’s law, which may offer guidance on how control should be defined but is not determinative.

⁵² See e.g., *CSOB v. Slovakia*, Decision on Jurisdiction, May 24, 1999, para. 35; *BSGR v. Guinea*, Award, May 18, 2022, para. 291.

⁵³ See e.g., *Duke v. Peru*, Decision on Jurisdiction, February 1, 2006, paras. 76-78 referring to principles on interpretation elaborated in *Amco v. Indonesia* and *Société Ouest Africaine des Bétons Industriels v. Republic of Senegal* (ICSID Case No. ARB/82/1) (“**SOABI v. Senegal**”). See also *Elsamex, S.A. v. Republic of*

67. Domestic laws may be relevant to assessing certain requirements under Article 25 of the Convention. As noted in *East Kalimantan v. PT Kaltim Prima Coal*, “[t]he fact that international law sets the requirements for ICSID jurisdiction does not mean that other laws, specifically national laws, may never be considered when reviewing whether the requirements set by international law are met.”⁵⁴ Tribunals have deemed domestic law to be pertinent, for example, to assess: (i) the investor’s nationality;⁵⁵ (ii) the validity of a corporate merger or succession for purposes of the investor’s legal standing;⁵⁶ and (iii) whether a disputing party qualifies as a Constituent Subdivision or Agency.⁵⁷ Domestic laws (including the law applicable to the contract) may also be relevant to certain issues concerning consent to arbitration.⁵⁸
68. In some cases, contract-based tribunals have interpreted arbitration clauses without expressly identifying the law applicable to interpretation, focusing on the text of the clause, as well as the parties’ common intent and conduct.⁵⁹

Honduras (ICSID Case No. ARB/09/4) (“*Elsamex v. Honduras*”), Decision on Objections to Jurisdiction, June 4, 2010, paras. 127-131.

⁵⁴ *East Kalimantan v. PT Kaltim Prima Coal*, Award, December 28, 2009, para. 166; *see also* *BSGR v. Guinea*, Award, May 18, 2022, para. 256.

⁵⁵ *See* below Section III.E.

⁵⁶ *See e.g., Noble Energy v. Ecuador*, Decision on Jurisdiction, March 5, 2008, para. 88; *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited* (ICSID Case No. ARB/10/20) (“*SCB (Hong Kong) v. TESCL*”), Decision on Jurisdiction and Liability, February 12, 2014, paras. 141-151 where the tribunal considered whether the claimant had a legal right through a security deed to the benefits of the contract and analyzed the validity of the assignment by mortgage under English law. *See also AGIP S.p.A. v. People’s Republic of Congo* (ICSID Case No. ARB/77/1) (“*AGIP v. Congo*”), Award, November 30, 1979, paras. 91-94 applying Congolese law to examine whether AGIP had legal standing to claim for hydrocarbons’ rights under the theory of “*stipulation pour autrui*.”

⁵⁷ Delaume, ICSID Clauses; Some Drafting Problems ([News from ICSID, Vol. 1, No. 2, 1984](#)), p. 17.

⁵⁸ *See e.g., East Kalimantan v. PT Kaltim Prima Coal*, Award, December 28, 2009, paras. 166-168 finding that, “in assessing the requirement of consent set by international law, [the tribunal] will take Indonesian law [the governing law of the contract] into account” to assess whether the claimant could qualify as a third-party beneficiary of the arbitration agreement.

⁵⁹ *See e.g., AHG Industry GmbH & Co. KG v. Republic of Iraq* (ICSID Case No. ARB/20/21) (“*AHG v. Iraq*”), Award on the Respondent’s Application under ICSID Rule 41(5), September 30, 2022, paras. 125-133; *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited* (“*Bapex*”) (ICSID Case No. ARB/10/11) (“*Niko Resources v. Bangladesh I*”) and *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited* (“*Bapex*”) and *Bangladesh Oil Gas and Mineral Corporation* (“*Petrobangla*”) (ICSID Case No. ARB/10/18) (“*Niko Resources v. Bangladesh II*”), Decision on Jurisdiction, August 19, 2013, paras. 501-506.

B. A LEGAL DISPUTE

69. Article 25(1) requires a dispute brought to ICSID to be a “legal dispute”, but the Convention does not define the concept. This requirement has raised very few issues in ICSID Convention contract-based arbitrations.
70. *A dispute.* Contract-based tribunals frequently refer to the International Court of Justice’s definition of “dispute” as “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.”⁶⁰ They also refer to paragraph 26 of the ED Report, which states that a legal dispute arises when it concerns “the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.”⁶¹
71. Tribunals have further determined that “legal disputes” can relate to the performance or non-performance of contracts,⁶² including defenses based on *force majeure* or similar events, breaches of stabilization clauses, disputes relating to the interpretation of contracts, expropriation or nationalization, and compensation issues.⁶³ Additionally, technical disputes can be considered “legal” if they pertain to contractual rights and obligations, as these rights and obligations are inherently legal.⁶⁴ However, mere conflicts of interest do not qualify as legal disputes.⁶⁵

⁶⁰ *Mavrommatis Palestine Concessions (Greece v. United Kingdom)* (Publications of the Permanent Court of International Justice, Series A No. 2), Judgement, August 30, 1924, para. 19; *see also Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, March 30, 1950, p. 12.

⁶¹ ED Report, para. 26.

⁶² *E.g., QNB v. South Sudan*, Decision on Jurisdiction and Liability, January 5, 2024, para. 164 finding that “the disagreement between the Parties [...] concerns legal rights and obligations flowing from the Facility Agreement. [...] Thus, the dispute is a legal dispute as required under Article 25 of the ICSID Convention.”

⁶³ Delaume, ICSID Arbitration Proceedings: Practical Aspects (Pace Law Review, Vol. 5, No. 3, 1985) (“**Delaume, ICSID Arbitration Proceedings**”), p. 567.

⁶⁴ *See e.g.,* Delaume, ICSID Arbitration Proceedings, p. 567; *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru* (ICSID Case No. ARB/19/28) (“**Latam Hydro v. Peru**”), Award, December 20, 2023, paras. 273, 563 referring to the distinction drawn in the arbitration clause of the underlying contract between technical and non-technical disputes, and to a provision specifying that, in the event of disagreement between the parties as to the nature of the dispute, it shall be considered non-technical.

⁶⁵ *See e.g., M. Meerapfel Söhne AG v. Central African Republic* (ICSID Case No. ARB/07/10) (“**MMS v. Central Africa**”), Award, May 12, 2011, para. 234; Delaume, ICSID Arbitration Proceedings, pp. 567-568 noting that “disputes regarding conflicts of interest between the parties, such as those involving the desirability of renegotiating the entire agreement or certain of its terms, would normally fall outside the scope of the Convention. The Convention also does not apply to factual disputes, such as those concerning accounting or factfinding investigations.”

72. Most parties do not specify what constitutes a “legal dispute” in their arbitration agreements. When considering whether there is a legal dispute, the way the claimant has framed the dispute can be relevant.⁶⁶
73. *Notification of certain classes of disputes by Contracting States.* Pursuant to Article 25(4), Contracting States can notify ICSID of the class or classes of disputes they would or would not consider submitting to the jurisdiction of the Centre.⁶⁷

C. ARISING DIRECTLY OUT OF AN INVESTMENT

74. Under Article 25(1) of the Convention, ICSID tribunals have jurisdiction over disputes “arising directly out of an investment.”

(i) *Arising directly out of*

75. For a dispute to “arise directly out of” an investment, it must be closely linked to that investment, or to the overall transaction that makes up the investment.⁶⁸ To establish this

⁶⁶ See e.g., *Repsol YPF Ecuador v. Empresa Estatal Petróleos del Ecuador (PetroEcuador)* (ICSID Case No. ARB/01/10) (“*Repsol v. Petrocuador*”), Decision on Jurisdiction, January 23, 2003, paras. 32-34 finding that the dispute was necessarily of legal nature, as the investor’s claim referred to rights and obligations arising out of a contract and sought a legal remedy. See also *Transgabonais v. Gabon*, Decision on Jurisdiction, December 19, 2005, para. 26 finding that a “legal dispute” existed because the claimant alleged that the respondent wrongfully terminated the contract; *CSOB. v. Slovakia*, Award, December 29, 2004, paras. 48, 54-57 where the respondent argued that the dispute was of a political nature, because it related to the dissolution of the former Czech and Slovak Federal Republic, and the tribunal held that these political elements did not affect the legal nature of the dispute because the claimants invoked as the basis of their claims their legal rights, the respondent’s obligations, and the consequences of the breach of the contract between the parties.

⁶⁷ As of the date of publication, notifications are recorded for seven States. These notifications are set out in ICSID Document [ICSID/8-D](#). For example, Jamaica notified “Legal dispute arising directly out of an investment relating to minerals or other natural resources.” See ED Report, para. 31 stating that “[...] The provision makes clear that a statement by a Contracting State that it would consider submitting a certain class of dispute to the Centre would serve for purposes of information only and would not constitute the consent required to give the Centre jurisdiction. Of course, a statement excluding certain classes of disputes from consideration would not constitute a reservation to the Convention.”. See e.g., Schreuer, Article 25, paras. 1478-1481, 1501-1505 noting that a notification cannot remove disputes for which consent has already been given from the tribunal’s jurisdiction; *Alcoa Minerals of Jamaica Inc. v. Government of Jamaica* (ICSID Case No. ARB/74/2) (“*Alcoa Minerals v. Jamaica*”), Decision on Jurisdiction and Competence, July 6, 1975. See also below para. 189.

⁶⁸ See e.g., *Amco v. Indonesia*, Decision on Jurisdiction (Resubmission), May 10, 1988, paras. 126-127 in which Indonesia raised, as a counterclaim, allegations of tax fraud by the investor and asked for compensation for tax evasion. The resubmission tribunal concluded that the State’s counterclaim for tax evasion did not “arise directly” from the investment because the duty to not commit tax fraud is a general legal obligation, not a specific obligation undertaken by the investor in the investment agreement. See also ICSID Convention, Article 46 which allows counterclaims, incidental and additional claims if they “aris[e] directly out of the subject matter of the dispute.” See below Section IV.B(iv)(b).

connection, contract-based tribunals have referred to the theory of the general unity of the investment.⁶⁹ To determine if there is a close connection;⁷⁰ tribunals may also look at the specific circumstances of the case as well as the content and language of the relevant contracts.⁷¹

(ii) *An investment*

76. To date, the vast majority of tribunals, faced with an objection to jurisdiction on the ground that there is no qualifying investment as required by Article 25(1), have upheld jurisdiction.⁷²
77. *Criteria.* Investment is not defined in the ICSID Convention. It was clear during the drafting of the Convention that purely commercial transactions, such as an ordinary sale of

⁶⁹ See e.g., *Holiday Inns S.A. and others v. Morocco* (ICSID Case No. ARB/72/1) (“**Holiday Inns v. Morocco**”), Decision on Jurisdiction, May 12, 1974. The decisions issued by the tribunal in this case are not public. Information on this case, including extracts from the tribunal’s decisions, has been made available in an article later published by counsel for the claimants, Pierre Lalive. See Lalive, The First ‘World Bank’ Arbitration (*Holiday Inns v. Morocco*) – Some Legal Problems, (ICSID Reports, Vol. 1, 1993) (“**Lalive, The First World Bank Arbitration**”), pp. 645-681. The dispute arose out of an agreement for the establishment and operation of hotels in Morocco, the financing for which was partly by means of separate loan contracts between a Moroccan specialized administrative agency, and four subsidiaries created by the claimants. These loan contracts contained choice-of-forum clauses in favor of Moroccan courts. The respondent objected to the tribunal’s jurisdiction over the claims connected with the loan contracts. According to Lalive, the tribunal affirmed its jurisdiction over the investors’ claims, relying on “the general unity of an investment operation.” See also *CSOB v. Slovakia*, Decision on Jurisdiction, May 24, 1999, para. 72, noting that “[a]n investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.” See also, on the general unity principle, para. 78 and note 78, and para. 289.

⁷⁰ Schreuer, Article 25, para. 128.

⁷¹ E.g., *Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v. People’s Republic of Bangladesh* (ICSID Case No. ARB/06/10) (“**Chevron v. Bangladesh**”), Award, May 17, 2010, paras. 127-128 where the request was brought on the basis of two contracts for production of natural gas (“PSCs”). The execution of the PSCs led to the conclusion of successive contracts for the distribution of the gas, which incorporated a tariff scheme from the PSCs (“GPSAs”). The dispute arose out of the interpretation of the tariff provisions. Having established that the “[c]laimants’ decision to enter into the PSCs constituted an investment for the purpose of Article 25(1),” the tribunal concluded on the “plain reading” of the PSCs and GPSAs that any dispute about these agreements was a matter arising directly out of the investment.

⁷² Schreuer, Article 25, para. 200. In one case where the award is not publicly available, the tribunal found that the contract on which the arbitration was initiated could not qualify as a protected investment under the Convention, because it was obtained by fraud; there was no discussion of whether the transaction qualified as an investment as such.

goods, would not qualify under Article 25.⁷³ In practice, tribunals tend to apply the so-called “double-barrel” test,⁷⁴ combining objective criteria as developed by tribunals, notably by the *Salini* tribunal, and subjective criteria derived from the instrument of consent, such as the contract. According to the objective criteria, an investment generally requires: (i) a substantial economic contribution; (ii) a certain duration; (iii) the existence of risk; and (iv) a contribution to the development of the host State.⁷⁵ As in treaty-based cases, contract-based tribunals have noted that these criteria are to be applied with flexibility, taking into account the specific circumstances of each case.⁷⁶

⁷³ See e.g., Schreuer, Article 25, paras. 292-294; *Joy Mining Machinery Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Award, August 6, 2004, paras. 55-58, although a BIT case, the tribunal looked at the difference between ordinary sales contracts and investment contracts; *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, paras. 358-359; *Noble Energy v. Ecuador*, Decision on Jurisdiction, March 5, 2008, para. 132 in which the tribunal found that it is immaterial whether the dispute concerns aspects of the investment with a commercial character as “[...] the fact that certain aspects of the dispute may be connected to the debts of the distribution companies does not change their nature and transform them into commercial disputes. The disputes submitted to the Tribunal relate to and arise directly from the implementation of a project which was clearly not a mere commercial operation. The Concession was to last 31 years and the project clearly benefited the State’s development and involved a risk for the investors.”

⁷⁴ Schreuer, Article 25, para. 177.

⁷⁵ See generally Schreuer, Article 25, para. 238 *et seq.*; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction, July 23, 2001, para. 52. For contract cases, see e.g., *RSM Production Corporation v. Central African Republic* (ICSID Case No. ARB/07/2) (“**RSM v. Central Africa**”), Decision on Jurisdiction and Liability, December 7, 2010, paras. 60-70; *Elsamex v. Honduras*, Award, November 16, 2012, paras. 256-260; *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, para. 352; *Transgabonais v. Gabon*, Decision on Jurisdiction, December 19, 2005, paras. 27-28 where the tribunal did not expressly refer to the “*Salini* test”, but referred instead to “criteria method”, which allows obtaining a “*optimo jure*” definition of the notion of investment, and which relied on four criteria, namely a duration, a contribution, a risk, and contribution to the economic development of the host State.

⁷⁶ See e.g., *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/15/41) (“**SCB (Hong Kong) v. Tanzania**”), Award, October 11, 2019, para. 200; *CSOB v. Slovakia*, Decision on Jurisdiction, May 24, 1999, para. 90; *QNB v. South Sudan*, Decision on Jurisdiction and Liability, January 5, 2024, paras. 109, 205.

78. The requirement that there be an “investment” can be satisfied either by a single investment contract,⁷⁷ or by a transaction that involves several contracts and operations.⁷⁸
79. In determining if an investment exists, tribunals generally examine the objective features of the transaction, but also the parties’ intention.⁷⁹
80. *Presumption created by the inclusion of an ICSID arbitration clause.* An ICSID Convention arbitration clause in a contract suggests that the parties view the transaction as an under Article 25(1),⁸⁰ and tribunals have therefore held that such a clause creates a presumption in favor of the existence of an investment.⁸¹
81. *Parties’ agreements to qualify the operation as an investment.* Parties often include contract clauses stating that their contract or related transaction qualifies as an investment

⁷⁷ See e.g., *Lundin Tunisia B. V. v. Republic of Tunisia* (ICSID Case No. ARB/12/30) (“**Lundin v. Tunisia I**”), Award, December 22, 2015, para. 141 where the tribunal noted that exploitation of an oil field “quintessentially” met the criteria to define an investment under Article 25(1); *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5) (“**Aucoven v. Venezuela**”), Decision on Jurisdiction, September 27, 2001, para. 101 where the tribunal concluded that the performance of the contract, which implied substantial resources during significant periods of time, “clearly qualified as an investment in the sense of Article 25 of the ICSID Convention”; *Grenada Private Power Limited and WRB Enterprises, Inc. v. Grenada* (ICSID Case No. ARB/17/13) (“**Grenada Private Power & WRB v. Grenada**”), Award, March 19, 2020, para. 110.

⁷⁸ E.g., *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, paras. 355-372 where the tribunal applied the doctrine of the general unity of the investment and held that a gas sale contract qualified as an investment because it formed part of a broader operation to develop gas fields in the host State. Accordingly, it was immaterial whether the parties’ relationship was set out in a single instrument or in multiple contracts.

⁷⁹ See e.g., *RSM Production Corporation v. Grenada* (ICSID Case No. ARB/05/14) (“**RSM v. Grenada I**”), Award, March 13, 2009, paras. 233-236 where the tribunal stated that the parties’ agreement creates the presumption in favor of the existence of an investment; see also paras. 240-266 where the tribunal referred to the Salini criteria and evaluated whether there was an investment and noted that an oil concession is the quintessential investment operation; *Société d’Exploitation des Mines d’Or de Sadiola S.A. v. Republic of Mali* (ICSID Case No. ARB/01/5) (“**Sadiola v. Mali**”), Award, February 25, 2003, para. 7 briefly examined the features of the investment but also indicates that the nature of the transaction as an investment is confirmed by the agreement of the parties; *SCB (Hong Kong) v. Tanzania*, Award, October 11, 2019, para. 194 states that the party’s consent is of great importance but not the only test and not conclusive; *CSOB v. Slovakia*, Decision on Jurisdiction, May 24, 1999, paras. 66-68 state that the party’s intention has considerable significance in evaluating whether a transaction is an investment, but it is not by itself conclusive.

⁸⁰ Schreuer, Article 25, para. 188 “[t]he classification by the parties of the proposed operation as an investment arises by necessary inference from the ICSID clause.”

⁸¹ See e.g., *RSM v. Central Africa*, Decision on Jurisdiction and Liability, December 7, 2010, para. 47; *CSOB v. Slovakia*, Decision on Jurisdiction, May 24, 1999, paras. 66-68; *SCB (Hong Kong) v. Tanzania*, Award, October 11, 2019, paras. 193-194; *Elsamex v. Honduras*, Award, November 16, 2012, para. 282; *RSM v. Grenada I*, Award, March 13, 2009, paras. 233, 236.

under Article 25 of the ICSID Convention.⁸² (See [ICSID Model Clause](#) on the existence of a qualifying investment.)

82. The parties' agreement that labels an asset, a contract or a transaction as an investment is generally viewed as a strong signal that an investment exists. While some tribunals have considered that such stipulations are not binding and that parties cannot create their own definition of investment simply by agreement,⁸³ others have given greater weight to the parties' intention,⁸⁴ with one tribunal finding that, where the parties indicate in their contract that their operation is an investment, they should later be considered precluded from challenging the tribunal's jurisdiction on the basis of the alleged absence of an investment.⁸⁵ Overall, tribunals have found that they must independently determine if the objective criteria for an investment under Article 25 of the Convention are met.⁸⁶ In so

⁸² See e.g., *Sadiola v. Mali*, Award, February 25, 2003, para. 7 quoting a clause providing that, "for arbitration purposes, the parties have agreed that the operations to which this convention relates constitute an investment within the meaning of Article 25.1 of the [...] Convention"; *World Duty Free Company Limited v. Kenya* (ICSID Case No. ARB/00/7) ("*World Duty Free v. Kenya*"), Award, October 4, 2006, para. 6 mentioning that the clause indicated that "the transaction to which this [a]greement relates is an 'investment' within the meaning of the Convention"; *Caratube v. Kazakhstan II*, Award, September 27, 2017, para. 630 the clause provided that "[e]ach of the Parties hereby agrees that all of the transactions contemplated by this Contract shall constitute and shall be deemed to constitute an investment within the jurisdiction of ICSID."

⁸³ See e.g., *CSOB v. Slovakia*, Decision on Jurisdiction, May 24, 1999, para. 68; *SCB (Hong Kong) v. Tanzania*, Award, October 11, 2019, para 194.

⁸⁴ See e.g., *RSM v. Grenada I*, Award, March 13, 2009, para. 236 "while the parties' agreement cannot arbitrarily confer jurisdiction upon ICSID by characterizing as an investment a project that lacks all the characteristic features of an investment, their express designation of ICSID as the arbitral forum in which to settle their potential disputes indicates that the parties themselves perceived their agreement as one relating to an investment." See also *Caratube v. Kazakhstan II*, Award, September 27, 2017, paras. 631 where the tribunal found that the clause was "not a clause contained in an investment treaty, but figure[d] in an investment contract, directly negotiated between the Parties", and that this clause was "'carefully planned' and 'freely negotiated' by the Parties, who intended 'to leave nothing open to surprise'."

⁸⁵ *Caratube v. Kazakhstan II*, Award, September 27, 2017, para. 635 where the tribunal found that, when the parties indicate in their contract that it qualifies as an investment, they should later be precluded from challenging ICSID's jurisdiction based on the absence of an investment.

⁸⁶ See e.g., *RSM v. Grenada I*, Award, March 13, 2009, para. 235 finding that "a private party and a state contracting with each other are not at liberty to create their own definition of an investment under the ICSID Convention with the effect of bringing a dispute under the jurisdiction of ICSID even where their operation is clearly not an investment" and that "[t]here are certain objective elements to an investment which must be present; and it is the duty of this Tribunal to ensure that they are present, lest its assertion of jurisdiction be false and amount to an abuse of power"; *SCB (Hong Kong) v. Tanzania*, Award, October 11, 2019, para. 194 finding that "the Parties' consent as reflected in the contract, while of great importance, could not be the only test and is not conclusive in resolving the issue of whether there is jurisdiction under Article 25 of the ICSID Convention. The subject matter of the dispute must nevertheless still be an investment as contemplated by the ICSID Convention and consent by the Parties alone could not subject an ordinary commercial transaction or political dispute or non-legal dispute to ICSID for resolution."

doing, tribunals have applied the “double-barrel” test,⁸⁷ noting that in contract-based cases, these two prongs often align and can be readily reconciled.⁸⁸

83. *Legality of the investment.* In contrast to treaty-based ICSID Convention arbitration, the legality of the investment under the laws of the host State has been rarely addressed in contract-based cases in the context of jurisdiction.⁸⁹ Where this issue has arisen, tribunals have often found that the legality of the investment – that is, compliance with the host State’s laws – is not a requirement for the existence of an “investment” under Article 25(1). Legality is therefore generally addressed at the merits stage.⁹⁰

D. BETWEEN A CONTRACTING STATE (OR A CONSTITUENT SUBDIVISION OR AGENCY OF A CONTRACTING STATE)

84. Article 25 of the Convention provides that the jurisdiction of the Centre extends to disputes “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.”
85. *Contracting State as claimant or respondent.* A Contracting State may appear both as a claimant or as a respondent, subject to the terms of the contract.⁹¹

⁸⁷ E.g., *QNB v. South Sudan*, Decision on Jurisdiction and Liability, January 5, 2024, paras. 100-101.

⁸⁸ E.g., *Aucoven v. Venezuela*, Decision on Jurisdiction, September 27, 2001, para. 99 where the tribunal recalled that Article 25 provided objective requirements and agreed that “[a]s long as the criteria chosen by the parties to define these requirements are reasonable, i.e. as long as the requirements are not deprived of their objective significance, there is no reason to discard the parties’ choice”; see also para. 101 where the tribunal verified whether the transaction was an investment, and concluded that the performance of the parties’ contract, which implied substantial resources during significant periods of time, “clearly qualifie[d] as an investment in the sense of Article 25 of the ICSID Convention.”

⁸⁹ In one case where the award is not publicly available, however, the tribunal found that the negotiation and conclusion of the contract on which the claimant’s claims were based were tainted by fraud and illegality. As a result, the tribunal declined jurisdiction on the ground that there was not protected investment under Article 25(1) of the Convention.

⁹⁰ See e.g., *World Duty Free v. Kenya*, Award, October 4, 2006, paras. 130-188 finding that the claims made by an investor that had obtained a contract through the payment of bribes were inadmissible; *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, paras. 423-485 finding that, unless corruption allegations pertain to the conclusion of the arbitration agreement, (i) that clause remains valid and the tribunal has jurisdiction under it and (ii) that corruption allegations should be addressed at the merits stage.

⁹¹ ED Report, para. 13 noting that, “[w]hile the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States. Moreover, the Convention permits the institution of proceedings by host States as well as by investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases”. E.g., *East Kalimantan v. PT Kaltim Prima Coal*, Award, December 28, 2009, para. 174 holding that “nothing in the

86. There have been two contract-based ICSID Convention arbitration proceedings initiated by a Contracting State, both discontinued,⁹² and one conciliation under the Convention.⁹³
87. Similarly, a Constituent Subdivision, such as a province or a municipality, or an Agency of a Contracting State, both referred to as CSAs, may also appear as a claimant or as a respondent based on a contract to which that CSA is a party. To date, there have been 29 contract-based arbitrations involving a CSA (corresponding to 18% of such arbitrations). Of these:
- There have been three registered arbitrations instituted by a CSA acting as a claimant.⁹⁴
 - There have been 26 registered arbitrations instituted by private investors against a CSA only, or against a CSA and a State (*see* Annex I).

(i) A Contracting State

88. *Definition.* According to Article 68 of the Convention, a Contracting State is a State that has deposited its instrument of ratification, acceptance or approval and for which the ICSID Convention is in force. A List of Contracting States and Other Signatories of the Convention is published on ICSID's website.⁹⁵
89. *ICSID Membership and critical date.* Tribunals have held that the relevant date for determining a State's status as a Contracting State is the date of the submission of the dispute to arbitration, rather than the date of the contract.⁹⁶ Consent to ICSID Convention

ICSID Convention prevents a State or its subdivisions or agencies from appearing as claimant in an arbitration based on a contract."

⁹² *Peru v. Caraveli*, Order Taking Note of the Discontinuance of the Arbitral Proceeding, December 26, 2013; *Gabon v. Société Serete*, Order Taking Note of the Discontinuance issued by the Tribunal, February 27, 1978.

⁹³ *Togo v. ContourGlobal*. A State also initiated a conciliation under the AF Rules in *Equatorial Guinea v. CMS Energy*.

⁹⁴ *TANESCO v. IPTL*, Award, July 12, 2001. The case was initiated by TANESCO, a Tanzanian State-owned company responsible for electricity generation, transmission, and distribution, that challenged tariff terms under a PPA with a local power producer. The tribunal dismissed the main claims but clarified both parties' obligations. Jurisdiction was not contested. *East Kalimantan v. PT Kaltim Prima Coal*, Award, December 28, 2009, paras. 2, 173-174 where the Government of the Province of East Kalimantan ("GPEK") brought a case over a mining agreement and the tribunal found that GPEK could not access ICSID arbitration as it had not been designated by Indonesia under Articles 25(1) and 25(3) of the Convention; and *Energy Utility Corporation v. KivuWatt*.

⁹⁵ See [ICSID/3](#) List of Contracting States and Other Signatories of the Convention. See also [Database of ICSID Member States](#).

⁹⁶ See e.g., *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of St. Kitts and Nevis* (ICSID Case No. ARB/95/2) ("*Cable Television v. St. Kitts and Nevis*"), Award, January 13, 1997, para. 4.09; *Holiday Inns v. Morocco*, in Lalive, *The First World Bank Arbitration*, pp. 667-668.

arbitration in contracts signed before a State's ratification of the Convention has been considered effective for purposes of ICSID jurisdiction when the proceedings commence after the ratification (*see* Section III.F(i)(a), para. 158).⁹⁷

90. A State may also terminate its membership in ICSID. The effects of the denunciation of the ICSID Convention are addressed in Articles 71 and 72 of the ICSID Convention. Parties can, in their contracts, explicitly address the consequences on the dispute resolution mechanisms in case of the termination of ICSID membership and provide for an alternate forum for international arbitration (for example, the AF Rules).⁹⁸

(ii) Constituent Subdivision or Agency ("CSA")

91. Under Article 25, ICSID Convention arbitration extends to disputes involving a CSA as a party, provided that the CSA: (i) has been "designated to the Centre by" a Contracting State;⁹⁹ (ii) has consented to ICSID arbitration; and (iii) the CSA's consent has received "the approval of that [Contracting] State unless that State notifies the Centre that no such approval is required."¹⁰⁰
92. Whether these requirements have been met in a dispute arising from a contract to which a CSA is a party is fact-specific, and for tribunals to decide. Parties can seek to address these matters in their arbitration agreements. (*See* [ICSID Model Clause](#) Constituent Subdivision or Agency of a State is a Party to the Agreement.)

⁹⁷ *See e.g., Cambodia Power Company v. Kingdom of Cambodia and Electricité du Cambodge* (ICSID Case No. ARB/09/18) (***Cambodia Power v. Cambodia***), Decision on Jurisdiction, March 22, 2011, paras. 10- 15, 58 where the contracts were entered into in 1996 and 1998, the ICSID Convention came into force for Cambodia as of January 19, 2005, and the request for arbitration was submitted on July 30, 2009; *Liberian Eastern Timber Corporation v. Republic of Liberia* (ICSID Case No. ARB/83/2) (***LETCO v. Liberia***), Award, March 31, 1986, paras. 1-2, 16.4 where the contract was signed on May 12, 1970, the ICSID Convention came into force for Liberia as of July 16, 1970, and the request for arbitration was submitted on June 16, 1983.

⁹⁸ *E.g., Aucoven v. Venezuela*, Decision on Jurisdiction, September 27, 2001, para. 79 quoting clause 64 of the concession agreement that contemplated the possibility that the State party, or the State of the investor, might "revoke the Convention" or the possibility that "in any other way the Convention were to lose validity for these countries [...] or if it [were to be] impossible to carry out the arbitration in accordance with the [C]onvention " and provided for UNCITRAL arbitration as an alternate forum in such circumstances.

⁹⁹ ICSID Convention, Article 25(1).

¹⁰⁰ ICSID Convention, Article 25(3).

(a) Definition

93. The terms “agency” and “constituent subdivision” are not defined in the ICSID Convention. ICSID tribunals have the competence to decide if a given entity qualifies as a CSA for purposes of the ICSID Convention.¹⁰¹
94. *Constituent subdivision.* Tribunals have found that the term *constituent subdivision* can refer to a state, a province or a municipality over which the Contracting State exercises some measure of control.¹⁰² It includes “a colony or partially autonomous government forming part of or belonging to the [S]tate”¹⁰³, and, more generally, “a fair range of subdivisions including municipalities, local government bodies in unitary [S]tates, semi-autonomous dependencies, provinces or federated States in non-unitary States and the local government bodies in such subdivisions.”¹⁰⁴
95. *Agency.* An agency may be set up in the form of “a government statutory corporation or a company incorporated under national/local legislation in which the Government has some interest or shareholding.”¹⁰⁵ A tribunal specified that entities “wholly or substantially owned by private citizens would not appear to qualify” as agencies.¹⁰⁶ Another tribunal has concluded that an entity that exercises public functions typically vested in the Government

¹⁰¹ ICSID Convention, Article 41(1). *See also Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, para. 2.26.

¹⁰² *E.g., Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, para. 2.28.

¹⁰³ *Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, para. 2.28 where two local companies under US control sued the Federation of St. Christopher and Nevis based on an agreement entered into by the claimants and the Government of Nevis. The respondent argued, *inter alia*, that the Government of Nevis or the Nevis Island Administration was the party to the agreement, was a constituent subdivision or agency of the Federation and had not been designated by the Federation. *See also* para. 3.01 where the tribunal found that the Government of Nevis had not been designated to the Centre, and its consent had not been approved; and para. 3.02 stating that the Federation and the Government of Nevis were not the same and that the tribunal could not substitute the Federation as a party to the proceeding.

¹⁰⁴ *East Kalimantan v. PT Kaltim Prima Coal*, Award, December 28, 2009, para. 191 where a State’s subdivision, GPEK, initiated an arbitration against an investor relying on an arbitration clause in a contract signed by the Government of Indonesia. *See also* paras. 200-201 where GPEK argued, *inter alia*, that it was acting as Indonesia’s representative, that it was a designated constituent subdivision of Indonesia, and that it was a third-party beneficiary under the contract, or the real party to the contract. The case was dismissed on jurisdiction for lack of designation.

¹⁰⁵ *Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, para. 2.28.

¹⁰⁶ *Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, para. 2.28.

and which the Government delegates to it qualifies as an agency.¹⁰⁷ The agency can be organized under private or public law.¹⁰⁸

96. State-owned entities (“SOEs”) and entities exercising government-delegated functions may also qualify as “agencies or instrumentalities” under Article 25.¹⁰⁹ The issue in that situation, for jurisdictional purposes, is whether the SOE qualifies as a CSA and whether the requirements applicable to CSAs in Article 25 are met.

(b) Designation

97. *Purpose of the Designation.* Designation goes to the CSA’s procedural standing to appear as a party in an ICSID Convention proceeding and confers capacity before the Centre.¹¹⁰ It provides clarity and protection to investors by identifying which entities within a Contracting State may utilize ICSID dispute settlement.¹¹¹ It also serves a “gate-keeping” function for Contracting States, allowing them to control which entities are subject to ICSID jurisdiction.¹¹² Designation has also been viewed as confirmation of an entity’s

¹⁰⁷ *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, para. 228, 261. In addition to Bangladesh, the respondents were Bangladesh Petroleum Exploration & Production Company Limited (BAPEX, a wholly owned subsidiary of Petrobangla), and Bangladesh Oil Gas and Mineral Corporation (Petrobangla), two state-controlled entities performing government functions with a separate legal entity from the State. Both entered into agreements with the claimant. See paras. 239-241 where the tribunal observed that the entities were “controlled by the Government and perform[ed] some functions within domains reserved for the Government.” but the two entities had acted as “principals [...] in their own name,” and not as “agents for the Government.” See also *Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, para. 2.32 where the tribunal considered the functions of the entity in question relevant to the determination of whether the entity qualified as a CSA.

¹⁰⁸ E.g., *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, paras. 220, 225 noting that Petrobangla was a corporation created by public ordinance; whereas BAPEX was later created under the Companies Act of Bangladesh (just as any other private corporation might be).

¹⁰⁹ E.g., *Pluspetrol Perú Corporation S.A. and others v. Perupetro S.A.* (ICSID Case No. ARB/12/28) (“*Pluspetrol v. Perupetro*”), Award, May 21, 2015, para. 14.

