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ORIGINAL SCIENTIFIC ARTICLE

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THE GEM HIDDEN BEHIND PREDICTABILITY: DISCUSSING EFFICIENCY IN AND OF INVESTMENT ARBITRATION

***Abstract**: The paper discusses the status quo regarding efficiency in investment arbitration and suggests how predictability of the arbitral outcome can improve both efficiency in and of investment arbitration. First, the paper will address the cost and duration of investment arbitration. Second, it will look at the provisions of the 2022 ICSID Arbitration and Mediation Rules, as well as UNCITRAL Working Group III Draft Provisions, aimed at increasing efficiency in investment arbitration. Third, it will present efficiency in and of investment arbitration, on the one hand, and predictability, on the other, as intertwined issues. Fourth, it will use the intra-EU jurisdictional objections ratione personae and voluntatis as examples of how the unpredictability of arbitral outcomes reduces the efficiency in and of investment arbitration. Fifth, it will present some of the solutions that could improve efficiency in and of investment arbitration.*

Key words: Investment Arbitration, Efficiency, Predictability, Intra-EU Jurisdictional Objections, Spanish Saga Cases, ICSID, UNCITRAL, Precedent.

1. Introduction

Efficiency is one of the main reasons why investors decide to resolve disputes through arbitration.[1] Nevertheless, investment arbitration is increasingly criticized for being too costly and lengthy.[2] Cost and duration

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1 Zarra, G., 2016, *Parallel proceedings in Investment Arbitration*, The Hague, Eleven International Publishing, pp. 42–45.

2 UNCITRAL, 2018c, Possible reform of investor–State dispute settlement (ISDS) – cost and duration A/CN.9/WG.III/WP.153, 31 August, (https://documents.un.org/

in investor–State dispute settlement (ISDS) are interlinked matters since longer proceedings will most likely lead to higher costs.[3] A distinction can be made between efficiency in and efficiency of investment arbitration.[4] While efficiency in arbitration in this paper will be understood to concern efficiency after proceedings were initiated, in terms of faster and cheaper conduct of arbitration proceedings, efficiency of arbitration is understood in a broader manner and is not limited to proceedings that were initiated. Efficiency in investment arbitration could be increased if tribunals would spend less time on interpreting ambiguous treaty provisions. Efficiency of arbitration includes an additional component, which can reduce the number of initiated arbitration disputes. In this sense, efficiency of arbitration deals with investment arbitration's contribution to efficiency ahead of the initiation of arbitral proceedings. Efficiency of investment arbitration is increased when a party decides not to initiate the dispute but opts to settle outside of arbitration and, in such a manner, does not expose itself to the high arbitration costs.

Different initiatives have recently been undertaken with the aim of improving efficiency in investment arbitration. Most notably, the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules were amended in 2022 to include, *inter alia*, provisions that would help achieve greater cost and time efficiency of the proceedings.[5] In addition, having identified cost and duration as one of the main areas of criticism in the field, the United Nations Commission on International Trade Law (UNCITRAL) Working Group III has developed the Draft provisions on procedural and cross-cutting issues (UNCITRAL Draft Provisions),[6]

doc/undoc/ltd/v18/057/51/pdf/v1805751.pdf, 06. 09. 2024); ICSID, 2018a, Proposals for Amendment of the ICSID Rules – Working Paper 1, 2 August, (https://icsid.worldbank.org/sites/default/files/publications/WP1_Amendments_Vol_3_WP-updated-9.17.18.pdf, 06. 09. 2024), p. 898; Friedland, P., Mistelis, L., 2015, International Arbitration Survey: Improvements and Innovations in International Arbitration, Queen Mary University of London, White & Case, (https://www.qmul.ac.uk/arbitration/media/arbitration/docs/2015_International_Arbitration_Survey.pdf, 06. 09. 2024); Álvarez Zárate, J. M., *et al.*, 2020, Duration of Investor–State Dispute Settlement Proceedings, *Journal of World Investment & Trade*, Vol. 21, No. 2–3, p. 303; Bottini, G., *et al.*, 2020, Excessive Costs and Recoverability of Costs Awards in Investment Arbitration, *Journal of World Investment & Trade*, Vol. 21, No. 2–3, pp. 252–3, 266.

3 UNCITRAL, 2018c, para. 27.

4 Heiskanen, V., 2015, Key to Efficiency in International Arbitration, *Kluwer Arbitration Blog,* 29 May, (https://arbitrationblog.kluwerarbitration.com/2015/05/29/key-to-efficiency-in-international-arbitration/, 06. 09. 2024).

5 ICSID Arbitration Rules (as amended effective 1 July 2022).

6 The UNCITRAL Draft Provisions have been prepared for inclusion in, *inter alia*, existing and future international investment agreements.

which seek to address, among other things, the issue of efficiency.[7] These procedural tools address only efficiency in investment arbitration.

However, how can one improve both the efficiency in and of investment arbitration? The paper suggests that predictability of the arbitral outcome can improve both efficiency in and of investment arbitration. This does not mean that other aspects, such as impartiality, independence and expertise of arbitrators,[8] should not be considered when aiming to secure a predictable system. Indeed, independence, impartiality and legal expertise of adjudicators are requirements under the rule of law and democratic necessities.[9] Nevertheless, the present paper will be limited to addressing the relationship between efficiency and predictability in the system, while recognizing the intertwined nature of the different areas of criticism. Furthermore, some of the proposed solutions in the paper would, in addition to contributing to predictability and efficiency of the system, help ensure the independence, impartiality and expertise of adjudicators.

Throughout the UNCITRAL Working Group III reform process, it was stated that the identified areas of criticism of investment arbitration are intertwined and should therefore be addressed systemically.[10] The impact of unpredictability of the arbitral outcome on the cost and duration

7 UNCITRAL, 2023, Possible reform of investor–State dispute settlement (ISDS) Draft provisions on procedural and cross-cutting issues A/CN.9/WG.III/WP.231, 26 July, (https://documents.un.org/doc/undoc/ltd/v23/059/71/pdf/v2305971.pdf, 06. 09. 2024).

8 Arbitration rules and certain recent international investment treaties provide mechanisms that seek to ensure the independence and impartiality of arbitrators. In addition, these matters are regulated by soft law instruments. In general, independence and impartiality issues are addressed by a) requiring parties and arbitrators to disclose any relevant issues in this respect and b) allowing parties to challenge the independence and impartiality of an arbitrator. UNCITRAL, 2018d, Possible reform of investor–State dispute settlement (ISDS) – Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS A/CN.9/WG.III/WP.151, 30 August, (https://documents.un.org/doc/undoc/ltd/v18/057/64/pdf/v1805764.pdf, 17. 10. 2024), para. 16.

9 Bogdandy, A. von, Venzke, I., 2014, *In Whose Name?: A Public Law Theory of International Adjudication,* Oxford, Oxford University Press, p. 159; Dunoff, L. J., Pollack, A. M., 2017, The Judicial Trilemma, *American Journal of International Law,* Vol. 111, No. 2, pp. 225, 274.

