

# Arbitration Rules for Dispute Resolution Involving States and State Entities: What Are the Significant Differences?

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## Abstract

*The article compares the most recent editions of international arbitration rules that may be applicable to arbitrations involving states and state entities. Specifically, it contrasts the Permanent Court of Arbitration Rules issued in December 2012, the new edition of the ICC Rules in effect since January 2012, the 2010 edition of the UNCITRAL Rules, and the 2006 ICSID Arbitration Rules. The article focuses on significant distinctions relevant to arbitrations with states and state entities, namely: (i) the scope of application of the rules, (ii) the appointment and disqualification of arbitrators, (iii) applicable law, (iv) confidentiality and third party participation, (v) provisional measures, and (vi) allocation of costs. The comparative angle chosen by the authors, who are practitioners with years of experience in investor-state and commercial arbitration involving sovereigns, transforms the commentary into a practical guide for practitioners, businesses, and governments interested in arbitration of disputes involving states and state entities.*

## I. Introduction

The International Centre for Settlement of Investment Disputes (ICSID) has been viewed traditionally as the most suitable forum for arbitration of disputes between private parties and sovereign states. After all, this has always been its *raison d'être*. Such arbitrations are conducted pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)<sup>1</sup> and the ICSID Rules of Procedure for Arbitration Proceedings (ICSID Rules).<sup>2</sup> Investor-state arbitrations are

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1. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, available at <https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> [hereinafter ICSID Convention].

2. Int'l Ctr. for Settlement of Inv. Disputes, *ICSID Convention, Regulations and Rules, Rules of Procedure for Arbitration Proceedings (Arbitration Rules)*, 99 (2006), available at <https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> [hereinafter ICSID Rules].

also regularly brought under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules adopted in 1976 and revised in 2010.<sup>3</sup>

Other arbitral institutions have recently sought to appeal to parties arbitrating disputes with states and state entities by offering new arbitration rules that take into account the particularities of such disputes and the procedures that need to govern them.<sup>4</sup> On December 17, 2012, the Permanent Court of Arbitration (PCA) issued arbitration rules for use in arbitrating disputes involving at least one state, state-controlled entity, or an inter-governmental organization (PCA Rules).<sup>5</sup> The PCA Rules are based on the 2010 UNCITRAL Arbitration Rules (UNCITRAL Rules).<sup>6</sup> The International Chamber of Commerce (ICC) also introduced a new version of the ICC rules that came into force on January 1, 2012, (ICC Rules) and seek to facilitate the use of the ICC Rules in arbitrations with states and state entities.<sup>7</sup>

This commentary compares the PCA Rules, the ICC Rules, the UNCITRAL Rules, and the ICSID Rules, focusing on significant distinctions relevant to arbitration with states and state entities. The commentary addresses the provisions in the arbitration rules relating to: (i) the scope of application of the rules, (ii) the appointment and disqualification of arbitrators, (iii) applicable law, (iv) confidentiality and third party participation, (v) provisional measures, and (vi) allocation of costs.

## II. Comparison of Provisions Relevant to Arbitration with States and State Entities

### A. SCOPE OF APPLICATION

The ICSID Convention and the ICSID Rules apply to arbitrations between state parties to the ICSID Convention and an investor of another state that is a party to the ICSID Convention. Currently, 149 states are parties to the Convention.<sup>8</sup> However, a number of states, including Russia, Mexico, Brazil, Bolivia, Ecuador, and Venezuela, remain outside the convention's realm.<sup>9</sup> Unlike arbitration under the other arbitration rules, arbitration under the ICSID Convention imposes separate jurisdictional hurdles, in addition to any

3. ICSID Convention, *supra* note 1; ICSID Rules, *supra* note 2.

4. See generally Permanent Court of Arbitration, *Arbitration Rules 2012* (2012) [hereinafter PCA Rules]; Int'l Chamber of Commerce, *Arbitration and ADR Rules* (2012) [hereinafter ICC Rules].

5. PCA Rules, *supra* note 4, Introduction. It should be noted that the 2012 PCA Rules are not the first attempt of the PCA to issue arbitration rules for use in arbitrations involving states. In 1962, before the adoption of the ICSID Convention, the International Bureau of the PCA released its Rules of Arbitration and Conciliation for Settlement of Investment Disputes between Two Parties of Which Only One is a State. See Permanent Court of Arbitration, *Rules of Arbitration and Conciliation for Settlement of Investment Disputes between Two Parties of Which Only One is a State*, reprinted in 57 A. J. INT'L L. 500 (1963). The Rules were amended in 1993. Permanent Court of Arbitration, *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State*, i, vii (1993).

6. PCA Rules, *supra* note 4.

7. ICC Rules, *supra* note 4, at 7; Comm'n on Arbitration, Int'l Chamber of Commerce, *ICC Commission Report: States, State Entities and Arbitration*, 2 (2012) [hereinafter *ICC Report*].