¹¹⁰ ICSID maintains and publishes on its website a List of Designations by Contracting States regarding Constituent Subdivisions or Agencies (ICSID/8-C, List of Designations by Contracting States Regarding Constituent Subdivisions or Agencies). [ICSID/8-C](#), para. 2 lists entities “competent to become parties to disputes submitted to the Centre.” As of the date of this paper, 13 Contracting States have active general designations of CSAs. For example, Peru designated Perupetro S.A., the State-owned company responsible for promoting, negotiating, and supervising contracts for hydrocarbon exploration and exploitation in Peru. See also Schreuer, Article 25, para. 549; *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, paras. 269, 280, 303, 325.

¹¹¹ Schreuer, Article 25, para. 550. See e.g., *Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, para. 227; *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, paras. 277-280.

¹¹² Schreuer, Article 25, para. 551; see also *Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, para. 228.

CSA's status,¹¹³ or as a persuasive reason to preclude the designating State from denying the entity's CSA status for the purpose of ICSID arbitration.¹¹⁴

98. *Designation Authority*. The designation must be made by a Contracting State.¹¹⁵ The Convention does not specify the organ of the State competent to make the designation, which is an internal matter for the State.¹¹⁶ Whether the designation was made by the competent organ of the State under domestic law has been considered in some cases, and is a matter specific to the circumstances of each case.¹¹⁷
99. *Types of Designation*. The ICSID Convention does not prescribe a specific form for making a designation. A CSA may be designated by a State for general purposes (covering all disputes) or for specific *ad hoc* purposes (pertaining to disputes or arising from a particular instrument).¹¹⁸ *Ad hoc* designations are not included in ICSID/8-C.¹¹⁹
100. Designation might be explicit or implicit. Explicit designations are statements made by a Contracting State expressly stating a designation for the purposes of Article 25(1). They can be made in domestic legislation, international treaties, *ad hoc* communications to the Centre, or clauses in contracts. Some tribunals have accepted that a designation might also be implicitly made. The *Niko* tribunals held that an implicit designation might occur where

¹¹³ *Noble Energy v. Ecuador*, Decision on Jurisdiction, March 5, 2008, para. 63.

¹¹⁴ *Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, paras. 268, 271.

¹¹⁵ ICSID Convention, Article 25(1). See e.g., *Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, para. 2.22; *Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, para. 249; *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, paras. 293, 300, 325; *East Kalimantan v. PT Kaltim Prima Coal*, Award, December 28, 2009, para. 193 referring to a “document that emanates from the State” that “shows the State’s intent.”

¹¹⁶ Schreuer, Article 25, para. 552.

¹¹⁷ See e.g., *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, paras. 337-338; *East Kalimantan v. PT Kaltim Prima Coal*, Award, December 28, 2009, paras. 166-168 where the tribunal indicated that domestic law comes into play in this determination, holding that “international law applies to the determination of [the tribunal’s] jurisdiction” but adding that the tribunal would also “take [domestic] law into account” in assessing the requirement of consent “because of the specifics” of the case, involving an “agreement to arbitrate [...] contained in a contract governed by national law.”

¹¹⁸ See e.g., *Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, para. 2.29; *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, paras. 285-290, 325.

¹¹⁹ [ICSID/8-C](#), List of Designations by Contracting States Regarding Constituent Subdivisions or Agencies (October 28, 2022) indicates in a footnote that “*ad hoc* designations and notifications made by Contracting States pursuant to Articles 25(1) and 25(3) are excluded from this listing.” See also *QNB v. South Sudan*, Decision on Jurisdiction and Liability, January 5, 2024, paras. 240, 243 where the tribunal found an *ad hoc* designation.

the State's intent to designate is clear from its conduct.¹²⁰ Those tribunals found a strong case for implicit designation when a State formally approved in writing one of its agencies entering into an investment agreement containing an ICSID clause, and approved the CSA's consent to arbitration.¹²¹ Another tribunal has accepted an implicit designation where the State and the CSA together executed an agreement containing an ICSID arbitration clause, and the agreement was approved by the Government.¹²²

101. However, some other tribunals have taken a stricter view and considered that designation and approval of consent are distinct and separate requirements under Article 25(1) and Article 25(3) of the ICSID Convention respectively.¹²³
102. *Communication to the Centre*. Tribunals have held that to be effective for jurisdictional purposes, the designation of a CSA must be communicated to ICSID.¹²⁴
103. As to the *form* of the communication, a tribunal has held that the form of communication is irrelevant as long as the intent to designate is clear.¹²⁵ Another tribunal has found that the requirement is satisfied whenever the designation comes to ICSID's attention, whether

¹²⁰ *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, paras. 299-300 where BAPEX and Petrobangla entered into agreements with the claimant. Bangladesh accepted that their consent had been approved by the State but argued that there was no designation. The tribunal found that, when it approved their consent, the State designated, implicitly but necessarily, BAPEX and Petrobangla as agencies in the sense of Article 25(1). *See also Niko Resources v. Bangladesh II*, Decision on Annulment, October 12, 2023, para. 150 for the subsequent annulment proceeding in which the majority of the committee found that the tribunal had not manifestly exceeded its powers; *contra, Niko Resources v. Bangladesh II*, Dissenting Opinion by Committee Member Makhdoom Ali Khan ("**Dissenting Opinion of Makhdoom Ali Khan**"), October 12, 2023, para. 141 for an opinion that there was a manifest excess of power by the tribunal.

¹²¹ *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, paras. 301, 311, 326, 340, 344-345.

¹²² *QNB v. South Sudan*, Decision on Jurisdiction and Liability, January 5, 2024, paras. 237-239 where the State objected to the jurisdiction of the tribunal arguing that it had not designated the Central Bank of South Sudan as a CSA nor approved its consent, and the tribunal found that the designation "occurred with the State executing alongside the Second Respondent, an agency of the State, the Facility Agreement, which provides for ICSID arbitration, and which went through different high-level Government approvals" and "clearly conveyed upon, and identified the Second Respondent as having, eligibility/capacity to be a party in a qualifying arbitration before ICSID." *See also* para. 243.

¹²³ *See e.g., Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, para. 236; *Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, para. 5.11.

¹²⁴ *See e.g., Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, paras. 225, 238-239, 246, 269(a); *East Kalimantan v. PT Kaltim Prima Coal*, Award, December 28, 2009, para. 192; *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, paras. 303, 319 holding that the "competence [...] must be made known to the Centre."

¹²⁵ *East Kalimantan v. PT Kaltim Prima Coal*, Award, December 28, 2009, para. 192 "the form [...] of communication do[es] not matter, provided that the intention to designate is clearly established" and noting also that "commentators generally consider that designations are not subject to any formal requirement as long as they are made to the Centre."

through formal notification or indirectly – for example, through a domestic law or treaty that gives the designation sufficient public notoriety.¹²⁶

104. As to the *channel* of communication, some tribunals (the *East Kalimantan*, *Niko* and *QNB* tribunals) have found that while the designation must originate from the State, the communication to ICSID does not necessarily have to be made by the State itself, but can be made by the investor when filing a request for arbitration.¹²⁷ However, other tribunals, like the *Cambodia Power* tribunal, have considered that the communication of the designation must be made by the State.¹²⁸
105. *Agreement to designate*. A commitment to procure a designation in the future under Article 25 of the Convention has been held not to amount to an act of designation for the purposes of Article 25.¹²⁹
106. *Critical date*. The Convention does not establish a specific date for the designation to have occurred. Tribunals have held that the critical date for the existence of a designation is normally the day on which the request for conciliation or arbitration is registered.¹³⁰

¹²⁶ *Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, paras. 240, 242, 246, 269(b) where the tribunal dismissed jurisdiction over Electricité du Cambodge for lack of designation as the purported designation that took place prior to Cambodia becoming an ICSID Contacting State and set out in a private instrument, was not endowed with public notoriety.

¹²⁷ *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, paras. 318, 323, 327 referring particularly to *ad hoc* designations, holding that a “tribunal may give effect to an existing *ad hoc* designation which may be made known to ICSID by an investor when filing a Request for Arbitration”; *Niko Resources v. Bangladesh II*, Decision on Annulment, October 12, 2023, paras. 212, 216-218. *Contra*, *Niko Resources v. Bangladesh II*, Dissenting Opinion of Makhdoom Ali Khan, October 12, 2023, para. 126. *See also East Kalimantan v. PT Kaltim Prima Coal*, Award, December 28, 2009, paras. 192-193; *QNB v. South Sudan*, Decision on Jurisdiction and Liability, January 5, 2024, paras. 246, 248 where the tribunal was convinced by the *Niko* tribunal’s approach and found that the designation was properly communicated by the claimant in the request for arbitration.

¹²⁸ *Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, paras. 245-246, 250-251, 269(c).

¹²⁹ *Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, paras. 255-257, 259. *See also Cambodia Power v. Cambodia*, Decision on Claimant’s Application Concerning Electricité du Cambodge, April 19, 2011, paras. 1, 8-13, 22-23, 25-28 where, after the tribunal rendered its Decision on Jurisdiction, the claimant filed an ancillary claim seeking an order directing Cambodia to designate it on the basis that there was an alleged contractual obligation to do so; *Cambodia Power v. Cambodia*, Award, April 22, 2013, paras. 449-450 where, reviewing that issue with the merits, the tribunal decided that the State had only “promis[ed] to perfect any designation, by notifying the Centre – if and when any such designation occurred [...]” and found that Cambodia did not notify ICSID.

¹³⁰ Schreuer, Article 25, para. 564; e.g., *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, para. 289. *Contra*, *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, formerly *ARB/12/14 v. Republic of Indonesia* (ICSID Case No. ARB/12/14 and 12/40) (“*Churchill Mining v. Indonesia*”), Procedural Order No. 2, February 5, 2013, para. 25 where the Government of the Regency of East Kutai requested to be joined as a respondent to the treaty case, while the tribunal found that there was no consent of the claimant, it also left open whether a designation

107. When drafting, it might be advisable to consider what would happen if the subdivision or agency is abolished or becomes incapacitated (a matter that may also be addressed in domestic law). Parties to a contract can provide that the State will designate any future entity that would replace the original entity as party to the investment agreement, and to transfer consent to the successor.¹³¹ As a practical matter, parties should ascertain that the conditions set forth in the ICSID Convention for CSAs to act as a party in case of a dispute are satisfied.
108. *Designation distinguished from attribution.* Designation has been considered a different and separate concept from the question of whether the acts of the CSA are attributable to the State under the rules of State responsibility. Tribunals have observed that the designation of a CSA for ICSID jurisdiction does not equate to attributing the CSA's acts to the State for liability purposes.¹³²

(c) Consent and approval of consent

109. In addition to being designated, the CSA itself must give its written consent to arbitrate to appear as a party in an ICSID Convention arbitration.¹³³ Additionally, the investor must also have given its consent to arbitrate with the CSA.¹³⁴

communicated after the initiation of the proceedings could be admissible. *See also Klöckner v. Cameroon*, Award, October 21, 1983, para. 8 where the tribunal accepted that a designation could be made after the institution of proceedings. The local entity SOCAME was owned at the time of the contract at 51% by European investors, but became Cameroonian after a change of control in favor of the government. It became a co-respondent in its capacity as a CSA on the basis of another contract. When it raised counterclaims against the claimant, Klöckner objected that SOCAME was Cameroonian. The tribunal found that it had jurisdiction over SOCAME *rationae materiae* because Cameroon designated it after the initiation of the arbitration and upon questioning of the tribunal.

¹³¹ Schreuer, Article 25, para. 641.

¹³² Schreuer, Article 25, paras. 523-526; *see also Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, para. 283 remarking that “designation has the advantage for the State of limiting its legal and financial exposure with respect to contracts concluded by the agency”, although the Contracting State “may have a general obligation under Article 53 to ensure compliance with ICSID awards”; *contra, Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, para. 230 in which the tribunal took the view that “any award rendered against a constituent subdivision or agency could, arguably, be binding on the State itself” under Article 54(1) and Article 53(1) of the Convention.

¹³³ *See e.g., Churchill Mining v. Indonesia*, Procedural Order No. 2, February 5, 2013, para. 23; *QNB v. South Sudan*, Decision on Jurisdiction and Liability, January 5, 2024, paras. 255-267.

¹³⁴ *E.g., Churchill Mining v. Indonesia*, Procedural Order No. 2, February 5, 2013, para. 25.

110. Pursuant to Article 25(3), the CSA's consent must receive the "approval of [the Contracting] State unless that State notifies the Centre that no such approval is required."¹³⁵.
111. The Convention does not specify the method by which the State's approval must be given. For some tribunals, the State's approval of a contract entered into by a CSA, with an ICSID arbitration clause, constitutes the State's approval of the CSA's consent for the purposes of Article 25(3).¹³⁶
112. Case law also addresses the interaction between the requirement that the CSA's consent be approved by the Contracting State and the designation requirement. A number of tribunals have observed that the two requirements under Articles 25(1) and 25(3) are distinct¹³⁷ and operate independently from one another, while others have taken the view that the State's approval of the CSA's consent to ICSID arbitration "necessarily implies" that the CSA has been designated.¹³⁸
113. A State does not itself consent to arbitration when it designates a CSA or approves the CSA's consent. Tribunals have observed that a State might not be compelled to participate in an arbitration instituted on the basis of a consent provision included in a contract entered into by a CSA of the State in question.¹³⁹ The State must explicitly provide its consent to arbitration separately.¹⁴⁰

¹³⁵ ICSID Convention, Article 25(3); [ICSID Institution Rules](#) (2022), Rule 2(2)(e)(ii). [ICSID/8-C](#) contains notifications by certain States that have designated CSAs, indicating that the State's approval is not required for consent by the designated CSA(s) to submit disputes to the Centre *See* for example Australia and Canada for state, territory or province. Peru indicated that no approval of consent is required for Perupetro S.A.

¹³⁶ *See e.g., Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, para. 262; *QNB v. South Sudan*, Decision on Jurisdiction and Liability, January 5, 2024, paras 272, 277(d) where the State's action of executing together with the CSA an agreement including an ICSID arbitration clause was considered an act of approval of the CSA's consent.

¹³⁷ *See e.g., Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, para. 5.11; *Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, para. 236.

¹³⁸ *See e.g., Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, para. 340 where the tribunal held that, absent clear evidence to the contrary, the State's approval of the CSA's consent to ICSID arbitration "necessarily implies" that the CSA has been designated; *QNB v. South Sudan*, Decision on Jurisdiction and Liability, January 5, 2024, para. 243 where "the Government's [...] unreserved approval of the Facility Agreement post-signature" supported the tribunal's finding of a designation.

¹³⁹ *See e.g., Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, paras. 2.17, 2.22, 2.27, 3.02, 5.14, 8.01; *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, paras. 229-235. *See also East Kalimantan v. PT Kaltim Prima Coal*, Award, December 28, 2009, paras. 182, 185.

¹⁴⁰ *See, for an exception, Chevron v. Bangladesh*, Award, May 17, 2010, paras. 134-135, 146-149 where the tribunal found that Petrobangla's actions were attributable to the State, such that the State "must be

E. AND A NATIONAL OF ANOTHER CONTRACTING STATE

114. Under Article 25(1) of the ICSID Convention, one of the disputing parties must be “a national of another Contracting State.” This requirement ensures that a domestic investor cannot bring a claim against its own State under the ICSID Convention, subject to the exception identified below. Article 25(2) further defines “a national of another Contracting State,” differentiating between natural and juridical persons.

(i) *Natural person*

115. All ICSID cases solely based on a contract have been brought by juridical entities. There is no example of a proceeding brought by a natural person on the basis of a contract.¹⁴¹ This likely reflects the fact that investment projects, given their time frame and the significant resources and technical skills required, are most often carried out through companies, which are therefore usually the signatories of the investment contracts.
116. To access ICSID jurisdiction, a natural person must: (i) hold the nationality of a Contracting State; and (ii) not hold the nationality of the host State. The claimant must confirm both conditions at the time of consent and at the time of registration of the request for arbitration.
117. Nationality is typically determined by the law of the State whose nationality is claimed.¹⁴² However, an ICSID tribunal need not follow national law for example in situation of “involuntary acquisition of nationality that in violation of international law, or cases of withdrawal of nationality that are contrary to international law,” or nationality obtained by fraud or mistake.¹⁴³

considered as having consented to ICSID arbitration.” Relevant to the tribunal’s analysis was the additional finding that the contracts at issue were linked to and part of a “unified contractual scheme” with another set of contracts to which the State was indeed a party, which also provided for ICSID arbitration.

¹⁴¹ The only case involving a natural person and a contract is *Ghaith R. Pharaon v. Republic of Tunisia* (ICSID Case No. ARB/86/1), where the proceeding was initiated on the basis of an investment agreement and article 20 of Law No. 69-35 of June 26, 1969. The case was discontinued in 1988.

¹⁴² Schreuer, Article 25, para. 1118.

¹⁴³ Schreuer, Article 25, para. 1118. *See also* *Nottebohm (Liechtenstein v. Guatemala)* (Second Phase), Judgement, April 6, 1955, ICJ Reports 1955, p. 20; International Law Commission, Draft Articles on Diplomatic Protection with Commentaries (Yearbook of the International Law Commission, Volume 2, Part 2, 2006), Article 4, note (6).

118. If the natural person investor holds the nationality of the host State, ICSID jurisdiction is barred, regardless of any agreement to the contrary.¹⁴⁴ Parties cannot override this rule by contract or consent.

(ii) Juridical person

119. With one exception noted above, all contracts with host States that have given rise to ICSID arbitration proceedings were concluded by a juridical entity. Pursuant to Article 25(2)(b) of the Convention, a juridical person may qualify as a “national of another Contracting State”:

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration [*First Clause*] and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention [*Second Clause*].

120. The First Clause of Article 25(2)(b) sets out a general rule which requires the juridical person to be a national of a Contracting State other than the State party to the dispute; and the Second Clause sets out an exception to this general rule.

(a) Meaning of a juridical person

121. The ICSID Convention does not define a “juridical person.” This was a deliberate drafting choice given the differences among States in their treatment of partnerships, associations and companies.¹⁴⁵
122. No contract case has addressed whether Article 25(2)(b) requires legal personality under national law for an entity to qualify as a “juridical person.” However, treaty cases have established that entities lacking legal personality, such as trusts and associations, do not satisfy this requirement.¹⁴⁶

¹⁴⁴ ED Report, para. 29. *See also* Schreuer, Article 25, paras. 1142-1143, 1150.

¹⁴⁵ History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Vol. I-IV (1970) (“[History](#)”), Vol. II, pp. 284, 359, 360, 661.

¹⁴⁶ Schreuer, Article 25, para. 1175. *See also*, for treaty cases, *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction, April 22, 2005, para. 133; *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction, August 4, 2011, paras. 416-418 for a more nuanced approach finding that insolvent companies may have standing to bring claims under Article 25 (typically brought by the insolvency administrator in accordance with domestic law).

123. *Applicable law.* Tribunals have generally determined the nationality of a juridical entity by reference to its place of incorporation or seat – the test most commonly used in international law, investment treaties, and domestic laws of the States whose nationality is claimed.¹⁴⁷
124. *Criteria.* The nationality of a juridical person is usually determined by the criteria of place of incorporation or registered seat;¹⁴⁸ alternatively, the entity’s effective seat or place of administration is also considered.¹⁴⁹ ICSID tribunals have consistently held that a juridical entity need not demonstrate any “real” or “effective” connection with the Contracting State whose nationality it claims. This is particularly the case in a contract-scenario.¹⁵⁰ Most contract-based decisions also found that the Convention does not require an investigation into the claimant company’s shareholders for purposes of establishing nationality, except when the claim is brought by a local entity under the Second Clause of Article 25(2)(b).¹⁵¹
125. *State-owned enterprises (SOEs)* may qualify as nationals under Article 25 of the Convention, as “juridical persons” includes both private and government-owned companies.¹⁵² In treaty cases,¹⁵³ tribunals have used the *Broches* test – which examines the SOE’s functions rather than ownership – to determine if the SOE acts independently as an

¹⁴⁷ Schreuer, Article 25, paras. 1180-1181, 1185- 1195; *see also SOABI v. Senegal*, Decision on Jurisdiction, August 1, 1984, para. 30, *Aucoven v. Venezuela*, Decision on Jurisdiction, September 27, 2001, para. 108.

¹⁴⁸ *See e.g., Amco v. Indonesia*, Decision on Jurisdiction, September 25, 1983, para. 14(iii); *Klöckner v. Cameroon*, Award, October 21, 1983, paras. 10-14; *SOABI v. Senegal*, Decision on Jurisdiction, August 1, 1984, para. 30; *Aucoven v. Venezuela*, Decision on Jurisdiction, September 27, 2001, para. 107; *LETCO v. Liberia*, Award, March 31, 1986, para. 16.4; *Vacuum Salt Products Ltd. v. Republic of Ghana* (ICSID Case No. ARB/92/1) (“*Vacuum Salt v. Ghana*”), Award, February 16, 1994, para. 28.

¹⁴⁹ *E.g., Aucoven v. Venezuela*, Decision on Jurisdiction, September 27, 2001, para. 107.

¹⁵⁰ *Niko Resources v. Bangladesh I and Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, paras. 201-203.

¹⁵¹ *E.g., SOABI v. Senegal*, Decision on Jurisdiction, August 1, 1984, paras. 30-31; *Aucoven v. Venezuela*, Decision on Jurisdiction, September 27, 2001, paras. 107-116.

¹⁵² *CSOB v. Slovakia*, Decision on Jurisdiction, May 24, 1999, para. 16.

¹⁵³ *See e.g., Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/19), Award, November 18, 2014, paras. 274-275; *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* (ICSID case No. ARB/14/30) (“*Beijing Urban Construction v. Yemen*”), Decision on Jurisdiction, May 31, 2017, paras. 33-36.

private entity or as a government agent.¹⁵⁴ This test was applied in *CSOB v. Slovakia*, but has not been applied in any other contractual case.¹⁵⁵

(b) First Clause: a juridical person national of another Contracting State

126. *Nationality requirements for a juridical person.* A juridical person must have the nationality of a Contracting State; and must not have the nationality of the Contracting State party to the dispute, subject to the Second Clause.
127. *Critical date.* Under Article 25(2)(b), the critical date on which the juridical person must meet the positive and negative nationality requirements is the date of consent. Any change in the juridical person's nationality after the date of consent is immaterial for jurisdiction.¹⁵⁶
128. *Multiple nationalities.* A juridical person can have multiple nationalities if incorporation, seat, or control differ, which is a rare occurrence. If it has the nationality of a Contracting State but not of the host State, other nationalities are generally irrelevant.¹⁵⁷ However, if it also has the host State's nationality, a special agreement based on foreign control is needed under the Second Clause of Article 25(2)(b).
129. *Agreements on nationality.* An agreement regarding the nationality of a juridical person under the First Clause of Article 25(2)(b) can take the form of an express stipulation in the

¹⁵⁴ Broches, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, pp. 354-355 "It would seem, therefore, that for purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function." This is a fact-intensive inquiry that looks at the degree of State control, the nature of the activities, and whether the entity is acting commercially or governmentally. *See also Beijing Urban Construction v. Yemen*, Decision on Jurisdiction, May 31, 2017, paras. 41, 44 where a Chinese State-owned company, BUCG, initiated a treaty case. It had entered into a construction contract with Yemen and the tribunal, applying the *Broches* test, noted that BUCG was performing its work on the airport site under a construction contract as a commercial contractor and not as an agent of the Chinese Government, was not fulfilling any Chinese governmental functions and qualified as a national of another Contracting State.

¹⁵⁵ *CSOB v. Slovakia*, Decision on Jurisdiction, May 24, 1999, paras. 16-27 where the claimant was a bank jointly owned by the Czech and the Slovak States and was an SOE that qualified as a claimant: it was incorporated under Czech law, it was engaged in commercial banking activities, and it was not acting as an agent of the Czech government or discharging governmental functions.

¹⁵⁶ Schreuer, Article 25, paras. 1242-1250.

¹⁵⁷ Schreuer, Article 25, paras. 1231-1233.

contract¹⁵⁸ or be implicit.¹⁵⁹ Such an agreement cannot create a nationality that does not exist. In other words, a juridical person that is not a national of an ICSID Contracting State cannot be made a national of a Contracting State by agreement of the parties to the contract.¹⁶⁰

(c) Second Clause: exception for locally incorporated entities under foreign control

130. Article 25(2)(b) of the ICSID Convention sets out an exception to the general rule. A local entity (*i.e.*, incorporated or with a seat in the host State) can bring an ICSID claim against the host State if two conditions are met: (i) there must be an agreement with the host State to treat the local entity as a “national of another Contracting State” because of foreign control of the entity (subjective element); and (ii) the local entity must in fact be under foreign control (objective element of control). The reason for including this exception in the ICSID Convention is that States often require foreign investors to operate by way of a local company.
131. Out of the 175 ICSID contract cases examined in this paper, claimants in 79 cases invoked Article 25(2)(b) of the Convention, *i.e.*, 45% of the contract cases. The main controlling foreign entities were from the USA, France, the United-Kingdom, Spain, Australia, Luxembourg, The Netherlands, Belgium, Colombia, Denmark, Malaysia and Italy.

(1) *Subjective element: an agreement*

132. *Form of agreement.* The agreement to treat a local entity as foreign for purposes of Article 25(2)(b) of the Convention is not subject to any formality.¹⁶¹

¹⁵⁸ Schreuer, Article 25, paras. 1199-1202 recounting the circumstance of *MINE v. Guinea* where the arbitration clause stated that the investor was Swiss, when it was incorporated in Liechtenstein but under Swiss control (at the time Liechtenstein was not an ICSID Contracting State).

¹⁵⁹ Schreuer, Article 25, para. 1204 referring to two conditions for the validity of an implicit agreement on nationality: (i) that the host State express its consent specifically with respect to that particular foreign investor (*i.e.*, in a contract); and (ii) that the host State had full knowledge of the facts surrounding the investor’s nationality.

¹⁶⁰ Schreuer, Article 25, para. 1198.

¹⁶¹ See *e.g.*, *SOABI v. Senegal*, Decision on Jurisdiction, August 1, 1984, para. 30-31; *SOABI v. Senegal*, Declaration of the President on the Tribunal Decision, August 1, 1984, para. 6; *Amco v. Indonesia*, Decision on Jurisdiction, September 25, 1983, para. 14(ii); *Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, paras. 5.13-5.15; *TANESCO v. IPTL*, Award, July 12, 2001, para. 10; *Aucoven v. Venezuela*, Decision on Jurisdiction, September 27, 2001, para. 105; *Millicom International Operations B.V. and Sentel GSM S.A. v. Republic of Senegal* (ICSID Case No. ARB/08/20) (“*Millicom v. Senegal*”), Decision on Jurisdiction, July 16, 2010, para. 111(e).

133. *Explicit agreement.* In practice, agreements on foreign control are most often found in the contract containing the parties' consent,¹⁶² but they could also be concluded in a subsequent agreement or a *compromis*.¹⁶³ Practice shows a wide variety of explicit agreements, with some providing all the relevant details¹⁶⁴ (such as the identity of the controlling interest, the nationality of the controllers and the status of their home State as Contracting States), whereas others use less precise formulas.¹⁶⁵
134. Some tribunals found that there is no need for the parties to formally indicate the nationality of the foreign juridical person that controls the local entity.¹⁶⁶ However, an explicit indication might be preferable to avoid jurisdictional objections, and it will be likely requested by the ICSID Secretariat when examining the request for registration.
135. *Implicit agreement.* ICSID tribunals have generally upheld the validity of implicit agreements on nationality under the Second Clause of Article 25(2)(b). Such agreements must be clear and unambiguous, leaving no doubt about the parties' intent.¹⁶⁷ For example, the parties' intent is clear when the rights that are granted are typically reserved to foreign

¹⁶² See e.g., *SOABI v. Senegal*, Decision on Jurisdiction, August 1, 1984, para. 30; *Aucoven v. Venezuela*, Decision on Jurisdiction, September 27, 2001, para. 83.

¹⁶³ Schreuer, Article 25, para. 1275; see also *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/96/1) ("*Santa Elena v. Costa Rica*"), Award, February 17, 2000, para. 26.

¹⁶⁴ See e.g., *Aucoven v. Venezuela*, Decision on Jurisdiction, September 27, 2001, para. 83; *Transgabonais v. Gabon*, Decision on Jurisdiction, December 19, 2005, para. 34; *Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, paras. 11-14; *Caratube v. Kazakhstan II*, Award, September 27, 2017, para. 602 where, under clause 27.8 of the contract, the local initial private contractor (Consolidated Contractors (Oil and Gas) Company S.A.L.) was considered as a national of Lebanon, which was not yet a Contracting State of the ICSID Convention at the time of the contract. The contract had subsequently been assigned to Caratube (a local company), but the tribunal found that clause 27.8 expressed the parties' intention to consider the contractor as a foreign national for the purposes of the ICSID Convention.

¹⁶⁵ See e.g., *Sociedad Aeroportuaria Kuntur Wasi S.A. and Corporación América S.A. v. Republic of Peru* (ICSID Case No. ARB/18/27) ("*Kuntur Wasi v. Peru*"), Decision on Jurisdiction, Liability and Certain Aspects of Quantum, with Further Directions on Quantum ("*Decision on Jurisdiction and Liability*"), August 1, 2023, para. 243; *SOABI v. Senegal*, Decision on Jurisdiction, August 1, 1984, paras. 30-31.

¹⁶⁶ See e.g., *Amco v. Indonesia*, Decision on Jurisdiction, September 25, 1983, para. 14; *Klöckner v. Cameroon*, Award, October 21, 1983, paras. 15-16; *LETSCO v. Liberia*, Award, March 31, 1986, paras. 16.4-16.11; *Vacuum Salt v. Ghana*, Award, February 16, 1994, para. 31; *Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, paras. 5.17-5.18; *Millicom v. Senegal*, Decision on Jurisdiction, July 16, 2010, para. 111; *AHS Niger and Menzies Middle East and Africa S.A. v. Republic of Niger* (ICSID Case No. ARB/11/11) ("*AHS Niger v. Niger*"), Decision on Jurisdiction, March 13, 2013, paras. 137-148.

¹⁶⁷ See e.g., *Amco v. Indonesia*, Decision on Jurisdiction, September 25, 1983, paras. 14(ii)-(iii); *Millicom v. Senegal*, Decision on Jurisdiction, July 16, 2010, paras. 112-114; *AHS Niger v. Niger*, Decision on Jurisdiction, March 13, 2013, paras. 103-128, 140, 148; *Vacuum Salt v. Ghana*, Award, February 16, 1994, para. 31; *LETSCO v. Liberia*, Award, March 31, 1986, paras. 16.6-16.10; *Holiday Inns v. Morocco*, in Lalive, *The First World Bank Arbitration*, pp. 659-663; *Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, para. 5.24; *Latam v. Peru*, Award, December 20, 2023, paras. 383, 390-393 where another arbitration option existed had the concessionaire not met the requirement of foreign control.

nationals (such as tax and customs duty exemptions, provisions on currency convertibility, provisions for the recruitment of foreign workers, participation in tenders reserved for foreign investors).¹⁶⁸

136. An ICSID arbitration clause in a contract between a State and a local company has been interpreted as a strong indication of an agreement on foreign nationality under the Second Clause of Article 25(2)(b) of the Convention on the basis that the clause is only valid if the Convention's nationality requirements are satisfied.¹⁶⁹
137. *Conditional agreements on nationality.* Parties may conclude a conditional agreement for purposes of the Second Clause of Article 25(2)(b).¹⁷⁰
138. *Critical date.* Tribunals are unanimous in finding that what must be shown is that the contracting parties agreed to treat the local entity as foreign on the date of consent.¹⁷¹

(2) Foreign Control

139. The requirement of foreign control over the local company is an objective requirement. Tribunals invariably examined whether the local entity was under foreign control at the time of consent. However, some ICSID tribunals have accepted that a rebuttable presumption is raised when: (i) there is an agreement of the parties on a foreign nationality

¹⁶⁸ Schreuer, Article 25, para. 1292; see also *Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, paras. 5.17-5.18.

¹⁶⁹ See e.g., *Caratube v. Kazakhstan II*, Award, September 27, 2017, paras. 608-610; *Société des Mines de Loulo S.A. v. Republic of Mali* (ICSID Case No. ARB/13/16) ("*Loulo v. Mali*"), Award, June 2, 2016, para. 159.

¹⁷⁰ See e.g., *Aucoven v. Venezuela*, Decision on Jurisdiction, September 27, 2001, paras. 83, 89-91 where the claimant was a Venezuelan entity controlled by Mexican nationals at the time of the signature of the contract. Mexico was not a Contracting State at that time. The contract provided consent to ICSID arbitration if the majority shareholder of the local entity was a national of a state for which the ICSID Convention was in force. In their contract, the parties further agreed "to attribute to the concessionaire [the local company], a legal person of Venezuela subject to foreign control for the date when this clause enters into force, the character of 'National of another Contracting state' for the purpose of applying this Clause and the provisions of the Convention." At the time the dispute arose, the claimant local entity was controlled by nationals of the United States of America, which was a Contracting State. The tribunal considered that the date of consent was the date when the conditions for ICSID jurisdiction was met for both parties (i.e., the date when the claimant acquired a "foreign" nationality). See also *Caratube v. Kazakhstan II*, Award, September 27, 2017, para. 607 where the tribunal had found that the contract between the investor and the State contained an agreement to treat a local entity as foreign under Article 25(2)(b) of the Convention. On the issue of conditional consent, the tribunal found that the fact that the investor's home State was not yet an ICSID Contracting State at the time of signing the agreement did not alter its conclusion on the existence of an agreement on foreign control (the investor's home State acceded to the ICSID Convention 10 months after the contract was signed).

¹⁷¹ See e.g., *Klöckner v. Cameroon*, Award, October 21, 1983, para. 14; *SOABI v. Senegal*, Decision on Jurisdiction, August 1, 1984, para. 29; *LETCO v. Liberia*, Award, March 31, 1986, para. 16.4; Schreuer, Article 25, para. 1409.

based on foreign control;¹⁷² or (ii) they can infer an agreement on nationality from the very existence of an ICSID arbitration clause in a contract with a local company.¹⁷³

140. *Definition.* The notion of foreign control is not defined in the Convention. The drafters intentionally decided to give the parties to the dispute wide discretion to determine under what circumstances a local entity could be treated as a national of another Contracting State because of foreign control.¹⁷⁴
141. In practice, the existence of control relies on a factual inquiry which requires examination of several criteria:
- The early contract case law focused on share ownership to establish control.¹⁷⁵ For example, in *Amco v. Indonesia*, the tribunal referred to “the nationality of the controller” as determinative of foreign control.¹⁷⁶ Similarly, in *Klöckner v. Cameroon*, the tribunal observed that, on the date of consent, the foreign investor held 51% of the local entity’s shares, and considered this as dispositive of the issue of foreign control.¹⁷⁷
 - In later cases, such as *LETCO v. Liberia*, tribunals set out several factors pointing to “effective control” and attributed weight to the fact that foreign nationals dominated the local entity’s decision-making structure. The *LETCO v. Liberia* tribunal also noted

¹⁷² See e.g., *Société Industrielle des Boissons de Guinée v. Republic of Guinea* (ICSID Case No. ARB/12/8) (“*SIBG v. Guinea*”), Award, May 21, 2014, para. 100 ultimately deciding, however, that SIBG did not prove effective control by a French shareholder or a majority shareholding by foreign interest at the time of consent and dismissing jurisdiction; *Transgabonais v. Gabon*, Decision on Jurisdiction, December 19, 2005, para. 34; *Caratube v. Kazakhstan II*, Award, September 27, 2017, paras. 613-615; *Kuntur Wasi v. Peru*, Decision on Jurisdiction and Liability, August 11, 2023, para. 250. See also Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, pp. 360-361; Schreuer, Article 25, paras. 1327-1330.