10 UNCITRAL, 2017, Report of Working Group III (Investor–State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November – 1 December 2017) A/CN.9/930/Rev.1, 19 December, (https://documents.un.org/doc/undoc/gen/v18/029/83/pdf/v1802983.pdf, 06. 09. 2024), para. 44; UNCITRAL, 2018c, paras. 13, 84; UNCITRAL, 2018a, Report of Working Group III (Investor–State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018) A/CN.9/935, 14 May, (https://documents.un.org/doc/undoc/gen/v18/029/59/pdf/v1802959.pdf, 06. 09. 2024), para. 24; UNCITRAL, 2019, Possible reform of investor–State dispute settlement (ISDS) – Submission from the European Union and its Member States A/CN.9/WG.III/WP.159/Add.1, 24 January, (https://documents.un.org/doc/undoc/ltd/v19/004/19/pdf/v1900419.pdf, 06. 09. 2024), para. 10.

of disputes was identified in particular.[11] Furthermore, it is argued that the practical benefit of consistency is efficiency.[12] Accordingly, it could be said that predictable arbitral outcomes could result in fewer investor–State arbitration as the parties could use the stable interpretations to negotiate a settlement, and in the event that proceedings are initiated – more cost– and time-efficient arbitral processes and fewer annulment proceedings.[13]

Against this backdrop, the paper will first address the cost and duration of investment arbitration. Second, it will look at the 2022 ICSID amended Arbitration Rules, the 2022 ICSID Mediation Rules,[14] and the UNCITRAL Draft Provisions aimed at increasing efficiency in investment arbitration. Third, it will discuss efficiency in and *of* investment arbitration, on the one hand, and, predictability, on the other, as intertwined issues. Fourth, it will use the intra-EU jurisdictional objections *ratione personae* and *voluntatis* as examples of how unpredictability of arbitral outcomes reduces efficiency in and of investment arbitration. Fifth, it will present some of the options for improving efficiency in and of investment arbitration, which were proposed in the literature and mentioned during the UNCITRAL Working Group III ISDS reform process.

2. The Cost and Duration of Investment Arbitration

A 2021 empirical study has shown that in recent years[15] proceedings last five and a half years, on average.[16] It was found that the duration of

11 UNCTAD, 2013, IIA Issues Note – Reform of Investor–State Dispute Settlement: In search of a Roadmap, 26 June, (http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf, 06. 09. 2024), p. 4; UNCITRAL, 2018c, paras. 79–84; Bottini, G., *et al.*, 2020, p. 298.

12 Jarrett, M., 2024, ISDS 2.0: time for a doctrine of precedent?, *Journal of International Economic Law*, Vo. 27, No. 1, pp. 41, 46.

13 The referenced work refers to courts, however, predictability could also have same implications in the case of arbitration. *Ibid.,* pp. 46–47; Stinson, J. M., 2021, Preemptive Dicta: The Problem Created by Judicial Efficiency, *Loyola of Los Angeles Law Review*, Vol. 54, No. 2, pp. 587, 607; Bankowski, Z., *et al.*, Rationales for Precedent, in: MacCormick, N., Summers, R., (eds.), 1997, *Interpreting Precedents: A Comparative Study*, London, Routledge, p. 490; Macey, J. R., 1989, The Internal and External Costs and Benefits of Stare Decisis, *Chicago-Kent Law Review*, Vol. 65, No. 1, pp. 93, 94.

14 ICSID Mediation Rules (effective as of 1 July 2022).

15 Those that were concluded between June 2017 and May 2020. The length of proceedings is calculated from the request or notice for arbitration to the date of the final award.

16 The study examined over 400 investor–State cases conducted under ICSID, UNCITRAL, and other arbitration rules, and over 70 ICSID annulment decisions. Hodgson, M., Kryvoi, Y., Hrcka, D., 2021, 2021 Empirical Study: Costs, Damages and Duration

more recent proceedings was a year and a half longer than those concluded prior to June 2017.[17] Regarding ICSID proceedings, a 2009 study showed that the average length of proceedings[18] concluded between the creation of the ICSID and July 2009 was 3.6 years.[19] A more recent study demonstrated that the average length of ICSID proceedings concluded between 1 January 2015 and 30 June 2017 was 3 years and 7 months, calculated from the constitution of the tribunal to the issuance of an award.[20] As the latter study calculates the length of proceedings from the later phase of ICSID proceedings, the difference is greater. The average duration of UNCITRAL arbitrations concluded between 1990 and 2015, from notice of arbitration to award, was 3.96 years.[21] The three most time-intensive stages in the proceedings are considered to be: a) the appointment/constitution of the tribunal, b) the written process, and c) rendering of the award.[22] In addition, in certain cases the enforcement stage was shown to be lengthier than the original proceedings.[23]

The study conducted by Jeffery Commission identified that the average claimant costs in ICSID arbitrations concluded between 2011 and 2015 were USD 5,619,261.74.[24] The average respondent costs during the same period were USD 4,954,461.27.[25] Regarding UNCITRAL arbitrations, during the same period, the average claimant costs were USD 7,300,344.91,[26] while the average respondent costs between 2010 and 2015

in Investor–State Arbitration, British Institute of International and Comparative Law, Allen & Overy, (https://www.biicl.org/projects/empirical-study-costs-damages-and-duration-in-investor-state-arbitration?cookiesset=1&ts=1721132409, 06. 09. 2024), p. 32.

17 *Ibid*., pp. 5, 32.

18 Length of proceedings is calculated from the request for arbitration to the final award.

19 The article examined 115 ICSID cases. Clair, A., 2009, ICSID arbitration: How long does it take?, *Global Arbitration Review*, (https://icsid.worldbank.org/sites/default/files/parties_publications/C3765/Claimant%27s%20Response%20to%20the%20Respondent%27s%20Requests%20under%20ICSID%20Arbitration%20Rules%2028%281%29%20and%2039%281%29/Legal%20Authorities/CL-13.PDF, 06. 09. 2024).

20 The study was conducted by the ICSID Secretariat. ICSID, 2018a, p. 898.

21 A review of the duration of 60 publicly available investment arbitrations from notice of arbitration to award conducted under the UNCITRAL Arbitration Rules between 1990 and 2015. Commission, J., 2016, The duration and costs of ICSID and UNCITRAL investment arbitration rules, *Vannin Capital* (https://www.international-arbitration-attorney.com/wp-content/uploads/2018/07/Duration-and-Costs-of-ICSID-Arbitration.pdf, 06. 09. 2024).

22 ICSID, 2018a, pp. 898, 903; UNCITRAL, 2018c, para. 25.

23 *Ibid.*, para. 25; UNCITRAL, 2017, para. 48.