8. Int'l Ctr. for Settlement of Inv. Disputes, *List of Contracting States and Other Signatories of the Convention*, 1 (May 20, 2013), available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal>ShowDocument&language=English>.

9. See *id.*

jurisdictional requirements that must be satisfied under an investment treaty, a free trade agreement, an investment law, or an investment agreement.<sup>10</sup>

The scope of the PCA Rules extends to disputes involving states, state-controlled entities, or intergovernmental organizations where the parties agreed to arbitrate their disputes under the PCA Rules.<sup>11</sup> However, the involvement of at least one state, state-controlled entity, or intergovernmental organization as a party to the dispute is not necessary for jurisdiction where all the parties have agreed to settle a dispute under the PCA Rules.<sup>12</sup> The PCA Rules are very recent, and therefore few, if any, investment treaties, free trade agreements, or investment laws incorporate them directly. But parties may include the PCA Rules in their investment contracts or agree to apply them after a dispute arises.<sup>13</sup>

The ICC Rules, too, were revised with a view to facilitating the participation of state parties in ICC arbitration.<sup>14</sup> The 2012 ICC Rules now apply to “disputes,” as opposed to “business disputes,” as in the previous version of the Rules, which is sufficiently broad to cover investment treaty disputes.<sup>15</sup> Similarly, the 2010 UNCITRAL Rules apply where the parties agreed to resolve their disputes, “whether contractual or not,” through UNCITRAL arbitration.<sup>16</sup> Many investment treaties offer the UNCITRAL Rules as an alternative to ICSID arbitration, and there are also a few treaties that offer the investor the specific option of the ICC Rules or a “catch all” provision of “any” other arbitral institution’s rules, which the ICC would naturally be among.

The UNCITRAL Rules and the ICC Rules have certain temporal limitations. The 2010 UNCITRAL Rules are presumed to apply to arbitrations commenced after their entry into force (i.e., August 15, 2010) where the arbitration agreement was concluded after August 15, 2010, and the parties have not agreed to apply a particular version of the rules.<sup>17</sup> This presumption would not apply where an offer to arbitrate made before August 15, 2010, was accepted by a party after that date in the context of investment treaty arbitration.<sup>18</sup> The 2012 ICC Rules, on the other hand, apply to arbitrations commenced after their entry into force (i.e., January 1, 2012), unless otherwise agreed by the parties.<sup>19</sup>

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10. See e.g., ICSID Convention, *supra* note 1, art. 25.

11. PCA Rules, *supra* note 4, art. 1(1).

12. *Id.* art. 1(4).

13. The PCA Rules also contain certain innovative provisions that apply only to disputes involving states. For instance, the PCA Rules provide that in cases involving states only, “the parties shall communicate to the International Bureau the laws, regulations, or other documents evidencing the execution of the award.” *Id.* art. 34(7).

14. See *ICC Report*, *supra* note 7, at 2.

15. Compare ICC Rules, *supra* note 4, with Int’l Chamber of Commerce, *ICC–International Chamber of Commerce Arbitration Rules 1998*, art. 1(1), 3, (Jan. 1, 1998). See also *ICC Report*, *supra* note 7, at 4–5.

16. United Nations Comm’n on Int’l Trade Law, *UNCITRAL Arbitration Rules*, art. 1(1) (2010) [hereinafter *UNCITRAL Rules*].

17. *Id.* art. 1(2).

18. *Id.*

19. Notably, the ICC Rules specifically exclude the application of certain provisions to arbitration agreements concluded prior to January 1, 2012. See e.g., *ICC Rules*, *supra* note 4, art. 29(6)(a) (non-applicability of the emergency arbitrator provision to arbitration agreements concluded prior to the Rules’ entry into force). *Id.* art. 29(5) (excluding application of the emergency arbitrator provision to investment treaty arbitration).

## B. APPOINTMENT AND DISQUALIFICATION OF ARBITRATORS

All arbitration rules permit the parties to agree on the number of arbitrators within certain limits. Generally, a panel of three arbitrators is most common for arbitrations involving states or state entities.<sup>20</sup> The ICSID Convention provides that the tribunal “consist of a sole arbitrator or any uneven number of arbitrators appointed as” agreed by the parties.<sup>21</sup> The ICC Rules limit the number to one or three arbitrators.<sup>22</sup> Although the number of arbitrators is unrestricted under the UNCITRAL Rules and the PCA Rules, the default procedure for their appointment is set for a sole arbitrator or three arbitrators under the UNCITRAL Rules<sup>23</sup> and sole, three, or five arbitrators under the PCA Rules.<sup>24</sup> In addition, the UNCITRAL, PCA, and ICC Rules all make provisions for the appointment of arbitrators by multiple parties—a provision lacking in the ICSID Rules.<sup>25</sup>