¹⁷³ Schreuer, Article 25, paras. 1337-1339. See also *Klöckner v. Cameroon*, Award, October 21, 1983, paras. 15-16; *LETCO v. Liberia*, Award, March 31, 1984, para. 16.9; *Millicom v. Senegal*, Decision on Jurisdiction, July 16, 2010, para. 103; *Vacuum Salt v. Ghana*, Award, February 16, 1994, para. 38 but ultimately the tribunal rebutted the presumption and found that there was no foreign control over Vacuum Salt.

¹⁷⁴ Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, pp. 360-361.

¹⁷⁵ See e.g., *TANESCO v. IPTL*, Award, July 12, 2001, para. 10; *Aucoven v. Venezuela*, Decision on Jurisdiction, September 27, 2001, paras. 114-118; *Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, paras. 11, 14; *Perenco v. Ecuador*, Decision on Jurisdiction, June 30, 2011, para. 73.

¹⁷⁶ *Amco v. Indonesia*, Decision on Jurisdiction, September 25, 1983, para. 14(iii). See also *SOABI v. Senegal*, Decision on Jurisdiction, August 1, 1984, para. 41; *Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, para. 5.13; *Sadiola v. Mali*, Award, February 25, 2003, paras. 6, 21.

¹⁷⁷ *Klöckner v. Cameroon*, Award, October 21, 1983, para. 14.

that the directors of the local entity as well as its general manager were from another Contracting State.¹⁷⁸

- In subsequent cases, tribunals have recognized that the realities of corporate organization do not allow for a simple formula of control based on percentage ownership and have looked at various factors pointing to control. For instance, in *Vacuum Salt v. Ghana*, the tribunal concluded that a minority owner in some cases may exercise sufficient control to satisfy Article 25(2)(b).¹⁷⁹ More recently, in *Kuntur Wasi v. Peru*, the tribunal looked at the “actual power to steer the investment” in the context of the “operation and management of the enterprise, including expertise and know-how that may lead to operational control.”¹⁸⁰
- Examples of elements pointing to foreign control considered by ICSID tribunals include: the foreign controller’s ability to exercise substantial influence over the management and operation of the local entity;¹⁸¹ ability to exercise influence over the selection of the members of the managing bodies of the local entity; capacity to steer the company’s fortunes; exercise of voting rights;¹⁸² control of the company’s decision-making structure;¹⁸³ and contribution of technical expertise and know-how.¹⁸⁴

142. *Parties’ agreement on the meaning of control.* Case law also suggests that the parties’ agreement on the criterion for assessing the foreign control should not be disregarded

¹⁷⁸ *LETCO v. Liberia*, Award, March 31, 1986, para. 16.5.

¹⁷⁹ *Vacuum Salt v. Ghana*, Award, February 16, 1994, para. 43; see also para. 44 where the tribunal stated that the “smaller the percentage of voting shares held by the asserted source of foreign control, the more one must look to other elements bearing on that issue.”

¹⁸⁰ *Kuntur Wasi v. Peru*, Decision on Jurisdiction and Liability, August 11, 2023, paras. 254-255 regarding a local Peruvian company under 50% Argentinian control.

¹⁸¹ E.g., *Vacuum Salt v. Ghana*, Award, February 16, 1994, paras. 40-54.

¹⁸² E.g., *Caratube v. Kazakhstan II*, Award, September 27, 2017, paras. 613, 618, 622-623.

¹⁸³ See e.g., *LETCO v. Liberia*, Award, March 31, 1986, para. 16.5; *Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, paras. 5.18-5.22; *Transgabonais v. Gabon*, Decision on Jurisdiction, December 19, 2005, paras. 34-35, 39-40. See also *Transgabonais v. Gabon*, *Ad hoc* Committee Decision on the Application for Annulment (“**Decision on Annulment**”), May 11, 2010, para. 56.

¹⁸⁴ See e.g., *Transgabonais v. Gabon*, Decision on Jurisdiction, December 19, 2005, para. 40; *Vacuum Salt v. Ghana*, Award, February 16, 1994, paras. 40-54 where the tribunal evaluated technical expertise and know-how but found that it alone was not enough to “render [a person with 20% shareholding] capable of strongly influencing critical decisions on important corporate matters.”

unless their selection of nationality was unreasonable or if it would allow using the Convention in an abusive manner.¹⁸⁵

143. *Meaning of “foreign”.* The words “foreign control” in Article 25(2)(b) require that the local entity be controlled by nationals of another Contracting State.¹⁸⁶
144. *Direct vs. Indirect Control.* The question of whether “foreign control” is concerned with who *directly* controls the local company or whether it goes beyond the first layer up the corporate chain to the individual(s) or entity(ies) who *ultimately* control(s) the entity has arisen in a number of cases.
145. Tribunals in contract-based cases have taken different approaches to this issue. Some tribunals have required identifying the ultimate or real controller, which may require the tribunal to pierce several corporate layers.¹⁸⁷ Other tribunals have considered that, once foreign control is established, there is no need to inquire further up the ownership chain (except if the ultimate controller is a national of the host State, in which case jurisdiction could be rejected).¹⁸⁸
146. *Multiple foreign controllers.* Case law suggests that a local entity may be deemed to satisfy the “foreign control” requirement even where control is exercised jointly by shareholders of several Contracting States (other than the Contracting State party to the dispute). The

¹⁸⁵ See e.g., *Aucoven v. Venezuela*, Decision on Jurisdiction, September 27, 2001, para. 116 where the contract with the State was signed by a local Venezuelan entity and consent to ICSID arbitration in the contract was conditional on the transfer of the local entity’s shares to a national of another Contracting State. The tribunal read this as an agreement to define “control” for purposes of Article 25(2)(b) in terms of direct shareholding and stated that, although it would have preferred to resort to economic criteria to define “control”, the parties’ choice to define control by reference only to shareholding was not unreasonable. See also paras. 114-132 where, based on the facts of the case, the tribunal also examined (and rejected) whether the foreign shareholding was fictional or if the local entity’s conduct had been misleading as to its nationality, which would have allowed discarding jurisdiction on the basis of an abuse of the Convention’s purposes. See also *Kuntur Wasi v. Peru*, Decision on Jurisdiction and Liability, August 11, 2023, para. 250.

¹⁸⁶ See e.g., History, Vol. II, p. 868; *SOABI v. Senegal*, Decision on Jurisdiction, August 1, 1984, para. 33; *SOABI v. Senegal*, Declaration of the President on the Tribunal Decision, August 1, 1984, paras. 2-4; *Transgabonais v. Gabon*, Decision on Jurisdiction, December 19, 2005, para. 37 where the tribunal specifically observed that all of the foreign interests in the local company were held by nationals of other Contracting States.

¹⁸⁷ E.g., *SOABI v. Senegal*, Decision on Jurisdiction, August 1, 1984, paras. 35-38.

¹⁸⁸ See e.g., *Amco v. Indonesia*, Decision on Jurisdiction, September 25, 1983, para. 14(iii) where the tribunal found that an inquiry into the nationality of the ultimate owner of the local entity was not in accord with the Convention. However, such an analysis would be justified for “political or economical reasons [...] where it is proven that would the Contracting State have known [the controller’s] nationality, it would not have agreed to the arbitration clause”, or for allegations of “fraud or misrepresentation”; *Aucoven v. Venezuela*, Decision on Jurisdiction, September 27, 2001, paras. 83, 117-121, 133-134; *Transgabonais v. Gabon*, Decision on Jurisdiction, December 19, 2005, para. 36.

test in those cases appears to be whether the foreign shareholders exercise control together as a matter of fact.¹⁸⁹

147. *Critical date for control.* The Convention is not explicit as to the date relevant for the existence of foreign control.¹⁹⁰ ICSID tribunals have favored the date of consent, which typically is also the date of the agreement to treat the local entity under foreign control. Few contract cases looked at the disappearance of foreign control after the date of consent, and before the institution of the arbitration. There do not seem to have been many instances of a scenario where a local entity becomes controlled by nationals of non-Contracting States or by nationals of the State party to the dispute in contract-based arbitrations and the principle remains the date of consent.¹⁹¹
148. *Causal connection.* The ICSID Convention requires that the agreement on nationality of the local entity shall be “because of foreign control”. Tribunals routinely presume the causal link or find it satisfied by objectively establishing that the local entity was indeed under foreign control at the date of consent.¹⁹²

¹⁸⁹ Schreuer, Article 25, para. 1364. *See e.g., Transgabonais v. Gabon*, Decision on Jurisdiction, December 19, 2005, para. 37; *Transgabonais v. Gabon*, Decision on Annulment, May 11, 2010, paras. 54, 69; *Kuntur Wasi v. Peru*, Decision on Jurisdiction and Liability, August 11, 2023, paras. 259-267 on how to establish control when the blocking power is shared equally by two shareholders, one of which is a local investor. The tribunal was satisfied that the local entity was under foreign control for purposes of Article 25(2)(b) of the Convention, although the foreign shareholder did not direct the company’s formal decisions. It examined other facts and circumstances pointing to foreign control such as contribution of technical expertise and know-how; position as “strategic investor” in the concession’s bidding terms and the absence of evidence showing that the local shareholder did not drive the local entity’s decision-making, and found that there was not enough evidence “to rebut the presumption of foreign control created by the provisions of the Concession Contract”.

¹⁹⁰ Schreuer, Article 25, para. 1410.

¹⁹¹ Schreuer, Article 25, paras. 1412 *et seq.*; *see also Amco v. Indonesia*, Decision on Jurisdiction, September 25, 1983, para. 14(ii) finding that the requirements were still fulfilled at the time of the decision; *Klöckner v. Cameroon*, Award, October 21, 1983, paras. 14-17 avoiding that question although the control had changed between the consent and the institution of the arbitration to become Cameroonian; *SOABI v. Senegal*, Decision on Jurisdiction, August 1, 1984, para. 41 finding that changes after the consent date have no effect but looking at the nationality of the shareholders at the time of consent to arbitration; *LETCO v. Liberia*, Award, March 31, 1986, para. 16.4 finding French management at all times; *Vacuum Salt v. Ghana*, Award, February 16, 1994, para. 29, footnote 6, declining jurisdiction as there was no foreign control on the date of consent only and not at the time of registration but leaving room for a different decision depending on the circumstances. Of note, a change of control after the date of consent due to expropriation or similar measures and where the investor is forced to forego control of the local entity; or where the local entity is declared bankrupt would not affect jurisdiction. *See also* Schreuer, Article 25, para. 1438.

¹⁹² *E.g., LETCO v. Liberia*, Award, March 31, 1986, paras. 16.5, 16.7-16.8.

F. CONSENT IN CONTRACT-BASED ICSID CONVENTION ARBITRATION

149. Under Article 25(1) of the Convention, a tribunal has jurisdiction over a dispute if “the parties to the dispute consent in writing to submit to the dispute to the Centre.”¹⁹³

(i) *Requirements to establish consent*

150. Consent to arbitration under Article 25 of the Convention must be in writing, exist at the time of the registration of the request for arbitration, and be provided by the “parties to the dispute.”¹⁹⁴

(a) Consent in writing

151. Parties typically express consent to arbitration in a clause in the relevant contract, in its annexes,¹⁹⁵ or in other documentation relating to the investment.¹⁹⁶ Such clauses are usually referred to as “arbitration clauses”. Less frequently, consent is given in the form of an *ad hoc* agreement to arbitrate *existing* disputes (“*compromis*” or “*ad hoc* agreement”).¹⁹⁷
152. As noted in the preamble of the ICSID Convention, ratification of the Convention does not constitute consent by a State to arbitrate specific or future disputes at ICSID.¹⁹⁸
153. Article 25(1) of the Convention allows parties significant freedom in drafting arbitration agreements (be they arbitration clauses or *ad hoc compromis*), without requiring any

¹⁹³ ED Report, para. 23 defines the parties’ consent to defer a dispute to ICSID as the “cornerstone” of the jurisdiction of the Centre. See Schreuer, Article 25, paras. 759-1110.

¹⁹⁴ ICSID Convention, Article 25(1).

¹⁹⁵ E.g., *Elsamex v. Honduras*, Award, November 16, 2012, paras. 230-232.

¹⁹⁶ E.g., *Amco v. Indonesia*, Decision on Jurisdiction, September 25, 1983, para. 14(ii) where the investor consented to arbitration in an application, that was later approved by the host State’s authorities.

¹⁹⁷ See e.g., *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19) (“*Duke v. Ecuador*”), Award, August 18, 2008, para. 62; *Santa Elena v. Costa Rica*, Award, February 17, 2000, para. 26; *MINE v. Guinea*, Award, January 6, 1988, para. 30. In *Duke v. Ecuador* and *MINE v. Guinea*, the parties entered into an *ad hoc* agreement relating to disputes arisen in connection with investment contracts; in *Santa Elena*, on the contrary, the parties agreed to submit to ICSID a dispute that arose between them in relation to the expropriation by Costa Rica of a property known as “Santa Elena” and the compensation owed to the claimant as a result.

¹⁹⁸ The preamble to the Convention reads in relevant part: “[d]eclaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.” See also ED Report, paras. 23-24; Schreuer, Article 25, paras. 760-761.

“solemn, ritual and unique formulation.”¹⁹⁹ However, their intention to resolve disputes through ICSID Convention arbitration must be clearly expressed.²⁰⁰

154. *Direct consent.* Most arbitration agreements relied upon in contract cases contain an explicit consent to arbitration administered by ICSID under the Convention. For instance, parties have agreed that dispute “shall be submitted to ICSID for settlement by arbitration” under the Convention, or “shall be referred to [or settled by] arbitration” under the Convention or pursuant to the ICSID Arbitration Rules. (See [ICSID Model Clauses](#).)
155. Parties can customize the scope of their arbitration agreement to fit their needs. Arbitration clauses often use a broad language covering “any” “dispute or difference” between the parties “arising from or in connection with” the contract, or “any dispute, controversy or claim” between the parties, “concerning the interpretation, performance or validity of this [contract].”²⁰¹ Depending on the wording of the clause, the parties’ consent may be understood as also covering non-contractual claims, claims arising from international customary law,²⁰² or claims related to the parties’ investment transactions more generally.
156. Other clauses limit the scope of the consent to arbitrate to “disputes relating to the interpretation or performance” of the contract; permit ICSID arbitration only for disputes exceeding a specified monetary threshold;²⁰³ or exclude recourse to ICSID arbitration for specific issues (e.g., “tax matters” or disputes relating to administrative acts adopted relating to the investment²⁰⁴).
157. *Indirect consent and consent by reference.* Tribunals have determined that written consent to ICSID arbitration exists if the parties’ consent, even if not explicit, is clear from the

¹⁹⁹ *Amco v. Indonesia*, Decision on Jurisdiction, September 25, 1983, para. 23.

²⁰⁰ See e.g., *Amco v. Indonesia*, Decision on Jurisdiction, September 25, 1983, para. 23; *Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, paras. 4.12-4.17 finding that the respondent’s statements did not demonstrate an intention to be bound by an arbitration clause entered by a third party.

²⁰¹ *Duke v. Peru*, Decision on Jurisdiction, February 1, 2006, paras. 79-81.

²⁰² E.g., *Cambodia Power v. Cambodia*, Decision on Jurisdiction March 22, 2011, paras. 336-337.

²⁰³ See e.g., *Latam v. Peru*, Award, December 20, 2023, para. 273 where the arbitration clause provided for domestic arbitration for disputes involving less than USD 20 million, and ICSID arbitration for disputes exceeding that amount; *Mobil Oil Corporation and others v. New Zealand* (ICSID Case No. ARB/87/2) (“*Mobil Oil v. New Zealand*”), Judgment of the High Court of New Zealand, July 1, 1987, para. 8 recalling that clause 7.12 of the contract excluded recourse to ICSID arbitration “a) Where the parties in respect of a particular matter have specified in this agreement some other procedure for the resolution of disputes arising on such matter; or (b) Where the relief sought by either party to a dispute arising on a matter contained in this agreement shall involve a sum of money of less than \$5,000,000 [...]”.

²⁰⁴ E.g., *Metro de Lima Línea 2 S.A. v. Republic of Peru* (ICSID Case No. ARB/17/3) (“*Metro de Lima v. Peru I*”), Decision on Jurisdiction and Liability, July 6, 2021, paras. 651-653 where the arbitration clause excluded from ICSID jurisdiction “those disputes arising with respect to the administrative acts issued by the Regulator in the exercise of its functions” (translation by ICSID).

wording of the clause.²⁰⁵ Consent may be given in a separate document that is referenced or included in the contract. In such a case, ICSID case law considers that the contract does not need to refer to the arbitration clause specifically, as long as it is clear the parties intended to agree to ICSID arbitration.²⁰⁶

158. *Conditional consent.* Parties can agree to arbitration based on a future event happening. Consent materializes when the event takes place. Examples of conditional events in arbitration agreements include: (i) the ratification of the Convention by the host State or the investor's home State; or (ii) the transfer of shares of the company that entered into the contract to a national of a Contracting State.²⁰⁷
159. *Multi-step clauses.* ICSID dispute resolution clauses often require parties, before initiating ICSID arbitration, to attempt to resolve their dispute amicably through negotiation, mediation, conciliation, or a combination of alternative dispute resolution (“ADR”) methods. In practice, claimants generally complied with these requirements and commenced arbitration after unsuccessful settlement efforts.²⁰⁸ In two contract cases, arbitration commenced without the parties having followed the multi-step clause. In these

²⁰⁵ See e.g., *AHS Niger v. Niger*, Decision on Jurisdiction, March 13, 2013, paras. 163-177 where the tribunal found clear consent to ICSID because the arbitration clause provided that disputes be resolved by arbitration “in accordance with ‘the rules in force in Niger relating to the settlement of investments disputes’” (translation by ICSID) and Niger’s investment code provided for ICSID arbitration. See also *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26) (“*Inceysa v. Salvador*”), Award, August 2, 2006, paras. 309-330 where the tribunal did not find clear consent to ICSID arbitration because the clause referred to “arbitration proceeding in accordance with Salvadoran Law,” and none of the laws identified by the claimant contained a clear offer to arbitration before ICSID and instead contained specific procedural rules for arbitration; *SIBG v. Guinea*, Award, May 21, 2014, paras. 13-14 where the case was brought under a clause that referred to an investment code which contained an ICSID clause.

²⁰⁶ E.g., *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste* (ICSID Case No. ARB/15/2) (“*Lighthouse v. Timor-Leste*”), Award, December 22, 2017, paras. 148, 233-282 where the contracts referred to Lighthouse’s terms and conditions, which contained an ICSID arbitration clause. The tribunal denied jurisdiction, finding that the reference did not clearly establish consent to arbitration because it was not proven that the respondent had received the document containing the clause.

²⁰⁷ See e.g., *Holiday Inns v. Morocco*, in Lalive, *The First World Bank Arbitration*, pp. 667-668 noting that “[t]he Tribunal is of the opinion that the Convention allows parties to subordinate the entry into force of an arbitration clause to the subsequent fulfillment of certain conditions, such as the adherence of the States concerned to the Convention [...]. On this assumption, it is the date when the conditions are definitely satisfied, as regards one of the Parties involved, which constitutes in the sense of the Convention the date of Consent by that Party. As for the date of consent contemplated by Article 25(2)b of the Convention, it will automatically be the date on which the two corresponding consents coincide...”. See also *Aucoven v. Venezuela*, Decision on Jurisdiction, September 27, 2001, para. 90. See above Section III.D.

²⁰⁸ See e.g., *Noble Energy v. Ecuador*, Decision on Jurisdiction, March 5, 2008, paras. 214-217; *Transgabonais v. Gabon*, Award, March 7, 2008, paras. 43-45. ICSID can confirm that 11 of ICSID’s 13 conciliation cases were initiated under multi-step clauses that contemplated conciliation as a pre-arbitration step. It is publicly known that in three cases, the parties proceeded to arbitration after the conciliation. See above, at para. 49.

cases, the tribunals held that the failure to pursue an amicable settlement before initiating arbitration did not deprive the tribunal of jurisdiction nor affect the “regularity of the proceedings”, as it was not established that this was the parties’ reasonable intention when agreeing to the multi-step clause.²⁰⁹ Both tribunals then proceeded to examine and decide the merits.

160. *Interpretation of consent.* The ICSID Convention does not create any presumption in favor of the existence of an arbitration agreement. The party relying on a dispute resolution clause must prove that, by agreeing to that clause, the parties intended to consent to ICSID arbitration.²¹⁰ To determine the existence and scope of the parties’ consent to arbitration, ICSID case law generally seeks the parties’ “common” intent when forming the agreement.
161. ICSID tribunals have held that arbitration agreements must be interpreted in good faith, neither too narrowly nor too broadly, taking into account the consequences that the parties might have reasonably and legitimately expected from their commitments.²¹¹ Most tribunals have investigated the parties’ intention by primarily looking at: (i) the text of the arbitration clause and the contract;²¹² (ii) the negotiation history of the contract;²¹³ and (iii) the subsequent conduct of the parties.²¹⁴
162. The *Aucoven* tribunal emphasized that departure from the “clear wording” of a clause referring to ICSID arbitration should not be undertaken lightly “in the absence of any contrary indication.”²¹⁵ Similarly, in *Occidental v. Ecuador* the tribunal declined to carve out certain disputes from the scope of the ICSID arbitration agreement, finding that

²⁰⁹ *Elsamex v. Honduras*, Decision on Objections to Jurisdiction, June 4, 2010, paras. 119-157 finding that failure to satisfy multi-step requirements affects the claim’s admissibility and examining whether these requirements were met or alternatively forfeit under the law governing the contract; *Société d’Investigation de Recherche et d’Exploitation Minière v. Burkina Faso* (ICSID Case No. ARB/97/1) (“*SIREXM v. Burkina Faso*”), Award, January 19, 2000, para. 3.03.

²¹⁰ See e.g., *Lighthouse v. Timor-Leste*, Award, December 22, 2017, para. 148; *BSGR v. Guinea*, Award, May 18, 2022, para. 292.

²¹¹ See e.g., *Amco v. Indonesia*, Decision on Jurisdiction, September 25, 1983, para. 14; *SOABI v. Senegal*, Award, February 25, 1988, paras. 4.09, 4.10; *Duke v. Peru*, Decision on Jurisdiction, February 1, 2006, para. 76; *Noble Energy v. Ecuador*, Decision on Jurisdiction, March 5, 2008, paras. 195-197; *Lighthouse v. Timor-Leste*, Award, December 22, 2017, para. 148; *BSGR v. Guinea*, Award, May 18, 2022, para. 293.

²¹² See e.g., *SIBG v. Guinea*, Award, May 21, 2014, paras. 90-94.; *Rasia v. Armenia*, Award, January 20, 2023, para. 363; *AHS Niger v. Niger*, Decision on Jurisdiction, March 13, 2013, paras. 149-177; *Millicom v. Senegal*, Decision on Jurisdiction, July 16, 2010, paras. 94, 96-98.

²¹³ See e.g., *CSOB v. Slovakia*, Decision on Jurisdiction, May 24, 1999, paras. 53-55; *Lighthouse v. Timor-Leste*, Award, December 22, 2017, para. 145; *Millicom v. Senegal*, Decision on Jurisdiction, July 16, 2010, para. 95.

²¹⁴ See e.g., *Duke v. Ecuador*, Award, August 18, 2008, paras. 134-143; *Lighthouse v. Timor-Leste*, Award, December 22, 2017, paras. 228-282.

²¹⁵ *Aucoven v. Venezuela*, Decision on Jurisdiction, September 27, 2001, para. 87.

exceptions to the availability of the agreed method for settling the dispute “require[...] clear language”, and that waivers of ICSID jurisdiction cannot be implied in the absence of specific indications of the parties’ common intention.²¹⁶ In the same vein, in *CSOB v. Slovakia* the tribunal held that a good-faith reading of the arbitration agreement under Article 25(1) of the ICSID Convention does not require an arbitration agreement to be construed as automatically extending to all agreements comprising the broader transaction, especially for contracts with different parties.²¹⁷

163. *Consent in writing.* Under Article 25 of the Convention, consent to arbitration must be expressed “in writing.” No additional formalities like specific signature or notarization are required.²¹⁸ National laws’ formalities for arbitration agreements generally do not apply to ICSID agreements.²¹⁹
164. The requirement for written consent is met through paper documentation²²⁰ or other forms of written communication, such as fax and emails. Tribunals have typically required both parties to express consent in writing. However, one tribunal has indicated that consent can be demonstrated through conduct.²²¹
165. Parties can consent to ICSID arbitration in separate documents (rather than a single document) that contain, or refer to, equivalent arbitration undertakings. For instance, in *Amco v. Indonesia*, the investor’s consent was contained in the application that it filed with

²¹⁶ *Occidental v. Ecuador*, Decision on Jurisdiction, September 9, 2008, paras. 71-86 addressing the respondent’s argument that disputes relating to the *caducidad* of the contract were not only non-arbitrable under Ecuadorian law but also excluded from the scope of the ICSID arbitration clause by agreement of the parties.

²¹⁷ *CSOB v. Slovakia*, Decision of the Tribunal on the Respondent’s Further and Partial Objection to Jurisdiction, December 1, 2000, paras. 26-32. *See also* *Duke v. Peru*, Decision on Jurisdiction, February 1, 2006, para. 80 finding that an arbitration clause referring to disputes relating to “this Agreement” did not extend to other contracts entered into in connection with Duke Energy’s investment. *See, for* tribunals upholding jurisdiction over disputes connected to different contracts, *Klöckner v. Cameroon*, Award, October 21, 1983, paras. 19- 24; *SOABI v. Senegal*, Award, February 25, 1988, paras. 4.04-4.31. *See also* below Section V.C(i).

²¹⁸ *See for contrast*, New York Convention, Article II (2) requiring that arbitration agreements not contained in an exchange of letter or telegram be “signed by the parties”.

²¹⁹ *E.g., Amco v. Indonesia*, Decision on Jurisdiction, September 25, 1983, para. 23.

²²⁰ *E.g., Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, paras. 4.12-4.17 where the tribunal implicitly accepted that consent could be contained in court documents submitted by a party.

²²¹ *Lighthouse v. Timor-Leste*, Award, December 22, 2017, para. 148 where the tribunal found however that providing a document with an ICSID arbitration clause “without more [...] would not meet the requirement of consent under the ICSID Convention” (para. 268).

the State's authorities to establish the investment, while the State's consent was found to be in the State's approval of the investment application.²²²

(b) Date of consent

166. The date of consent is the date on which the parties agree to resolve their dispute(s) through ICSID arbitration. If the parties consent to arbitration at different times, consent is perfected on the date the last party provides its written consent.²²³ This is relevant when parties sign the same instrument on different dates, and when they consent to arbitration in separate documents at different times.²²⁴
167. If the parties' consent is conditional on a future event(s), their consent becomes effective once those conditions are met.²²⁵ The date of the consent is then the date on which the (last) condition is fulfilled.²²⁶
168. Parties can consent to arbitration either before or after a dispute arises between them.²²⁷ Under Article 36(3) of the Convention, the Secretary-General shall not register a request if the dispute is manifestly outside the jurisdiction of the Centre, because of lack of consent.²²⁸
169. Under the Convention, the "date of consent" is relevant for determining, among other matters:
- The investor's nationality under Article 25(2)(a) and (b) of the Convention (see Section III.E above).
 - The possibility of accessing local remedies or diplomatic protection for settling the dispute (Articles 26 and 27(1) of the Convention).

²²² *Amco v. Indonesia*, Decision on Jurisdiction, September 25, 1983, para. 14(ii); see also ED Report, para. 24; *Santa Elena v. Costa Rica*, Award, February 17, 2000, para. 26 where the claimant filed its own consent and the respondent consented via a letter to ICSID.

²²³ ICSID Institution Rules (1968, 1984, 2003, and 2006), Rule 2(3) and ICSID Institution Rules (2022), Rule 2(2)(b)(iii).

²²⁴ See ICSID Institution Rules (1968), Rule 2, Commentary M.

²²⁵ See e.g., *Holiday Inns v. Morocco*, in Lalive, *The First World Bank Arbitration*, pp. 667-668; *Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, para. 4.09; *Aucoven v. Venezuela*, Decision on Jurisdiction, September 27, 2001, para. 91.

²²⁶ See e.g., *Holiday Inns v. Morocco*, in Lalive, *The First World Bank Arbitration*, pp. 667-668; *Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, para. 4.09.

²²⁷ ED Report, para. 24.

²²⁸ ED Report, para. 24.

- The version of the arbitration rules applicable to the proceedings (Articles 33 and 44 of the Convention) (although the parties can reach an agreement on this point).
- Whether the parties may withdraw consent to arbitration unilaterally (Article 25(1), last sentence, of the Convention; *see* Section III.F(iv) below).
- The impact of a possible denunciation of the Convention on the parties' right to arbitration under the Convention (Article 72 of the Convention).

(c) Consent by the parties to the dispute

170. *Parties to the dispute.* Under Article 25 of the Convention, written consent to arbitration must be provided by the “parties to the dispute,” namely the natural or legal persons and the relevant State or State entity identified as “parties” in the request.
171. *Non-signatory investor – Real party to the contract.* Investors have frequently initiated ICSID arbitrations based on arbitration agreements concluded by other entities, arguing that they are the real parties to the contract. ICSID case law has recognized that a non-signatory investor may rely on an arbitration agreement where the signatory parties intended to allow such reliance. This may arise, for example, where:
- A non-signatory entity is explicitly identified in the contract as a “party” (despite not having signed the contract) or is explicitly granted rights and assumes obligations under the contract.²²⁹
 - A non-signatory entity is not expressly mentioned in the contract, but the signatory parties either (i) intended to extend to it the benefits of the contract;²³⁰ or (ii) were aware that the non-signatory was the real party to the contract.
172. Tribunals have often held that a parent company can rely on an arbitration clause signed by its subsidiary when the parent was actively involved in the negotiation, conclusion, and performance of the contract.²³¹ Conversely, subsidiaries that are not mentioned in the

²²⁹ *E.g., Noble Energy v. Ecuador*, Decision on Jurisdiction, March 5, 2008, paras. 110-116 where the tribunal found that a non-signatory to an agreement was, according to that agreement's terms, a party as a recipient of the investment.

²³⁰ *E.g., Amco v. Indonesia*, Decision on Jurisdiction, September 25, 1983, para. 24.

²³¹ *See e.g., Holiday Inns v. Morocco*, in Lalive, *The First World Bank Arbitration*, pp. 668 *et seq.*; *Klöckner v. Cameroon*, Award, October 21, 1983, para. 19; *AHS Niger v. Niger*, Decision on Jurisdiction, March 13, 2013, paras. 188-201.

contract, or that did not yet exist at the time the contract was concluded, are rarely permitted to rely on the parent company's consent, as they are separate entities.²³²

173. A non-signatory claimant bears the burden of proving that the original parties regarded it as a party to the contract. ICSID tribunals have declined jurisdiction where such intent has not been established. For instance, in *BSGR v. Guinea*, the respondent argued that the tribunal lacked jurisdiction over BSGR because it was not a party to the contract and held no rights therein. The claimants replied that BSG Resources Limited (BSGR, the parent company) should be deemed to be a party to the contract because Guinea had treated the parent company and its subsidiaries as a single group. The tribunal rejected jurisdiction finding that the claimants failed to demonstrate that the so-called group of companies doctrine could apply and had not provided sufficient evidence that BSGR played a material role in the negotiation, conclusion or performance of the contract.²³³
174. If the non-signatory is the real party to the contract, the date of consent is typically the date on which the signatory parties entered into the contract.²³⁴
175. *Non-signatory investor – Successors in the rights of a party.* Investors sometimes invoke an arbitration clause, claiming they acquired the original party's rights, either as universal successors²³⁵ or as singular successors.²³⁶

²³² See e.g., *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo* (ICSID Case No. ARB/98/7) ("**Banro v. DRC**"), Award, September 1, 2000, paras. 11-12; *LETCO v. Liberia*, Award, March 31, 1986, para. 16.16.

²³³ *BSGR v. Guinea*, Award, May 18, 2022, paras. 333-339. See also *LETCO v. Liberia*, Award, March 31, 1986, para. 16.16 finding that a non-signatory cannot rely on the arbitration clause.

²³⁴ See e.g., *Noble Energy v. Ecuador*, Decision on Jurisdiction, March 5, 2008, para. 183; *AHS Niger v. Niger*, Decision on Jurisdiction, March 13, 2013, paras. 190, 200-201. See above para. 167, regarding the date of consent in case of conditional consent.

²³⁵ Universal succession occurs when a natural or legal person succeeds in all rights and obligations of a party (which generally ceases to exist), such as, for instance, in cases of death of natural persons, merger, division, liquidation, and (potentially) bankruptcy of legal persons. E.g., *Noble Energy v. Ecuador*, Decision on Jurisdiction, March 5, 2008, paras. 87-109 where, prior to arbitration, Noble Energy merged with its wholly owned subsidiary, Samedan Oil Corporation – the contract signatory – with Noble Energy as the surviving entity. The tribunal determined that Delaware law governed the merger's validity and effects and, under that law, Noble Energy succeeded to all Samedan's rights and obligations.

²³⁶ Singular succession occurs when specific rights and obligations are voluntarily transferred to another entity, such in case of assignment of a contract. See e.g., *SCB (Hong Kong) v. Tanzania*, Award, October 11, 2019, paras. 57-175; *SCB (Hong Kong) v. TESCL*, Decision on Jurisdiction and Liability, February 12, 2014, paras. 112-113, 152-153; *Caratube v. Kazakhstan II*, Award, September 27, 2017, para. 626; *Amco v. Indonesia*, Decision on Jurisdiction, September 25, 1983, para. 31 finding that Pan American could benefit from the arbitration agreement entered into by Amco Asia in relation to its investment in PT Amco, as Amco Asia had transferred its PT Amco shares to Pan American.

176. For a successor or assignee investor to arbitrate claims under a contract, both the successor and the original party to the contract must have consented to arbitrate disputes through ICSID arbitration. The consent of the original party is often found in the contract (for instance, if the contract defines successors or assignees of a party as “party” to the contract)²³⁷ or in a later document.²³⁸ Successors typically give their consent in a separate document, after the original contract is signed and the succession occurs (before ICSID registers the request for arbitration).²³⁹ Tribunals have assessed whether the original party agrees to extend its consent to a successor or assignee with caution, focusing on the specific circumstances of each case.²⁴⁰
177. Tribunals have held that a successor may rely on the consent to ICSID arbitration given by the original parties only if (i) the original party had the right to access ICSID arbitration (for example, satisfying the requirements of Article 25);²⁴¹ and (ii) the assignment was valid under the applicable law.²⁴² Tribunals have confirmed that they retain the power to decide these issues pursuant to the competence-competence principle.²⁴³
178. *Non-signatory State, State subdivision, agency or entity.* In a limited number of cases, investors have sought to arbitrate contractual disputes against a non-signatory respondent (the host State or a State entity), relying on doctrines of agency, real party to the contract, and international attribution.²⁴⁴ Tribunals have adopted a cautious approach to these

²³⁷ See e.g., *Noble Energy v. Ecuador*, Decision on Jurisdiction, March 5, 2008, paras. 97-109; *Holiday Inns v. Morocco*, in *Lalive, The First World Bank Arbitration*, pp. 668 *et seq.*

²³⁸ E.g., *Amco v. Indonesia*, Decision on Jurisdiction, September 25, 1983, para. 31.