24 The study is based on the data from 55 ICSID arbitrations. Commission, J., 2016.

25 The study is based on the data from 56 ICSID arbitrations. *Ibid*.

26 The study is based on the data from 20 UNCITRAL arbitrations. *Ibid*.

were USD 4,709,504.30.[27] Parties are subject to various costs in ISDS proceedings, including tribunal costs (*e.g.*, fees for arbitrators and their expenses), administrative costs (*e.g.*, fees charged by arbitral institutions), and party costs (*e.g.*, fees for legal representation and experts).[28] Party costs represent the greatest percentage of all costs.[29] Some studies suggest that between 80 and 90 percent of all costs are party costs.[30] Average party costs of the claimant in the proceedings concluded between June 2017 and May 2020 were USD 4,100,000, while the average party costs of the respondent were USD 2,300,000.[31]

The notions of efficiency, cost and duration are relative.[32] It is recognized that investment arbitration is more cost– and time-intensive compared to commercial arbitration because of its complexity.[33] Further, it is argued that the excessive cost and duration of proceedings should be assessed in accordance with the case's specific circumstances.[34] For example, such a case-by-case approach in determining the reasonableness of the length of proceedings is implemented by the European Court of Human Rights (ECtHR).[35] In this respect, as per the ECtHR, the criteria that should be considered are: the complexity of the case, the applicant's behavior, the conduct of competent authorities, and the nature of the issue due to which proceedings were initiated.[36] The approach of the ECtHR points to the relative nature of what can be considered unreasonable or excessive duration of the proceedings. For instance, a study has shown a connection between the length of arbitral proceedings and the amount in dispute.[37] On average, proceedings lasted roughly eight years when the claimed amount was above USD 1 billion, while, in cases where the

27 The study is based on the data from 26 UNCITRAL arbitrations. *Ibid*.

28 UNCITRAL, 2018c, paras. 17–18.

29 *Ibid*., paras. 19, 52.

30 *Ibid.*, para. 19.

31 Hodgson, M., Kryvoi, Y., Hrcka, D., 2021.

32 UNCITRAL, 2018c, para. 12; Markert, L., 2011, Improving Efficiency in Investment Arbitration, *Contemporary Asia Arbitration Journal*, Vol. 4, No. 2, pp. 218–9.

33 ICSID, 2018a, p. 898; *Ibid.*, p. 217.

34 UNCITRAL, 2018c, para. 12; Álvarez Zárate, J. M., *et al.*, 2020, pp. 306–307.

35 The UNCITRAL Working Group III emphasized that the cost and duration of the ISDS proceedings should not be examined in isolation but by making reference to other suitable comparators, *i.e.*, other international dispute settlement bodies. *Ibid.*, para. 11; ECHR Registry, 2024, Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (civil limb) (updated to 29 February 2024), (https://ks.echr.coe.int/documents/d/echr-ks/guide_art_6_civil_eng, 27. 10. 2024), para. 530.

36 *Ibid*.

37 Hodgson, M., Kryvoi, Y., Hrcka, D., 2021, p. 32.

claimed amount was less than USD 50 million, the duration of the process was approximately 3.6 years.[38]

It could be useful now to compare different circumstances of the first publicly available concluded case, *Charanne v. Spain*, and one of the lengthiest cases, *The PV Investors v. Spain*, that pertain to the group of cases initiated by renewable energy investors against Spain, under the ECT, due the series of reforms that affected the sector (so-called Spanish saga cases).[39] The *Charanne* case lasted less than four years, namely from 7 May 2012, when the Claimants filled the request for arbitration, to 21 January 2016, when the final award was issued. Proceedings were joint proceedings on jurisdiction and merits – therefore not bifurcated. There were two claimants, *Charanne* and *Construction*, which claimed around EUR 17 million. Moreover, the *Charanne* case was the first concluded case of the Spanish saga cases, thus the Tribunal or the parties could not have referred to the decisions related to other renewable energy cases initiated against Spain, although, as it is usually the case, reference was made to other arbitral decisions. *The PV Investors* case lasted approximately eight years, from the notice of arbitration on 16 November 2011 to the issuance of the final award on 28 February 2020. Proceedings were bifurcated into a jurisdictional and liability phase. The claimants consisted of fourteen groups of investors, claiming EUR 1.16 billion. The Tribunal indicated in the Final Award that the parties had extensively discussed other Spanish saga cases that had been concluded during the different stages of *The PV Investors* case.[40] It could be concluded that the longer duration of *The PV Investors* case, compared to *Charanne*, is reasonable due to the number of claimants included in the dispute, the availability of numerous decisions dealing with same or similar factual and legal issues, the amount claimed (which exceeded USD 1 billion), and the fact that the proceedings were bifurcated.[41]

Furthermore, one way of measuring time efficiency could be by comparing the duration of the transaction (investment) with the duration of the proceedings.[42] The investment in both the *Charanne* and *The PV Investors* cases was determined to have a duration of around 30 years.[43] The

38 *Ibid.*, p. 32.

39 SCC, *Charanne B.V. and Construction Investments S.a.r.l. v. Spain*, Case No. 062/2012, Final Award of 21 January 2016; PCA, *The PV Investors v. Spain,* Case No. 2012-14, Final Award of 28 February 2020.

40 *Ibid.,* para. 551.

41 For example, ICSID statistics show that on average bifurcated proceedings last longer than joint proceedings or proceedings on the merits only. ICSID, 2018a, p. 900.

42 Heiskanen, V., 2015.

43 *The PV Investors v. Spain*, para. 651; *Charanne*, para. 527.

durations of the disputes in *Charanne* and *The PV Investors* were approximately 3.5 and 8 years, respectively. From this perspective, the greater the difference between the duration of the proceedings and the investment, the more efficient the proceedings would be. Regarding the measurement of cost efficiency, arbitration could be considered efficient if its costs are significantly lower than the amount awarded in the dispute.[44] The amount claimed in *Charanne* was around EUR 17 million, however the claimants lost the case and no compensation was awarded, while the costs of arbitration totaled EUR 269,208.29 and USD 10,310.[45] The party costs in the case are not publicly available. In the case of *The PV Investors*, the amount claimed was EUR 1.16 billion but the amount awarded was EUR 91.1 million. The arbitration costs in the case were EUR 442,152.22 for the jurisdictional phase and EUR 2,467,847.78 for the pre-jurisdictional and liability and quantum phase.[46] The party costs of the claimants and the respondent are not publicly available.[47]

Moreover, it should also be pointed out that statistics show that 31 percent of concluded ICSID arbitration cases in 2023 were settled or otherwise discontinued, while 69 percent of cases were decided by tribunals.[48] The percentage of all concluded ICSID arbitrations that were settled or otherwise discontinued reached 36 percent.[49] Some, but not many, of the publicly-available Spanish saga cases have also been settled or otherwise discontinued.[50]

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44 Pernt, V., Stanisavljevic, M., 2018, Efficient Arbitration – Part 1: Metrics, *Kluwer Arbitration Blog*, 16 June, (https://arbitrationblog.kluwerarbitration.com/2018/06/16/efficient-arbitration-part-1-metrics/, 06. 09. 2024).

45 http://dev.energychartertreaty.org/details/article/charanne-bv-and-constructions-investments-sarl-v-spain/, 27. 10. 2024.

46 https://www.energychartertreaty.org/details/article/the-pv-investors-v-spain-pca-case-no-2012-14/, 27. 10. 2024.

47 However, for the jurisdictional phase, although exact party costs are not known, the claimants and the respondent presented total expenses incurred, which include party costs, tribunal and administrative costs, amounting to GBP 1,552,129.23 and EUR 1,260,660.81, respectively. PCA, *The PV Investors v. Spain*, Case No. 2012-14, Preliminary Award on Jurisdiction of 13 October 2014, paras. 345, 348.

48 ICSID, 2024, The ICSID Caseload – Statistics Issue 2024-1, (https://icsid.worldbank.org/sites/default/files/publications/ENG_The_ICSID_Caseload_Statistics_Issue%202024.pdf, 18. 10. 2024).