Absent agreement of the parties, all rules provide for a default number of arbitrators and a procedure for their appointment.<sup>26</sup> Pursuant to the ICC Rules, where the parties have not agreed upon the number of arbitrators, the ICC International Court of Arbitration (ICC Court) will appoint a sole arbitrator, unless it decides that appointment of three arbitrators is warranted.<sup>27</sup> In such case, each party is to nominate its own arbitrator,<sup>28</sup> and the president of the tribunal is to be appointed by the ICC Court, unless otherwise agreed by the parties.<sup>29</sup>

Under the ICSID Convention, in the absence of agreement by the parties on the number of arbitrators, the default is three arbitrators, one appointed by each party and the president of the tribunal appointed by agreement of the parties.<sup>30</sup> If the tribunal is not constituted within ninety days after the request for arbitration has been registered or any other period as the parties may agree, the Chairman (i.e., the President of the World Bank)<sup>31</sup> will, at the request of either party and after consulting both parties, appoint the arbitrator or arbitrators not yet appointed.<sup>32</sup>

The PCA and UNCITRAL Rules provide that in the absence of any other agreement by the parties, the tribunal shall consist of three arbitrators,<sup>33</sup> where each party will ap-

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20. See e.g., CHRISTOPH H. SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY* 479 (2d ed. 2009) (“In actual practice, most ICSID tribunals have consisted of three arbitrators. The appointment of sole arbitrators has remained exceptional.”).

21. ICSID Convention, *supra* note 1, art. 37(2)(a).

22. ICC Rules, *supra* note 4, art. 12(1).

23. UNCITRAL Rules, *supra* note 16, art. 10(2).

24. PCA Rules, *supra* note 4, art. 10(2).

25. PCA Rules, *supra* note 4, art. 10(1); ICC Rules, *supra* note 4, art. 12(6); UNCITRAL Rules, *supra* note 16, art. 10(1).

26. See ICSID Convention, *supra* note 1, art. 37(2)(b); ICC Rules, *supra* note 4, art. 12(2), 12(5), 12(6); PCA Rules, *supra* note 4, art. 7(1), 7(2), 8(2), 9(1), 9(2)–(3), 10(1); UNCITRAL Rules, *supra* note 16, art. 7(1), 7(2), 8(2), 9(1), 9(2)–(3), 10(1).

27. ICC Rules, *supra* note 4, art. 12(2).

28. *Id.*

29. *Id.* art. 12(5).

30. ICSID Convention, *supra* note 1, art. 37(2)(b).

31. *Id.* art. 5.

32. *Id.* art. 38.

33. PCA Rules, *supra* note 4, art. 7(1); UNCITRAL Rules, *supra* note 16, art. 7(1).

point one arbitrator and the two arbitrators will choose the presiding arbitrator.<sup>34</sup> If a party fails to appoint its arbitrator or the two arbitrators do not agree on the presiding arbitrator, the appointment will be made by the appointing authority.<sup>35</sup> Further, if a party proposes to appoint a sole arbitrator, and the opposing party fails to respond, or if a party has failed to appoint a second arbitrator, the appointing authority may, at the request of a party, appoint a sole arbitrator if it determines that this is more appropriate.<sup>36</sup> In such circumstances, the appointing authority will communicate an identical list of at least three candidates to the parties, who in turn may put the candidates in the order of preference, excluding the arbitrators they object to.<sup>37</sup> In light of this provision, it might be prudent that a party promptly objects to the other party's proposal to appoint a sole arbitrator, unless the interests of the party dictate otherwise.

Moreover, unlike the ICSID Rules, the PCA Rules, the UNCITRAL Rules, and the ICC Rules all provide that if there are multiple parties as claimant or as respondent, unless otherwise agreed, the multiple parties jointly shall appoint an arbitrator.<sup>38</sup>

The various arbitration rules also contain divergent rules on the nationality of arbitrators. The drafting history of the ICSID Convention suggests that delegates considered it undesirable for the arbitrators to identify "at least by nationality with the interests of the parties."<sup>39</sup> Thus, under the ICSID Convention, arbitrators appointed by the Chairman would always be of a nationality other than the nationality of the parties.<sup>40</sup> The same rule applies to the majority of the arbitrators appointed by the parties, unless the parties have agreed to the appointment of a sole arbitrator or each individual member of the tribunal.<sup>41</sup> In contrast, the ICC Rules mandate the ICC Court to consider nationality, among other factors, in confirming or appointing arbitrators.<sup>42</sup> Under the ICC Rules, the sole arbitrator and the president of a tribunal have to have a nationality different from that of the parties, although in suitable circumstances and provided that none of the parties objects, they may have the nationality of one of the parties.<sup>43</sup> Pursuant to the PCA Rules and the UNCITRAL Rules, the appointing authority is required to take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties but it is not required to appoint an arbitrator of a different nationality.<sup>44</sup>

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34. PCA Rules, *supra* note 4, art. 9(1); UNCITRAL Rules, *supra* note 16, art. 9(1).