²³⁹ E.g., *Noble Energy v. Ecuador*, Decision on Jurisdiction, March 5, 2008, para. 183. The date of the parties’ consent under Article 25 is the date on which the last party consents. See above para. 166.

²⁴⁰ E.g., *Amco v. Indonesia*, Decision on Jurisdiction, September 25, 1983, paras. 27-31 and Award, November 20, 1984, paras. 41-46 where PT Amco sought permission from Indonesia to transfer shares to Pan American Development Ltd., years after initially consenting to arbitration. The exchanges did not mention ICSID arbitration, and Indonesia argued that the share transfer permission did not imply consent to ICSID arbitration. The tribunal disagreed, stating that the government’s approval meant that the transferee acquired all rights attached to the shares, including arbitration rights, unless explicitly excluded.

²⁴¹ E.g., *Banro v. DRC*, Award, September 1, 2000, para. 5.

²⁴² See e.g., *SCB (Hong Kong) v. TESCL*, Decision on Jurisdiction and Liability, February 12, 2014, paras. 152-153; *Noble Energy v. Ecuador*, Decision on Jurisdiction, March 5, 2008, paras. 87-89.

²⁴³ E.g., *SIREXM v. Burkina Faso*, Award, January 19, 2000, para. 4.13.

²⁴⁴ See e.g., *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, paras. 236-256; *Chevron v. Bangladesh*, Award, May 17, 2010, paras. 129-149; *East Kalimantan v. PT Kaltim Prima Coal*, Award, December 28, 2009, paras. 132-151, 173-202 denying jurisdiction because GPEK failed to prove that it could rely on the arbitration clause. See above Section III.D(ii)(b).

arguments and have declined jurisdiction when it was not demonstrated that the non-signatory respondent had consented in writing to arbitration.²⁴⁵

179. In *Niko v. Bangladesh*, the claimant brought claims against Petrobangla, a statutory corporation, and BAPEX, a wholly-owned subsidiary of Petrobangla incorporated in Bangladesh, as well as against Bangladesh itself, based on two contracts concluded with Petrobangla and BAPEX. The tribunal declined jurisdiction over the State of Bangladesh, finding that it was not a party to the contracts, for three main reasons. First, the tribunal held that Petrobangla and BAPEX had not concluded the contracts as agents of the State. Rather, they were expressly identified in the contracts as parties in their own right, and not as signatories acting on behalf of Bangladesh. Second, the tribunal found that the claimant had failed to demonstrate that Bangladesh intended to be bound by the ICSID arbitration clauses signed by Petrobangla and BAPEX, notwithstanding the State's substantial involvement in the negotiation of the contracts. Third, the tribunal rejected the claimant's attribution arguments, finding that rules on attribution under international law cannot, by themselves, establish a State's consent to arbitrate with an investor.²⁴⁶
180. *Capacity to enter into an arbitration agreement*. The ICSID Convention does not impose any capacity requirements for parties entering an arbitration agreement. Some respondents have challenged a claimant's capacity to enter into an investment contract and its arbitration clause, because the signatory entity was not yet established at the time of the contract. ICSID case law has addressed these issues under the applicable domestic company law and international law, dismissing "formalistic arguments" when it was evident that the parties reasonably anticipated ICSID jurisdiction over the company.²⁴⁷
181. In several cases, respondents have contested the tribunal's jurisdiction, arguing that they lacked the capacity to enter into the contract under their own laws. This issue is explored

²⁴⁵ See e.g., *Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, para. 4.17; *AHG v. Iraq*, Award, September 30, 2022, para. 127 "[...] for purposes of the Respondent's ICSID Rule 41(5) Application, the Tribunal has assumed that the Republic of Iraq can be deemed to be a real party to the Rehabilitation Contract. The question, then, is whether that is enough to establish Iraq's consent to ICSID arbitration under the Rehabilitation Contract. The Tribunal finds in the negative [...]" ; see also para. 133 where based on the interpretation of the arbitration clause on the Rehabilitation Contract the tribunal concluded that "the Claimant's argument that Article 26(2) of the Rehabilitation Contract contains Iraq's consent to ICSID arbitration is manifestly without legal merit."

²⁴⁶ *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, paras. 228-256; see contra, *Chevron v. Bangladesh*, Award, May 17, 2010, paras. 148-149, where the tribunal concluded that Bangladesh consented to ICSID arbitration through the actions of Petrobangla.

²⁴⁷ See e.g., *Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, paras. 6.29, 6.27; *Holiday Inns v. Morocco*, in Lalive, *The First World Bank Arbitration*, pp. 667-668.

in Section III.F(iii) below, as this argument is typically used to challenge the validity of the arbitration agreement.

182. Parties may also consent to arbitration through representatives, agents, party organs, or separate entities acting on their behalf. The ICSID Convention does not prescribe any formal requirements for authorizing agents or representatives to enter into an arbitration agreement (such as powers of attorney or corporate resolutions).²⁴⁸ The existence and scope of a party's representation are generally assessed under the law applicable to that party.²⁴⁹

(ii) Separability/severability/autonomy of the arbitration clause

183. The principle of separability (or severability), pursuant to which an arbitration clause is independent from the contract of which it forms part, is widely accepted in domestic arbitration laws. Although not explicitly stated in the ICSID Convention, ICSID case law has consistently endorsed this principle, relying on its well-established character,²⁵⁰ and general legal principles.²⁵¹
184. The principle of separability has several consequences, including that:
- The law applicable to the arbitration clause can be different from the law governing the contract (*see* Section a above);
 - The existence, validity, and legality of the arbitration clause must be assessed independently from the existence, validity and legality of the contract which contains it, and the arbitration clause may survive the termination or invalidity of the contract;²⁵² and
 - Corruption affecting the contract does not, *per se*, invalidate the arbitration clause nor deprive the tribunal of jurisdiction (*see* Section III.F(iii) below).

²⁴⁸ *E.g., Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, para. 4.12 on the authority to represent the State when entering an arbitration agreement.

²⁴⁹ *E.g., Noble Energy v. Ecuador*, Decision on Jurisdiction, March 5, 2008, paras. 181-182.

²⁵⁰ *See e.g., RSM v. Central Africa*, Decision on Jurisdiction and Liability, December 7, 2010, para. 71; *SIREXM v. Burkina Faso*, Award, January 19, 2000, paras. 3.04, 4.13; *Duke v. Peru*, Decision on Annulment, March 1, 2011, para. 131.

²⁵¹ *E.g., MMS v. Central Africa*, Award, May 12, 2011, para. 152; *see also* paras. 148-155.

²⁵² *E.g., SIREXM v. Burkina Faso*, Award, January 19, 2000, para. 3.04.

(iii) Validity and survival of ICSID arbitration agreements

185. The ICSID Convention does not specify any validity requirements for arbitration agreements (except for the “in writing” requirement; *see* Section III.F(i)(a) above).
186. States have frequently sought to challenge the validity of ICSID arbitration agreements by arguing that their domestic law prohibits them from arbitrating certain disputes or from entering into contracts containing an arbitration clause.²⁵³ ICSID tribunals have consistently rejected such arguments, emphasizing that a State may not rely on its internal law to evade its consent to arbitration under the ICSID Convention, as doing so would be contrary to principles of good faith and international public policy.²⁵⁴
187. Respondent States have, at times, contested the validity of the underlying contract without specifically challenging the arbitration clause itself. Applying the separability doctrine, tribunals have consistently held that the arbitration agreement stands independently and, therefore, even where the contract is void or terminated, the arbitration agreement remains valid and operative.²⁵⁵ Tribunals have, for instance, generally considered the argument that a contract was obtained through corruption as a challenge to the admissibility or merits of the claims, rather than as an objection to the validity of the contract and the arbitration clause therein.²⁵⁶

²⁵³ *See e.g., Aucoven v. Venezuela*, Award, September 23, 2003, paras. 89-90 where Venezuela argued that the tribunal could not decide over a dispute concerning the termination of the concession because, under Venezuelan law (the law governing the concession), matters related to termination were to be reserved to Venezuelan courts; *Millicon v. Senegal*, Decision on Jurisdiction, July 16, 2010, paras. 92, 101-102 where the State argued that Senegal laws applicable to the concession barred it from entering into an arbitration agreement relating to the subject matter of the concession.

²⁵⁴ *See e.g., Millicon v. Senegal*, Decision on Jurisdiction, July 16, 2010, para. 103; *Aucoven v. Venezuela*, Award, September 23, 2003, paras. 91, 200-208; *Occidental v. Ecuador*, Decision on Jurisdiction, September 9, 2008, para. 86; *Transgabonais v. Gabon*, Decision on Jurisdiction, December 19, 2005, para. 24 where the respondent argued that the arbitration clause in the contract was invalid because, under Gabonese law, the contract qualified as an administrative contract. The tribunal rejected this argument, finding that the respondent “cannot claim either that the arbitration clause is paralyzed due to the administrative nature of the contract. Indeed, Article 25 of the Washington Convention applies regardless of the nature of the contract in question. To require that it not be administrative would be to add a condition that does not exist. Furthermore, it is a well-established rule that a State cannot invoke its domestic law in order to escape its obligations arising under international law.” (translation by ICSID).

²⁵⁵ *E.g., World Duty Free v. Kenya*, Award, October 4, 2006, para. 187.

²⁵⁶ *See e.g., World Duty Free v. Kenya*, Award, October 4, 2006, paras. 137-157, 188; *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, paras. 430-485; *BSGR v. Guinea*, Award, May 18, 2022, para. 486.

188. Tribunals have upheld jurisdiction in cases where the respondent argued that the contract was no longer in force at the time the request for arbitration was filed, noting that the termination of the contract does not entail the termination of the arbitration agreement.²⁵⁷

(iv) *Effects of an arbitration agreement*

189. Pursuant to the last sentence of Article 25(1) of the Convention, once consent to arbitration has been given, it cannot be unilaterally withdrawn. Unilateral repudiations of an arbitration agreement – irrespective of the form they may take – do not affect its validity.²⁵⁸ One tribunal held that a State’s notification under Article 25(4) of the Convention, excluding disputes relating to mineral or natural resource investments from the Centre’s jurisdiction, cannot deprive the Centre of its jurisdiction over a dispute covered by an ICSID arbitration clause in a contract concluded before the notification.²⁵⁹
190. *Modification, withdrawal and termination.* Parties can jointly modify, withdraw, or terminate an ICSID arbitration agreement. Parties may also jointly terminate or withdraw their consent to ICSID arbitration, explicitly and possibly implicitly, provided that their conduct clearly evidences such intent. For example, in *Klöckner v. Cameroon*, the tribunal found that the absence of an ICSID arbitration clause in a subsequent contract between the same parties could not be interpreted as an implicit withdrawal of the earlier ICSID arbitration agreement in light of the circumstances of the case (*see* Section III.F(i)(a) above). Any amendment to an ICSID arbitration agreement should be documented in writing, as amended consent to ICSID must be given in writing under Article 25 of the Convention.

IV. MERITS IN CONTRACT-BASED ICSID CONVENTION ARBITRATION

191. The ICSID Convention and the ICSID Rules and Regulations do not establish substantive standards for the protection of foreign investment. Their primary purpose is to provide a procedural framework for resolving investment disputes between investors and States, whether those disputes arise from contracts, investment laws, or investment treaties.²⁶⁰
192. For the purposes of this paper, ICSID has reviewed the merits of contract-based cases in addition to other issues directly related to the Convention or the ICSID Rules. On that basis,

²⁵⁷ *E.g., Millicom v. Senegal*, Decision on Jurisdiction, July 16, 2010, para. 91.

²⁵⁸ *See e.g., Schreuer*, Article 25, para. 1096; *Repsol v. Petroecuador*, Decision on Jurisdiction, January 23, 2003, para. 43.

²⁵⁹ *Alcoa Minerals v. Jamaica*, Decision on Jurisdiction and Competence, July 6, 1975.

²⁶⁰ Schreuer, Preamble, para. 15.

ICSID can offer general observations on tribunals' practice when analyzing the substance of contractual claims.

193. In particular, this Section reviews the laws and rules applied by contract-based ICSID tribunals in deciding the merits of contract-based disputes; the categories of claims most frequently raised, as well as the principal defenses used by States when they are respondents; and the remedies sought and awarded.

A. LAW APPLICABLE TO THE MERITS

194. The sole provision in the Convention concerning the merits of disputes is Article 42. This Article requires ICSID tribunals to decide disputes in accordance with the rules of law agreed upon by the parties.²⁶¹ In the absence of such agreement, Article 42 provides a default rule, directing tribunals to apply the law of the host State together with applicable rules of international law.
195. Article 42 strikes a careful balance between the interests of the host State and the investor: on the one hand, parties remain free to choose the law governing the merits of their dispute; on the other hand, if no agreement is reached, the Convention recognizes the role of the law of the host State where the investment is made, while also acknowledging that the State may also be bound by rules of international law as may be applicable.

(i) *The parties' choice of law applicable to the merits*

196. The first sentence of Article 42(1) confers broad freedom on parties to agree on the applicable law. (See [ICSID Model Clause](#) on Governing/Applicable Law.)
197. *Critical date.* The Convention does not specify a timing requirement for choosing the applicable law. **Contracts cited in ICSID cases commonly include an applicable law clause,** reflecting the importance parties place on predictable governing law in long-term investment contracts.
198. *Modalities of choice.* Article 42(1) does not prescribe the form of the agreement. The choice of law must be clear and unequivocal.²⁶² **In most cases, the choice is explicit.** Most contracts include an applicable law clause, specifying that the contract shall be "governed by" the law or rules of the parties' choosing. Less commonly, the parties incorporate the

²⁶¹ See e.g., *CSOB v. Slovakia*, Award, December 29, 2004, paras. 52, 62-63; *Caraveli Cotaruse Transmisora de Energia S.A.C. v. Republic of Peru* (ICSID Case No. ARB/11/9) ("*Caraveli v. Peru*"), Award, April 15, 2013, paras. 107-110.

²⁶² E.g., *Santa Elena v. Costa Rica*, Award, February 17, 2000, para. 63.

choice of rules into the dispute resolution clause, directing the tribunal to decide the dispute “in accordance with” or to “apply” the specified rules. Some contract-based tribunals have also recognized implicit choices of law, inferred from the facts and circumstances of the contractual relationship.²⁶³

199. *Scope of choice.* Pursuant to the first sentence of Article 42(1), parties have autonomy to agree on the rules of law applicable to their dispute.
200. Article 42(1) allows parties broad freedom to choose the law governing their contract or dispute, without requiring a connection to the chosen law or limiting them to domestic laws.²⁶⁴ Although uncommon, they can select any rules or principles, such as the UNIDROIT Principles,²⁶⁵ or apply different laws to different issues.²⁶⁶ Parties can also specify the governing law as it existed at a particular date (see below on stabilization clauses).²⁶⁷
201. Contracts may designate a specific statute or regulation from a domestic legal system as governing the contract.²⁶⁸ Some early cases treated such references as a general choice of law encompassing the entire body of the State’s law.²⁶⁹ However, at least one tribunal has rejected that interpretation, holding that a reference to a specific legal instrument does not evidence *per se* the parties’ intent to apply all domestic legislation beyond the instrument cited.²⁷⁰ To avoid complex inquiries into their intention, parties should state as clearly as possible which rules of law apply to their contract.

²⁶³ See e.g., *LETCO v. Liberia*, Award, March 31, 1986, paras. 35-36; *CSOB v. Slovakia*, Award, December 29, 2004, para. 63. See also for this principle discussed in the context of a case brought under an investment law *Sudapet Company Limited v. Republic of South Sudan* (ICSID Case No. ARB/12/26) (“*Sudapet v. South Sudan*”), Award, September 30, 2016, para. 395.

²⁶⁴ Schreuer, Article 42, para. 75.

²⁶⁵ E.g., *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18) (“*Lemire v. Ukraine*”), Decision on Jurisdiction and Liability, January 14, 2010, paras. 106-111.

²⁶⁶ E.g., *SCB (Hong Kong) v. Tanzania*, Award, October 11, 2019, paras. 9-10, 12-13, 15.

²⁶⁷ See e.g., *MINE v. Guinea*, Decision on Annulment, December 22, 1989, paras. 6.31-6.33; *Grenada Private Power & WRB v. Grenada*, Award, March 19, 2020, paras. 211-215.

²⁶⁸ E.g., *Aucoven v. Venezuela*, Award, September 23, 2003, para. 96.

²⁶⁹ E.g., *LETCO v. Liberia*, Award, March 31, 1986, paras. 35-36.

²⁷⁰ *Aucoven v. Venezuela*, Award, September 23, 2003, paras. 97-100 where the concession agreement was governed by two specific instruments – Decree Law 138 and Executive Decree No. 502 – along with “any other laws, regulations, or other documents as may be applicable.” Venezuela argued that this language amounted to a general choice of Venezuelan law, while the investor denied that the reference to these specific instruments could be construed as such. The tribunal held that Article 42(1) allows parties to choose specific “rules of law,” rather than an entire legal system. It found that the concession contained a valid partial choice of law, rejected the view that the reference to the two instruments was to be interpreted as a reference to the

202. Importantly, a dispute between the parties as to the specific rules applicable within a legal system would not invalidate their broader choice of law.²⁷¹
203. *Law of the host State*. In the majority of contract-based cases where the parties selected the applicable law, they chose the host State's law (alone or in combination with other sources of law, including principles of international or transnational law).²⁷² In a limited number of older contracts, parties agreed to define their content by reference to another legal system.²⁷³ Some contracts are of administrative nature and can be subject to the host State's administrative law.²⁷⁴ Some tribunals have supplemented the parties' chosen domestic law with international law.²⁷⁵ Others have interpreted domestic law as referring to international law.²⁷⁶

entire body of Venezuelan law. Save for the issues covered by the partial choice of law, the tribunal equated the parties' failure to ascertain mutual intent on the applicability of Venezuela law as a whole to an absence of general law choice and resorted to the second sentence of Article 42(1).

²⁷¹ E.g., *Transgabonais v. Gabon*, Award, March 7, 2008, para. 37 stating "According to its Article [...] [applicable law], the Concession Agreement shall be governed by and construed in accordance with Gabonese law. Both Parties accept that Gabonese law applies, even if they do not derive the same rules from it." (translation by ICSID).

²⁷² See e.g., *Mobil Oil v. New Zealand*, Judgment of the High Court of New Zealand, July 1, 1987, para. 8; *TANESCO v. IPTL*, Award, July 12, 2001, para. 51; *Perenco v. Ecuador*, Decision on Remaining Issues of Jurisdiction and on Liability, September 12, 2014, para. 318; *Pluspetrol v. Perupetro*, Award, May 21, 2015, para. 114.

²⁷³ E.g., *Atlantic Triton Company Limited v. People's Revolutionary Republic of Guinea* (ICSID Case No. ARB/84/1) ("*Atlantic Triton v. Guinea*"), Award, April 21, 1986 (ICSID Reports, Vol. 3, 1995), pp. 19, 33 where the contract provided the application of Guinean law, which the parties agreed was identical for the relevant provisions to the French law in force at the time of Guinea's independence. The tribunal referred to French law in its award.

²⁷⁴ E.g., *Transgabonais v. Gabon*, Decision on Jurisdiction, December 19, 2005, para. 24.

²⁷⁵ See e.g., *Aucoven v. Venezuela*, Award, September 23, 2003, para. 207 where, as explained above, the parties had effected a partial choice of law, and the tribunal resorted to the default rule in the second sentence of Article 42(1) for the issues not covered by the chosen instruments. Nevertheless, the tribunal affirmed that international law serves a corrective function even where the parties have effected a choice in favor of domestic law. See also *Elsamex v. Honduras*, Award, November 16, 2012, paras. 311, 315; *Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, paras. 331-335 where the contracts were governed by English law, but the tribunal noted that "customary international law exists and may be applied independently of any choice of law," even more so when the parties had not expressly excluded customary international law from the scope of their consent; *Caratube v. Kazakhstan II*, Award, September 27, 2017, paras. 284, 288, 290 finding a supplemental and corrective function to international law even where there was a choice of law by the parties in a contract.

²⁷⁶ E.g., *Togo Electricité v. Togo*, Award, August 10, 2010, paras. 137-138 where the contract was expressly governed by Togolese law, yet the tribunal concluded that the contract had to be construed within the framework of Togolese law, which it found includes international agreements entered into by Togo (including OHADA law) as well as principles of international law.

204. *Law of the investor's State*. The choice of the law of the investor's State appears to have been uncommon.²⁷⁷
205. *International, supranational and transnational law*. Parties frequently agree on the application of "general principles of law", "general principles of international law", transnational rules, or sector-specific principles, in conjunction with the host State's law.²⁷⁸ One tribunal has recognized that the parties' conduct may demonstrate an intention to apply such a combination of legal norms.²⁷⁹ Conversely, it is rare for parties to provide that a contract be governed solely by "international law" or "principles of international law" given that customary international law does not contain a comprehensive set of rules applicable to contracts. In at least one case, the parties agreed that OHADA law would govern their contract,²⁸⁰ and in another that the UNIDROIT Principles of International Commercial Contracts apply to their agreement.²⁸¹
206. *Contract-based rules*. Parties may also agree that certain provisions of the contract itself should govern the relationship and, where possible, prevail over the chosen domestic law.²⁸²

²⁷⁷ See e.g., *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14) ("*CDC v. Seychelles*"), Award, December 17, 2003, para. 43 where the agreement and its performance was governed by and construed in all respects in accordance with the laws of England, and the submissions presented by the parties proceeded on the basis that CDC's claim was to be resolved in accordance with English law.

²⁷⁸ See e.g., *AGIP v. Congo*, Award, November 30, 1979, para. 18 where the parties agreed that "[t]he law of the Congo, supplemented, if need be, by any principles of international law, will be applicable"; *Kaiser Bauxite Company v. Jamaica* (ICSID Case No. ARB/74/3) ("*Kaiser Bauxite v. Jamaica*"), Decision on Jurisdiction and Competence, July 6, 1975, para. 12; *Duke v. Ecuador*, Award, August 18, 2008, paras. 195-196; *BSGR v. Guinea*, Award, 18 May 2022, paras. 258-262 where the tribunal applied both Guinean law and international law to determine the legality and consequences of allegations of corruption. It did not consider Guinean criminal law because the proceedings were not aimed at establishing criminal liability and determined under international public policy that the claims were inadmissible as the investment was not protected under the BIT.

²⁷⁹ *CSOB v. Slovakia*, Award, December 29, 2004, para. 63 where, in addition to expressly submitting their contract to Czech private law, the parties also implicitly incorporated rules of international law when they stated that the contract was also governed by the relevant BIT.

²⁸⁰ Schreuer, Article 42, footnote 93 referring to *MMS v. Central Africa*, Award, May 12, 2011, paras. 291-295 where, considering the limited scope of OHADA law and the absence of provisions on expropriation in that law, the tribunal resorted to general principles of international law and customary international law.

²⁸¹ *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, January 14, 2010, para. 111.

²⁸² See e.g., *Grenada Private Power & WRB v. Grenada*, Award, March 19, 2020, para. 112; *MINE v. Guinea*, Decision on Annulment, December 22, 1989, paras. 1.03, 6.31, 6.40 where the parties agreed that the contract would constitute the law between them and, in case of lacuna, be supplemented by Guinean private law contained in the "*Code Civil de l'Union Française*"; *Loulo v. Mali*, Award, June 2, 2016, paras. 164-165, 172 where the parties agreed that, subject to provisions of public order, the contract would be the applicable law, and that the law of the host State in force at the time of the contract would only intervene insofar as the contract did not exhaustively address the issue.

207. *Law of a third State*. More rarely, parties agree on the application of the law of a third State, with no direct relation with either party or the dispute.²⁸³
208. *Applicable law to damages*. Parties can also specifically agree on how damages should be quantified and what rule(s) the tribunal should apply to damages issues, although such agreements do not seem to be common.²⁸⁴ **If the parties have chosen a law governing the contract or dispute, damages issues would generally be decided under that chosen law, unless the parties have agreed otherwise.** In the absence of a choice of law altogether, tribunals decide these issues in accordance with the second sentence of Article 42(1).²⁸⁵
209. **Tribunals also look at the law applicable to the merits to decide interest claims.**²⁸⁶ One tribunal awarded interest pursuant to the applicable host State law, and referred to the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (the “**ILC Articles on State Responsibility**”) and investment treaty cases to reinforce that interest is a component of full reparation.²⁸⁷

(ii) Law applicable to the merits in the absence of a choice of law

210. In the absence of the parties’ choice, the second sentence of Article 42(1) provides that tribunals **shall apply the law of the host State (including rules on the conflict of laws)** and such rules of international law as may be applicable.

²⁸³ See e.g., *QNB v. South Sudan*, Decision on Jurisdiction and Liability, January 5, 2024, para. 49 choosing English law; *World Duty Free v. Kenya*, Award, October 4, 2006, paras. 158-159 choosing Kenyan Law and English law (which presented no material difference on the points at issue).

²⁸⁴ E.g., *Pluspetrol v. Perupetro*, Award, May 21, 2015, paras. 114, 203, 206; see also Licence contract for the exploitation of hydrocarbons, Lot 56, between Perupetro S.A. and Pluspetrol Peru Corporation S.A., Hunt Oil Company of Peru L.L.C., Sucursal del Peru, SK Innovation, Sucursal Peruana, Tecpetrol del Perú S.A.C., Sonatrach Peru Corporation S.A.C., June 2004, Clause 21.1 providing that Peruvian law would govern the “content, performance, and other consequences that arise from [the contract].” (translation by ICSID).

²⁸⁵ E.g., *Aucoven v. Venezuela*, Award, September 23, 2003, paras. 96-97, 102-105, 340 where, after noting that the claimant’s lost profits claim was based on contractual provisions and Venezuelan law, and that neither party had argued incompatibility with international law, the tribunal held that contractual and Venezuelan law provisions set the standard for recovery of lost profits and that it would “merely refer to international practice as a matter of additional guidance”; see also paras. 388-397 on the issue of interest, the tribunal did not award compound interest because it concluded that “the applicable Venezuelan law combined with the pertinent contract provision does not allow compound interest and that international law does not require it.”

²⁸⁶ E.g., *Elsamex v. Honduras*, Award, November 16, 2012, paras. 854-856 where the State argued that there could not be interest for late payment because the contract did not expressly provide a right to interest. The tribunal disagreed given that, the law chosen by the parties, *i.e.*, Honduran law, did set out a legal right to interest for late payment. In a case where materials have not been published, the tribunal held that it could not order compound interest because the domestic law the parties had chosen to govern the contract prohibits interest capitalization.

²⁸⁷ *Lundin v. Tunisia I*, Award, December 22, 2015, paras. 385-386, 389 and footnote 166.

211. *Law of the host State*. Because Article 42 refers to the host State’s law, including its conflict of laws rules, tribunals frequently first examine the conflict rules to determine whether they refer to another legal system.²⁸⁸ This approach marks a departure from the first sentence of Article 42(1). If the conflict of law rules do not give rise to a *renvoi*, the tribunal applies the substantive rules of the host State’s law together with any applicable rules of international law.
212. *International law*. The Convention does not specify how to apply the host State’s law alongside international law, nor their relationship. The role of international law under the second sentence of Article 42(1) has been debated. Some tribunals regard international law as supplementary or corrective to the host State’s law,²⁸⁹ while others have read the provision as conferring discretion to apply municipal or international law depending on the issue to be resolved.²⁹⁰

(iii) *Agreement to decide in equity*

213. As corollary to the parties’ freedom to choose the law applicable to the merits, Article 42(3) of the Convention grants parties the choice to authorize the tribunal to decide *ex aequo et bono* (based on equity and fairness). As of December 31, 2025, only two ICSID tribunals had been authorized to decide *ex aequo et bono* in the cases of *Benvenuti & Bonfant v. Congo* and *Atlantic Triton v. Guinea*.²⁹¹

²⁸⁸ Some decisions have looked at the law most closely connected to the contract. See e.g., *Klöckner v. Cameroon*, Award, October 21, 1983, paras. 104-105 choosing the Cameroonian legal system that is based on French law; *SOABI v. Senegal*, Award, February 25, 1988, para. 5.02 choosing Senegalese administrative law; *S.A.R.L. Benvenuti & Bonfant v. People’s Republic of the Congo*, ICSID Case No. ARB/77/2 (“*Benvenuti & Bonfant v. Congo*”), Award, August 8, 1980, paras. 4.2-4.3 where the tribunal noted that Congolese law was applicable (as well as the principles of international law) but found that that “Congolese law applies to civil and commercial matters French law as it existed at the time of the accession of the country to independence.”

²⁸⁹ Schreuer, Article 42, paras. 274, 283-309. See e.g., *Aucoven v. Venezuela*, Award, September 23, 2003, paras. 102-103 where the tribunal considered that international law has a “corrective and supplemental function” and held that in case of conflict between Venezuelan and international law, the latter would prevail; *Santa Elena v. Costa Rica*, Award, February 17, 2000, paras. 64-66 deciding that international law should prevail in case of inconsistency with Costa Rican law; *Duke v. Peru*, Decision on Jurisdiction, February 1, 2006, paras. 160-162; see also *contra*, *Amco v. Indonesia*, Award (Resubmission), June 5, 1990, para. 40 where the tribunal criticized the approach that assigns international law a mere supplemental function; *contra*, *Amco v. Indonesia*, Decision on Annulment (Resubmission), December 17, 1992, paras. 7.24-7.26.

²⁹⁰ See e.g., *Burlington Resources, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5) (“*Burlington v. Ecuador*”), Decision on Counterclaims, February 7, 2017, para. 74; *BSGR v. Guinea*, Award, May 18, 2022, para. 456.

²⁹¹ *Atlantic Triton v. Guinea*, Award, April 21, 1986 (ICSID Reports, Vol. 3, 1995); *Benvenuti & Bonfant v. Congo*, Award, August 8, 1980.

214. *Critical date.* The parties' agreement can be made before the dispute arises, as part of the dispute resolution clause,²⁹² or once a dispute has arisen.²⁹³
215. *Modalities of choice.* The parties' agreement must be explicit.²⁹⁴ An *ex aequo et bono* ruling without the parties' express authorization would potentially expose the award to annulment on grounds of manifest excess of powers.²⁹⁵
216. *Scope of choice.* Article 42(3) does not preclude the tribunal from applying rules of law in addition to equity. The tribunal can apply the law, depart from it, or apply other rules of law.²⁹⁶

B. DISPUTES ON THE MERITS

217. *Claims in contract-based disputes.* Contract-based ICSID disputes arise from claims brought by a claimant, most commonly, though not always, an investor. These claims are based on a contract (or contracts) whose nature or operation may qualify as an investment.
218. *Contract-claims vs treaty-claims – Terminology.* The expression “contract claims” is often used in the context of treaty-based arbitration to describe claims relating to a respondent State’s contractual obligations toward an investor.²⁹⁷ In such cases, the investor alleges that a breach of such contractual obligations by the State constitutes a breach of an investment treaty. To make that argument, the investor generally relies either on: (i) general standards of protection found in investment treaties, such as the *fair and equitable treatment* standard or protection against unlawful expropriation, and argues that these standards require adherence to investment-related contractual obligations; or (ii) provisions in investment treaties that are deemed to specifically require adherence to contractual obligations, such as “observance of undertakings clauses” or “umbrella clauses”.²⁹⁸ The question of how,

²⁹² E.g., *Atlantic Triton v. Guinea*, Award, April 21, 1986 (ICSID Reports, Vol. 3, 1995), pp. 17-19 where the dispute was to be decided *ex aequo bono* and Guinean law was the applicable law to the contract.

²⁹³ E.g., *Benvenuti & Bonfant v. Congo*, Award, August 8, 1980, para. 1.22.

²⁹⁴ Schreuer, Article 42, para. 333.

²⁹⁵ Schreuer, Article 42, para. 340.

²⁹⁶ Schreuer, Article 42, para. 348; e.g., *Benvenuti & Bonfant v. Congo*, Award, August 8, 1980, paras. 4.97- 4.98.

²⁹⁷ Dolzer, Kriebaum, and Schreuer, *Principles of International Investment Law*, 3rd ed., (Oxford University Press, 2022) (“**Dolzer, Kriebaum, and Schreuer, Principles of International Investment Law**”), p. 395. See also Konstantin, *Treaty Claims vs. Contractual Claims in ISDS* (Jus Mundi Online Publication, 2026).

²⁹⁸ Such clauses are generally defined as provisions in investment treaties that guarantee the observance of obligations assumed by the host State vis-à-vis the investor. See Dolzer, Kriebaum, and Schreuer, *Principles of International Investment Law*, p. 272 noting that “these clauses are referred to as ‘umbrella clauses’ because they bring contractual and other commitments under the treaty’s protective umbrella.”

and under what circumstances, a breach of contract may amount to a violation of these standards or clauses in investment treaties falls outside the scope of this paper.²⁹⁹ From a terminological perspective, however, it is important to distinguish contract claims raised in a treaty context from disputes that arise directly under a contract. For the purposes of this paper, unless otherwise specified, the term “contract claims” refers to claims brought in contract-based disputes.

219. *Different types of claims in contract-based disputes.* Contract-based disputes raise a wide range of issues on the merits. Unlike treaty-based disputes, which often concern recurring standards of treatment found in investment treaties, contract-based disputes vary significantly from case to case and depend on multiple factors. These include the type of contract at issue, whether the contract remains in force, the governing law, and whether the contract incorporates or refers to additional legal protections available to the parties.
220. To facilitate the analysis of these claims, this Section identifies three categories of contract claims: (i) claims arising from the alleged non-performance of the contract, whether in whole or in part; (ii) claims concerning breaches of stabilization clauses; and (iii) claims relating to disputes that combine an alleged breach of contract with the violation of other obligations under another instrument of consent. In addition, this Section also addresses (iv) common defenses and counterclaims raised by respondents.

(i) Non-performance of the contract

221. *Breach of one or more contractual obligations.* The most typical claim raised in contract-based disputes is a claim for breach of contract, where the claimant alleges that the respondent has failed to fulfill one or more obligations arising under the contract. Contract-based arbitral tribunals have therefore routinely examined issues of contractual liability. Examples of such claims include:
- A dispute arising from a highway concession, where the claimant argued that the State breached its contractual obligations by refusing to make agreed toll adjustments said to be necessary for the financial viability of the project.³⁰⁰

²⁹⁹ This issue has given rise to many commentaries. See e.g., Alexandrov, Breaches of Contract and Breaches of Treaty (Journal of World Investment & Trade, Volume 5, 2004), pp. 555-577; Crawford, Treaty and Contract in Investment Arbitration (Arbitration International, Vol. 24, Issue 3, 2008), pp. 351-374; Tawil, The Distinction Between Contract Claims and Treaty Claims: An Overview (International Council for Commercial Arbitration Congress Series, Vol. 13, 2006) (“Tawil, The distinction Between Contract Claims and Treaty Claims”), pp. 492-544.

³⁰⁰ *Aucoven v. Venezuela*, Award, September 23, 2003, para. 83.