49 *Ibid.*

50 Based on https://investmentpolicy.unctad.org/investment-dispute-settlement/country/197/spain/investor, 27. 10. 2024; SCC, *Alten Renewable Energy Developments BV v. Spain*, Case No. 2015/036; ICSID, *TS Villalba GmbH and others v. Spain*, Case No. ARB/21/43; SCC, *Solarpark Management GmbH & Co. Atum I KG v. Spain*, Case No. 2015/163.

3. Recent Efforts at Increasing Efficiency in Investment Arbitration

There have been several recent efforts to improve efficiency in investment arbitration.[51] The paper will continue by addressing efficiency developments in the 2022 ICSID Arbitration Rules and 2023 UNCITRAL Draft Provisions, as these processes involved many States and other stakeholders. It can be seen from the negotiations on amendments of the ICSID arbitration rules and UNCITRAL Working Group III reform process that ensuring greater efficiency of the proceedings was one of the key areas of focus.[52] Thus, the improvements in the new ICSID Arbitration Rules, promising greater efficiency, can be identified in different steps of the proceedings, such as the constitution of the tribunal, the conduct of the proceedings, costs and awards. In addition, the new ICSID Rules introduced expedited arbitration as an option for the parties. The UNCITRAL Draft Provisions also address efficiency issues, such as security for costs, allocation of costs, and the period for making the final decision. Against this background, the paper will present the efficiency efforts related to the tribunal's constitution, the conduct of the proceedings, costs, awards, as well as the special features of expedited arbitration. In addition, the 2022 ICSID Mediation Rules will be commented.

3.1. TRIBUNAL CONSTITUTION

Under the previously ICSID arbitration rules, one of the parties needed to notify the Secretary General of its decision to invoke the formula prescribed in Article 37(2)(b)[53] of the ICSID Convention.[54] Since this requirement delayed the proceedings, the new ICSID Rules provide that the formula will be automatically triggered if the Secretary General

51 Provisions aimed at increasing efficiency may also be found in international investment agreements, but they will not be addressed in this paper.

52 ICSID, 2018b, Backgrounder on Proposals for Amendment of the ICSID Rules, (https://icsid.worldbank.org/sites/default/files/publications/Amendment_Backgrounder.pdf, 06. 09. 2024); ICSID, 2018a, pp. 897–918.

53 Article 37(2)(b) prescribes that "[w]here the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties."

54 Rule 2(3) of the (previous) 2006 ICSID Arbitration Rules (entered into force 10 April 2006); ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966).

is not informed of the parties' decision regarding the number of arbitrators and the method of their appointment, within 45 days of the registration of the request.[55]

3.2. CONDUCT OF THE PROCEEDINGS

The new ICSID Rules require the tribunal and the parties to conduct the proceedings "in good faith and in an expeditious and cost-effective manner."[56] All documents should be filed electronically, as a general rule, with the objective to reduce the costs and duration of proceedings and make the proceedings more environmentally friendly.[57] In addition, the first session and hearings can take place either in person or virtually.[58] Furthermore, tribunals must make every effort to adhere to the time limits for issuing decisions.[59] They must also inform the parties of any exceptional circumstances causing a delay and give an estimated date of completion.[60]

Furthermore, Rule 41(5) of the earlier 2006 ICSID Arbitration Rules was found to be an efficient tool that dismissed claims lacking legal merit early in the proceedings, before parties' resources were unnecessarily consumed.[61] Arbitral practice shows that the objections under the Rule 41(5) would be sustained "only where a claim is evidently unmeritorious or patently abusive."[62] The 2006 rule stipulated that the objection could be filed only after the tribunal was established. However, the new Rules also allow the party to file an objection that a claim manifestly lacks legal merit even before the constitution of the tribunal.[63] Accordingly, the new Rule allows an even earlier dismissal of claims lacking legal merit, thus making

55 ICSID, 2018a, pp. 139–40; 2022 ICSID Arbitration Rules, Rule 15(2); ICSID, 2019a, Compendium of State and Public Comments on WP #1, (https://icsid.worldbank.org/sites/default/files/amendments/Compendium_Comments_Rule_Amendment_3.15.19.pdf, 06. 09. 2024), pp. 196–200.

56 *Ibid*., Rule 3.

57 ICSID, 2018b.

58 As "hearings" are considered any sessions, hearings, meetings or sittings between the parties and the Tribunal subsequent to the first session. Rule 32(2) of the 2022 ICSID Arbitration Rules provides that "[t]he President of the Tribunal shall determine the date, time and method of holding a hearing after consulting with the other members of the Tribunal and the parties." 2022 ICSID Arbitration Rules, Rules 29, 32; ICSID, 2018a, p. 116.

59 *Ibid*., Rule 12(1); *ibid.*, p. 906.

60 *Ibid*., Rule 12(2); *ibid.*

61 Markert, L., 2011, p. 235.

62 *Ibid*.

63 2022 ICSID Arbitration Rules, Rule 41(2)(d).

the process even more effective. The UNCITRAL Draft Provision 19 prescribes early dismissal of claims but only after the tribunal is constituted, in contrast to the new ICSID Rules.

3.3. COSTS

During the ICSID amendment and UNCITRAL Working Group III reform processes, the greatest attention was focused on two cost-related issues: cost allocation and providing security for costs. It is argued that the "costs follow the event" approach for allocating costs – suggesting that a successful party should ordinarily recover its reasonable costs – can incentivize the parties to be more efficient.[64] Throughout the ICSID amendment negotiations, some States suggested that the "costs follow the event" approach should be prescribed as a default rule.[65] In addition, a number of States suggested that if the tribunal determines that the claim manifestly lacks legal merit, the claimant should be responsible for covering all the expenses of the proceedings.[66]

The ICSID Convention prescribes that the tribunal should decide how to allocate the costs between the parties, except if the parties agree otherwise.[67] This provision does not provide more profound changes of the arbitration rules, such as the inclusion of the "costs follow the event" approach as a default rule. Nevertheless, the new ICSID Rules stipulate guidance regarding the circumstances that the tribunal should consider when deciding on costs, such as the outcome of the proceedings and the parties' conduct.[68] Moreover, absent special circumstances justifying a different approach, the successful party should be granted its reasonable costs in the event that the tribunal determines that all claims manifestly lack legal merit.[69] It can be concluded that, considering the constraints of Article 61(2) of the ICSID Convention, the new ICSID Rules aim to induce the application of the "costs follow the event" approach on the

64 UNCITRAL, 2018c, paras. 29–30.

65 ICSID, 2019b, Proposals for Amendment of the ICSID Rules – Working Paper 2, (https://icsid.worldbank.org/sites/default/files/amendments/Vol_1.pdf, 06. 09. 2024), p. 228.

66 *Ibid.*

67 ICSID Convention, Art. 61(2); IISD, 2019, Commentary: Summary Comments to the Proposals for Amendment of the ICSID Arbitration Rules, (https://www.iisd.org/articles/summary-comments-proposals-amendment-icsid-arbitration-rules#:~:text=The%20proposed%20amendments%20signal%20an,state%20dispute%20settlement%20(ISDS), 06. 09. 2024).