35. PCA Rules, *supra* note 4, art. 9(2)–(3); UNCITRAL Rules, *supra* note 16, art. 9(2)–(3).

36. PCA Rules, *supra* note 4, art. 7(2); UNCITRAL Rules, *supra* note 16, art. 7(2).

37. PCA Rules, *supra* note 4, art. 8(2); UNCITRAL Rules, *supra* note 16, art. 8(2). Article 8(2)(b) of the PCA Rules provides in addition that each party may return the list to the appointing authority without copying the other party. PCA Rules, *supra* note 4, art. 8(2)(b).

38. PCA Rules, *supra* note 4, art. 10(1); ICC Rules, *supra* note 4, art. 12(6); UNCITRAL Rules, *supra* note 16, art. 10(1).

39. Int'l Bank for Reconstr. and Dev., *Regional Consultative Meeting of Legal Experts on Settlement of Investment Disputes, Chairman's Report on Issues Raised and Suggestions Made with Respect to the Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, ¶ 56, Report No. Z-11 (July 9, 1964).

40. ICSID Convention, *supra* note 1, art. 38.

41. *Id.* art. 39.

42. ICC Rules, *supra* note 4, art. 13(1).

43. *Id.* art. 13(5).

44. PCA Rules, *supra* note 4, art. 6(3); UNCITRAL Rules, *supra* note 16, art. 6(7).

The pool of arbitrators for default appointments ranges from the Panel of Arbitrators under the ICSID Convention,<sup>45</sup> to any independent and impartial arbitrator under the PCA Rules and the UNCITRAL Rules.<sup>46</sup> The ICC Rules mandate the ICC Court to make the appointment of an arbitrator upon a proposal of a National Committee or Group of the ICC that it considers to be appropriate.<sup>47</sup> If the ICC Court does not accept the proposal made or if the National Committee or Group fails to make the proposal, the ICC Court may appoint directly any person it regards as suitable.<sup>48</sup> But the ICC Court may appoint directly any person whom it regards as suitable where, *inter alia*, one of the parties is a state or “claims” to be a state entity.<sup>49</sup> This revision to the ICC Rules seeks to address a concern expressed by states that ICC National Committees are perceived to lack neutrality due to their association with the leading businesses in a country.<sup>50</sup> Additionally, in appointing a co-arbitrator on behalf of a state or state entity that has failed to make a nomination, the ICC Court’s practice was to appoint an arbitrator either from that state or from a state with which that state has cultural affinities.<sup>51</sup> However, under the 2012 ICC Rules, the Court’s discretion is not limited to appointing a co-arbitrator from the same or a culturally-related state, and instead the ICC Court will take into consideration all facts and circumstances.<sup>52</sup>

The rules also differ with respect to the authority that is responsible for deciding on requests to disqualify an arbitrator. Under the ICSID Rules, the remaining tribunal members will decide on the request, unless a sole arbitrator is challenged or the tribunal is equally divided, in which case the Chairman will make the decision.<sup>53</sup> The UNCITRAL and PCA Rules provide that the appointing authority is in charge of such decisions,<sup>54</sup> while the ICC Rules entrust the ICC Court with the decision-making on arbitrator challenges.<sup>55</sup> In addition, while the PCA Rules permit the appointing authority to indicate the reasons for the decision on the challenge (unless the parties agree otherwise),<sup>56</sup> the UNCITRAL Rules are silent on this issue, and the ICC Rules specifically prohibit the Court to state its reasons.<sup>57</sup> The latter provision purports to expedite the overall proceeding,

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45. ICSID Convention, *supra* note 1, art. 40(1).

46. PCA Rules, *supra* note 4, art. 10(4) (providing that in appointing arbitrators under the Rules, the parties and the appointing authority are free to choose persons who are not members of the Permanent Court of Arbitration), art. 6(3) (providing that the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator); UNCITRAL Rules, *supra* note 16, art. 6(7) (same).

47. ICC Rules, *supra* note 4, art. 13(3).

48. *See id.*

49. *Id.* art. 13(4)(a). Due to concerns over how the ICC Court would determine whether one of the parties was a “state entity” and how “state entity” should be defined for purposes of Article 13(4) of the ICC Rules, it was decided that the Court may make a direct appointment in a case where a party “claims to be a state entity.” *See ICC Report, supra* note 7, at 6.

50. *ICC Report, supra* note 7.

51. *Id.* at 7.

52. *Id.* at 8.