- A dispute arising from a railway concession, where the claimant alleged breaches of obligations relating to: (i) the maintenance of the railway network; (ii) the applicable financial conditions; (iii) the submission of activity reports; and (iv) the independent performance guarantee to be provided by the investor to the State.³⁰¹
 - A dispute arising from a power purchase agreement and related instruments, where the claimant alleged that the State failed to comply with contractual obligations governing payment, guarantees, and the operation of the power project.³⁰²
 - A dispute arising from a gold mining concession, where the claimant argued that the State failed to honor the applicable security commitments.³⁰³
 - A dispute arising from a loan agreement, where the claimant alleged breaches of repayment obligations, including the failure to repay principal and interest as contractually required.³⁰⁴
222. In cases where the claim relates to a specific breach of contractual obligations, the contract will typically remain in force despite the existence of a dispute. **The initiation of arbitral proceedings, or the issuance of an award, does not necessarily end the contractual relationship.** In many cases, the dispute concerns a particular obligation, while the parties continue their business relationship under the contract.³⁰⁵

³⁰¹ *Transgabonais v. Gabon*, Award, March 7, 2008, para. 50.

³⁰² *Cambodia Power v. Cambodia*, Award, April 22, 2013, para. 131.

³⁰³ *AngloGold Ashanti (Ghana) Limited v. Republic of Ghana* (ICSID Case No. ARB/16/15), Order of the Tribunal Taking Note of the Discontinuance of the Proceeding, August 7, 2018, where the case was ultimately resolved amicably and the parties concluded a confidential settlement agreement. Details on the claims were made available through various public reports.

³⁰⁴ *QNB v. South Sudan*, Decision on Jurisdiction and Liability, January 5, 2024, paras. 311-334 where the dispute arose out of a loan facility agreement concluded between the claimant and the respondents, and which provided funds to repay an earlier loan the claimant had granted to the respondent, and to support the balance of payments of that loan. The claimant argued that the respondent failed to make payment on the first and subsequent due dates under the agreed schedule for repayments.

³⁰⁵ See e.g., *Desarrollo Vial de los Andes S.A.C. v. Republic of Peru* (ICSID Case No. ARB/20/18). This case arose out of a road concession granted by Peru to the investor. The claimant alleged that Peru breached several contractual obligations, principally by failing to timely constitute and appoint committees to supervise road construction works and by not exhausting required efforts to enable operation toll stations. The tribunal found that Peru breached several of its obligation under the contract and ordered the respondent to pay the amounts that were not collected at the toll stations, in application of the concession agreement. According to public sources, the road concession remains active and in operation. The investor continues to manage toll collection and road operation and maintenance under OSITRAN's (Peru's transport infrastructure regulator) supervision (see <https://www.ositran.gob.pe/anterior/carreteras/iirsa-centro-t2/>). See also *Autopista del Norte S.A.C. v. Republic of Peru* (ICSID Case No. ARB/18/17), Award, June 30, 2022. The award in this case is not public. However, it is public knowledge that the arbitration concerned a concession contract for Road Network No. 4 in Peru. Based on publicly available, official sources, this concession contract is still in force.

223. Typically, where the claim relates to a breach of contract, the tribunal will need to determine, first, whether there is such a breach and, second, what are the legal consequences flowing from this breach under the contract itself and under the applicable law, considering the relief requested by the party.³⁰⁶
224. Contract-based conciliations likewise most often arise out of alleged contractual breaches. A significant number of the 13 ICSID contract-based conciliation proceedings have concerned disagreements between the parties regarding the performance of contractual obligations and how the contractual equilibrium could be restored, with a view to enabling the continuation or adjustment of the contractual relationship.
225. *Non-renewal, cancellation, revocation, or termination of the contract.* Another important category of contract-based disputes concerns the consequences and/or the validity of the non-renewal, cancellation or termination of the contract. In such cases, claimants typically allege that the non-renewal, revocation, cancellation or termination was wrongful either because it was inconsistent with the terms of the contract itself or because it violated the law applicable to the contract and seek compensation for the resulting damages.³⁰⁷
226. *Other claims relating to the performance of the contract.* In a more limited number of cases, claimants have neither identified a specific breach of the contract by the respondent nor argued that the State wrongfully terminated the contract. Instead, they have relied on the contract and the applicable law to argue that certain of the State's measures were

In particular, Autopista del Norte S.A.C. is still listed as the concessionaire for the Road Network No. 4 on OSITRAN's website (*see* <http://ositran.gob.pe/anterior/carreteras/red-vial-4/>).

³⁰⁶ See e.g., *QNB v. South Sudan*, Decision on Jurisdiction and Liability, January 5, 2024, paras. 311-334 where the tribunal found that the respondents' failure to make payments as scheduled constituted a breach of contract and that such failure was not excused under the law applicable to the contract; *Metro de Lima v. Peru I*, Decision on Jurisdiction and Liability, July 6, 2021, where the claimant alleged that Peru had breached specific provisions of the concession contract for the Lima Metro Line 2 project. Relying on Peruvian law and its interpretation of the provisions of the contract, the tribunal recognized Peru's liability in principle, reserving quantification of damages for a later phase. The tribunal issued its award on March 21, 2024. This award is currently subject to revision and annulment proceedings.

³⁰⁷ See e.g., *SOABI v. Senegal*, Award, February 25, 1988, paras. 3.01-3.08 where the dispute arose from a low-income housing construction project in Senegal involving several contractual agreements between the investor and the State. The investor claimed that disagreements over performance of the agreements led to the termination of the housing scheme at the core of the project. The investor sought monetary compensation for alleged breaches of the agreements by Senegal, as well as broader damages tied to the termination of the housing scheme. See also *LETCO v. Liberia*, Award, March 31, 1986, paras. 38-56 where the dispute arose from a forest products utilization contract for a long-term timber concession. Following a change in the government, Liberia's Forestry Development Authority unilaterally reduced the investor's concession area and later cancelled the contract. The investor claimed these actions violated notice-and-cure and other contractual provisions and amounted to an improper revocation. See also *Banro v. DRC*, Introductory Note, September 1, 2000, where the dispute arose from the DRC's repeal of decrees underpinning a mining convention granted to the investors. The case was dismissed on jurisdiction, but it represents a typical example of an investor seeking relief and compensation after the cancellation of mining rights.

inconsistent with the contract and the legal framework surrounding it, or that the tribunal should intervene to maintain the economic equilibrium of the contract.³⁰⁸

227. *Reference to domestic and international law.* When articulating claims based on the non-performance of contracts, investors routinely rely on the law governing the contract in support of their claims, for instance to interpret the obligations contained in the contract, or because the contractual obligations are tied to the law governing the contract.³⁰⁹
228. In several cases, investors have also invoked the governing law of the contract as a distinct cause of action or legal basis to complement their claims for breach of specific contractual obligations. Indeed, the contract and its governing law operate together, unlike treaty-based disputes, where breaches usually arise solely from the obligations set out in the investment treaty, interpreted in accordance with the law applicable to that treaty. For instance:
- In a dispute arising out of the breach and subsequent termination of a concession contract, governed by Peruvian law, for the design, construction, and operation of an airport in Peru,³¹⁰ the claimants advanced several contractual claims under the concession agreement. In addition, the claimants argued that the limitation of liability

³⁰⁸ See e.g., *Niko Resources v. Bangladesh I*, where the dispute arose after Petrobangla (Bangladesh's national oil company) and BAPEX, its subsidiary, initiated domestic court proceedings seeking damages in connection with two blowouts at gas fields governed by a joint-venture energy project agreement (the "JVA"). Niko initiated ICSID arbitration relying on the JVA, arguing that this agreement referred all disputes arising thereunder to ICSID, and requested a declaration of non-liability before the ICSID tribunal. See also *Caraveli v. Peru*, Award, April 15, 2013, where the investor initiated ICSID arbitration against Peru on the basis of two electricity transmission concession contracts. The investor argued that the 2008 financial crisis constituted a case of *excesiva onerosidad* (excessive onerosness) under Peruvian law, entitling it to a renegotiation and readjustment of the concession contracts to restore economic equilibrium. The tribunal rejected these arguments, finding that the investor's right to invoke *excesiva onerosidad* had lapsed under the Peruvian Civil Code before the arbitration was initiated and that, in any event, the investor had not met the threshold required to establish that the 2008 financial crisis constituted a truly unforeseeable event within the meaning of the *excesiva onerosidad* doctrine. It is also worth noting that the case did not ultimately end with the 2013 award alone. The Spanish shareholders of *CCTE* had separately initiated a related ICSID arbitration *Isolux Corsán Concesiones S.A. v. Republic of Peru* (ICSID Case No. ARB/12/5) under the Spain-Peru BIT. In December 2013, these two proceedings, and a third case initiated by Peru as claimant, *Peru v. Caraveli*, were resolved through an "Integral Agreement."

³⁰⁹ See e.g., *Sadiola v. Mali*, Award, February 25, 2003, paras. 85, 91 where the claimant relied on Malian domestic law to interpret a mining convention with the host State. The claimant invoked principles from the obligations to support its claim regarding fiscal exemptions contained in the convention. The tribunal accepted this domestic-law-based interpretive approach and found the respondent's measures contrary to the convention. See also *QNB v. South Sudan*, Decision on Jurisdiction and Liability, January 5, 2024, paras. 49-51, 302-334 where the tribunal applied English law, which was the law designated as law applicable under the contract, to interpret the contractual provisions invoked by the claimant and to eventually determine that the State had breached such provisions.

³¹⁰ *Kuntur Wasi v. Peru*, Decision on Jurisdiction and Liability, August 11, 2023, para. 1 where the claimant initiated this case on the basis of three instruments of consent: the concession contract, a guarantee agreement, and the Argentina-Peru BIT.

clause contained in the contract, which notably excluded the recovery of lost profits, was unenforceable under Peruvian law because, as they alleged, the respondent had engaged in willful misconduct (*dolo*) and gross negligence (*culpa inexcusable*).³¹¹ The tribunal rejected this separate claim, finding that while the claimants had established a breach of contract, they had failed to demonstrate willful misconduct or gross negligence, which required a particularly high standard of proof.³¹² This finding had implications for damages. Had the tribunal found that the respondent had engaged in willful misconduct or gross negligence, the liability limitation would not have applied, and the claimants would have been entitled to recover lost profits.

- In a dispute concerning the forfeiture by a State of a geothermal exploration license, the claimant argued that the declaration of forfeiture was contrary to several provisions of the license, as interpreted in light of the legislation of the law governing the license.³¹³ The claimant also argued, separately, that the forfeiture constituted an expropriation in breach of property rights guaranteed under the Respondent State's constitution.³¹⁴ The tribunal dismissed both claims, finding that the investor had failed to comply with its license obligations, and that the State's actions were valid under the terms of the license and domestic law.³¹⁵
- In a non-public award, the claimant alleged breaches of two hydrocarbon contracts and, separately, invoked the governing law of the contract to argue that the respondent State was required to renew the contractual periods. The tribunal examined these arguments – labelled as the claimant's "alleged contractual and legal breaches" – and dismissed them on the merits, concluding that the termination was attributable to the claimant's own conduct.

229. In a number of cases, investors have also invoked international law as a separate cause of action. In these cases, the investors usually argue that the law applicable to the contract is international law, or that it could be referred to indirectly because it is applicable under the governing domestic legal framework. For instance:

- In a dispute arising from a participation agreement governed by the law of the host State, the claimants argued, in addition to their contract claims, that international law applied alongside the contract and its governing law and that the respondent's

³¹¹ *Kuntur Wasi v. Peru*, Decision on Jurisdiction and Liability, August 11, 2023, paras. 553-555.

³¹² *Kuntur Wasi v. Peru*, Decision on Jurisdiction and Liability, August 11, 2023, paras. 568-569, 577, 906.

³¹³ *WalAm v. Kenya*, Award, July 10, 2020, paras. 368-378.

³¹⁴ *WalAm v. Kenya*, Award, July 10, 2020, para. 397.

³¹⁵ *WalAm v. Kenya*, Award, July 10, 2020, paras. 397, 549.

measures were tantamount to expropriation in violation of customary international law, including the principles of acquired rights and *pacta sunt servanda*. The tribunal found a breach of the agreement but deemed it unnecessary to decide the international law issues.³¹⁶

- In a case that settled before an award was issued and for which details were not made public, the claimant argued that a contractual clause guaranteeing treatment no less favorable than that accorded to nationals, entitled it to the same rights and protections provided under bilateral investment treaties in force between the respondent State and third countries.³¹⁷
- In a case relating to an oil exploration and production contract, the claimants argued that the respondent had *inter alia* violated customary international law, notably by failing to comply with the international minimum standard of treatment, incorporated into the host State domestic law, which governed the contract. The tribunal rejected this argument, holding that while mandatory rules of international law cannot be ignored when interpreting a contract, they cannot serve as an independent basis for liability.³¹⁸
- In one case in which the parties did not agree to the publication of the award and no information on the dispute was made public, the claimant raised claims under both the contract and international law. In particular, the claimant invoked an ‘investment protection guarantees’ clause in the contract, arguing that the clause allowed the tribunal to apply standards contained in international investment treaties to which the respondent was a party.

³¹⁶ *Mobil Oil v. New Zealand*, Decision on Liability, January 6, 1988, paras. 3.4(f), 7, the case was later settled after liability findings. See also *WalAm v. Kenya*, Award, July 10, 2020, paras. 549-551 where the claimant articulated claims based on customary international law, arguing that the declaration of forfeiture of its geothermal license tantamounted to unlawful expropriation and a violation of the minimum standard of treatment. According to the claimant, these international rules applied by virtue of the references to international law in the Kenyan constitution and in application of Article 42(1) of the Convention. The tribunal dismissed the claimant’s claim based on international law, finding that, even if it considered that international law was applicable to the case, there was no expropriation and no breach of the minimum standard of treatment.

³¹⁷ The case settled before an award was issued.

³¹⁸ *Caratube v. Kazakhstan II*, Award, September 27, 2017, paras. 260-262; 288-290.

(ii) *Stabilization clauses*

230. Stabilization clauses are generally understood as contractual mechanisms used in investment agreements to manage regulatory and political-risk exposure by limiting the effects of future changes in law.³¹⁹
231. Several forms of such stabilization mechanisms exist:³²⁰
- “freezing clauses”, which generally aim to exempt the contractual framework governing the investment from the application of subsequently enacted legislation.³²¹ Authors have noted that such “freezing” clauses have proven controversial because they may raise concerns relating to State sovereignty.³²²
 - “Renegotiation clauses” or “economic-equilibrium clauses”, which seek to preserve the project’s financial balance by requiring compensation and/or the renegotiation of the contract in the event of legislative change.³²³
232. Stabilization clauses may be tied to specific types of legislative changes (for instance of fiscal nature) or may have a more comprehensive scope (and referring to broader legal or regulatory changes).³²⁴

³¹⁹ Dolzer, Kriebaum, and Schreuer, *Principles of International Investment Law*, p. 127.

³²⁰ Dolzer, Kriebaum, and Schreuer, *Principles of International Investment Law*, p. 127. *See also* Shanagher and James, *Stabilization Clause* (Jus Mundi Online Publication, 2025), para. 4.

³²¹ Dolzer, Kriebaum, and Schreuer, *Principles of International Investment Law*, p. 127.

³²² Shanagher and James, *Stabilization Clause* (Jus Mundi Online Publication, 2025), para. 7.

³²³ *See e.g.*, Dolzer, Kriebaum, and Schreuer, *Principles of International Investment Law*, p. 129-130; *Lidercón, S.L. v. Republic of Peru* (ICSID Case No. ARB/17/9), Award, March 6, 2020, para. 73 where an example of such a clause was referred to in this case that was initiated on the basis of the Spain-Peru BIT but referred to contractual instruments concluded by the investor and the State. One of these contracts included an “equilibrium clause”, providing that either party to the contract could submit a proposal to reestablish the contractual equilibrium whenever it considered that the equilibrium had been affected by variations exceeding 10% of net revenues as a result of changes in the applicable law or their interpretation or application. *See also Burlington v. Ecuador*, Decision on Liability, December 14, 2012, paras. 21-22 where this case was also initiated based on the Ecuador-US BIT, but similarly referred to contractual instruments between the investor and the State. One of these instruments contained a “tax modification clause” which provided that in case of change in the tax system applicable to the investor, the employment contribution or its interpretation, a correction factor should be applied to preserve the economics of the contract, and that the State would “absorb” the consequence of that change. The clause read as follows: “Modification to the tax system and to the employment contribution: In the event of a modification to the tax system, the employment contribution or its interpretation, which have an impact on the economics of this Contract, a correction factor will be included in the production sharing percentages to absorb the increase or decrease in the tax. This adjustment will be approved by the Administrative Board on the basis of a study that the Contractor will present to that effect.”

³²⁴ Dolzer, Kriebaum, and Schreuer, *Principles of International Investment Law*, p. 127.

233. Stabilization clauses or comparable contractual mechanisms have been invoked or referred to in a number of ICSID disputes arising from investment contracts. Several decisions and awards in these cases – many of them dating from the 1970s and 1980s – are public.³²⁵
234. A number of recent contract-based cases – arising from decisions rendered over the last 5 to 10 years – have also featured references to stabilization clauses or similar mechanisms. With some exceptions,³²⁶ the decisions in these more recent cases have not been made public to date. On the basis of the information available, ICSID can nonetheless make the following observations:
- Enforcement and interpretation of stabilization clauses – particularly those referring to tax regimes – remain topical issues and remain a source of disputes.

³²⁵ See e.g., *Kaiser Bauxite v. Jamaica*, Decision on Jurisdiction and Competence, July 6, 1975, para. 12 where the dispute was based on an agreement for the operation of a bauxite mine which contained stabilization language described as a “no further tax” clause, and which the investor argued prevented the State from imposing a new tax levy on bauxite production. After the State enacted a new tax legislation, the investor initiated ICSID arbitration seeking, among others, declarations that the State was bound by its “no further tax” undertaking and that Kaiser had no obligation to pay the new levy. The case settled before an award was issued. See also *AGIP v. Congo*, Award, November 30, 1979, paras. 68, 85-88 where the investor argued that the respondent State breached key obligations under investment agreements over a project for the supply of petroleum products. The tribunal found that there was a stabilization mechanism pursuant to which the State had agreed to not alter the regime applicable to the claimant’s investment vehicle and ultimately found for the claimant. See also *LETCO v. Liberia*, Award, March 31, 1986, paras. 80-81 where the tribunal treated the “Warranty of Concessionaire’s Rights” provision in the contract as a stabilization mechanism. The tribunal emphasized that such clauses in long-term resource contracts must be respected to prevent governments from evading commitments through new laws. The tribunal found that the contract had been improperly revoked by the respondent and did not specifically address whether the stabilization clause had been breached or what the consequences of such a breach could have been. See also *SOMILO v. Mali*, Award, February 25, 2003, paras. 26, 47, 67-75, 97-99 where the claimant relied on a stabilization clause in its mining convention guaranteeing stability of the tax and custom regime applicable to its operation. After the respondent imposed a stamp duty on export applications, the claimant initiated proceeding arguing that the stabilized regime precluded applying this new duty. The tribunal agreed, finding the respondent’s measure incompatible with the contract’s stability guarantees and ordering reimbursement of the duty. See also *Duke v. Peru*, Award, August 18, 2008, paras. 184-228, 365-366 where the dispute arose out of a legal stability agreement (or “LSA”) concluded between Peru and the investor, so the dispute revolved around the scope and nature of such stabilization mechanism. The tribunal eventually treated the LSA as a binding instrument that stabilized the tax and legal regime applicable to the investor and found that the some of the measures taken by the States constituted violation of the guarantee of tax stabilization.

³²⁶ See e.g., *Caratube v. Kazakhstan II*, Award, September 27, 2017, paras. 28, 557, 593, 627 noting that the clause in the contract providing for the maintenance of Kazakhstan’s foreign investment law should be considered as a “stabilization clause” and finding that changes to Kazakhstan’s foreign investment law made after the conclusion of the contract should not apply to the contract; *Loulo v. Mali*, Award, June 2, 2016, paras. 168-170, 186-190, 333 where the tribunal found that the host State was bound by the fiscal stability undertakings it assumed in the contract and, as a result, could not unilaterally impose less favorable tax measures on the project without triggering the contractual remedies provided for in the agreement.

- Stabilization clauses formulated in broader terms, and not confined to tax measures, have likewise been relied upon in recent cases.³²⁷
- Based on the cases reviewed, no recent contract-based dispute has dealt with the enforcement or interpretation of a renegotiation or economic-equilibrium clause, as opposed to a “freezing clause”.³²⁸

(iii) Combination of a contract claim with a claim under other instrument of consent

235. In 19 contract-based ICSID cases, investors relied both on a contract (or a *compromis* or specific agreement) and a treaty (such as a BIT, a Free Trade Agreement with an investment chapter, or a Multilateral Trade or Investment Treaty) as sources of consent. In eight cases, investors relied on both a contract and the domestic investment law of the host State, and in three cases, investors relied on a contract, one or several treaties and the domestic investment law of the host State.³²⁹
236. In these cases, investors typically raised parallel claims under each instrument.³³⁰ These claims frequently share the same factual origin, as it can be argued that the same act by the host State may constitute both a breach of contract and a violation of the applicable investment law or investment treaty. In such scenarios, tribunals have sometimes stressed the importance of carefully distinguishing the rules and standards applicable under each ground to determine whether one or the other or both have been violated.³³¹

³²⁷ See e.g. *Caratube v. Kazakhstan II*, Award, September 27, 2017, paras. 28, 557, 593, 627, where the tribunal found, among other things, that changes to the legislation on investments of the respondent made after the conclusion of the contract should not apply to the contract; *Aguaytia Energy, LLC v. Republic of Peru* (ICSID Case No. ARB/06/13), Award, December 11, 2008, paras. 75-97 where the claimant relied on a juridical stabilization clause to claim the respondent had breached its obligations of non-discrimination. While the tribunal recognized the clause granted the claimant protection from new discriminatory laws, it dismissed the claim, finding that the clause did not provide substantive protections against discriminatory acts.

³²⁸ See Shanagher and James, *Stabilization Clause* (Jus Mundi Online Publication, 2025), para. 16 where a similar observation was reached in a recent study on stabilization clauses, with the authors noting that “Economic equilibrium” provisions remain relatively untested in publicly reported awards.”

³²⁹ See Annex I for information on the instruments of consent of all the cases discussed in this paper.

³³⁰ See e.g., *Inceysa v. Salvador*, Award, August 2, 2006, paras. 37-42; *Duke v. Ecuador*, Award, August 18, 2008, para. 115; *AHG v. Iraq*, Award, September 30, 2022, para. 48 where the claimant initiated arbitration under a BIT, as well as a contract, the host State domestic law and several other legal instruments which the claimant said were relevant to its operation. The tribunal dismissed the claims for manifest lack of jurisdiction, holding that the BIT had not entered into force, and that the other instruments invoked by the investor did not include the State’s consent to ICSID arbitration.

³³¹ See Tawil, *The Distinction Between Contract Claims and Treaty Claims*, pp. 492-544 for a discussion on the criteria applied by tribunals when making this distinction. See also Dolzer, Kriebaum, and Schreuer, *Principles of International Investment Law*, p. 397.

- An example of a case with overlapping contract-based and treaty-based claims is *Rasia v. Armenia*. The claimants relied on concession agreements concluded with the host State and, in parallel, on a BIT, to articulate claims arising from the same factual background. The tribunal assessed independently whether the jurisdiction requirements and conditions for liability were met under each legal basis, and eventually found that neither the contractual claims nor the treaty claims were established, rejecting the contractual claims as time-barred under domestic law and finding no breach of the treaty standards relied upon.³³²
 - In *Kuntur Wasi v. Peru*, the claimants initiated claims based on a concession contract as well as a BIT.³³³ Both the contract claims and the treaty claims found their origin in the breach and termination of the concession contract by the State. The tribunal carefully distinguished the two categories of claims,³³⁴ and eventually found that by wrongfully terminating the contract, the State had breached both the contract and the treaty.³³⁵ The tribunal, however, awarded damages to the investors only on the basis of the treaty breach, notably to avoid double recovery.³³⁶
237. In this context, a clear articulation of the legal basis of each claim, including the applicable law and the obligations allegedly breached, may assist tribunals in disentangling contract-based claims from claims grounded in other legal instruments.³³⁷

³³² *Rasia v. Armenia*, Award, January 20, 2023, paras. 475, 625, 725 where the dispute arose out of a concession agreement under which Rasia, a UAE-based investment company, was granted rights to construct and operate two major infrastructure projects in Armenia. Rasia and its CEO, Mr. Borkowski, sued Armenia, claiming that its actions breached the concession agreement and violated the U.S.-Armenia BIT. Rasia lodged contract claims under the two concession contracts (*i.e.*, contractual claims based on the contract), and Mr. Borkowski, who was not party to the concession contracts, lodged a claim using the Armenia-US BIT, alleging breaches of a number of substantive protections under the BIT, including the umbrella clause. *See also* paras. 412, 422 where, looking at the treaty case law on umbrella clause claims, and at the wording of the umbrella clause in this case (“Each Party shall observe any obligation it may have entered into with regard to investments”), the tribunal concluded that Mr. Borkowski had no standing to bring a claim relating to the alleged contractual breaches via the BIT’s umbrella clause, given that he was not privy to the contracts.

³³³ *Kuntur Wasi v. Peru*, Decision on Jurisdiction and Liability, August 11, 2023, para. 1.

³³⁴ *Kuntur Wasi v. Peru*, Decision on Jurisdiction and Liability, August 11, 2023, para. 287.

³³⁵ *Kuntur Wasi v. Peru*, Award, May 9, 2024, para. 3.

³³⁶ *Kuntur Wasi v. Peru*, Award, May 9, 2024, paras. 16, 58.

³³⁷ Dolzer, Kriebaum, and Schreuer, *Principles of International Investment Law*, p. 397-399. *See also* *Rasia v. Armenia*, Decision on Annulment, November 5, 2024, paras. 251-252 finding that the tribunal’s reasoning and explanation in distinguishing the contract and treaties raised by the parties was “clear and sufficient,” especially as such claims were presented in an “interwoven” way.

(iv) *Defenses and counterclaims*

238. In treaty-based disputes, respondent States may build their defenses on the merits by contesting the factual or legal allegations made by the investors and/or by relying on rules or principles of international law, such as necessity, contributory negligence, essential security exceptions, or a State's right to regulate or exercise its police powers. While respondents may also rely on such principles in contract-based disputes, their defenses are usually more case-specific and depend on the language of the contract, the law applicable to that contract, and the circumstances of the case. Counterclaims appear to be more common in contract-based than in treaty-based disputes.

(a) Defenses against the claimant's claims

239. *Defenses based on the contract and on the governing law.* In contract-based cases, respondents typically challenge allegations of breach on two fronts: factual and contractual.³³⁸ On the facts, for instance, they contest how obligations were performed in practice, dispute the sequence of events, and point to the claimant's own conduct.³³⁹ On the law, they may rely on interpretive arguments to limit the scope of the obligation allegedly breached, invoke specific clauses governing performance, termination, or remedies, and raise arguments grounded in interpretation of the overall contractual framework, for instance regarding risk allocation or the preservation of the contract's economic balance.³⁴⁰

³³⁸ See e.g., *Chevron v. Bangladesh*, Award, May 17, 2010, which arose out of a dispute regarding the tariff regime applicable under production sharing contracts and gas purchase and sale agreements. The claimants argued that the tariff deductions applied by the respondent were contrary to the terms of their agreements. The respondent argued that the deductions were contemplated under the contract, and that the claimant had in any event accepted them for years without protest. The tribunal ultimately accepted Bangladesh's contract interpretation and the significance of the parties' course of performance and dismissed the claims. See also *WalAm v. Kenya*, Award, July 10, 2020, paras. 369, 379 where the claimant argued that the State's declaration that a geothermal resource license was forfeited was unlawful. The State considered that the investor had failed to carry out the required work under the license and that the revocation was valid. The tribunal rejected the claimant's claims, holding that both Kenyan energy law and the license required work and that Kenya validly declared forfeiture after months without such activity.

³³⁹ See e.g., *Transgabonais v. Gabon*, Award, March 7, 2008, para. 50; *Cambodia Power v. Cambodia*, Award, April 22, 2013, paras. 265-266, 454-456 rejecting breach claims after examining the factual sequence of events, the claimant's performance and conduct, and the express contractual provisions governing extensions, performance, and termination, and finding that no specific contractual breach had been established.

³⁴⁰ See e.g., *Klöckner v. Cameroon*, Award, October 21, 1983, paras. 136, 151, 160-171 relying on the overall contractual framework and the reciprocal allocation of obligations to reject claims that would have disturbed the economic balance agreed by the parties; *CDC v. Seychelles*, Award, December 17, 2003, paras. 3-4, 7-8, 44-57, where the case arose out of a loan agreement for a power project backed by two sovereign guarantees. After the State defaulted, CDC sought to activate the guarantees, but the State did not comply and the investor

240. Respondents in contract-based disputes have frequently relied on defenses grounded in the law applicable to the contract, including that the impugned conduct was lawful.

- One set of defenses concerned concepts rooted in the contract's governing law and focused on the investors' wrongful performance or non-performance of their contractual obligations.³⁴¹ Such concepts have included, for instance, termination for cause based on the investors' own material breach,³⁴² contributory fault,³⁴³ set-off,³⁴⁴ waiver,³⁴⁵ good faith,³⁴⁶ and estoppel.³⁴⁷

therefore initiated arbitration. In defense, the State argued the investor had misrepresented the project and owed a duty of care, and that such missteps should defeat or reduce liability under the guarantees. The tribunal rejected these defenses, holding that the guarantees allocated the payment/default risk to the sovereign guarantor.

³⁴¹ *Perenco v. Ecuador*, Award, September 27, 2019, para. 327, where the tribunal noted that the respondent defenses on liability advanced various arguments to the effect that the investor was either the author of its own misfortune or otherwise has contributed to the harm in respect of which it sought damages.

³⁴² *E.g., Klöckner v. Cameroon*, Award, October 21, 1983, paras. 114 *et seq.* where the tribunal applied the *exceptio non adimpleti contractus* to find that investor's own material failures effectively justified the State's refusal to perform its own obligations under the contract. In the annulment proceeding, the *ad hoc* Committee examined whether the tribunal had correctly stated its reasoning for applying this exception and eventually found the tribunal's reasoning on this point insufficiently stated, contributing to partial annulment. *Klöckner v. Cameroon*, Decision on Annulment, May 3, 1985, pp. 114 *et seq.*

³⁴³ *E.g., Burlington v. Ecuador*, Award, February 7, 2017, para. 572 where the tribunal found that it was "undisputed that a claimant's conduct may justify an exclusion or reduction of damages if it has contributed to the injury", but that in the case at hands, the investors' alleged contractual and legal failures resulted from the respondent's own conduct that could not, in any event, be considered as having contributed to the investor's injury.

³⁴⁴ *E.g., Gardabani Holdings v. Georgia II*, Partial Award, April 19, 2021, paras. 659-662, 670-675 where the tribunal granted a counterclaim raised by the respondent which functionally operated as a set-off claim, as it relied on the investors' own failure to perform their contractual obligations and requested that such failure should be credited against any damages owed to the investors. The tribunal in the parallel treaty arbitration reached the same conclusion. *See Gardabani Holdings v. Georgia I*, Award, October 27, 2022, paras. 734-736.

³⁴⁵ *E.g., Duke v. Ecuador*, Award, August 18, 2008, paras. 268-280 where the tribunal had to determine whether the respondent had complied with its payment obligations under power purchase agreements and whether the investor's representations in instruments concluded after the power purchase agreements amounted to a waiver of its entitlement to claim interest on such payment obligations.

³⁴⁶ *E.g., Klöckner v. Cameroon*, Award, October 21, 1983, paras. 107-108 where the tribunal found that the investor had a duty of full disclosure to the respondent, as its contractual partner, based on the general principle of *bona fide* in the conduct of the contract, and that the investor had in fact breached that duty by concealing from the State information of importance at critical stages of the investment project; *Aucoven v. Venezuela*, Award, September 23, 2003, para. 110 where the tribunal discussed good faith as a general principle of law applicable to the performance of contractual obligations, and specifically in the context of examining both parties' conduct in the performance of the contract, including the investor's own obligations.

³⁴⁷ *E.g., TANESCO v. IPTL*, Decision on Tariff and Other Remaining Issues, February 9, 2001, paras. 158 *et seq.* where the tribunal had to decide on the respondent's arguments that the claimant waived or should be estopped from challenging the reasonableness and prudence of costs incurred by the respondent in the

- Another set of defenses have focused on measures adopted in the public interest, where respondent States have argued that the law governing the contract permitted or required intervention affecting contractual rights to pursue public objectives.³⁴⁸
- Respondent States have also relied on governing law doctrines addressing changes in circumstances, including hardship, to argue that unforeseen economic or regulatory developments altered the contractual equilibrium and justified the suspension or adjustment of performance.³⁴⁹ Other defenses have focused on events alleged to excuse performance, most notably *force majeure*. In this context, tribunals have examined whether the conditions set out under the contract or its governing law were satisfied, and whether a sufficient causal link existed between the event and the failure to perform.³⁵⁰
- Finally, respondents have relied on governing law concepts such as the civil law doctrine of *dolus* (which can be roughly translated as “willful misconduct”) or fraud to challenge the validity of the contract itself. These defenses have been used to argue

development of the power project under a power purchase agreement. The respondent’s argument was essentially that the claimant’s prior conduct, approvals, and participation in the project process had foreclosed it from later contesting those costs.

³⁴⁸ See e.g., *Kuntur Wasi v. Peru*, Decision on Jurisdiction and Liability, August 11, 2023, paras. 335-346, 354-360 where the dispute arose under a concession contract for the design, construction and operation of an airport, which the State unilaterally terminated for reasons that the investor said were illegitimate. In the arbitration, the respondent argued that the reasons for termination were valid and in line with domestic law. In particular, the State invoked reasons of public interest, affirming that the concessionaire, was an unfit partner to carry out the project. The tribunal reviewed these arguments, and eventually determined that the basis invoked by the State to unilaterally terminate the contract (reasons of public interest) was unjustified on all the fact and circumstances. See also *Togo Electricité v. Togo*, Award, August 10, 2010, paras. 105-106, 142-147 where the respondent argued that it had to seize and use the claimant’s property to ensure electricity production, the continuity of which was a necessary public service both according to the contract and Togolese law. Ultimately, while the tribunal found that there was a general principle of law that required continuity of public services, the respondent was still required under to indemnify the claimant in accordance with the contractual terms.

³⁴⁹ E.g., *QNB v. South Sudan*, Decision on Jurisdiction and Liability, January 5, 2024, paras. 306-308, 311-312 where the respondents argued the State’s severe economic turmoil rendered performance of the loan agreement concluded with the investor impracticable. The tribunal found that the agreement imposed unconditional payment obligations and contained no hardship clause.

³⁵⁰ See e.g., *Aucon v. Venezuela*, Award, September 23, 2003, paras. 106-129 where the respondent argued that that widespread protests, civil unrest, and the national strike constituted *force majeure* that made performance of its obligations under a contract for the rehabilitation and operation of highway impossible or impracticable, thereby excusing the State from liability. The tribunal found that the elements of force majeure, and more specifically unforeseeability, were not met. See also *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on the Payment Claim, September 11, 2014, paras. 192-205, 228 - 230, where Petrobangla relied on force majeure under both general principles of law, common law, and national law. As the injunction of the BELA courts was already in place before Petrobangla concluded the GPSA, the tribunal found that it was not unforeseeable and could not constitute force majeure.

that the investor's conduct at the time of conclusion vitiated consent or rendered the agreement void or voidable, thereby undermining the contractual basis of the claim.³⁵¹

241. *Defenses based on international law or international legal doctrines.* Respondent States have also relied on defenses derived from general principles of international law or international legal doctrines.