68 2022 ICSID Arbitration Rules, Rule 52(1).

69 *Ibid.*, Rule 52(2).

part of tribunals. This seems to be consistent with the recent ICSID and non-ICSID arbitral practice.[70]

The "costs follow the event" approach is adopted in the UNCITRAL Arbitration Rules and UNCITRAL Draft Provision 25, which stipulate that the costs of the arbitration should "in principle be borne by the unsuccessful party."[71] The UNCITRAL Rules and UNCITRAL Draft Provision 25 stipulate that the costs could be apportioned if it is reasonable, based on the case circumstances. The UNCITRAL Draft Provision 25 provides further guidance on the relevant circumstances that should be taken into consideration, which are similar to the ones mentioned in the amended ICSID Rules. In its comments on the UNCITRAL Draft Provision 25, the European Union (EU) emphasized the need to prescribe that the prevailing party should only "exceptionally" cover the expenses.[72] Nevertheless, Argentina opines that the "costs follow the event" approach should not be adopted as a general rule because none of the parties in investment arbitration may be considered fully successful or unsuccessful.[73] Accordingly, it favors a more case-by-case approach, which was adopted in the ICSID Rules.

The new ICSID Rules introduce a separate provision on security for costs, aiming to address the potential situation where a party fails to adhere to a costs awards issued against it.[74] They stipulate that the tribunal can request security for costs from any party asserting a claim or counterclaim, upon the request of one of the parties.[75] Further, the new

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70 ICSID, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Spain,* Case No. ARB/15/36, Award of 6 September 2019, para. 741. It also refers to other cases where the success of the claims and defenses was important for determining the allocation of costs: *Charanne*, paras. 561–562; SCC, *Isolux Infrastructure Netherlands B.V. v. Spain*, Case No. 2013/153, Award of 12 July 2016, paras. 859–861; ICSID, *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B V) v. Spain*, Case No. ARB/13/31, Award of 15 June 2018, paras. 744–745.

71 2010 UNCITRAL Arbitration Rules (with Art. 1(4), as adopted in 2013, and Art. 1(5), as adopted in 2021), Art. 42(1).

72 Comments made by the European Union and its Member States on Draft provisions on procedural and cross-cutting issues (A/CN.9/WG.III/WP.231), (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_the_eu_and_its_ms_wp.231.pdf, 06. 09. 2024) ("European Union and its Member States on A/CN.9/WG.III/WP.231").

73 Comentarios de la República Argentina sobre el documento A/CN.9/WG.III/WP.231, (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comentarios_argentina_wp.231.pdf, 06. 09. 2024) ("Argentina on A/CN.9/WG.III/WP.231").

74 ICSID, 2018a, p. 229.

75 2022 ICSID Arbitration Rules, Rule 53(1).

Rule prescribes non-exhaustive criteria the tribunal should consider when deciding on the need for providing security for costs.[76] In the event the party does not comply with the order for security for costs, the proceedings may be discontinued.[77] During the amendment process, some stakeholders suggested that only States should be allowed to request security for costs because they may not be able to recover costs when defending a claim that is unsuccessful, frivolous or in bad faith.[78]

Furthermore, the UNCITRAL Draft provision 20 on security for costs is similar to the one stipulated in the ICSID Rules. In general, during the UNCITRAL Working Group III process, States welcomed Draft provision 20,[79] although the need to request security for costs from States was challenged.[80]

3.4. AWARD AND EXPEDITED ARBITRATION

As per the ICSID Arbitration Rules, the award should be issued as soon as possible.[81] Different time limits regarding rendering the award are introduced under Rule 58 of the new ICSID Arbitration Rules.[82] There is a 60-day limit for awards on claims manifestly lacking legal merit,

76 Rule 53(3) of the 2022 Arbitration Rules provides the following non-exhaustive criteria: "(a) [...] party's ability to comply with an adverse decision on costs; (b) [...] party's willingness to comply with an adverse decision on costs; (c) the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim; and (d) the conduct of the parties," *ibid.*

77 *Ibid.,* Rule 53(6); Parra, A., 2022, Some Highlights of the Amended ICSID Arbitration Rules, *Kluwer Arbitration Blog,* 26 May, (https://arbitrationblog.kluwerarbitration.com/2022/05/26/some-highlights-of-the-amended-icsid-arbitration-rules/, 06. 09. 2024).

78 ICSID, 2019b, p. 233; See ICSID, 2019a, pp. 333, 337, 340, 343; UNCITRAL, 2018c, para. 33.

79 See *e.g.*, Israel's Comments on Draft Provisions on Procedural and Cross-cutting Issues, (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/israel_comments.pdf, 06. 09. 2024); European Union and its Member States on A/CN.9/WG.III/WP.231; Singapore's written comments on Draft Provisions contained in A/CN.9/WG.III/WP.231, (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_singapore.pdf, 06. 09. 2024).

80 See *e.g.*, Argentina on A/CN.9/WG.III/WP.231; Viet Nam's written comments on Draft provisions on procedural and cross-cutting issues, (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/writte1.pdf, 06. 09. 2024).

81 2022 ICSID Arbitration Rules, Rule 58(1).

82 Previously there had been no time limits on the part of the tribunal, except to render the award within 120 days after the closure of the proceedings. However, as tribunals normally close the proceedings when the award is almost finalized, they rarely limited the time for rendering of the award. 2006 ICSID Arbitration Rules, Rules 38, 46; ICSID, 2018a, pp. 257, 906.

a 180-day limit from the last submission for awards on preliminary objections in bifurcated proceedings, and a 240-day limit from the last submission in all other cases.

UNCITRAL Draft Provision 24 also prescribes that the award should be rendered as soon as possible. It proposes that, unless the parties agreed otherwise, the award should be issued within a particular period after the last submission or hearing, with the possibility of extension. The EU and its Member States recommended a period of 6 months after the last submission or hearing, or 18 or 24 months after the submission of a claim.[83]

Furthermore, parties may choose to use expedited arbitration offered by different institutions to accelerate the process. As per the ICSID Rules, the written consent of the parties is required to conduct expedited arbitration.[84] In addition, the parties may opt out of expedited arbitration at any time.[85] Expedited arbitration can be concluded within 470–530 days.[86] Compared with ordinary ICSID proceedings, it reduces time limits for the following procedural steps: selection and appointment of the tribunal,[87] the first session,[88] the procedural schedule,[89] and the tribunal's award.[90]

3.5. MEDIATION

The objective of mediation proceedings is to help the parties reach a consensual resolution of all or part of issues in dispute.[91] Unlike arbitrators, the mediator or co-mediators lack authority to impose a binding resolution. The 2022 ICSID Mediation Rules can also be considered as one of the tools that can increase efficiency *in* investment arbitration as they can be conducted in conjunction with the arbitration proceedings. It is argued

83 European Union and its Member States on A/CN.9/WG.III/WP.231.

84 2022 ICSID Arbitration Rules, Rule 75(1).

85 *Ibid.,* Rules 75(1), 86(1).

86 ICSID, 2018a, p. 915.

87 For example, under expedited arbitration, the parties have 30 days to agree on the number of arbitrators and the method of constituting the tribunal, contrary to the 45 days under the ordinary rules. 2022 ICSID Arbitration Rules, Rule 76.