53. ICSID Convention, *supra* note 1, art. 58; ICSID Rules, *supra* note 2, Rule 9(4)–(5).

54. PCA Rules, *supra* note 4, art. 13(4); UNCITRAL Rules, *supra* note 16, art. 13(4).

55. ICC Rules, *supra* note 4, art. 14(3).

56. PCA Rules, *supra* note 4, art. 13(5).

57. ICC Rules, *supra* note 4, art. 11(4) (“The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final, and the reasons for such decisions shall not be communicated”).

albeit at the expense of transparency. Sovereigns, however, may include specific language in their treaties or national legislation derogating from the default ICC Rule and providing that the ICC Court shall communicate the reasons for its decisions on the disputed confirmation, non-confirmation, challenge, and replacement of arbitrators.<sup>58</sup>

### C. APPLICABLE LAW

The default rules on the law applicable to the substance of the dispute might also be important in the absence of agreement of the parties. Pursuant to Article 42 of the ICSID Convention, “[t]he [t]ribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”<sup>59</sup> Many ICSID arbitrations are brought pursuant to investment treaties that may not contain an applicable law clause.<sup>60</sup> ICSID tribunals have treated treaty claims brought on the basis of investment treaties as involving an implicit agreement of the parties to apply the substantive provisions of the treaties.<sup>61</sup> “Whether such an implicit choice of law also encompasses other rules of international law is less clear.”<sup>62</sup> It has been argued that because investment treaties are instruments of international law, they should be interpreted in light of rules of general international law.<sup>63</sup>

Under the ICC Rules, in the absence of any agreement on the law applicable to the merits of the dispute, the tribunal is directed to apply “the rules of law” that it determines to be appropriate, taking into account “the provisions of the contract, *if any*,” and “*any* relevant trade usages.”<sup>64</sup> The phrase “rules of law” was considered to be broad enough to encompass the issue of the applicable law in investment treaty cases, and the addition of the word “any” reflects the idea that investment treaty disputes are based on treaties rather than contracts and that in investment arbitration no trade usages normally apply.<sup>65</sup> The UNCITRAL Rules contain a substantially similar provision.<sup>66</sup>

Unlike other rules, the PCA Rules provide a detailed list of the default applicable law depending on the parties involved. The law applicable to disputes between states reflects

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58. States may include the following language in their bilateral or multilateral investment treaty, investment chapter in their free trade agreement, or domestic law: “The Parties agree that the ICC International Court of Arbitration shall communicate the reasons for its decisions on the disputed confirmation, non-confirmation, challenge and replacement of arbitrators, in derogation of Article 11(4) of the ICC Rules of Arbitration.” See *ICC Report*, *supra* note 7.

59. ICSID Convention, *supra* note 1, art. 42(1).

60. See e.g., SCHREUER ET AL., *supra* note 20, at 578.

61. *Id.*

62. *Id.*

63. *Id.*

64. ICC Rules, *supra* note 4, art. 21(1)–(2) (emphasis added).

65. See *ICC Report*, *supra* note 7, at 6.

66. UNCITRAL Rules, *supra* note 16, art. 35(1) (“The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.”); *Id.* art. 35(3) (“In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.”).

the sources of law listed in Article 38 of the Statute of the International Court of Justice.<sup>67</sup> Disputes between states and intergovernmental organizations are to be arbitrated in accordance with the rules of the organization concerned, the law applicable to the agreement or relationship between the parties, and where appropriate, the general principles governing the law of intergovernmental organizations, as well as the rules of general international law.<sup>68</sup> In arbitrating disputes between intergovernmental organizations and private parties, the tribunal will “have regard” to the foregoing sources of law and “shall decide in accordance with the terms of the agreement and shall take into account relevant trade usages.”<sup>69</sup> In all other cases, the tribunal will apply the law that it determines to be appropriate and “decide in accordance with the terms of the agreement” and “take into account relevant trade usages.”<sup>70</sup>

#### D. CONFIDENTIALITY AND THIRD PARTY PARTICIPATION

Confidentiality provisions in arbitration rules are particularly relevant for disputes involving states, as transparency or privacy of the proceedings might serve various, and often divergent, public policy or purely strategic goals of the parties. PCA and UNCITRAL proceedings are confidential by default, requiring a hearing *in camera*, unless agreed otherwise.<sup>71</sup> The PCA and the UNCITRAL Rules also allow the award to be released to the public upon consent of all parties.<sup>72</sup> Similarly, the ICSID Convention and ICSID Rules require the consent of the parties for the publication of an award<sup>73</sup> but allow ICSID to publish excerpts of the tribunal’s legal reasoning without the parties’ consent<sup>74</sup> and require the Secretary-General to publish information on ICSID cases, including information on “the registration of all requests for . . . arbitration and . . . an indication of the date and method of the termination of each proceeding.”<sup>75</sup> Moreover, each ICSID arbitrator is required to make a statement of confidentiality.<sup>76</sup> The ICC Rules contain no default rule on confidentiality but, similar to ICSID, allow the tribunal, upon the request of a party, to “make orders concerning the confidentiality of the arbitration proceedings or of any other matters . . . and [to] take measures for protecting trade secrets and confidential information.”<sup>77</sup> Conversely, nothing in the ICC Rules prohibits “states/state entities and their private contractual counterparties” from agreeing “on greater transparency . . . by providing for the award, proceedings or submissions of the parties to be made public.”<sup>78</sup>

67. PCA Rules, *supra* note 4, art. 35(1)(a); See Statute of the International Court of Justice, June 26, 1945, art. 38, ¶ 1, 59 Stat. 1055, 3 Bevens 1179. One distinction is that Article 35(a) of the PCA Rules includes the word “arbitral,” as well as judicial decisions amongst the sources of international law.