- For instance, respondent States have invoked international public policy to argue that investors' claims cannot succeed because the contract should be considered invalid from the outset.³⁵² Respondent States have also alleged corruption, which tribunals have treated as incompatible with the doctrine of international public policy and capable of affecting the admissibility or viability of contractual claims on the merits.³⁵³
- Finally, respondent States have relied on notions such as necessity or similar concepts in connection with measures adopted in response to exceptional situations.³⁵⁴ While ICSID is not aware of any public contract-based case in which an express reference

³⁵¹ See e.g., *SIREXM v. Burkina Faso*, Award, January 19, 2000, paras. 5.01, 5.13, 5.26-5.41 where the dispute arose out over governance and capital increases for the operation of a gold mining project. The respondent alleged fraudulent conduct (in French, "*dol*") by the investor's misrepresentations, concealment, and conflicts of interest vitiating consent and rendering the agreements concluded for the project void or unenforceable. The tribunal found *dol* and determined that the agreements were to be considered as void and, as result, dismissed the claimant's claims. See also *World Duty Free v. Kenya*, Award, October 4, 2006, paras. 105, 130-133, 188 where, in the course of the arbitration, evidence produced showed that important sums of cash had been given to State officials to secure the investment. The respondent argued the investment contracts were procured by bribery and thus void/unenforceable under Kenyan law and international public policy. The tribunal agreed, holding corruption vitiated consent and barred the claimant's claims, dismissing the case.

³⁵² E.g., *World Duty Free v. Kenya*, Award, October 4, 2006, paras. 105, 188 where the respondent referred to (and the tribunal endorsed) the notion of international public policy to support the argument whereby the contract should be considered as void because obtained by fraud.

³⁵³ See e.g., *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, paras. 413-464 and Decision on the Corruption Claim February 25, 2019, paras. 1970 *et seq.* where the respondents invoked corruption allegations and argued that, based on these allegations: (i) the tribunals should decline jurisdiction, or (ii) the tribunal should consider that contracts used as the basis of the arbitrations should be declared void. The tribunals eventually dismissed these defenses, finding that these agreements were not produced by corruption. See also *BSGR v. Guinea*, Award, May 18, 2022, paras. 362, 468, 472-473, 1085 where the case arose out of the termination of mining concessions. In defense, the respondent argued that the investor secured the disputed mining rights by way of corruption and that their claims were consequently either inadmissible or unfounded on the merits. The tribunal sided with the respondent, finding that the claimants' claims were inadmissible because the claimants had engaged in corrupt practice to secure its investment.

³⁵⁴ E.g., *Concesionaria Peruana de Vías – COVINCA, S.A. v. Republic of Peru* (ICSID ARB/21/45), Award, December 3, 2025. The award in this case is not public, but public reports indicate that the dispute arose out of the investor's allegations that emergency measures taken by the State further to the COVID-19 pandemic constituted breach of a road concession agreement, and that defenses address the legality of pandemic measures (adopted during a national emergency).

has been made to the notion of necessity as reflected in the ILC Articles on State Responsibility or in customary international law, contract-based tribunals have often found that the ILC Articles or customary international law may apply alongside the governing law in contract-based disputes.³⁵⁵

(b) Counterclaims

242. *General observations.* Counterclaims are claims for relief brought by the respondent against the claimant in a proceeding.³⁵⁶ Unlike defenses to the claims, counterclaims allow the respondent to seek relief for the claimant's breach of contractual or other legal obligations, including tort-based obligations, arising from the same subject matter as the claimant's claims.
243. Unlike in investment treaty arbitration,³⁵⁷ counterclaims are frequently filed in contract-based cases. This may be explained by the reciprocal nature of investment contracts, and by the fact that the jurisdiction clauses in investment treaties often allow claims only by investors.³⁵⁸ As of December 31, 2025, respondents filed counterclaims in 42 ICSID contract-based arbitrations, that is, in 26% of contract-based arbitrations.
244. *Legal test.* Under Article 46 of the Convention, a tribunal may entertain counterclaims if they (i) arise directly out of the subject-matter of the dispute; (ii) fall within the scope of the parties' consent to arbitration; and (iii) are otherwise within the jurisdiction of the Centre.³⁵⁹
245. *Jurisdiction over the counterclaims.* Counterclaims must satisfy the jurisdictional requirements set forth in Article 25 of the Convention; specifically, they must fall within

³⁵⁵ *E.g., Perenco v. Ecuador*, Award, September 27, 2019, para. 344, where the tribunal, relying on Article 39 of the ILC Articles ("Contribution to the Injury"), examined whether the investor's alleged lack of care in the operation of its investment justified a reduction of any damages which it would be entitled to.

³⁵⁶ ICSID Convention, Article 46 and ICSID Arbitration Rules (2022), Rule 48 cover incidental (or additional) claims as well as counterclaims. This Section addresses counterclaims only.

³⁵⁷ *See generally* on the issue of counterclaims in investor-State arbitration Ugale and Ruggeri Abonnat, Counterclaims (Jus Mundi Online Publication 2026); Hoffmann, Counterclaims, in Building International Investment Law: The First 50 Years of ICSID, Kinneer et al. eds. (Kluwer Law International, 2016), pp. 647-665.

³⁵⁸ *See above* para. 52.

³⁵⁹ ICSID Convention, Article 46 provides that, "[e]xcept as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre." *See also* ICSID Arbitration Rules (2022), Rule 48.

the scope of the parties' agreement to arbitrate,³⁶⁰ and must directly arise out of an investment.³⁶¹

246. *Arising out of the subject matter of the dispute (admissibility)*. A counterclaim arises out of the subject matter of the dispute when it is closely connected to the dispute and to the claimant's claims. Tribunals have held that counterclaims form part of the same dispute if they are not practically separable, and that this requirement may be satisfied even if the counterclaims are based on a different contract or legal instrument from the one invoked by the claimant.³⁶²
247. *Merits of the counterclaims*. On the merits, tribunals have assessed counterclaims in contract-based disputes by applying the law governing the counterclaim, which will most often be the same law applicable to the contract, or a combination of such law governing the contract and international law.³⁶³ Counterclaims have typically concerned allegations that the investor breached contractual obligations, failed to perform ancillary duties, or

³⁶⁰ See e.g., *Benvenuti & Bonfant v. Congo*, Award, August 8, 1980, para. 4.104; *Atlantic Triton v. Guinea*, Award, April 21, 1986 (ICSID Reports, Vol. 3, 1995), p. 39 where the tribunal declined jurisdiction over a counterclaim alleging that Atlantic Triton selected vessels unsuitable for their intended purpose, on the basis that the counterclaim did not concern the performance of the contract containing the arbitration clause from which the tribunal's authority derived. The clause conferred jurisdiction on the tribunal to hear "disagreements arising from the interpretation, the application or the execution of the [contract]". See also *Elsamex v. Honduras*, Award, November 16, 2012, para. 304 where the tribunal denied jurisdiction over a counterclaim based on a breach of Honduran Civil Code because non-contractual claims were outside the scope of the arbitration agreement; *MMS v. Central Africa*, Award, May 12, 2011, para. 447 declining jurisdiction over a counterclaim for non-payment of taxes and tax fraud finding that these matters are generally subject to national jurisdictions.

³⁶¹ See e.g., *Amco v. Indonesia*, Decision on Jurisdiction (Resubmission), May 10, 1988, paras. 122-127 where the tribunal dismissed a counterclaim for tax fraud. The tribunal held that only counterclaims arising directly from rights or obligations specific to the investment agreement fell within Article 25(1) of the Convention. Counterclaims grounded solely in general obligations under domestic law – such as an obligation not to commit tax fraud – do not, in principle, fall within ICSID jurisdiction unless the general law issue itself gives rise to an "investment dispute" under the Convention. See also *Elsamex v. Honduras*, Award, November 16, 2012, para. 302 where the tribunal upheld jurisdiction over a counterclaim under the contract finding that it arose out of the "same investment" that gave rise to the dispute; *BSGR v. Guinea*, Award, May 18, 2022, paras. 285-290, 1093-1095 where the tribunal found that it had jurisdiction over the counterclaims (of economic and moral damages suffered by the respondent as a consequence of the claimant's alleged corrupt dealings to obtain mining rights) because it "fulfill[ed] the connexity requirement ('arising directly out of the subject-matter of the dispute')" with the dispute having already been found to concern the claimant's investment in Guinea.

³⁶² See e.g., *Klöckner v. Cameroon*, Award, October 21, 1983, para. 136; *Grenada Private Power & WRB v. Grenada*, Award, March 19, 2020, para. 359.

³⁶³ See e.g., *Klöckner v. Cameroon*, Award, October 21, 1983, paras. 104 *et seq.* where the tribunal assessed Cameroon's counterclaims by reference to Cameroonian law, which governed the contractual relationship, treating the counterclaims as contractual in nature and subject to the same applicable law as the principal claims; *Burlington v. Ecuador*, Decision on Counterclaims, February 7, 2017, paras. 71-74, where although arising in a mixed treaty/contract context, the tribunal held that Ecuador's counterclaims for environmental damage were governed by Ecuadorian law.

caused harm through conduct related to the operation of the investment.³⁶⁴ In resolving such claims, tribunals have considered, among other things, defenses raised by the claimant, including contributory conduct, the respondent's prior non-performance, or the lack of causation between the alleged breached invoked in the counterclaims and any harm that would have been suffered by the respondent.³⁶⁵

248. Arbitral tribunals accepted jurisdiction over (and/or found admissible) counterclaims in 26 cases and upheld such counterclaims on the merits – whether in part or in full – in 11 cases. Considering only concluded cases involving counterclaims (35 cases), counterclaims were successful in 31% arbitrations. This rate appears higher than in treaty-based disputes. This difference may reflect the fact that, in contract-based disputes, both the legal basis of the counterclaim and its connection to the investor's claim may be easier to establish, given the reciprocal nature of investment contracts.³⁶⁶

C. REMEDIES

249. Remedies in contract-based ICSID cases depend on the applicable law, the terms of the contract and the relief sought by the parties. In contract-based ICSID cases, remedies can take the form of monetary or non-monetary relief.

(i) *Compensation and damages*

250. In assessing compensation and damages, contract-based tribunals apply the standards and principles established by the applicable law, whether domestic or international.

³⁶⁴ See e.g., *Klöckner v. Cameroon*, Award, October 21, 1983, paras. 21, 114 *et seq.* where counterclaims concerned, among others, non-performance and mismanagement under contracts forming “an indivisible whole” (in French, “*un tout inséparable*”) with the claimant's claims; *Perenco v. Ecuador*, Interim Decision on the Environmental Counterclaim, August 11, 2025, paras. 34 *et seq.* where Ecuador's counterclaims related to environmental harm allegedly caused by the investor's operations, *i.e.*, conduct directly connected to performance of the investment. See also UNCITRAL Working Group III, Possible reform of investor-State dispute settlement (ISDS) – Multiple proceedings and counterclaims (Note by the Secretariat, A/CN.9/WG.III/WP.193, 2020), paras. 33-35 identifying contractual breaches and investment-related harm as the most common substantive bases for State counterclaims; Ugale and Ruggeri Abonnat, Counterclaims (Jus Mundi Online Publication 2026), para. 13.

³⁶⁵ See e.g., *Amco v. Indonesia*, Award (Resubmission), June 5, 1990, paras. 157-162 finding that a counterclaimant State cannot rely on breaches triggered or aggravated by its own prior non-performance; *Burlington v. Ecuador*, Decision on Counterclaims, February 7, 2017, paras. 1030-1045; *Perenco v. Ecuador*, Award, September 27, 2019, para. 727 where the claimant argue that it cannot be held liable for harm it did not cause; *BSGR v. Guinea*, Award, May 18, 2022, para. 1110 noting that the respondent's conduct had to be taken into consideration and that, in light of the principles that general principles of international law, such as *nemo auditur propriam turpitudinem allegans*, *ex dolo malo non oritur action*, or *ex turpi causa non oritur actionem*, the counterclaims had to be held inadmissible.

³⁶⁶ Ugale and Ruggeri Abonnat, Counterclaims (Jus Mundi Online Publication 2026), para. 4.

251. *Heads of damages.* In contract-based cases, the recoverable heads of damages as well as the valuation criteria will depend on the applicable law,³⁶⁷ the terms of the contract and the underlying facts. Consistent with the principle of party autonomy, parties may stipulate in their contracts the categories of damages subject to compensation.³⁶⁸ They may also specify the valuation principles to be applied and parameters governing quantification of damages.³⁶⁹ Parties may likewise limit the scope of available remedies to be awarded by a tribunal.³⁷⁰
252. A review of concluded contract-based ICSID cases shows that compensation, or damages, is the most frequently requested and awarded remedy (*see above*, paragraphs 56-57 for statistics).

(ii) Specific performance

253. Even though ICSID tribunals have the power to order specific performance and restitution,³⁷¹ such orders remain rare in contract-based cases. In the event restitution is ordered against a State, this raises questions about State sovereignty as well as practical implications as to the enforceability of such orders. For instance, difficulties may arise in jurisdictions where non-monetary remedies are not recognized.³⁷² Depending on the

³⁶⁷ See above para. 208.

³⁶⁸ E.g., *Aucoven v. Venezuela*, Award, September 23, 2003, paras. 237, 243, 263, 274-275, 281, 303.

³⁶⁹ See e.g., *SCB (Hong Kong) v. Tanzania*, Award, October 11, 2019, para. 497; *Kuntur Wasi v. Peru*, Decision on Jurisdiction and Liability, August 11, 2023, para. 912; *Grenada Private Power & WRB v. Grenada*, Award, March 19, 2020, paras. 258, 264 where the tribunal calculated the compensation based on the methodology set out in a contractual schedule; *QNB v. South Sudan*, Decision on Jurisdiction and Liability, January 5, 2024, paras. 340-342.

³⁷⁰ See e.g., *Togo Electricité v. Togo*, Award, August 10, 2010, para. 174 where, following their unilateral termination of the concession, the claimants sought lost profits in addition to the compensation expressly provided for in the contract. The tribunal found that the claimants had validly terminated the concession under the contract and awarded damages limited to those prescribed in the contract. It declined to award lost profits because they were not contemplated in the contract. See also paras. 164-165, 169 for the tribunal's reasoning as to whether it was limited to what the contract expressly provided or whether it could award additional compensation. See also *Kuntur Wasi v. Peru*, Decision on Jurisdiction and Liability, August 11, 2023, para. 906 where the contract contained a limitation of liability clause, which notably excluded lost profits. However, to avoid any risk of double recovery, the parties agreed that payment should be made to Kuntur Wasi and that claimants would not seek recovery of contract damages. The tribunal thus awarded damages to the investors only because of the treaty breach.

³⁷¹ Schreuer, Article 54, paras. 94-96; see also History, Vol. II, pp. 903, 991 where A. Broches emphasized that awards could order the performance or non-performance of certain acts, but all that could be enforced would be the obligation to pay damages if the party did not comply with said order.

³⁷² Under Article 54 of the Convention, the obligation to enforce extends only to the pecuniary obligations in the award, but does not extend to other obligations, such as restitution or other forms of specific performance. See Schreuer, Article 54, paras. 54, 88, 90; ICSID Background Paper on Compliance with and Enforcement of ICSID Awards (2024), paras. 3, 16, 87, 118.

circumstances, specific performance and restoration to the original condition may be practically impossible, as was the case in *LETCO v. Liberia*, where specific performance was excluded on the facts and the tribunal instead awarded monetary damages.³⁷³

254. Nevertheless, in some cases, claimants have sought specific performance as primary remedy to compel their contractual counterpart to fulfill a specific contractual obligation. Specific performance ordered by a tribunal can take different forms in contract cases: reinstatement of a wrongfully terminated or revoked contract or a license;³⁷⁴ restitution of unduly collected payments;³⁷⁵ performance of contractual obligations;³⁷⁶ or performance of pecuniary obligations under the contract, such as payments due for services rendered.³⁷⁷

³⁷³ *LETCO v. Liberia*, Award, March 31, 1986, paras. 92-93 where Liberia had granted LETCO a timber concession agreement, then revoked it. The tribunal found that Liberia had acted unlawfully. The claimant explicitly stated that it was not requesting specific performance as an order requiring Liberia to return the land would be “wholly inadequate” given it had since been significantly exploited by other timber companies, and another concession would also be unsatisfactory since there was no comparable forest land in Liberia.

³⁷⁴ *E.g., WalAm v. Kenya*, Award, July 10, 2020, paras. 334-336, 562. WalAm had received a license to, among other matters, explore, produce, and dispose of geothermal steam and associated resources for 30 years. In 2009, WalAm informed the Ministry of Energy that it had completed exploration and pre-feasibility analyses. Yet, it did not carry out physical exploration, arguing that it was waiting for a PPA before incurring further expenses. Kenya forfeited the license on grounds that WalAm had, among other things, failed to perform its obligations under the license. The claimant requested the reinstatement of the license, as primary remedy (requesting compensatory damages only if the license could not be reinstated), as well as lost profits from the date of cancellation to the date of the award. The tribunal found that the claimant had not performed any physical exploration as contractually required and Kenya had been entitled to forfeit the license. The tribunal did not consider what remedies would have been appropriate had the claimant established either the invalidity of the forfeiture or any of its other claims.

³⁷⁵ *E.g., Sadiola v. Mali*, Award, February 25, 2003, paras. 23-25, 97-99 where the claims arose from the application of stamp duties on gold exports. The tribunal found that Mali’s enforcement of stamp duties were inconsistent with the contract and fiscal stability guarantees. It ordered Mali to comply with the contract by ceasing the measures and recognized the claimant’s entitlement to exemption from said duties. The tribunal ordered restitution of the collected duties. Also, in a non-public award, the claimants alleged the respondent had breached the contract by failing to issue the certificate of completion and to release the amounts that had been retained from the payments under the contract following the supervisor’s refusal to approve the works based on an alleged misapplication of a price-adjustment formula. The tribunal found the State had breached the contract and ordered restitution of the retained amounts. It rejected the claim for damages.

³⁷⁶ *E.g., Grenada Private Power and WRB v. Grenada*, Award, March 19, 2020, paras. 97-98 which was initiated based on a share purchase agreement for ownership and operation of an electricity company. The claimant argued that Grenada’s electricity-sector reform triggered the “put option” clause in the agreement, a mechanism that gave the investors the contractual right to require Grenada to buy back their shares in the company if certain adverse government actions occurred. *See also* paras. 258, 380 where the tribunal treated the repurchase obligation as a primary contractual obligation and ordered Grenada to repurchase the shares.

³⁷⁷ *See e.g., Niko Resources v. Bangladesh II*, Award, September 24, 2021, paras 35-36, 375 where the claimant argued that Petrobangla breached its contractual obligation to pay for gas delivered by Niko and sought payment for its share of the price for the gas sold and delivered to Petrobangla, which the tribunal ordered; *Atlantic Triton v. Guinea*, Award, April 21, 1986 (ICSID Reports, Vol. 3, 1995), pp. 25 *et seq.* where the tribunal ordered the payment for certain services performed under the contract, the quantum of which had been agreed by the respondent, and rejected the requests for damages. In a non-public award, a claimant

(iii) Declaratory relief

255. To a lesser extent, parties also seek non-monetary, purely declaratory relief as primary remedy. Such declarations can relate to the validity of the contract,³⁷⁸ or the interpretation of contractual obligations.³⁷⁹

(iv) Penalties for non-compliance, interest, currency and taxes

256. There are certain overarching considerations related to remedies that have arisen in certain contract-based ICSID cases. These considerations may be applicable in the context of compensation and damages as well as orders for performance of pecuniary obligations under the contract.
257. *Penalties for non-compliance.* These penalties, known as “*astreintes*” in French, may be available in contract-based cases when provided for by the applicable law or expressly agreed by the parties to incentivize compliance with the tribunals’ decisions.³⁸⁰

sought payment of overdue invoices as well as of costs incurred due to the respondent’s failure to take over the project upon completion. The tribunal ordered payment of amounts due under the contract after verifying that the works had been completed, that invoices had been approved, and that the claimant had continued to maintain the site.

³⁷⁸ See e.g., *RSM v. Grenada I*, Award, March 13, 2009, paras. 27-28, 393, 502 where the claimant sought an order from the tribunal declaring, among others, that the contract remained in force, and that Grenada had to ensure an exploration license was granted, seeking damages only as an alternative. Grenada relied upon the claimant’s alleged breach as a ground for terminating the contract. The tribunal dismissed all substantive claims by the claimant and declared that Grenada did not breach any of its obligations. See also *Latam Hydro v. Peru*, Award, December 20, 2023, paras. 980, 984, 988-990 where the tribunal declined to declare that the contract was terminated because of an impossibility created by the respondent. Instead, the tribunal found that the contract was terminated automatically (in Spanish, “*de pleno derecho*”) when the second claimant failed to achieve the commercial operation start by a specific date. The tribunal ordered the restitution of the performance bond to the claimants and issued a declaration whereby Peru may not call or collect the performance bond under the contract.

³⁷⁹ See e.g., *Pluspetrol v. Perupetro*, Award, May 21, 2015, para. 57 where the claimants sought a declaration that they had not breached the contract, including the obligation to inform Perupetro of the markets in which end-use consumption of gas would take place and their compliance with royalty payments to Perupetro. Ultimately, the tribunal rejected the claimants’ request and upheld Perupetro’s position on the meaning of “end-use market”. See also *Niko Resources v. Bangladesh I*, Award, December 18, 2025, paras. 8, 50-54, 783 where the claimant sought a declaration of non-liability for events that occurred during operations. The tribunal declared that the claimant was not responsible with respect to one, but found the other incident was caused by the claimant’s breaches.

³⁸⁰ See *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Implementation of the Decision on the Payment Claim, September 14, 2015, para. 106. The claimant sought to reduce the interest compounding interval from annual to monthly to encourage Petrobangla to comply with the payment obligation. As a starting point, the tribunal acknowledged that parties could stipulate in a contract that a tribunal may penalize non-compliance through increased interest rates or “*astreinte*”. However, the tribunal clarified that “this does not mean that the ICSID Convention empowers or entitles arbitrators, on grounds independently of the parties’ agreement, to impose sanctions on a party for non-compliance with a tribunal’s

258. *Interest rate.* Contract parties can further stipulate the interest rate applicable to compensation under their contract. ICSID tribunals apply the rate agreed by parties whether expressed as a fixed rate,³⁸¹ by reference to a bank rate,³⁸² or by reference to a legal rate.³⁸³ Similarly, tribunals have applied the modalities for the calculation of interest as agreed in the contracts.³⁸⁴
259. *Currency and taxes.* Contract parties may agree on the currency in which compensation or damages are to be awarded.³⁸⁵ Although uncommon, they may also stipulate that any compensatory award shall be tax-free.³⁸⁶ Tribunals are sometimes requested to issue tax-free awards.³⁸⁷

decision”; and paras. 160-163 where the tribunal held that, while “tribunals have indeed included in the award an element to ‘encourage’ the award debtor to comply in a timely fashion with its obligations flowing from the award, for instance by increasing the rate for post-award interest and reducing the compounding interval”, it ultimately saw no basis to do so in that case. *See also Togo Electricité v. Togo*, Award, August 10, 2010, paras. 18, 234-235 where the claimants requested a partial award ordering Togo to reimburse claimants for the arbitration costs they had advanced on behalf of the respondent as well as a penalty of USD 1,000 per day in case of non-compliance. The tribunal rejected the request given that it could not issue a partial award under the ICSID Convention.

³⁸¹ *E.g., Astaldi S.p.A. v. Republic of Honduras* (ICSID Case No. ARB/07/32), Award, September 17, 2010, paras. 80, 83.

³⁸² *E.g., Pluspetrol v. Perupetro*, Award, May 21, 2015, para. 207 which states that the fixed bank rate applied was fixed by the parties’ contract as the prime rate plus 3 points.

³⁸³ The award in which this reference was made is not public.

³⁸⁴ *See e.g., Aucon v. Venezuela*, Award, September 23, 2003, para. 370 stating that contract established that the payment should be made within “thirty (30) business days from the due date of the obligation.” Despite Venezuela’s contention that the interest should run from the date of contract termination, the tribunal decided that “interest should generally run from the date on which the principal amount to which it applies became due.” *See also QNB v. South Sudan*, Award, May 7, 2024, para. 55(2)(b).

³⁸⁵ In a non-public award, the underlying contract provided for the conversion of US dollars to a foreign currency on the date of payment. The tribunal applied the parties’ agreement and ordered damages in the foreign currency.

³⁸⁶ *E.g., Caratube v. Kazakhstan II*, Award, September 27, 2017, para. 27 where the contract stated that “any award of a monetary sum shall be rendered in hard currency, free of any tax or other deduction.”

³⁸⁷ *See e.g., Grenada Private Power WRB v. Grenada*, Award, March 19, 2020, paras. 104(e), 380. The claimant sought an award “free and exempt from all Grenadian taxes, levies, and other duties” and the tribunal granted damages “exempt from all Grenadian taxes, levies and other duties.” In a non-public award, a claimant submitted that damages should be “grossed up” on account of taxes, otherwise damages would be reduced and it would not be made whole. Alternatively, the claimant requested the tribunal to state in the award that the respondent State should not levy those taxes. The tribunal found that the parties agreed that the taxes should not be applied, and that it had not been demonstrated that they would be applicable. It only granted reimbursement of taxes on a conditional basis, *i.e.*, if they were levied by the State. In another non-public decision, a tribunal found that it was allowed to gross up awards to correspond to the applicable tax status as long as the grossing up was not speculative. The tribunal denied the tax gross-up on the grounds that the claimant was no longer present in the host State and it was unlikely that the State would enforce tax obligations on it.

V. PROCEDURAL ISSUES IN CONTRACT-BASED ICSID CONVENTION ARBITRATION

260. This Section examines several procedural issues commonly addressed in contracts or arising in contract-based arbitrations and discusses how these matters are resolved in proceedings under the ICSID Convention.

A. LAW APPLICABLE TO THE PROCEDURE

261. Under Article 44 of the Convention, arbitration proceedings are conducted in accordance with: (i) the provisions of Section III of Chapter IV of the ICSID Convention; (ii) the arbitration rules in effect on the date on which the parties consented to arbitration, except as otherwise agreed; and (iii) any rules agreed by the parties. Article 44 further provides that any question of procedure not addressed by items (i) to (iii) will be decided by the tribunal.

262. Given that arbitration under the ICSID Convention is a self-contained system, domestic arbitration laws or procedural rules – including those of the place of arbitration – do not, in principle, apply to ICSID proceedings. Tribunals have ruled that domestic arbitration laws do not automatically apply to ICSID arbitrations held in ICSID Contracting States.³⁸⁸ However, parties may expressly agree to depart from this principle by allowing domestic law to govern certain procedural aspects of the arbitration. In practice, parties have rarely agreed that an ICSID arbitration be governed by domestic arbitration rules.³⁸⁹

263. As noted above, Article 44 of the Convention provides that tribunals can decide procedural questions that are not addressed by the Convention or applicable rules, including any rule agreed by the parties. With respect to issues not expressly addressed prior to the introduction of the 2022 ICSID Arbitration Rules, such as the conditions for granting

³⁸⁸ *E.g., Noble Energy v. Ecuador*, Decision on Jurisdiction, March 5, 2008, para. 228.

³⁸⁹ *E.g., TANESCO v. IPTL*, Decision on the Respondent's Request for Provisional Measures, December 20, 1999, paras. 7, 11 noting that article 18(c) and (e) of the parties' agreement (titled "Procedural Law") provided that "the Law governing the procedure and administration of [the] arbitration ... shall be the English law." In deciding a request for provisional measures, the tribunal determined that such an agreement does not override the application of the ICSID Convention, rules, and regulations to the proceeding.

provisional measures,³⁹⁰ bifurcation,³⁹¹ consolidation, and joinders of claims,³⁹² ICSID case law has relied on general principles derived from the ICSID Convention, international law, and prior ICSID awards and decisions. ICSID tribunals have also referred to such general principles when addressing other procedural issues, including procedural estoppel,³⁹³ *res judicata*,³⁹⁴ and joinder of parties.³⁹⁵

264. Domestic law may have relevance for specific procedural issues. For instance, in *Scimitar v. Bangladesh*, the tribunal found that the law of the claimant's place of incorporation governs the issue of whether the claimant had initiated the arbitration with proper authority in light of its corporate governance.³⁹⁶

B. PROCEDURAL AGREEMENTS

265. Article 44 of the Convention affords the parties significant flexibility in shaping arbitration proceedings. The same degree of flexibility is reflected in the ICSID Arbitration Rules. Pursuant to 2022 ICSID Arbitration Rule 1(2), “[t]he Tribunal shall apply any agreement of the parties on procedural matters to the extent that it does not conflict with the Convention or the ICSID Administrative and Financial Regulations.” The parties cannot derogate from either the ICSID Administrative and Financial Regulations,³⁹⁷ nor the Institution Rules. The ICSID Convention specifies when parties may depart from its

³⁹⁰ E.g., *RSM Production v. Saint Lucia*, Decision on Saint Lucia's Request for Security for Costs, August 13, 2014, para. 75. See also ICSID Arbitration Rules (2022), Rule 47(3) which sets the conditions for granting provisional measures.

³⁹¹ E.g., *Lighthouse v. Timor-Leste*, Decision on Bifurcation and related requests, July 8, 2016, paras. 19-21. See also ICSID Arbitration Rules (2022), Rules 42, 44 which regulate bifurcation.

³⁹² E.g., *Noble Energy v. Ecuador*, Decision on Jurisdiction, March 5, 2008, paras. 188-207. See also ICSID Arbitration Rules (2022), Rule 46 which addresses joinder of proceedings.

³⁹³ See e.g., *Caratube v. Kazakhstan II*, Award, September 27, 2017, paras. 458-475; *East Kalimantan v. PT Kaltim Prima Coal*, Award, December 28, 2009, paras. 211-212.

³⁹⁴ E.g., *Caratube v. Kazakhstan II*, Award, September 27, 2017, paras. 487-500.

³⁹⁵ E.g., *LETSCO v. Liberia*, Award, March 31, 1986, para. 16.17 denying LETSCO's request for joinder on the ground that the parties had not consented to the joinder.

³⁹⁶ *Scimitar Exploration Limited v. Bangladesh and Bangladesh Oil, Gas and Mineral Corporation* (ICSID Case No. ARB/92/2), Award, May 4, 1994, paras. 26-29 where the tribunal considered that the application of the British Virgin Islands law was “consonant with Article 42(1)” of the Convention.

³⁹⁷ See [ICSID Administrative and Financial Regulations \(2022\)](#). Regulation 22 states that the parties cannot appoint an institution different than ICSID to administer cases under the Convention; see also ICSID Administrative and Financial Regulations (2022), Regulation 26 stating that the parties cannot prohibit the Centre from maintaining and publishing a register for each case containing all significant data concerning the institution, the conduct and disposition of the proceeding, including the economic sector involved, the names of the parties and their representatives, the method of constitution and membership of the tribunal; all published under the procedural details of each case on ICSID website.

provisions, typically through formulations such as “except as the parties otherwise agree” or similar language.

266. Parties frequently seek to reflect any agreement regarding procedure through the inclusion of tailored dispute resolution provisions in investment contracts. This Section provides examples of issues that can be regulated in arbitration agreements based on past contract language and recommendations by the Secretariat. These recommendations complement the [ICSID Model Clauses](#).
267. *Applicable Rules – Critical date.* Under Article 44 of the Convention, arbitration is governed by the ICSID rules applicable at the time of consent.³⁹⁸ Parties may agree – and often do – to apply a different version of the rules, such as the version in force at the time the request was filed.³⁹⁹
268. *Precondition to arbitration proceedings.* As noted in the context of consent to ICSID jurisdiction, parties frequently provide in their arbitration agreement for mandatory amicable settlement as a precondition to the commencement of arbitration proceedings.⁴⁰⁰ The forms and the number of mandatory ADR mechanisms agreed by the parties vary significantly throughout regions and economic sectors. Some dispute resolution clauses require the parties to attempt to settle their dispute for a certain period of time (cooling off periods),⁴⁰¹ while others (mainly in the construction, oil and mining sectors) set up detailed negotiation mechanisms and/or conciliation procedures,⁴⁰² and some refer technical disputes to experts.⁴⁰³

³⁹⁸ See above para. 263.

³⁹⁹ See e.g., *Mobil Oil v. New Zealand*, Judgment of the High Court of New Zealand, July 1, 1987, para. 8 citing clause 7.8 of the arbitration agreement relied upon by the parties: “[e]xcept as otherwise provided in this Agreement any arbitration proceedings shall be conducted in accordance with the Arbitration Rules of the Centre in effect on the date the Dispute is submitted to the Centre”; *World Duty Free v. Kenya*, Award, August 4, 2006, para. 6.

⁴⁰⁰ See above para. 159.

⁴⁰¹ See e.g., *Aucon v. Venezuela*, Decision on Jurisdiction, September 27, 2001, para. 79 quoting the arbitration agreement relied upon by the parties requiring the parties to attempt to settle the dispute by conciliation for 30 working days; *Transgabonais v. Gabon*, Award, March 7, 2008, para. 43 citing the agreement requiring the parties to attempt negotiation for 30 days and conciliation for additional 30 days before initiating arbitration.

⁴⁰² See e.g., *Occidental v. Ecuador*, Decision on Jurisdiction, September 9, 2008, para. 31 citing the arbitration agreement relied upon by the parties; *Elsamex v. Honduras*, Decision on Objection to Jurisdiction, June 4, 2010, para. 33. Non-compliance with multi-step clauses is addressed above in para. 159.

⁴⁰³ E.g., *Latam Hydro v. Peru*, Award, December 20, 2023, para. 273 citing the arbitration agreement of the parties.

269. *Service of the request.* It is common for parties to agree on how notices of disputes or of intent to initiate negotiation, conciliation or arbitration should be served.⁴⁰⁴ Parties should consider the long-term nature of the contract and set process and contact details that are likely to remain valid over the many years that may elapse before disputes arise (or methods to update them).
270. *Number of arbitrators, nationality and method of constituting the tribunal.* The ICSID Convention establishes three requirements for the appointment of arbitrators and the constitution of the tribunal: (i) the tribunal must consist of an uneven number of arbitrators (Article 37(2)(a)); (ii) the majority of arbitrators must be nationals of States other than the host State and the investor's home State, unless each arbitrator is appointed by agreement of the parties (Article 39), and (iii) arbitrators appointed from outside the Panel of Arbitrators must possess the qualities required for those serving on that Panel under Article 14 of the Convention (Article 40(2)). Apart from these requirements, the parties are free to choose the method for constituting the tribunal and to select the arbitrators they prefer.
271. Often parties agree to appoint three arbitrators, with each party selecting one, and the president being appointed either by the parties or by the co-arbitrators.⁴⁰⁵ If a sole arbitrator is to be appointed, the parties generally agree to a joint appointment or may authorize the ICSID Secretary-General to make the appointment. Parties usually also agree on a default method to appoint any missing arbitrator, such as authorizing the ICSID Secretary-General to make the appointment.
272. Parties can establish time limits for appointing tribunal members. If the time limits are linked to the appointment of an arbitrator, parties should ensure that these limits run from the date the parties are notified that the arbitrator has accepted their role, rather than from the date of appointment.