88 Under expedited arbitration, the first session should be held within 30 days after the constitution of the tribunal, contrary to the 60-day limit (or different if so agreed by the parties) in the case of ordinary arbitration. *Ibid.*, Rules 29, 80.

89 Expedited arbitration entails a procedural schedule, under Rule 81(1), with time and page limits, and does not allow bifurcation.

90 Under the expedited arbitration, the tribunal should render the award within 120 days from the (sole) hearing. *Ibid.*, Rule 81(1) (i); see ICSID, Expedited Arbitration – ICSID Convention Arbitration (2022 Rules), (https://icsid.worldbank.org/procedures/arbitration/convention/expedited-arbitration/2022, 28. 10. 2024).

91 ICSID Mediation Rules, 2022, Rule 17.

that "the parties can take advantage of the various times during the life of the dispute when the parties' understanding of their case and the likelihood of success change."[92] As per the ICSID Mediation Rules, which are specifically intended for settling investment disputes, the proceedings can be initiated either based on a prior agreement between the parties or after the acceptance of the request for mediation.[93] As is the case with expedited arbitration, each of the parties can decide to terminate the mediation proceedings at any time.[94]

4. Efficiency and Predictability in and of Investment Arbitration as Intertwined Issues

Efficiency is crucial to the success of the ISDS system.[95] ICSID and UNCITRAL arbitration rules emphasize that arbitral proceedings should be conducted in a cost– and time-efficient manner, while preserving due process and fairness of the proceedings.[96] As the tribunal in Sempra v. Argentina stated:

> *The Tribunal is mindful of the parties' wish and right to fully present their cases. The Tribunal also understands its duty to conduct the proceedings in an orderly and efficient manner. The Tribunal is confident that the parties in these proceedings have been given plenty of opportunities to fully present their arguments on each issue in dispute. Accepting Argentina's non-invited submission at this late stage of the proceedings would open the door for a never ending exchange of arguments, unduly burdening both parties.*[97]

It is argued that the particular nature of proceedings – namely, the public interest involved, the desire for greater transparency, as well as the

92 Jung, J., 2022, Investor–State Mediation – A Third Lane on the ISDS Highway, *ASA Bulletin*, Vol. 40, No. 2, p. 281.

93 ICSID Mediation Rules, 2022, Rules 2, 5, 6.

94 *Ibid*, Rule 22.

95 ICSID, 2018a, p. 898.

96 Under Rule 3 of ICSID Arbitration Rules: "(1) The Tribunal and the parties shall conduct the proceeding in good faith and in an expeditious and cost-effective manner. (2) The Tribunal shall treat the parties equally and provide each party with a reasonable opportunity to present its case" 2022 ICSID Arbitration Rules; Under Article 17(1) of the UNCITRAL Arbitration Rules, "[t]he arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute"; 2010 UNCITRAL Arbitration Rules; *ibid.,* p. 912.

97 ICSID, *Sempra Energy International v. Argentina*, Case No. ARB/02/16, Award of 28 September 2007, para. 53.

desire for enhancing legal certainty – should be considered when discussing efficiency in investment arbitration.[98] According to Raz, "long delays, excessive costs [...] may effectively turn the most enlightened law to a dead letter and frustrate one's ability effectively to guide oneself by the law."[99] Indeed, it was identified that high costs of ISDS particularly impede the participation of developing countries and small and medium size enterprises which may struggle to finance the proceedings or decide not to initiate them due to limited financial resources.[100]

Several factors that make ISDS costly and lengthy have been identified.[101] One of the identified causes of cost and time intensity is that the tribunals and the party representatives need to develop their legal positions regarding ambiguous unsettled provisions of international investment agreements in every case and hence invest extensive resources on studying increasingly plentiful previous awards.[102] In particular, it was found that the reason why the parties submit all available arguments, including those that were rejected by earlier tribunals, is due to the lack of a rule of binding precedent and a consequent lack of predictability.[103]

How can predictability of the arbitral outcome result in greater efficiency of and in investment arbitration? Concerning efficiency of investment arbitration, if potential parties are certain about the outcome of the dispute and their probabilities of success, they will not expose themselves to the costs of arbitration.[104] It was argued that one of the reasons why parties are not settling investor–State disputes more often is because they have unrealistic expectations and assessments of the possible outcome of the case.[105] Investors and States could use the stable law to negotiate the settlement and hence save the resources they would spend on party, administrative, and tribunal costs.[106] Accordingly, increasing the predictability of the arbitral outcome through stable interpretations of ambiguous legal issues could result in less arbitration.[107] The renewable energy cases

98 Markert, L., 2011, pp. 220–222.

99 Raz, J., 1979, *The Authority of Law: Essays on Law and Morality,* Oxford, Clarendon Press, p. 217.

100 UNCITRAL, 2018c, paras. 7–9.

101 *Ibid.*, para. 76.

102 UNCTAD, 2013; *Ibid.*, paras. 79–84.

103 UNCITRAL, 2017, para. 44; UNCITRAL, 2018c, paras. 13, 84.

104 Jarrett, M., 2024, p. 46; Macey, J. R., 1989, p. 107; Bhala, R., 2001, Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy), *The George Washington International Law Review*, Vol. 33, No. 3–4, pp. 873, 948–950.

105 Jung, J., 2022, p. 289.

106 Jarrett, M., 2024, p. 46.

107 Macey, J. R., 1989; Gould, J., 1973, The Economics of Legal Conflicts, *Journal of Legal Studies*, Vol. 2, No. 2, pp. 279, 286.

initiated against Spain are a good example of how uncertainty about the arbitral outcome resulted in the initiation of numerous arbitration proceedings dealing with same or similar factual and legal issues, despite the first arbitral decisions being made publicly available back in 2016.[108]

Regarding efficiency in investment arbitration, consistency of the arbitral practice can make proceedings more efficient. It is contended that the doctrine of binding precedent creates efficiency in the judicial process as "resolving cases the same way prior cases have been resolved can save time and resources."[109] When a particular legal position is adopted to the extent it is considered binding, arbitrators and counsels could simply refer to the settled legal position with no need to present additional arguments and argue different legal positions. An example of how unpredictability leads to inefficiency in investment arbitration will be discussed in the following section.

Furthermore, predictability and certainty of the arbitral outcome could minimize the costs of control mechanisms.[110] Control mechanisms in investment arbitration are narrower in scope than judicial review.[111] After arbitral awards were issued in the Spanish saga cases, annulment proceedings were initiated under ICSID or, in the case of non-ICSID proceedings, arbitral awards were challenged before national courts. Here again the value of predictability comes into play as the party that requests annulment on a particular basis would not do so if it was certain about the position the tribunal would take regarding the matter.[112] As ICSID annulment committees are established on an *ad hoc* basis, they may arrive at inconsistent conclusions.[113] In contrast, it is argued that in the long run the ISDS appellate mechanism could increase consistency through the appellate body's clear position on important issues, consequently reducing party costs.[114] Accordingly, it could be argued that ensuring predictability of the arbitral outcome could save time and resources during the arbitral proceedings.