68. PCA Rules, *supra* note 4, art. 35(1)(b).

69. *Id.* art. 35(1)(c).

70. *Id.* art. 35(1)(d).

71. *Id.* art. 28(3); UNCITRAL Rules, *supra* note 16, art. 28(3).

72. PCA Rules, *supra* note 4, art. 34(5); UNCITRAL Rules, *supra* note 16, art. 34(5).

73. ICSID Convention, *supra* note 1, art. 48(5); ICSID Rules, *supra* note 2, Rule 48(4).

74. ICSID Rules, *supra* note 2, Rule 48(4).

75. Int’l Ctr. for Settlement of Inv. Disputes, *ICSID Convention, Regulations and Rules, Administrative and Financial Regulations*, 22(1) (2006), available at <https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>.

76. ICSID Rules, *supra* note 2, Rule 6(2).

77. ICC Rules, *supra* note 4, art. 22(3).

78. See *ICC Report*, *supra* note 7, at 3.



Participation of third parties also might be an essential consideration for the parties seeking to limit publicity. The ICSID Rules are unique in that they provide for third party participation under certain circumstances.<sup>79</sup> An ICSID tribunal, after consulting the parties, may allow third parties to file a written submission with the tribunal. In its decision, the tribunal will evaluate, among other things: (a) whether “the [third] party’s submission would assist the Tribunal in the determination of a factual or legal issue”; (b) whether the “submission would address a matter within the scope of the dispute”; and (c) whether “the [third] party has a significant interest in the proceeding.”<sup>80</sup> The tribunal further must ensure that the proceedings are not disrupted, the submission does not “unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the [third] party’s submission.”<sup>81</sup> In addition, the ICSID Rules permit the tribunal, after consultation with the Secretary-General, and unless either party objects, to allow third parties (not only the non-disputing parties permitted to make submissions to the tribunal) “to attend or observe all or part of the hearings,” subject to protections of proprietary or privileged information.<sup>82</sup> Notably, a proposal in 2004 to amend the ICSID Rules and allow tribunals to open hearings to the public over the parties’ objections was ultimately rejected in the current 2006 edition of the Rules.<sup>83</sup>

Where additional parties are sought to be included in the proceedings, the PCA and UNCITRAL Rules specifically authorize the tribunal to join additional parties *provided that they are parties to the arbitration agreement*, “unless the . . . tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard” that the joinder would prejudice any one of those parties.<sup>84</sup> The ICC Rules, too, allow third parties to join, although only prior to confirmation or appointment of an arbitrator, after which time all parties must agree to the joinder.<sup>85</sup> The ICSID Rules are silent on the issue of joinder of parties to the arbitration agreement, making it less clear whether a joinder would be permitted.

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79. In July 2013, UNCITRAL adopted new rules for transparency in treaty-based investor-state arbitrations and at the same time revised its 2010 UNCITRAL Rules to incorporate the new provisions. Both sets of rules will take effect on April 1, 2014. The transparency rules will apply to investor-state arbitration initiated under the UNCITRAL Rules pursuant to treaties concluded after April 1, 2014, unless the parties to the treaty have agreed otherwise. The transparency rules will only apply to investor-state arbitrations under existing treaties with the consent of all the parties to the arbitration or where the home state of the claimant and the respondent state agree to their application. The new transparency rules contain requirements for the disclosure of documents and submissions from non-disputing parties that exceed those required under the ICSID Rules. Hearings generally will be required to be public and all orders, decisions, and awards of the tribunal, the parties’ written submissions, lists of exhibits, and transcripts of hearings will be published. See generally *United Nations Comm’n on Int’l Trade Law*, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, (Oct. 2, 2013), available at <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf>.

80. ICSID Rules, *supra* note 2, Rule 37(a).

81. *Id.*

82. *Id.* Rule 32(2).

83. Secretariat, Int’l Ctr. for Settlement of Inv. Disputes, *Discussion Paper: Possible Improvements of the Framework for ICSID Arbitration*, ¶ 15 (Oct. 22, 2004), [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive\\_%20Announcement14](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement14).

84. PCA Rules, *supra* note 4, art. 17(5); UNCITRAL Rules, *supra* note 16, art. 17(5).

85. ICC Rules, *supra* note 4, art. 7(1).

## E. PROVISIONAL, INTERIM, OR CONSERVATORY MEASURES

The PCA Rules, the UNCITRAL Rules, the ICC Rules, and the ICSID Rules authorize the tribunal to issue provisional measures (also referred to as interim or conservatory measures) prior to the resolution of the parties' dispute. In addition, the PCA Rules, the UNCITRAL Rules, and the ICC Rules also permit the parties to apply to a municipal court for provisional measures without waiving the right to arbitrate.<sup>86</sup> The advantage of applying for provisional measures to the courts rather than the tribunal is that unlike tribunals, courts have coercive power to enforce provisional measures and may order attachment of assets. On the other hand, there are advantages in having the tribunal issue provisional measures. For example, tribunals, unlike courts, may already be familiar with the facts and issues in dispute and the applicable law. Participation of the parties in the selection of the tribunal's members may also enhance their confidence in the integrity of the decision-making. As for the arbitrators' lack of coercive power, such power is often unnecessary. Parties frequently comply with provisional measures orders because they wish to make a good impression upon the members of the tribunal who are ultimately charged with resolving their dispute.