⁴⁰⁴ See e.g., *Noble Energy v. Ecuador*, Decision on Jurisdiction, March 5, 2008, para. 55 quoting clause 22.3 of the parties' contract; *Transgabonais v. Gabon*, Award, March 7, 2008, paras. 44-45 where the tribunal decided, also in light of the principle of "the *indivisibilité de l'État*", that sending a notice of conciliation to the *agent judiciaire*, instead of the relevant Ministries, did not make the notice invalid or without effect.

⁴⁰⁵ See ICSID Arbitration Rules (2022), Rules 13-21 for the default method of constitution, pursuant to Rule 15(2) if the parties do not agree on a method of constitution within 45 days after registration, Article 37(2)(b) of the Convention applies, according to which the tribunal is composed of three arbitrators, one appointed by each party and the third appointed by agreement of the parties. Under Rule 17, the Secretary-General can assist with the appointment of the president of the tribunal. Under Rule 18, if the tribunal has not been constituted within 90 days after the date of registration, or such other period as the parties may agree, either party may request that the Chair of the Administrative Council appoint the arbitrator(s) who have not yet been appointed pursuant to Article 38 of the Convention.

273. Parties can also agree on the nationality or qualifications of the arbitrators to be appointed to the case or on the arbitrator's profile the institution should take into account when making a default appointment.⁴⁰⁶ Pursuant to Article 39 of the Convention, in order to derogate from the requirement that the majority of arbitrators not be nationals of the respondent State or of the State whose national is a disputing party, the parties must agree on the appointment of all three arbitrators.
274. *Language of proceeding.* Parties often select the language of the proceeding in the arbitration agreement. In accordance with 2022 ICSID Arbitration Rule 7(1), the parties may choose English, French or Spanish (or a combination of up to two of these languages).⁴⁰⁷ If the Parties intend to agree on a language that is not an official language of the Centre, they need to first consult with the Centre.
275. *Place of proceeding.* Parties often agree to hold proceedings in a location other than the Centre's seat, as allowed by Article 62 of the Convention. Of note, in-person sessions and hearings do not need to take place at the place of the proceedings. Hearings have taken place all over the world. The Centre has cooperation agreements with 35 institutions and has access to the World Bank's offices and meeting rooms, which facilitates the possibility of holding hearings worldwide.⁴⁰⁸
276. *Provisional measures.* As explained further below and as an exception to the exclusivity rule of Article 26 of the Convention, under 2022 ICSID Arbitration Rule 47(7), parties may agree to seek provisional measures from domestic courts or other authorities.⁴⁰⁹ (See [ICSID Model Clauses](#) on provisional measures.) If there is no such agreement, ICSID tribunals have exclusive authority to order these measures.

⁴⁰⁶ See e.g., *Mobil Oil v. New Zealand*, Judgment of the High Court of New Zealand, July 1, 1987, para. 8 citing the arbitration agreement of the parties stating that the president of the tribunal should "be a New Zealand national [and should be] appointed by agreement of such parties, but failing agreement shall be a New Zealand national appointed by the chairman, as that term is described in the Convention"; *Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, para. 11 citing an agreement on the profile of the arbitrators when appointed by the institution. Parties can also agree to apply the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (2023) to candidates and actual arbitrators.

⁴⁰⁷ E.g., *Latam v. Peru*, Award, December 20, 2023, para. 273 citing to the clause of the contract establishing that the arbitration be conducted in Spanish. See also para. 566 recounting that the parties subsequently agreed that in addition to Spanish, English would be a procedural language.

⁴⁰⁸ See [Global Facilities and Partnerships](#) for the list of institutions with which ICSID has entered into cooperation agreements.

⁴⁰⁹ E.g., *Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, para. 12 quoting article 12.4 of the arbitration clause stating "[e]ach party hereby irrevocably agrees not to bring legal proceedings in any court except: (i) seeking interim and conservatory measures to protect or enforce its rights under this Agreement as provided in Article 8(5) of the ICC Rules or carrying out actions to give effect to Section 12.3."

277. *Effect on the contract.* Many investment contracts require that business operations and contract performance continue during arbitration.⁴¹⁰ In some contracts, the parties explicitly provide that the arbitration clause survives the termination of the contract, likely to anticipate any jurisdictional challenges arising from the termination.⁴¹¹
278. *Costs of the proceedings.* Parties often agree in their arbitration agreements on the principles that should govern the allocation of costs by the tribunal.⁴¹² If the parties do not address this point, Article 61(2) of the Convention provides that the tribunal has discretion to decide how and by whom the costs of the proceeding, including the parties' legal and other costs, are to be paid. In practice, tribunals allocate the costs either by splitting the costs between the parties, applying the rule '*costs follow the event*' or adopting a combination of both. Pursuant to Rule 52(2), there is a presumption in favor of '*costs follow the event*' if the tribunal dismisses the case under Rule 41(3) on manifest lack of legal merit and renders an award.
279. *Expedited arbitration.* Parties occasionally agree in their arbitration agreements to specific time limits for the conduct of the proceedings. Since 2022, ICSID has had expedited arbitration rules that provide a faster and more efficient process, significantly reducing the duration of proceedings.⁴¹³ In particular, the expedited rules provide for shortened, mandatory time frames, the appointment of a sole arbitrator (unless otherwise agreed), limited written submissions, compressed hearing scheduling, and shorter time limits for the issuance of the award. An expedited arbitration is expected to conclude 470- 530 days after registration based on the schedule adopted for pleadings. Parties can opt for expedited arbitration under Chapter XII of the 2022 ICSID Arbitration Rules by expressly agreeing to apply this chapter, in addition to consenting to ICSID Convention arbitration. If an arbitration clause includes consent to expedited arbitration, this is communicated to ICSID when the request for arbitration is filed, and the expedited rules apply from the date the

⁴¹⁰ See e.g., *Latam v. Peru*, Award, December 20, 2023, para. 273 quoting the arbitration agreement of the parties stating, "while the arbitration is pending, the Parties shall continue fulfilling, to the extent possible, their contractual obligations, including those obligations that are the subject-matter of the arbitration"; *Caratube v. Kazakhstan II*, Award, September 27, 2017, para. 27 quoting clause 27.10 of the parties' agreement; *Noble Energy v. Ecuador*, Decision on Jurisdiction, March 5, 2008, para. 55 quoting clause 22.4 of the parties' agreement.

⁴¹¹ E.g., *East Kalimantan v. PT Kaltim Prima Coal*, Award, August 28, 2009, para. 14 quoting clause 23.2.2 of the parties' agreement. See above on this issue paras. 183-184 discussing the notion of "separability."

⁴¹² See e.g., *Caratube v. Kazakhstan II*, Award, September 27, 2017, para. 27 quoting clause 27.6 where the parties agreed that costs would follow the events; *Duke v. Peru*, Award, August 18, 2008, paras. 495-500 where the parties agreed in the contract to share arbitration costs equally.

⁴¹³ See [Expedited Arbitration - ICSID Arbitration Rules \(2022\)](#) for more information on expedited arbitration and its process.

request is registered. However, the parties may also agree to expedited arbitration or particular provisions in the expedited rules (*e.g.*, regarding the constitution of the tribunal) after registration. Expedited arbitration is particularly well-suited to contract-based disputes with smaller value claims⁴¹⁴ or that involve time-sensitive considerations. (See [ICSID Model Clauses](#) on expedited arbitration.)

280. *Transparency and confidentiality.* Parties may agree on whether the proceeding and the tribunal's rulings will be published or kept confidential. Under Article 48(5) of the Convention, the Centre's publication of an award or a decision on annulment requires the consent of both parties. Some parties address this in their arbitration agreement.⁴¹⁵ Under ICSID Arbitration Rule 62(3), ICSID may publish an award in full if neither party objects within 60 days of its dispatch, as the absence of objections is deemed consent to publication. In practice, however, awards, decisions, and orders are typically published with the express consent of both parties and following a party-driven redaction process.⁴¹⁶ The agreements on confidentiality and transparency are typically addressed in a procedural order at the outset of the arbitration. The agreements may include whether hearings will be open to the public.⁴¹⁷ If the parties agree on publication of case decisions or other documents and open hearings, the tribunal typically establishes procedures to prevent the disclosure of confidential or protected information.⁴¹⁸
281. *Waiver of immunity.* Parties often include clauses in investment contracts in which the State explicitly waives any immunity from jurisdiction or execution in connection with contract-related proceedings.⁴¹⁹ Under Article 54 of the Convention, all Contracting States must recognize awards rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed therein. Article 55 of the Convention nevertheless makes clear that a State does not, by becoming a party to the Convention, waive such immunity from execution of an award as the State might enjoy under national laws. However, this does not prevent a State from waiving such immunity. Given the different interpretations

⁴¹⁴ See Report of the IBA Investment Arbitration Subcommittee, *Arbitrating Small Value Claims in Investment Arbitration* (2022), p. 8, pp. 19-24.

⁴¹⁵ *E.g.*, *CDC v. Seychelles*, Award, December 17, 2003, para. 4 quoting para. 6.3 of the guarantee contract allowing the Centre to publish the award.

⁴¹⁶ ICSID Arbitration Rules (2022), Rules 62(3)-(4), 63.

⁴¹⁷ ICSID Arbitration Rules (2022), Rule 65.

⁴¹⁸ ICSID Arbitration Rules (2022), Rule 66.

⁴¹⁹ See *e.g.*, *Atlantic Triton v. Guinea*, Award, April 21, 1986 (ICSID Reports, Vol. 3, 1995), p. 17; *Noble Energy v. Ecuador*, Decision on Jurisdiction, March 5, 2008, para. 54 quoting clause 11(f) of the parties' agreement; *MMS v. Central Africa*, Award, May 12, 2011, para. 188; *Caratube v. Kazakhstan II*, Award, September 27, 2017, para. 27, clause 27.9.

of the concept of waiver in various jurisdictions, drafters need to tailor any immunity waiver to the jurisdictions where enforcement is likely to be sought.

282. *Unavailability of the ICSID system.* Some contracts anticipate situations where ICSID arbitration may not be accessible and specify alternative forums for dispute resolution. For example, some parties agree that if ICSID either refuses to register a request for arbitration or if the tribunal determines it lacks jurisdiction, the dispute will instead be settled through arbitration under the ICC, LCIA, or UNCITRAL Rules.⁴²⁰ (See [ICSID Model Clauses](#) on addition to basic ICSID arbitration clause to address possible unavailability of ICSID Convention.)

C. ISSUES OF MULTIPLICITY: MULTIPLE CONTRACTS, MULTIPLE PARTIES, AND MULTIPLE PROCEEDINGS

(i) Claims under multiple contracts

283. Investment projects often involve multiple contracts, each containing a dispute resolution clause. When several contracts relating to the same investment project refer to ICSID arbitration in case of a dispute, it may be efficient to provide for the resolution of all potential claims in a single proceeding. ICSID case law provides support for such an approach, provided that: (i) all claims satisfy the requirements of Article 25 of the Convention;⁴²¹ (ii) the arbitration clauses are identical (or at a minimum compatible);⁴²² and (iii) the parties intend to consolidate the claims in a single arbitration.⁴²³

⁴²⁰ See e.g., *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, paras. 45, 88 for the JVA and for the GPSA respectively, both referring to ICC arbitration; *Caratube v. Kazakhstan II*, Award, September 27, 2017, para. 27 quoting clause 27.3 of the relevant contract referring to UNCITRAL; *QNB v. South Sudan*, Decision on Jurisdiction and Liability, January 5, 2024, para. 97(b) referring to LCIA; *Rasia v. Armenia*, Decision on Annulment, November 5, 2024, para. 109 referring to ICC; *Latam Hydro v. Peru*, Award, December 20, 2023, para. 384 referring to arbitration before the Lima Chamber of Commerce.

⁴²¹ E.g., *Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, paras. 118, 120 *et seq.*

⁴²² E.g., *Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, para. 155 where the tribunal relied upon non-identical but compatible arbitration clauses; see also paras. 10-14 quoting the text of the clauses.

⁴²³ E.g., *Latam Hydro v. Peru*, Award, December 20, 2023, paras. 453-454 finding that there was “‘no juridical difficulty in having an ICSID arbitration based on different claims arising from separate investment protections and separate but identical arbitration provisions’ and that this solution is in fact in line with ‘fairness, consistency and procedural efficiency in international arbitration.’”

284. Claims under different contracts containing references to ICSID Convention arbitration may be filed with a single request for arbitration,⁴²⁴ or introduced in a pending arbitration as counterclaims or additional claims under Article 46 of the Convention.⁴²⁵
285. In determining whether claims under multiple contracts may be decided in a single proceeding, ICSID tribunals have examined whether the parties agreed to permit this. Parties' consent may be explicit in the arbitration agreement or in a separate agreement. This would be the case, for example, of contracts providing that disputes under multiple contracts will be resolved pursuant to the arbitration clause in one of the contracts, or that such claims may be brought into a single arbitration.⁴²⁶
286. Parties' consent to a single proceeding may also be implied from the terms of the contracts and the parties' conduct. Parties' intention may be, for example, evidenced by the fact that they included identical arbitration clauses across contracts, that these arbitration clauses were concluded contemporaneously, are interdependent or otherwise interconnected, and they are included in interrelated contracts arising from a single project.⁴²⁷
287. In *Cambodia Power v. Cambodia*, the claimant brought claims under three contracts with Cambodia and the state-owned entity, Electricité du Cambodge, containing non-identical,

⁴²⁴ E.g., *Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, paras. 157-160 finding that it "would be contrary to the spirit of the Convention to require claimants in each case to file as many requests for arbitration as they have claims arising under different agreements, particularly where such claims are clearly connected as in the present case. Not only would this be onerous, but it would also represent a considerable waste of time and costs, and could lead to potential delaying tactics, and inconsistent determinations. More importantly such an approach is not mandated by the Convention or by the Rules". Claims can also be presented under various instruments (such as contract, treaty and law) and disposed of together. The *Noble Venture* tribunal considered that this was a matter of the conduct of the procedure covered by Article 44 of the ICSID Convention. It noted that there was an obvious interdependence between the different disputes submitted, arising out of the same investment project and the same overall economic transaction, and that it was more efficient to deal with all the claims in one proceeding rather than to resolve them separately. *Noble Ventures v. Ecuador*, Decision on Jurisdiction, March 5, 2008, paras. 188-207.

⁴²⁵ E.g., *Lundin v. Tunisia I*, Award, December 22, 2015, paras. 22-29 recounting how in *Lundin v. Tunisia I* and *Lundin Tunisia B.V. v. Republic of Tunisia* (ICSID Case No. ARB/13/15) ("**Lundin v. Tunisia II**"), the claimant was the same with two sets of claims. The second set of claims was presented through a new request. Those claims were admitted into the *Lundin v. Tunisia I* proceeding as additional claims and *Lundin v. Tunisia II* was discontinued. Parties may also bring claims under multiple contracts in separate proceedings and subsequently consolidate or coordinate those proceedings. See below.

⁴²⁶ E.g., *Contour Global Kosovo LLC v. Republic of Kosovo and others* (ICSID Case No. ARB/20/50), Request for Arbitration, November 19, 2020, para. 25 citing clause 22.6 of the contract between the parties providing that "(a) The arbitral tribunal may consolidate an arbitration arising out of or relating to this Agreement with any arbitration arising out of or relating to one or more of the Project Agreements if the subject matter of the Disputes arises out of or relates to essentially the same facts or transactions. Such consolidated arbitration shall be determined by the arbitral tribunal appointed for the arbitration proceeding that was commenced first in time."

⁴²⁷ E.g., *Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, paras. 132, 155.

but compatible, ICSID clauses.⁴²⁸ The tribunal carefully examined the investment structure, the interrelationship among the contracts, their wording, and the parties' post-signing conduct, and concluded that all these elements showed that the parties intended claims under different contracts to be heard by a single tribunal and that no indication existed that the parties intended to have multiple, parallel, proceedings arising out of the same dispute, with the burdens and risks that this would entail.⁴²⁹

288. Issues may arise when multiple interrelated agreements, through which complex investment transactions are structured, refer disputes to different fora – for example another form of arbitration, court litigation, or a combination of the two⁴³⁰ – or when not all agreements contain a dispute resolution clause.
289. In early ICSID contract cases, tribunals found that an ICSID clause appearing in some – but not all – related contracts could extend to the entire investment operation, depending on the circumstances. This was grounded in a broad reading of dispute resolution clauses, and in the context of the parties' overall relationship rather than a single document in isolation.⁴³¹ More recently, tribunals have recognized the principle of the general unity of the investment operation while clarifying that this principle does not automatically grant jurisdiction to ICSID tribunals over claims arising from every agreement concluded in furtherance of the investment. Under this view, the scope of consent to arbitration cannot be presumed to stretch beyond what the parties intended.⁴³²

⁴²⁸ *Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, paras. 155-156; see also paras. 10- 14 restating an ICC clause providing ICC arbitration prior to Cambodia's ratification of the ICSID Convention and four ICSID clauses providing for ICSID arbitration after the ratification.

⁴²⁹ *Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, paras. 129-156.

⁴³⁰ Parties often include references to domestic courts alongside ICSID arbitration within the same contract – for example, to address specific categories of disputes that the parties consider non-arbitrable or unsuitable for resolution by an ICSID tribunal. In some contracts, parties expressly regulate the potential interaction between proceedings in different fora, e.g., *Latam Hydro v. Peru*, Award, December 20, 2023, para. 271 citing TPA article 10.18 (4), which provided “No claim may be submitted to arbitration for (1) breach of an investment authorization under [other articles of the contract] or (2) for a breach of an investment agreement under [other articles of the contract] if those claims have been previously submitted to a court of the respondent.”

⁴³¹ See e.g., *Holiday Inns v. Morocco*, in Lalive, *The First World Bank Arbitration*, pp. 677-681; *SOABI v. Senegal*, Award, February 25, 1988, paras. 2.01-2.15, 4.01-4.56; *Klöckner v. Cameroon*, Award, October 21, 1983, paras. 1-24.

⁴³² *CSOB v. Slovakia*, Decision on Jurisdiction, May 24, 1999, paras. 72, 80-82; *CSOB v. Slovakia*, Decision on Further and Partial Objection to Jurisdiction, December 1, 2000, paras. 26-32 where the tribunal denied jurisdiction over claims arising from the Loan Agreements; *Duke v. Peru*, Decision on Jurisdiction, February 1, 2006, paras. 75–82, 89, 90, 119-134.

290. Conflicting dispute resolution clauses can result in significant complications, including jurisdictional objections during the arbitration,⁴³³ parallel proceedings, increased costs, and the risk of inconsistent outcomes. Therefore, contract drafters should exercise particular care when designing dispute resolution mechanisms for investments governed by multiple instruments. If the parties intend to refer disputes to ICSID, this intention should be clearly and consistently reflected across all relevant agreements.
291. *Exclusive Remedy*. Article 26 assists tribunals and domestic courts in resolving such conflicts by granting ICSID exclusive competence over a dispute, unless it is evident that the parties intended to use multiple forums.⁴³⁴ For example, tribunals in *Holiday Inns* and *SOABI* relied on Article 26 to assert jurisdiction over disputes arising from a series of contracts with multiple dispute resolution clauses.⁴³⁵
292. The *MINE v. Guinea* case further illustrated this point. Despite the parties having entered into ICSID arbitration agreements, MINE initiated an AAA arbitration and secured a

⁴³³ E.g., *Klöckner v. Cameroon*, Award, October 21, 1983, paras. 1-5, 20-24. The case concerned several agreements entered for the construction and operation of a fertilizer plant. The contracts with the State – the 1971 Protocol of Agreement, the 1972 Supply Contract, and the 1973 Establishment Agreement – contained the same ICSID arbitration clause, but the 1977 Management Contract between Klöckner and SOCAMÉ (a local joint venture with the Cameroonian government) included an ICC clause, under which Cameroon counterclaimed. The ICSID tribunal, by majority, accepted jurisdiction over both the claims and the counterclaim. The tribunal reasoned that, based on the ICSID clause’s wording and the parties’ intentions, its jurisdiction covered all disputes arising from the 1971 Protocol, including those related to management responsibilities, and that the Management Contract did not override the earlier ICSID clause in the 1971 Protocol. See also *Klöckner v. Cameroon*, Dissenting Opinion of Arbitrator D. Schmidt, October 21, 1983, paras. 78-97 where Arbitrator Schmidt dissented from this view; and *Klöckner v. Cameroon*, Decision on Annulment, May 3, 1985, para. 52. The award was subsequently annulled, but not on grounds relating to jurisdiction. The committee did, however, question the tribunal’s reasoning on this point, noting ambiguity in the agreements’ wording. Nevertheless, it found the tribunal’s interpretation “tenable” and not a manifest excess of power.

⁴³⁴ ICSID Convention, Article 26 states “Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.” See also Schreuer, Article 26, paras. 2-4 commenting that the first sentence of Article 26, known as the exclusive remedy rule, is designed to maintain the exclusivity and self-contained nature of the ICSID system, preventing interference in the ICSID process; ED Report, para. 32 stating that “[i]t may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy.”

⁴³⁵ *Holiday Inns v. Morocco*, in Lalive, *The First ‘World Bank’ Arbitration*, pp. 655-658, 680-681 where the claimants sought provisional measures before Moroccan courts and where the tribunal in its Decision on Provisional Measures of July 2, 1972, reminded the parties that it had exclusive jurisdiction, and confirmed in its Decision on Jurisdiction of May 12, 1974 its jurisdiction over Moroccan courts mentioned in some of the contracts – the case did not go on to the merits as it was settled; see also *SOABI v. Senegal*, Award, February 25, 1988, paras. 4.44-4.52 where the tribunal found that it had jurisdiction regarding the investments while local courts had jurisdiction over disputes between an engineer and the contractor before the works were finished.

favorable award.⁴³⁶ Subsequently, MINE commenced ICSID proceedings related to the underlying dispute, while simultaneously seeking to enforce the AAA award in the United States of America, Belgium, and Switzerland. Guinea requested provisional measures from the ICSID tribunal, seeking an order for MINE to withdraw and discontinue all ongoing court proceedings. The ICSID tribunal granted this request, relying on the exclusivity principle in Article 26.⁴³⁷ Courts in the United States of America, Belgium, and Switzerland also vacated attachments based on the AAA award, equally citing ICSID's exclusive jurisdiction under Article 26.

293. *Parties' agreements on ICSID exclusivity.* Parties often reinforce the exclusivity principle set by Article 26 by including a waiver requirement in their arbitration agreement, stipulating that disputes covered by the agreement may only be resolved through ICSID arbitration and not through other avenues, such as domestic litigation.⁴³⁸
294. Parties may also choose to limit ICSID exclusivity. For example, under ICSID Arbitration Rule 47(7), parties can agree in their arbitration agreement to seek provisional relief from domestic courts.⁴³⁹ Any exception to the ICSID exclusivity should however be drafted with care, to avoid ambiguity. (See [ICSID Model Clauses](#).)

(ii) Multiple parties/Joinder

295. Contract-based arbitrations frequently involved multiple claimants or multiple respondents. Out of the 175 contract-based cases, 47 cases (27%) involved at least two

⁴³⁶ See Schreuer, Article 26, paras. 9-19 on this case; *MINE v. Guinea*, Award, January 6, 1988, paras. 31-35. In 1978, MINE requested a US Federal District Court to compel an AAA arbitration because Guinea did not cooperate in the initiation of the ICSID arbitration on the basis of a previous agreement. The AAA arbitration was ordered by the US Court. In 1980, an AAA panel rendered an award, which MINE moved to confirm by the District Court of the District Court of Columbia. Guinea appeared to contest MINE's request, but the District Court confirmed the AAA award. Guinea appealed, and the Court of appeals found in 1982 that the District Court had no jurisdiction to order Guinea to arbitrate. MINE went on to try to enforce the AAA award in various European countries. MINE brought an ICSID case against Guinea in May 1984. Upon Guinea's request relying on Article 26, the ICSID tribunal issued recommendations in December 1985 ordering MINE to immediately withdraw all proceedings in national courts. The 1988 ICSID award found for MINE for approx. USD 12.5 million and accepted partially Guinea's counterclaims. The award was then partially annulled on damages for failure to state reasons on December 22, 1989, and the case was resubmitted in 1990, and finally settled few months later (see [ICSID Procedural Details](#)).

⁴³⁷ *MINE v. Guinea*, Award, January 6, 1988, paras. 77-79.

⁴³⁸ E.g., *Noble Energy v. Ecuador*, Decision on Jurisdiction, March 5, 2008, para. 55 quoting clause 22.5 of the arbitration clause, waiving the jurisdiction of Ecuador domestic courts.

⁴³⁹ E.g., *Cambodia Power v. Cambodia*, Decision on Jurisdiction, March 22, 2011, para. 12 quoting article 12.4 of the arbitration clause; see above note 409 for the text of the clause. Parties can also include a clause in an investment contract requiring investors to exhaust local remedies before seeking arbitration. In practice, such clauses are rare, and there have been no ICSID Convention arbitration cases where a tribunal had to address an explicit requirement to exhaust local remedies in an investment contract.

claimants, and 20 cases (11%) involved at least two respondents. Where multiple State-side parties are named, claims typically proceed against the State together with a State constituent subdivision or agency (*e.g.*, a central bank,⁴⁴⁰ a national oil company,⁴⁴¹ or another State-owned enterprise that qualifies as an agency of the State).

296. If a request for arbitration is filed by multiple claimants or against multiple respondents, the ICSID Secretary-General will determine whether the dispute is manifestly outside the Centre's jurisdiction in relation to each party; the request is registered only for the parties that satisfy the requirements of Article 36(3).
297. Joinder of new parties after proceedings have commenced has been rarely sought in contract-based arbitrations under the ICSID Convention. There is no specific provision on joinder in the Convention or the ICSID Arbitration Rules. Two tribunals, declining the joinder requests, examined: (i) whether the tribunal had *prima facie* jurisdiction over the proposed new party, including that all parties consented to ICSID arbitration; and (ii) whether the parties agreed to resolve disputes in a single arbitration and the potential relevance of the joinder on the proceedings.⁴⁴² Another Tribunal accepted the joinder of a second claimant because all the parties consented to it, without further reasoning.⁴⁴³
298. No tribunal seems to have addressed the fact that the request for arbitration must identify the parties to the dispute, and that a joinder after a case is registered would not satisfy the

⁴⁴⁰ *E.g.*, *QNB v. South Sudan*, where the case was brought against South Sudan and the South Sudan National Bank.

⁴⁴¹ *E.g.*, *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (Petroecuador) (ICSID Case No. ARB/06/21).

⁴⁴² *LETCO v. Liberia*, Award, March 31, 1986, para. 16.17 where the claimant requested that the Liberian Bank for Development and Investment be joined as a party and the tribunal observed that neither the Bank nor Liberia had consented to the Bank's participation and that the tribunal did not have jurisdiction involving the Bank; *see also East Kalimantan v. PT Kaltim Prima Coal*, Award, December 28, 2009, paras. 154-159 where the tribunal denied the claimant's request to join the Regency of East Kutai as a co-claimant because it was not established that the Regency satisfied ICSID Convention Article 25, including consent to arbitration, the tribunal further noted there was "no indication either on the impact which the joinder would have on the other Parties to these proceedings," and that "neither the Claimant nor the Regency have put forward any claim to which the Regency would be entitled and which may affect the outcome of this case." *See also Ayat Nizar Raja Sumrain and others v. State of Kuwait* (ICSID Case No. ARB/19/20), Decision on the Request for Joinder of Third Party, October 5, 2020, paras. 20-23 where, in this treaty-based case, the tribunal declined to join a third party, emphasizing that the ICSID framework requires clear identification of the parties in the request for arbitration. The tribunal noted, however, that the outcome could differ where a contract provides specific provisions addressing the joinder of third parties to arbitrations commenced under that contract's clause.

⁴⁴³ *Togo Electricité v. Togo*, Award, August 10, 2010, paras. 13-16, 126 where the parties consented to the joinder of Suez Energie Services (SES), further to Togo's request at the first session to extend the arbitration clause to its local subsidiary. SES requested in turn as a condition to its participation that Togo waive any other remedies against it.

registration requirements of Article 36 of the ICSID Convention. In any event, all tribunals that dealt with the joinder of a party, including in treaty cases, seem to accept that consent of all participating parties would be required.

(iii) Consolidation and coordination of arbitrations under the 2022 ICSID Arbitration Rules

299. Earlier ICSID rules did not address consolidation or coordination of arbitrations. Besides cases mentioned in the earlier Sections, parties that sought *de facto* consolidated proceedings sometimes appointed identically composed tribunals and coordinated the proceedings when they were connected.⁴⁴⁴ Parties also sometimes agreed to consolidating cases after registration, and to have identically composed tribunals appointed to decide the cases pursuant to ICSID Arbitration Rule 19 (2006).⁴⁴⁵
300. The 2022 ICSID Arbitration Rules introduced specific provisions on consolidation and coordination. Under Arbitration Rule 46, parties may agree to consolidate or coordinate two or more pending arbitrations administered by the Centre.
301. *Consolidation of proceedings.* Consolidation merges all aspects of one or more arbitration(s) into a single case and results in one award. Under ICSID Arbitration Rule 46(2), the condition for a consolidation is that all proceedings are pending ICSID arbitrations registered under the ICSID Convention and involve the same Contracting State or CSA. Parties jointly submit proposed terms of reference for the consolidation, which are consulted with the Secretary-General and subsequently implemented by tribunal(s) through

⁴⁴⁴ See e.g., *Petronor E&P Gambia Limited and APCL Gambia B.V. v. Republic of The Gambia* (ICSID Case No. ARB/17/38) and *African Petroleum Gambia Limited and APCL Gambia B.V. v. Republic of The Gambia* (ICSID Case No. ARB/17/39) where, in both contract-based proceedings, the parties appointed the same tribunal; both cases were discontinued at an early stage. See *African Petroleum Gambia Limited (Block A1) v. Republic of The Gambia* (ICSID Case No. ARB/14/6) and *African Petroleum Gambia Limited (Block A4) v. Republic of The Gambia* (ICSID Case No. ARB/14/7) for a similar coordination process. See also *Niko Resources v. Bangladesh I* and *Niko Resources v. Bangladesh II*, Decision on Jurisdiction, August 19, 2013, which also illustrates a potential form of coordination: the composition of the tribunals was identical in both cases allowing for the coordination of some decisions, such as the Decision on Jurisdiction, while the awards were issued separately in each proceeding.

⁴⁴⁵ E.g., *BSGR v Guinea*, Procedural Order No. 5, February 14, 2016, where there were two cases initially ICSID Case No. ARB/14/22 (BSG Resources Limited) and ICSID Case No. ARB/15/46 (BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL), which the parties agreed to consolidate into one case ICSID Case No. ARB/14/22 and the name of the case was modified accordingly. The second case was discontinued. See also *Churchill Mining PLC v. Indonesia* (ICSID Case No. ARB/12/14) and *Planet Mining Pty Ltd v Indonesia* (ICSID Case No. 12/40), Procedural Order No. 4, March 18, 2013, for previous treaty cases where two cases where *de facto* coordinated and conducted together but with two awards issued.

an order or decision. Parties may provide in their arbitration agreement for the consolidation of future disputes involving related facts or legal issues.⁴⁴⁶

302. *Coordination of proceedings.* Coordination aligns procedures but keeps cases separate. Pursuant to ICSID Arbitration Rule 46(3), proceedings are administered as separate cases, even though steps are aligned. Parties jointly submit proposed terms of reference for the coordination, which are consulted with the Secretary-General and subsequently implemented by tribunal(s) through an order or decision. Coordination is best addressed at the outset of the arbitration, particularly as the parties may agree to constitute identically composed tribunals. Written submissions may relate to both cases concurrently or can be filed separately, and hearings can encompass oral arguments and evidence in relation to both proceedings to avoid duplication of time, arguments, and examination of witnesses and experts, resulting in considerable time and costs saving. Any procedural objections may likewise be addressed jointly.
303. Parallel Convention and AF cases can be coordinated pursuant to ICSID Arbitration Rule 46 and AF Arbitration Rule 56.⁴⁴⁷ The tribunals will issue separate awards under the ICSID Convention and under the AF Rules, as applicable.⁴⁴⁸
304. Coordination can also exist across institutions, where an ICSID case can be administered by ICSID in parallel to a case taking place under procedural rules of another institution.⁴⁴⁹

VI. CONCLUSION

305. This paper is intended to support informed decision-making by States, State entities, and investors in considering ICSID for investment contracts. By documenting, in a systematic manner, how ICSID tribunals have addressed contract-based disputes, it seeks to provide a reliable reference for those considering ICSID as a forum for resolving investment contract-based disputes and to contribute to the continued development of this well-

⁴⁴⁶ See above footnote 426.

⁴⁴⁷ In such a scenario, consolidation is not available as the two proceedings are of a different nature: one under the ICSID Convention and one under the AF Rules. Once the awards are issued, the ICSID Convention award is subject to the self-contained ICSID post award remedies and the AF award to regular set aside proceedings.

⁴⁴⁸ E.g., *Klesch Group Holdings Limited & others v. European Union* (ICSID Case No. ARB(AF)/23/1), Procedural Order No. 1, June 14, 2024, para. 28.1 for an example of coordination of one AF proceeding and two Convention proceedings under the Energy Charter Treaty.

⁴⁴⁹ E.g., *Gardabani Holdings v. Georgia I* and *Gardabani Holdings v. Georgia II*, two cases that were coordinated across institutions, respectively a treaty claim initiated under the ICSID Convention and the 2006 Arbitration Rules, and a contract claim filed at the Arbitration Institute of the Stockholm Chamber of Commerce. The parties in these cases agreed to coordinate administration of these claims at ICSID, given the overlap in underlying facts and damages claimed.

established dimension of ICSID's mandate. ICSID provides a mechanism for resolving disputes in a predictable and effective manner. This in turn supports investment stability and continuity.

306. ICSID's experience with contract-based arbitration spans more than five decades. Contract-based cases were the only type of case registered at the Centre from its inception until the mid-1980s, when treaty-based arbitration began to grow. While the relative proportion of such cases has evolved over time, contract-based proceedings have remained a consistent feature of the Centre's caseload. This experience reflects the continued relevance of the ICSID framework for disputes arising out of contractual arrangements across sectors and regions.
307. Despite ICSID's long-standing practice, contract-based proceedings remain less frequently initiated than treaty-based ones. This may reflect a greater familiarity with ICSID in the treaty context. It may also reflect concerns regarding the application of jurisdictional requirements in contract-based cases and protecting confidential information. The practice reviewed in this paper indicates that such concerns may be unwarranted. Jurisdictional objections, while frequently raised, succeed at a comparatively lower rate in contract-based proceedings than in treaty arbitration. Clear and structured arbitration clauses can also reduce uncertainty and support the effective use of ICSID for contractual disputes.
308. Furthermore, the practice reviewed in this paper points to several clear advantages for parties considering whether to include an ICSID arbitration clause in an investment contract. In particular, the ICSID system:
- *Establishes a neutral and stable legal regime:* Proceedings are governed by international rules and are insulated from domestic court intervention.
 - *Provides for reliable and well-defined rules governing compliance and enforcement:* ICSID awards are binding and must be recognized and enforced by all Contracting States as final judgments of their domestic courts, without the possibility of review on the merits, offering a uniquely robust enforcement framework.
 - *Preserves a high degree of party autonomy:* In contract-based disputes, parties may define the scope of consent to arbitration, select the applicable law, and tailor dispute settlement arrangements to their needs.
 - *Supports effective dispute resolution while offering the necessary procedural flexibility for contractual disputes:* Amicable settlement remains available at any stage of the dispute. States and State entities may act as claimants or respondents. Parties can request provisional measures and expect tribunals to address such requests efficiently. Counterclaims may be raised, reflecting the reciprocal nature of

contractual obligations. Proceedings can accommodate complex contractual structures, including multiple parties and multiple instruments. Parties may agree to keep case documents and decisions confidential.