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108 This paper will present only an example of inconsistencies in the Spanish saga cases regarding the jurisdictional objection *ratione voluntatis* as the tribunals' reasoning on jurisdictional objections was arguably the most consistent and predictable. Regarding other inconsistencies in the Spanish saga cases see Rajković, N., 2024, The Danger of the Interpretation of Facts: Legal Uncertainty in the Spanish Saga Cases, *Laws*, Vol. 13, No. 3, pp. 1–16; *Charanne*; *Isolux*.

109 Stinson, J. M., 2021, p. 607. See Macey, J. R., 1989, p. 102.

110 *Ibid*., pp. 108–110.

111 Cheng, T. H., 2006, Precedent and Control in Investment Treaty Arbitration, *Fordham International Law Journal,* Vol. 30, No. 4, p. 1024.

112 Macey, J. R., 1989, p. 108; Jarrett, M., 2024, p. 47.

113 UNCTAD, 2013, p. 3.

114 Bottini, G., *et al.*, 2020, pp. 261–262, 279.

5. (Un)predictability of the Arbitral Outcome in Renewable Energy Cases Initiated Against Spain – an Example of Intra-EU Jurisdictional Objections *Ratione Personae* and *Voluntatis*

This section will address the intra-EU jurisdictional objections *ratione personae* and *voluntatis* that were extensively addressed in the Spanish saga cases. There are over 30 such concluded cases and over 45 initiated.[115] Most of these cases are intra-EU, meaning they are initiated by an investor from an EU Member State against an EU Member State. These cases deal with same or similar factual and legal issues, which facilitates the comparison of different arguments and interpretations, and increases the need for greater consistency. The tribunals' reasoning on jurisdictional objections in this line of cases was arguably the most consistent and predictable. Still, the parties spent a lot of resources trying to prove the competence *ratione personae* and *voluntatis* of the tribunal or the opposite.[116] As proven by the *Green Power Partners v. Spain* case, in a system where there is no binding precedent, it cannot be guaranteed that consistent reasoning will be followed even when tribunals address same or similar factual and legal issues. The paper will focus on the last five[117] concluded disputes of the Spanish saga cases whose decisions have been made publicly available.

115 See https://investmentpolicy.unctad.org/investment-dispute-settlement/country/197/spain/investor, 28. 10. 2024.

116 For example, in the *The PV Investors v. Spain* case, the arbitration costs for the jurisdictional phase were EUR 442,152.22. Exact party costs are not known as the claimants and the respondent presented total expenses incurred (party costs, tribunal and administrative costs), amounting to GBP 1,552,129.23 and EUR 1,260,660.81, respectively. In the *Green Power Partners* case, the party costs (which include the expert fees) of the Claimants and the Respondent were: EUR 1,319,149.34 (claimant *Green Power Partners*), EUR 909,429.63 (claimant *CSE*), and EUR 867,592.98 (Respondent). *The PV Investors*, 2014, paras. 345, 348, 362; SCC, *Green Power Partners K/S and SCE Solar Don Benito APS v. Spain*, Case No. 2016/135, Award of 16 June 2022, paras. 490–491.

117 The *Green Power Partners* case did not reach the merits stage. SCC, *Triodos SICAV II v. Kingdom of Spain,* Case No. 2017/194, Final Award of 24 October 2022, (partially unredacted); ICSID, *Mathias Kruck and others v. Spain*, Case No. ARB/15/23, Decision on Jurisdiction, Liability and Principles of Quantum of 14 September 2022; *ibid.*; ICSID, *Renergy S.à.r.l. v. Spain*, Case No. ARB/14/18, Award of 6 May 2022; ICSID, *Sevilla Beheer B.V. v. Spain*, Case No. ARB/16/27, Decision on Jurisdiction, Liability and the principles of Quantum of 11 February 2022. All the decisions are publicly available at https://www.italaw.com/ (28. 10. 2024) and https://investmentpolicy.unctad.org/investment-dispute-settlement (28. 10. 2024).

Spain raised the intra-EU objection to jurisdiction *ratione personae* in all analyzed cases. Jurisdiction *ratione personae* exists under Article 26(1) of the ECT if there is a dispute "between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III" of the treaty.[118] Spain argued that arbitral tribunals lack jurisdiction to hear the cases because the claimants did not originate from another ECT Contracting Party, as both countries are from the EU.[119] It argued that when determining the jurisdiction of the tribunal, EU law and principles should be considered "applicable rules and principles of international law," as per Article 26(6) of the ECT.[120] Spain relied on the *Achmea* and *Komstoy* Judgments of the Court of Justice of the EU (CJEU) to support its arguments on jurisdictional objections.[121]

Spain's argument that the tribunal lacks jurisdiction *ratione personae* was consistently rejected by the arbitral tribunals in all the Spanish saga cases because, pursuant to Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[122] Hence, the ordinary meaning should be given to Article 26(1) of the ECT, which provides that disputes should be resolved between "a Contracting Party" and "an Investor of another Contracting Party".[123] The tribunals found that the fact that the EU as a whole is a Contracting Party to the ECT does not deprive EU Member States of their status of a Contracting Party.

The Tribunal in *Green Power Partners* was the only Tribunal that upheld a jurisdictional objection in the Spanish saga cases, but not regarding *ratione personae*. It found it lacked jurisdiction *ratione voluntatis,*

118 Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998), Art. 26(1); ICSID, *Mathias Kruck and others v. Spain*, Case No. ARB/15/23, Decision on Jurisdiction and Admissibility of 19 April 2021, para. 245.

119 *Green Power Partners*, para. 120; *Renergy,* para. 260; *ibid.,* para. 260.

120 *Triodos,* para. 201; *Green Power Partners*, paras. 132, 155; *Renergy*, para. 263; *Sevilla Beheer,* paras. 553, 556; *Ibid.,* para. 259.

121 *Renergy*, paras. 258–260; *Green Power Partners*, paras. 201, 204, 206, 211–212; *Sevilla Beheer*, para. 554*;* CJEU, case C-284/16, *Slovak Republic v. Achmea B.V.*, Judgment of 6 March 2018, ECLI:EU:C:2018:158; CJEU, case C-741/19, *Republic of Moldova v. Komstroy,* Judgment of 2 September 2021, ECLI:EU:C:2021:655.

122 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980).

123 *Green Power Partners,* paras. 187–189; *Sevilla Beheer,* para. 632; *Triodos,* para. 204; *Renergy,* paras. 366–368, 410–411; *Kruck,* paras. 286–288.

which concerns the respondent's consent to arbitration. In particular, the question formulated by the Tribunal in the *Green Power Partners* was "whether a unilateral offer to arbitrate under Article 26(3)(a) ECT[124] can be considered validly given by an EU Member State to the investors of another EU Member State despite the existence of another agreement between these EU Member States which prevents them from making such an offer."[125] The Tribunal emphasized that it is reliant on the particular circumstances of the case whose seat of arbitration was in Stockholm, in an EU Member State, which consequently triggered the applicability of the EU law on jurisdictional matters.[126] It found that this distinguishes the case from all ICSID cases that are conducted under the ICSID Convention and thus not subject to the domestic *lex arbitri* of the seat of an EU Member State. The Tribunal did not stop the analysis of its jurisdiction *ratione voluntatis* by looking at the ordinary meaning of the wording of Article 26 but also found it necessary to analyze the extensive arguments made by the parties and provide the meaning in line with the facts of the case.[127]

Without entering into the details on the Tribunal's reasoning,[128] it would suffice for the purpose of this paper to mention that the Tribunal found that, bearing in mind the particular circumstances of the case, determining its jurisdiction under Article 26 of the ECT without applying EU law would be inconclusive.[129] Consequently, the Tribunal relied on the rules of EU law and the CJEU *Achmea* and *Komstoy* Judgments to determine that the Respondent's consent to arbitration (unilateral offer to arbitrate in Article 26) is invalid due to it being inconsistent with the

124 Article 26(3)(a) of the ECT prescribes that "[...] each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article."