Under the ICC Rules, applications for provisional measures to municipal courts should be made "[b]efore the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter."<sup>87</sup> In contrast, the PCA Rules and the UNCITRAL Rules do not contain a similar limitation. The ICSID Convention prohibits resort to local courts altogether in an effort to avoid conflicting decisions of the courts and the tribunal.<sup>88</sup> The original drafters of the Convention seem to have failed to consider potential benefits of resorting to courts, in particular for provisional measures in aid of arbitration.<sup>89</sup> As a result, once ICSID arbitration proceedings have been instituted, resort to the municipal courts for provisional measures is prohibited, unless the parties have so stipulated in the agreement recording their consent to arbitration.<sup>90</sup>

The standard for provisional measures under the ICSID Convention and the ICSID Rules and the other arbitration rules is also different. Article 47 of the ICSID Convention and Rule 39 of the ICSID Rules stipulate that the tribunal may "recommend any provisional measure . . . to preserve the respective rights of either party" upon request of one of the parties or on its own initiative.<sup>91</sup> Although the ICSID Convention and the ICSID Rules use the word "recommend," it is generally recognized that ICSID tribunals are empowered under these provisions to order provisional measures with binding force and

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86. PCA Rules, *supra* note 4, art. 26(9); ICC Rules, *supra* note 4, art. 28(2).

87. ICC Rules, *supra* note 4, art. 28(2).

88. See e.g., SCHREUER ET AL., *supra* note 20, at 381.

89. *Id.* at 380.

90. See ICSID Convention, *supra* note 1, art. 26 ("Consent of the parties to arbitration shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy."); ICSID Rules, *supra* note 2, Rule 39(6) ("Nothing in the Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.").

91. ICSID Convention, *supra* note 1, art. 47; ICSID Rules, *supra* note 2, Rule 39(1), (3).

that the parties are obliged to comply.<sup>92</sup> The requesting party “shall specify the rights to be preserved, the measures requested and the circumstances that require such measures.”<sup>93</sup> In contrast, under the PCA Rules and the UNCITRAL Rules, the tribunal may “order” a party to (a) “[m]aintain or restore the status quo” pending the arbitration, (b) “[t]ake action that would prevent, or refrain from taking action that is likely to cause (i) current or imminent harm or (ii) prejudice to the arbitral process”; (c) “[p]rovide a means of preserving assets out of which a subsequent award may be satisfied”; or (d) “[p]reserve evidence that may be relevant and material to the resolution of the dispute.”<sup>94</sup> The party seeking an order of interim measures has to show that (a) “[h]arm not adequately reparable by an award of damages is likely to result if the measure is not ordered,” (b) “such harm substantially outweighs the harm . . . likely to result to the party against whom the measure is directed,” and (c) “[t]here is a reasonable possibility that the requesting party will succeed on the merits.”<sup>95</sup> In addition, unlike the ICSID Rules, the PCA Rules and the UNCITRAL Rules expressly authorize the tribunal to “require the party requesting an interim measure to provide appropriate security in connection with the measure.”<sup>96</sup>

The ICC Rules also provide that as soon as the file has been transmitted to the tribunal and unless the parties agree otherwise, the tribunal may order any interim or conservatory measures at the request of a party.<sup>97</sup> Like the PCA and the UNCITRAL Rules, the ICC Rules expressly provide that the tribunal may require appropriate security for granting any conservatory or interim measure.<sup>98</sup> The ICC Rules further specify that the conservatory or interim measure may take the form of an order or an award.<sup>99</sup> The advantage of an award of provisional measures is that, unlike an order, an award may be enforceable by municipal courts under the New York Convention<sup>100</sup> and under the national arbitration law in the arbitral seat. At the same time, an award, unlike an order, is subject to a mandatory review and approval by the ICC Court as to its form, which might delay the ultimate effect of the provisional measures.<sup>101</sup>

In addition, the ICC Rules introduce a novel Emergency Arbitrator Provision that allows for an urgent adoption of interim or conservatory measures before the tribunal is constituted.<sup>102</sup> But this provision does not apply to ICC investment treaty arbitration because the provision only applies to parties who are signatories of the arbitration agreement or their successors and parties to an arbitration agreement contained in an invest-

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92. See, e.g., *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, ¶ 58 (Aug. 17, 2007); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 1, ¶ 4 (July 1, 2003).