309. Recent amendments to the ICSID Rules reinforce these features. The 2022 Rules introduce provisions on expedited arbitration, coordination of related proceedings, and procedural efficiency. These tools address practical considerations that often arise in contractual disputes. They provide options to streamline proceedings and manage complexity, while maintaining procedural balance.
310. More generally, the practice reviewed in this paper confirms that ICSID contract-based arbitration operates within a coherent and reliable framework. Tribunals have applied the Convention's requirements in a consistent manner. The resulting body of decisions contributes to legal certainty. This practice also indicates that the ICSID framework is capable of accommodating the evolving needs of investment contracts and dispute settlement.

ANNEX I – DATASET OF CONTRACT-BASED ICSID CASES

Legend:

- All references in the second column (“Case Reference”) are hyperlinked to the relevant case page on the ICSID website.
- In the third column (“Instrument of Consent”), “C” refers “contract”, “C*” refers to “*compromis*” or *ad hoc* agreement, “BIT” refers to “bilateral investment treaty”, “OT” to “other treaty” (for instance a multilateral investment treaty, or a free trade agreement with an investment chapter), and “L” refers to “domestic law”. The instruments of consent referred to in this column are those invoked by the claimant(s) at the time of registration.
- The last column (“Cited Decision(s)”) lists, for each case, the decision(s) / award cited in the paper, if any. “n/a” means that while the case has been reviewed by ICSID, no specific decision has been expressly referred to in the paper, either because other cases were deemed more illustrative, because the decisions are not available (for instance, because the case was discontinued or is still pending), or because they are not public.
- When available, the listed decisions in the last column include hyperlinks to the publicly available texts of such decisions.

Color coding:

State as Claimant

State Constituent Subdivision or Agency (“CSA”) as Claimant

CSA as Respondent/Co-Respondent

	Case name	Case Reference	Instrument of Consent	Industry	Status	Cited Decision(s)
ICSID Convention Arbitration						
1	<i>Holiday Inns S.A. and others v. Morocco</i>	ARB/72/1	C	Tourism	Concluded	<ul style="list-style-type: none"> Decision on Jurisdiction, May 12, 1974, in <i>Lalive, The First World Bank Arbitration</i>
2	<i>Adriano Gardella S.p.A. v. Côte d’Ivoire</i>	ARB/74/1	C	Other Industry	Concluded	<ul style="list-style-type: none"> n/a
3	<i>Alcoa Minerals of Jamaica, Inc. v. Jamaica</i>	ARB/74/2	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> Decision on Jurisdiction and Competence, July 6, 1975
4	<i>Kaiser Bauxite Company v. Jamaica</i>	ARB/74/3	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> Decision on Jurisdiction and Competence, July 6, 1975
5	<i>Reynolds Jamaica Mines Limited and Reynolds Metals Company v. Jamaica</i>	ARB/74/4	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> n/a
6	<i>Gabon v. Société Serete S.A.</i>	ARB/76/1	C	Construction	Concluded	<ul style="list-style-type: none"> n/a

*This paper does not constitute legal advice. The paper was published on June 30, 2026 with data and statistics as of December 31, 2025.

7	<i>AGIP S.p.A. v. People's Republic of the Congo</i>	ARB/77/1	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Award, November 30, 1979
8	<i>S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo</i>	ARB/77/2	C	Other Industry	Concluded	<ul style="list-style-type: none"> • Award, August 8, 1980
9	<i>Guadalupe Gas Products Corporation v. Nigeria</i>	ARB/78/1	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • n/a
10	<i>Amco Asia Corporation and others v. Republic of Indonesia</i>	ARB/81/1	C	Tourism	Concluded	<ul style="list-style-type: none"> • Decision on Jurisdiction, September 25, 1983 • Award, November 20, 1984 • Ad hoc Committee decision on the application for Annulment, May 16, 1986 • Decision on Jurisdiction (Resubmission), May 10, 1988 • Award (Resubmission), June 5, 1990 • Decision on Annulment (Resubmission), December 17, 1992
11	<i>Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais</i>	ARB/81/2	C	Other Industry	Concluded	<ul style="list-style-type: none"> • Award, October 21, 1983 • Dissenting Opinion of Arbitrator D. Schmidt, October 21, 1983 • Decision on Annulment, May 3, 1985
12	<i>Société Ouest Africaine des Bétons Industriels v. Republic of Senegal</i>	ARB/82/1	C	Construction	Concluded	<ul style="list-style-type: none"> • Decision on Jurisdiction, August 1, 1984 • Declaration of the President on the Tribunal Decision, August 1, 1984 • Award, February 25, 1988
13	<i>Swiss Aluminium Limited and Icelandic Aluminium Company Limited v. Iceland</i>	ARB/83/1	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • n/a
14	<i>Liberian Eastern Timber Corporation v. Republic of Liberia</i>	ARB/83/2	C	Agriculture, Fishing & Forestry	Concluded	<ul style="list-style-type: none"> • Award, March 31, 1986
15	<i>Atlantic Triton Company Limited v. People's Revolutionary Republic of Guinea</i>	ARB/84/1	C	Agriculture, Fishing & Forestry	Concluded	<ul style="list-style-type: none"> • Award, April 21, 1986, (ICSID Reports, Vol. 3, 1995)
16	<i>Colt Industries Operating Corporation v. Republic of Korea</i>	ARB/84/2	C	Other Industry	Concluded	<ul style="list-style-type: none"> • n/a
17	<i>Maritime International Nominees Establishment v. Republic of Guinea</i>	ARB/84/4	C*	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Award, January 6, 1988 • Decision on Annulment, December 22, 1989
18	<i>Ghaith R. Pharaon v. Republic of Tunisia</i>	ARB/86/1	C + L	Tourism	Concluded	<ul style="list-style-type: none"> • n/a
19	<i>Société d'Études de Travaux et de Gestion SETIMEG S.A. v. Gabonese Republic</i>	ARB/87/1	C	Construction	Concluded	<ul style="list-style-type: none"> • n/a

20	<i>Mobil Oil Corporation and others v. New Zealand</i>	ARB/87/2	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Judgment of the High Court of New Zealand, July 1, 1987 • Decision on liability, January 6, 1988
21	<i>Occidental of Pakistan, Inc. v. Islamic Republic of Pakistan</i>	ARB/87/4	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • n/a
22	<i>Vacuum Salt Products Ltd. v. Republic of Ghana</i>	ARB/92/1	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Award, February 16, 1994
23	<i>Scimitar Exploration Limited v. Bangladesh and Bangladesh Oil, Gas and Mineral Corporation</i>	ARB/92/2	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Award, May 4, 1994
24	<i>Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of St. Kitts and Nevis</i>	ARB/95/2	C	Information & Communication	Concluded	<ul style="list-style-type: none"> • Award, January 13, 1997
25	<i>Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica</i>	ARB/96/1	C*	Tourism	Concluded	<ul style="list-style-type: none"> • Award, February 17, 2000
26	<i>Misima Mines Pty. Ltd. v. Independent State of Papua New Guinea</i>	ARB/96/2	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • n/a
27	<i>Société d'Investigation de Recherche et d'Exploitation Minière v. Burkina Faso</i>	ARB/97/1	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Award, January 19, 2000
28	<i>Société Kufpec (Congo) Limited v. Republic of Congo</i>	ARB/97/2	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • n/a
29	<i>Československa obchodní banka, a.s. v. Slovak Republic</i>	ARB/97/4	C* + BIT	Finance	Concluded	<ul style="list-style-type: none"> • Decision on Jurisdiction, May 24, 1999 • Decision of the Tribunal on the Respondent's Further and Partial Objection to Jurisdiction, December 1, 2000 • Award, December 29, 2004
30	<i>WRB Enterprises, Inc. and Grenada Private Power Limited v. Grenada</i>	ARB/97/5	C	Electric Power & Other Energy	Concluded	<ul style="list-style-type: none"> • n/a
31	<i>Compagnie Française pour le Développement des Fibres Textiles v. Côte d'Ivoire</i>	ARB/97/8	C	Other Industry	Concluded	<ul style="list-style-type: none"> • n/a
32	<i>International Trust Company of Liberia v. Republic of Liberia</i>	ARB/98/3	C	Transportation	Concluded	<ul style="list-style-type: none"> • n/a
33	<i>Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo</i>	ARB/98/7	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Introductory Note, September 1, 2000 • Award, September 1, 2000
34	<i>Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited</i>	ARB/98/8	C	Electric Power & Other Energy	Concluded	<ul style="list-style-type: none"> • Decision on the Respondent's Request for Provisional Measures, December 20, 1999 • Decision on Tariff and Other Remaining Issues, Feb. 9, 2001

						<ul style="list-style-type: none"> • Award, July 12, 2001
35	<i>Astaldi S.p.A. & Columbus Latinoamericana de Construcciones S.A. v. Republic of Honduras</i>	ARB/99/8	C	Transportation	Concluded	<ul style="list-style-type: none"> • n/a
36	<i>GRAD Associates, P.A. v. Bolivarian Republic of Venezuela</i>	ARB/00/3	C	Construction	Concluded	<ul style="list-style-type: none"> • n/a
37	<i>Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela</i>	ARB/00/5	C	Transportation	Concluded	<ul style="list-style-type: none"> • Decision on Jurisdiction, September 27, 2001 • Award, September 23, 2003
38	<i>World Duty Free Company Limited v. Republic of Kenya</i>	ARB/00/7	C	Services & Trade	Concluded	<ul style="list-style-type: none"> • Award, October 4, 2006
39	<i>Ridgepointe Overseas Developments, Ltd. v. Democratic Republic of the Congo and Générale des Carrières et des Mines</i>	ARB/00/8	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • n/a
40	<i>Société d'Exploitation des Mines d'Or de Sadiola S.A. v. Republic of Mali</i>	ARB/01/5	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Award, February 25, 2003
41	<i>Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)</i>	ARB/01/10	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Decision on Jurisdiction, January 23, 2003
42	<i>CDC Group plc v. Republic of Seychelles</i>	ARB/02/14	C	Finance	Concluded	<ul style="list-style-type: none"> • Award, December 17, 2003
43	<i>Inceysa Vallisoletana S.L. v. Republic of El Salvador</i>	ARB/03/26	C + BIT	Transportation	Concluded	<ul style="list-style-type: none"> • Award, August 2, 2006
44	<i>Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru</i>	ARB/03/28	C	Electric Power & Other Energy	Concluded	<ul style="list-style-type: none"> • Decision on Jurisdiction, February 1, 2006 • Award, August 18, 2008 • Decision on Annulment, March 1, 2011
45	<i>Cemex Asia Holdings Ltd v. Republic of Indonesia</i>	ARB/04/3	C + OT	Construction	Concluded	<ul style="list-style-type: none"> • n/a
46	<i>Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic</i>	ARB/04/5	C	Transportation	Concluded	<ul style="list-style-type: none"> • Decision on Jurisdiction, December 19, 2005 • Award, March 7, 2008 • Decision on Annulment, May 11, 2010
47	<i>Russell Resources International Limited and others v. Democratic Republic of the Congo</i>	ARB/04/11	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • n/a
48	<i>Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador</i>	ARB/04/19	C* + BIT	Electric Power & Other Energy	Concluded	<ul style="list-style-type: none"> • Award, August 18, 2008
49	<i>Noble Energy Inc. and MachalaPower Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad</i>	ARB/05/12	C + BIT	Electric Power & Other Energy	Concluded	<ul style="list-style-type: none"> • Decision on Jurisdiction, March 5, 2008

50	<i>RSM Production Corporation v. Grenada</i>	ARB/05/14	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Award, March 13, 2009
51	<i>Hrvatska Elektroprivreda d.d. v. Republic of Slovenia</i>	ARB/05/24	C* + OT	Electric Power & Other Energy	Concluded	<ul style="list-style-type: none"> • n/a
52	<i>Togo Electricité and GDF-Suez Energie Services v. Republic of Togo</i>	ARB/06/7	C	Electric Power & Other Energy	Concluded	<ul style="list-style-type: none"> • Award, August 10, 2010
53	<i>Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v. People's Republic of Bangladesh</i>	ARB/06/10	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Award, May 17, 2010
54	<i>Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador</i>	ARB/06/11	C + BIT	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Decision on Jurisdiction, September 9, 2008 • Decision on Annulment of Award, November 2, 2015
55	<i>Scancem International ANS v. Republic of Congo</i>	ARB/06/12	C	Construction	Concluded	<ul style="list-style-type: none"> • n/a
56	<i>Aguaytia Energy, LLC v. Republic of Peru</i>	ARB/06/13	C	Electric Power & Other Energy	Concluded	<ul style="list-style-type: none"> • Award, December 11, 2008
57	<i>Barmek Holding A.S. v. Republic of Azerbaijan</i>	ARB/06/16	C + BIT	Electric Power & Other Energy	Concluded	<ul style="list-style-type: none"> • n/a
58	<i>City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador</i>	ARB/06/21	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • n/a
59	<i>Fondel Metal Participations B.V. v. Republic of Azerbaijan</i>	ARB/07/1	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • n/a
60	<i>RSM Production Corporation v. Central African Republic</i>	ARB/07/2	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Decision on Jurisdiction and Liability, December 7, 2010
61	<i>Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others</i>	ARB/07/3	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Award, December 28, 2009
62	<i>M. Meerapfel Söhne AG v. Central African Republic</i>	ARB/07/10	C	Other Industry	Concluded	<ul style="list-style-type: none"> • Award, May 12, 2011
63	<i>Astaldi S.p.A. v. Republic of Honduras</i>	ARB/07/32	C	Transportation	Concluded	<ul style="list-style-type: none"> • Award, September 17, 2010
64	<i>Burlington Resources, Inc. v. Republic of Ecuador</i>	ARB/08/5	C + BIT	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Decision on Liability, December 14, 2012 • Decision on Counterclaims, February 7, 2017 • Decision on Reconsideration and Award, February 7, 2017
65	<i>Perenco Ecuador Limited v. Republic of Ecuador</i>	ARB/08/6	C + BIT	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Decision on Jurisdiction, June 30, 2011

						<ul style="list-style-type: none"> • Decision on Remaining Issues of Jurisdiction and on Liability, September 12, 2014 • Interim Decision on the Environmental Counterclaim, August 11, 2015 • Award, September 27, 2019 • Decision on Annulment, May 28, 2021
66	<i>Repsol YPF Ecuador, S.A. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador</i>	ARB/08/10	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • n/a
67	<i>Millicom International Operations B.V. and Sentel GSM S.A. v. Republic of Senegal</i>	ARB/08/20	C + BIT	Information & Communication	Concluded	<ul style="list-style-type: none"> • Decision on Jurisdiction, July 16, 2010
68	<i>Elsamex, S.A. v. Republic of Honduras</i>	ARB/09/4	C	Transportation	Concluded	<ul style="list-style-type: none"> • Decision on Objections to Jurisdiction, June 4, 2010 • Award, November 16, 2012
69	<i>International Company for Railway Systems (ICRS) v. Hashemite Kingdom of Jordan</i>	ARB/09/13	C + BIT	Transportation	Concluded	<ul style="list-style-type: none"> • n/a
70	<i>Cambodia Power Company v. Kingdom of Cambodia</i>	ARB/09/18	C	Electric Power & Other Energy	Concluded	<ul style="list-style-type: none"> • Decision on Jurisdiction, March 22, 2011 • Decision on Claimant's Application Concerning Electricité du Cambodge, April 19, 2011 • Award, April 22, 2013
71	<i>Carnegie Minerals (Gambia) Limited v. Republic of The Gambia</i>	ARB/09/19	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • n/a
72	<i>Corporación Quiport S.A. and others v. Republic of Ecuador</i>	ARB/09/23	C	Transportation	Concluded	<ul style="list-style-type: none"> • n/a
73	<i>Olyana Holdings LLC v. Republic of Rwanda</i>	ARB/10/10	C	Agriculture, Fishing & Forestry	Concluded	<ul style="list-style-type: none"> • n/a
74	<i>Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex")</i>	ARB/10/11	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Decision on Jurisdiction, August 19, 2013 • Decision on the Payment Claim, September 11, 2014 • Decision on Implementation of the Decision on the Payment Claim, September 14, 2015 • Decision on the Corruption Claim, February 25, 2019 • Award, December 18, 2025
75	<i>Niko Resources (Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla), Bangladesh</i>	ARB/10/18	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Decision on Jurisdiction, August 19, 2013 • Decision on the Payment Claim, September 11, 2014

	<i>Petroleum Exploration and Production Company Limited (Bapex)</i>					<ul style="list-style-type: none"> • Decision on Implementation of the Decision on the Payment Claim, September 14, 2015 • Decision on the Corruption Claim, February 25, 2019 • Award, September 24, 2021 • Decision on Annulment, October 12, 2023 • Dissenting Opinion of Makhdoom Ali Khan, October 12, 2023
76	<i>Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited</i>	ARB/10/20	C	Electric Power & Other Energy	Concluded	<ul style="list-style-type: none"> • Decision on Jurisdiction and Liability, February 12, 2014
77	<i>Caravelí Cotaruse Transmisora de Energía S.A.C. v. Republic of Peru</i>	ARB/11/9	C	Electric Power & Other Energy	Concluded	<ul style="list-style-type: none"> • Award, April 15, 2013
78	<i>AHS Niger and Menzies Middle East and Africa S.A. v. Republic of Niger</i>	ARB/11/11	C + L	Services & Trade	Concluded	<ul style="list-style-type: none"> • Decision on Jurisdiction, March 13, 2013
79	<i>Diamond Fields Liberia, Inc. v. Republic of Liberia</i>	ARB/11/14	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • n/a
80	<i>DP World Callao S.R.L., P&O Dover (Holding) Limited, and The Peninsular and Oriental Steam Navigation Company v. Republic of Peru</i>	ARB/11/21	C + BIT	Transportation	Concluded	<ul style="list-style-type: none"> • n/a
81	<i>Société Industrielle des Boissons de Guinée v. Republic of Guinea</i>	ARB/12/8	C + L	Other Industry	Concluded	<ul style="list-style-type: none"> • Award, May 21, 2014
82	<i>RSM Production Corporation v. Saint Lucia</i>	ARB/12/10	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Decision on Saint Lucia's Request for Security for Costs, August 13, 2014 • Decision on Annulment, April 29, 2019
83	<i>Pluspetrol Perú Corporation and others v. Perupetro S.A.</i>	ARB/12/28	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Award, May 21, 2015
84	<i>Lundin Tunisia B. V. v. Republic of Tunisia</i>	ARB/12/30	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Award, December 22, 2015
85	<i>Tullow Uganda Operations Pty Ltd v. Republic of Uganda</i>	ARB/12/34	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • n/a
86	<i>Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan</i>	ARB/13/13	C + BIT + L	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Award, September 27, 2017
87	<i>RSM Production Corporation v. Republic of Cameroon</i>	ARB/13/14	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • n/a
88	<i>Lundin Tunisia B.V. v. Republic of Tunisia</i>	ARB/13/15	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • n/a

89	<i>Société des Mines de Loulo S.A. v. Republic of Mali</i>	ARB/13/16	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Award, June 2, 2016
90	<i>Republic of Peru v. Caraveli Cotaruse Transmisora de Energía S.A.C.</i>	ARB/13/24	C	Electric Power & Other Energy	Concluded	<ul style="list-style-type: none"> • Order Taking Note of the Discontinuance of the Arbitral Proceeding, December 26, 2013
91	<i>Tullow Uganda Operations Pty Ltd and Tullow Uganda Limited v. Republic of Uganda</i>	ARB/13/25	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • n/a
92	<i>Spentex Netherlands, B.V. v. Republic of Uzbekistan</i>	ARB/13/26	C + BIT + L	Other Industry	Concluded	<ul style="list-style-type: none"> • n/a
93	<i>African Petroleum Gambia Limited (Block A1) v. Republic of The Gambia</i>	ARB/14/6	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • n/a
94	<i>African Petroleum Gambia Limited (Block A4) v. Republic of The Gambia</i>	ARB/14/7	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • n/a
95	<i>BSG Resources Limited (in administration), BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v. Republic of Guinea</i>	ARB/14/22	C + L	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Procedural Order No. 5, February 14, 2016 • Award, May 18, 2022
96	<i>Tamagot Bumi S.A. and Bumi Mauritania S.A. v. Islamic Republic of Mauritania</i>	ARB/14/23	C + L	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • n/a
97	<i>Baymina Enerji Anonim Şirketi v. Boru Hatları ile Petrol Taşıma Anonim Şirketi</i>	ARB/14/35	C	Electric Power & Other Energy	Concluded	<ul style="list-style-type: none"> • n/a
98	<i>Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste</i>	ARB/15/2	C + L	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Decision on Bifurcation and related requests, July 8, 2016 • Award, December 22, 2017
99	<i>WalAm Energy LLC v. Republic of Kenya</i>	ARB/15/7	C	Electric Power & Other Energy	Concluded	<ul style="list-style-type: none"> • Award, July 10, 2020
100	<i>Total E&P Uganda BV v. Republic of Uganda</i>	ARB/15/11	C + BIT	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • n/a
101	<i>Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania</i>	ARB/15/41	C	Electric Power & Other Energy	Concluded	<ul style="list-style-type: none"> • Award, October 11, 2019
102	<i>BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v. Republic of Guinea</i>	ARB/15/46	C + L	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • n/a
103	<i>AngloGold Ashanti (Ghana) Limited v. Republic of Ghana</i>	ARB/16/15	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> • Order of the Tribunal Taking Note of the Discontinuance of the Proceeding, August 7, 2018
104	<i>APM Terminals Callao S.A. v. Republic of Peru</i>	ARB/16/33	C	Transportation	Concluded	<ul style="list-style-type: none"> • n/a

105	<i>Metro de Lima Línea 2 S.A. v. Republic of Peru</i>	ARB/17/3	C	Transportation	Pending	<ul style="list-style-type: none"> Decision on Jurisdiction and Liability, July 6, 2021
106	<i>Grenada Private Power Limited and WRB Enterprises, Inc. v. Grenada</i>	ARB/17/13	C	Electric Power & Other Energy	Concluded	<ul style="list-style-type: none"> Award, March 19, 2020
107	<i>Puma Energy PNG Supply Ltd and Puma Energy PNG Refining Limited v. Independent State of Papua New Guinea</i>	ARB/17/26	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> n/a
108	<i>Petronor E&P Gambia Limited and APCL Gambia B.V. v. Republic of The Gambia</i>	ARB/17/38	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> n/a
109	<i>African Petroleum Gambia Limited and APCL Gambia B.V. v. Republic of The Gambia</i>	ARB/17/39	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> n/a
110	<i>Wise Solutions CDI, SA v. Republic of Côte d'Ivoire</i>	ARB/17/48	C	Water, Sanitation & Flood Protection	Concluded	<ul style="list-style-type: none"> n/a
111	<i>Société des Parcs d'Alger and Emirates International Investment Company LLC v. People's Democratic Republic of Algeria</i>	ARB/18/11	C	Construction	Concluded	<ul style="list-style-type: none"> n/a
112	<i>NEPC Consortium Power Limited v. Bangladesh Power Development Board</i>	ARB/18/15	C	Electric Power & Other Energy	Concluded	<ul style="list-style-type: none"> n/a
113	<i>Togo Terminal v. Republic of Togo</i>	ARB/18/16	C	Construction	Concluded	<ul style="list-style-type: none"> n/a
114	<i>Autopista del Norte S.A.C. v. Republic of Peru</i>	ARB/18/17	C	Transportation	Concluded	<ul style="list-style-type: none"> n/a
115	<i>African Petroleum Senegal Limited v. Republic of Senegal</i>	ARB/18/24	C	Oil, Gas & Mining	Concluded	<ul style="list-style-type: none"> n/a
116	<i>Sociedad Aeroportuaria Kuntur Wasi S.A. and Corporación América S.A. v. Republic of Peru</i>	ARB/18/27	C + BIT	Transportation	Concluded	<ul style="list-style-type: none"> Decision on Jurisdiction and Liability, August 11, 2023 Award, May 9, 2024
117	<i>Rasia FZE and Joseph K. Borkowski v. Republic of Armenia</i>	ARB/18/28	C + BIT	Transportation	Concluded	<ul style="list-style-type: none"> Award, January 20, 2023 Decision on Annulment, November 5, 2024
118	<i>Société d'Energie et d'Eau du Gabon and Veolia Africa v. Gabonese Republic and Société de Patrimoine du service public de l'eau potable, de l'énergie électrique et de l'assainissement</i>	ARB/18/36	C	Electric Power & Other Energy	Concluded	<ul style="list-style-type: none"> n/a
119	<i>Hydrika I S.A.C. and others v. Republic of Peru</i>	ARB/18/48	C	Electric Power & Other Energy	Concluded	<ul style="list-style-type: none"> n/a

120	<i>Energy Utility Corporation Limited v. KivuWatt Limited</i>	ARB/19/3	C	Electric Power & Other Energy	Concluded	• n/a
121	<i>Niko Exploration (Block 9) Ltd. v. People's Republic of Bangladesh and Bangladesh Oil Gas and Mineral Corporation</i>	ARB/19/18	C	Oil, Gas & Mining	Pending	• n/a
122	<i>Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru</i>	ARB/19/28	C + BIT	Electric Power & Other Energy	Concluded	• Award , December 20, 2023
123	<i>Kansanshi Mining Plc v. Republic of Zambia</i>	ARB/20/17	C	Oil, Gas & Mining	Concluded	• n/a
124	<i>Desarrollo Vial de los Andes S.A.C. v. Republic of Peru</i>	ARB/20/18	C	Construction	Concluded	• n/a
125	<i>AHG Industry GmbH & Co. KG v. Republic of Iraq</i>	ARB/20/21	C + OT + BIT + L	Construction	Concluded	• Award , September 30, 2022
126	<i>Qatar National Bank (Q.P.S.C.) v. Republic of South Sudan and Bank of South Sudan</i>	ARB/20/40	C	Finance	Concluded	• Decision on Jurisdiction and Liability , January 5, 2024 • Award , May 7, 2024
127	<i>Contour Global Kosovo LLC v. Republic of Kosovo and others</i>	ARB/20/50	C	Electric Power & Other Energy	Concluded	• Request for Arbitration , November 19, 2020
128	<i>Mauritanian Copper Mines S.A. v. Islamic Republic of Mauritania</i>	ARB/21/9	C	Oil, Gas & Mining	Concluded	• n/a
129	<i>APM Terminals Callao S.A. v. Republic of Peru</i>	ARB/21/28	C	Transportation	Pending	• n/a
130	<i>Menankoto SARL v. Republic of Mali</i>	ARB/21/38	C	Oil, Gas & Mining	Concluded	• n/a
131	<i>Metro de Lima Línea 2, S.A. v. Republic of Peru</i>	ARB/21/41	C	Transportation	Pending	• n/a
132	<i>Concesionaria Peruana de Vías– COVINCA, S.A. v. Republic of Peru</i>	ARB/21/45	C	Construction	Concluded	• n/a
133	<i>Metro de Lima Línea 2, S.A. v. Republic of Peru</i>	ARB/21/57	C	Transportation	Pending	• n/a
134	<i>AGEM Ltd v. Republic of Mali</i>	ARB/21/62	C	Oil, Gas & Mining	Concluded	• n/a
135	<i>KrisEnergy Bangladesh Limited v. People's Republic of Bangladesh and Bangladesh Oil, Gas and Mineral Corporation</i>	ARB/22/4	C	Oil, Gas & Mining	Pending	• n/a
136	<i>Primesouth International Offshore S.A.L. v. Republic of Iraq</i>	ARB/22/7	C	Electric Power & Other Energy	Concluded (post-December 2025)	• n/a

137	<i>Digicel (Singapore) Private Limited v. Independent State of Papua New Guinea</i>	ARB/22/18	C	Information & Communication	Concluded	• n/a
138	<i>Upland Oil and Gas LLC (USA) and Upland Oil and Gas LLC (Perú) v. PeruPetro S.A.</i>	ARB/22/19	C	Oil, Gas & Mining	Concluded	• n/a
139	<i>Cameroon Oil Transportation Company S.A. v. Republic of Cameroon</i>	ARB/22/27	C	Oil, Gas & Mining	Pending	• n/a
140	<i>Autopistas del Atlántico, S.A. de C.V. and others v. Republic of Honduras</i>	ARB/23/10	C	Transportation	Pending	• n/a
141	<i>Operadora Ecológica del Titicaca S.A.C. v. Republic of Peru</i>	ARB/23/11	C	Water, Sanitation & Flood Protection	Pending	• n/a
142	<i>TV Azteca S.A.B de C.V. and Azteca Comunicaciones Perú S.A.C. v. Republic of Peru</i>	ARB/23/37	C + BIT	Information & Communication	Pending	• n/a
143	<i>Palmerola International Airport, S.A. de C.V. v. Republic of Honduras</i>	ARB/23/42	C	Transportation	Concluded	• n/a
144	<i>Elsewedy Electric for Transmission and Distribution of Energy S.A.E. v. Republic of South Sudan</i>	ARB/23/44	C	Construction	Concluded (post-December 2025)	• n/a
145	<i>Gas Natural de Lima y Callao S.A. v. Republic of Peru</i>	ARB/24/9	C	Oil, Gas & Mining	Pending	• n/a
146	<i>Qatar National Bank (Q.P.S.C) v. Republic of the Sudan and Central Bank of Sudan</i>	ARB/24/28	C	Finance	Pending	• n/a
147	<i>Gasoducto Sur Peruano S.A. En Liquidación v. Republic of Peru</i>	ARB/24/29	C	Oil, Gas & Mining	Pending	• n/a
148	<i>Operadora Portuaria Centroamericana, S.A. de C.V. v. Republic of Honduras</i>	ARB/24/33	C + L	Transportation	Pending	• n/a
149	<i>Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v. People's Republic of Bangladesh and Bangladesh Oil Gas and Mineral Corporation</i>	ARB/24/39	C	Oil, Gas & Mining	Pending	• n/a
150	<i>Minas de Revuboe Limitada v. Republic of Mozambique</i>	ARB/24/40	C	Oil, Gas & Mining	Concluded	• n/a
151	<i>Concesionaria Angostura Sigüas, S.A. v. Republic of Peru</i>	ARB/24/43	C	Construction	Pending	• n/a

152	<i>Société Industrielle de Viande de Côte d'Ivoire v. Republic of Côte d'Ivoire</i>	ARB/24/47	C	Construction	Pending	• n/a
153	<i>GoviEx Niger Holdings Ltd. and GoviEx Uranium Inc. v. Republic of Niger</i>	ARB/25/1	C	Oil, Gas & Mining	Pending	• n/a
154	<i>Société des Mines de Loulo S.A. and Société des Mines de Goukoto S.A. v. Republic of Mali</i>	ARB/25/2	C	Oil, Gas & Mining	Concluded (post-December 2025)	• n/a
155	<i>Orano Mining SAS v. Republic of Niger</i>	ARB/25/8	C	Oil, Gas & Mining	Pending	• n/a
156	<i>Orano Mining SAS v. Republic of Niger</i>	ARB/25/9	C	Oil, Gas & Mining	Pending	• n/a
157	<i>Bellwether International, Inc. and Tecnipetrol Inc. v. Republic of Ecuador and Empresa Pública de Hidrocarburos del Ecuador (EP Petroecuador)</i>	ARB/25/12	C	Oil, Gas & Mining	Pending	• n/a
158	<i>Oleoducto de Crudos Pesados (OCP) Ltd. v. Republic of Ecuador</i>	ARB/25/19	C	Oil, Gas & Mining	Concluded (post-December 2025)	• n/a
159	<i>Woodside Energy (Sénégal) B.V. v. Republic of Senegal</i>	ARB/25/23	C + BIT	Oil, Gas & Mining	Pending	• n/a
160	<i>PanAfrican Energy Tanzania Limited v. United Republic of Tanzania and Tanzania Petroleum Development Corporation</i>	ARB/25/43	C	Oil, Gas & Mining	Pending	• n/a
161	<i>PanAfrican Energy Tanzania Limited v. United Republic of Tanzania and Tanzania Petroleum Development Corporation</i>	ARB/25/44	C	Oil, Gas & Mining	Concluded	• n/a
ICSID AF Arbitration						
162	<i>EnviroGold (Las Lagunas) Limited v. Dominican Republic</i>	ARB(AF)/20/1	C	Oil, Gas & Mining	Concluded	• n/a
ICSID Convention Conciliation						
163	<i>SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. Democratic Republic of Madagascar</i>	CONC/82/1	C	Other Industry	Concluded	• n/a
164	<i>Tesoro Petroleum Corporation v. Trinidad and Tobago</i>	CONC/83/1	C	Oil, Gas & Mining	Concluded	• n/a

165	<i>SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. Madagascar</i>	CONC/94/1	C	Other Industry	Concluded	• n/a
166	<i>TG World Petroleum Limited v. Republic of Niger</i>	CONC/03/1	C	Oil, Gas & Mining	Concluded	• n/a
167	<i>Togo Electricité v. Republic of Togo</i>	CONC/05/1	C	Electric Power & Other Energy	Concluded	• n/a
168	<i>Shareholders of SESAM v. Central African Republic</i>	CONC/07/1	C	Agriculture, Fishing & Forestry	Concluded	• n/a
169	<i>RSM Production Corporation v. Republic of Cameroon</i>	CONC/11/1	C	Oil, Gas & Mining	Concluded	• n/a
170	<i>Société d'Energie et d'Eau du Gabon v. Gabonese Republic</i>	CONC/18/1	C	Electric Power & Other Energy	Concluded	• n/a
171	<i>La Camerounaise des Eaux (CDE) v. Republic of Cameroon and Cameroon Water Utilities Cooperation (CAMWATER)</i>	CONC/19/1	C	Water, Sanitation & Flood Protection	Concluded	• n/a
172	<i>Barrick (Niugini) Limited v. Independent State of Papua New Guinea</i>	CONC/20/1	C	Oil, Gas & Mining	Concluded	• n/a
173	<i>Republic of Togo v. ContourGlobal Togo SA</i>	CONC/25/1	C	Electric Power & Other Energy	Concluded (post-December 2025)	• n/a
ICSID AF Conciliation						
174	<i>Hess Equatorial Guinea, Inc. and Tullow Equatorial Guinea Limited v. Republic of Equatorial Guinea</i>	CONC(AF)/12/1	C	Oil, Gas & Mining	Pending	• n/a
175	<i>Republic of Equatorial Guinea v. CMS Energy Corporation and others</i>	CONC(AF)/12/2	C	Oil, Gas & Mining	Concluded	• n/a
ICSID Administered Proceeding						
1	<i>Gardabani Holdings B.V., Inter RAO UES PJSC, Telasi JSC v. Government of Georgia, Ministry of Economy and Sustainable Development of Georgia, State Service Bureau Ltd</i>	ADM/18/1 and SCC Case No. V2018/039	C	Electric Power & Other Energy	Concluded	• Partial Award , April 19, 2021

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