93. ICSID Rules, *supra* note 2, Rule 39(1).

94. PCA Rules, *supra* note 4, art. 26(2); UNCITRAL Rules, *supra* note 16, art. 26(2).

95. PCA Rules, *supra* note 4, art. 26(3); UNCITRAL Rules, *supra* note 16, art. 26(3).

96. PCA Rules, *supra* note 4, art. 26(6); UNCITRAL Rules, *supra* note 16, art. 26(6).

97. ICC Rules, *supra* note 4, art. 28(1).

98. *Id.*

99. *Id.*

100. This conclusion is not entirely clear, as the New York Convention only allows for enforcement of final awards and there is controversy between different commentators and different national courts as to whether an award granting interim measures can be “final” and hence can be enforced. See JACOB GRIERSON & ANNET VAN HOOFT, *ARBITRATING UNDER THE 2012 ICC RULES: AN INTRODUCTORY USER’S GUIDE* 161 (2012).

101. ICC Rules, *supra* note 4, art. 33; see also GRIERSON & VAN HOOFT, *supra* note 100, at 161.

102. See generally ICC Rules, *supra* note 4, art. 29; see also *id.* App. V.

ment treaty are not considered “signatories.”<sup>103</sup> Nor does the emergency arbitrator provision apply where (i) the arbitration agreement was concluded prior to the entry into force of the 2012 ICC Rules; (ii) “the parties have agreed to opt out of the Emergency Arbitrator Provision”; or (iii) the parties have agreed to another pre-arbitral procedure for conservatory or interim measures.<sup>104</sup> “The Emergency Arbitrator Provision [is] also not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority” in accordance with the ICC Rules.<sup>105</sup>

#### F. ALLOCATION OF COSTS

The ICSID Rules contain no default provision on allocation of costs and instead confer a wide discretion on the tribunal.<sup>106</sup> “The traditional position in investment arbitration, in contrast to commercial arbitration, has been to follow the practice under public international law that the parties shall bear their own costs of legal representation.”<sup>107</sup> The ICC Rules also confer discretion on the tribunal in the allocation of costs<sup>108</sup> and further suggest that the tribunal may take into account the extent to which each party conducted the arbitration in an expeditious and cost-effective manner,<sup>109</sup> thus putting an onus on the parties to refrain from dilatory tactics. In contrast, the PCA and UNCITRAL Rules state that, in principle, the unsuccessful party bears the costs of the arbitration, although the tribunal may apportion the costs “if it determines that [it] is reasonable, taking into account the circumstances of the case.”<sup>110</sup>

### III. Conclusion

The substantive distinctions between the ICSID, PCA, UNCITRAL, and ICC Rules might offer a strategic advantage of selecting one set of rules over the other, where such choice is available. For instance, the ICSID Rules guarantee that unless otherwise agreed by the parties the members of the tribunal will have a nationality different from that of the

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103. See ICC Rules, *supra* note 4, art. 29(5) (“The emergency arbitrator provision shall apply only to parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to such signatories.”); see also ICC Report, *supra* note 7, at 6–7 (“One of the purposes of Article 29(5) of the 2012 ICC Rules was to exclude investment arbitration from the scope of emergency arbitrator [provision because] the investor and the host state are not signatories of the arbitration agreement formed by the state’s offer contained in the BIT and the investor’s acceptance contained in . . . [the] request for arbitration.”).

104. ICC Rules, *supra* note 4, art. 29(6).

105. *Id.* art. 29(7).

106. ICSID Convention, *supra* note 1, art. 61(2) (“In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges of the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.”).

107. See, e.g., Vito G. Gallo v. Government of Canada, PCA 55798, Award, ¶ 358 (Sept. 15, 2011).

108. ICC Rules, *supra* note 4, art. 37(4) (“The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.”).

109. *Id.* art. 37(5) (“In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.”).

110. PCA Rules, *supra* note 4, art. 42(1); UNCITRAL Rules, *supra* note 16, art. 42(1).

parties. The ICSID Rules are also more favorable by default for a transparent and public arbitration. On the other hand, an explicit provision for appointment of arbitrators by multiple parties or joinder of multiple parties in the arbitration rules might tilt the choice in favor of the PCA, UNCITRAL, and ICC Rules. Moreover, where the parties seek to request provisional measures from a municipal court, the PCA, UNCITRAL, and ICC Rules offer a better alternative to ICSID. Finally, with respect to costs, the PCA and UNCITRAL Rules provide a greater clarity as to cost allocation, i.e., the unsuccessful party pays unless considerations warrant otherwise. Further considerations, including ICSID's self-contained system of review, recognition, and enforcement of ICSID awards (which is beyond the scope of this commentary), also may play a role in choosing one set of the rules over the other. Ultimately, an overall assessment of the circumstances of each case and the parties' strategic goals is required to select the most appropriate arbitration rules, to the extent a choice is available. What is clear, however, is that, largely as a result of the explosion of investor-state disputes and the institutions' desire to capture that growing business, investors, and states now have a plethora of arbitration options dedicated to resolving arbitrations between them.