125 *Green Power Partners*, para. 348.

126 The arbitration was administered by the Arbitration Institute of the Stockholm Chamber of Commerce. Stockholm was chosen as the seat of arbitration and thus the proceedings were governed by the Swedish Arbitration Act. *Ibid*., paras. 137, 162, 165–166, 172, 335. The Tribunal in *LBBW* rejected the relevance of the *Green Power Partners* case because the seat of arbitration was in Sweden. ICSID, *Landesbank Baden-Württemberg and others v. Spain*, Case No. ARB/15/45, Decision on the Respondent's application for reconsideration of the tribunal's decisions of 25 February 2019 and 11 November 2021 regarding the "intra-EU" jurisdictional objection of 22 February 2023, para. 42.

127 *Ibid.*, paras. 343–346.

128 See Fanou, M., 2023, *Green Power Partners v Spain*: Upholding the Intra-EU Objection to Jurisdiction in the ECT Context – A Swerve in the Search for the Line of Two Planes, *ICSID Review – Foreign Investment Law Journal*, Vol. 38, No. 3, pp. 508–517.

129 *Green Power Partners,* paras. 412, 415.

autonomy and primacy of EU law.[130] Moreover, the ICSID Tribunal in the *Stadtwerke* case also recognized that EU law, including CJEU *Achmea* case, can be characterized as international law and hence may be taken into account when interpreting provisions of the ECT related to jurisdictional matters.[131]

In contrast, the Tribunal in the *Triodos v. Spain* case stated that it cannot follow the CJEU *Achmea* and *Komstroy* Judgements "without relinquishing its responsibility to apply the ECT as the source of its mandate in this case."[132] It is important to point out that the Tribunal in the *Triodos* case shared the same special circumstances as the Tribunal in *Green Power Partners*, as the seat of arbitration was also Stockholm.[133] The Tribunal in *Triodos* analyzed Article 26[134] by looking at its ordinary meaning in the light of the object and purpose of the treaty, as per Article 31(1) of the VCLT.[135] Contrary to the Tribunal in *Green Power Partners*, the Tribunal found that the scope of the Respondent's consent should not be determined by the rules of EU law but only based on the ECT and the "rules and principles of international law," such as the VCLT.[136]

Considering the apparent discrepancy in the approach of the two non-ICSID Tribunals based in an EU Member State when determining their jurisdiction *ratione voluntatis*, one can only expect that extensive arguments will be presented on the matter in future non-ICSID intra-EU arbitral cases. Although EU Member State parties may expect with greater certainty that intra-EU objection *ratione personae* will be rejected even if the seat of arbitration is in an EU Member State, since the objection was consistently rejected by all tribunals, respondents will justifiably continue to raise this objection. This is so because contradictory decisions may not be excluded without the appropriate mechanism aimed at increasing predictability in the system, as proven by the reasoning of the Tribunal in *Green Power Partners*.

130 Judgments discussed in paras. 413–478; Conclusions reached at paras. 476–477. *Ibid.*

131 ICSID, *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Spain,* Case No. ARB/15/1, Award of 2 December 2019, para. 138.

132 *Triodos,* para. 356.

133 *Ibid*., para. 9.

134 The Tribunal outlined that, as per ECT Article 26(3), the "Respondent tendered its 'unconditional consent' to refer to international arbitration the disputes that fall within the scope of that provision, which include disputes between an investor incorporated in an EU Member State such as the Claimant, and another EU Member State such as the Respondent," *ibid.*, para. 350.

135 *Ibid.,* paras. 317, 334, 338, 345.

136 *Ibid.,* para. 349.

6. Different Means for Increasing Efficiency *in* and *of* Investment Arbitration

This section of the paper will explore some of different means for increasing efficiency of and in investment arbitration, which were suggested in the literature and mentioned during the UNCITRAL Working Group III ISDS reform process,[137] namely the introduction of the preliminary rulings mechanism, the multilateral two-tier investment court system, the standing appellate mechanism, and the implementation of the doctrine of precedent within the framework of the last two mechanisms.

6.1. THE PRELIMINARY RULINGS MECHANISM

One of the mechanisms that were proposed to achieve greater consistency, and thus predictability and efficiency in the ISDS system, is the introduction of the system of preliminary rulings, which exists in the EU.[138] Pursuant to Article 19(3)(b) of the Treaty on EU and Article 267 of the Treaty on the Functioning of the EU, national courts or tribunals of EU Member States can request the CJEU to, *inter alia*, give preliminary rulings related to the interpretation of EU law.[139] Such a similar consultative mechanism, developed within the context of international investment law, could allow tribunals to seek interpretative guidance on controversial legal issues, which could make arbitral outcomes more predictable.[140] The advisory center on international investment dispute resolution, which was proposed during the UNCITRAL Working Group III reform process, could potentially serve as a consultation mechanism that Tribunals could consult regarding the interpretation of international

137 Nevertheless, some authors/stakeholders oppose such systemic reforms and believe that coherence in the arbitral practice should be achieved only to a certain extent. For example, Giovanni Zarra argues that arbitration should remain a dispute settlement method used by *ad hoc* tribunals, which are free to apply "the proper law of the case without suffering conditioning from the work of other tribunals." Zarra, G., 2018, The issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform, *Chinese Journal of International Law*, Vol. 17, No. 1, p. 145.

138 Kaufmann-Kohler, G., Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences?, in: Gaillard, E., Banifatemi, Y., (eds.), 2004, *Annulment of ICSID Awards*, New York, Juris Publishing, p. 221; Kaufmann-Kohler, G., 2007, Arbitral Precedent: Dream, Necessity or Excuse? – The 2006 Freshfields Lecture, *Arbitration International*, Vol. 23, No. 3, pp. 357–378.

139 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2016, OJEU C 202/1.

140 Kaufmann-Kohler, G., 2004; Kaufmann-Kohler, G., 2007.

investment law. Nevertheless, the statute on its establishment would need to clearly stipulate such an interpretative function.[141]

6.2. A MULTILATERAL TWO-TIER INVESTMENT COURT SYSTEM

It was emphasized that concerns related to ISDS are intertwined and systemic.[142] In addition to securing predictability and efficiency, this mechanism would guarantee impartiality and independence of adjudicators by changing the method of their appointment.[143] For this reason, the EU proposes the introduction of a multilateral two-tier investment court system that could address all identified issues in the field.[144] In addition, a draft statute of a standing mechanism for the resolution of international investment disputes was developed recently during the UNCITRAL Working Group III reform process.[145] The court would be comprised of a first-tier and appellate tribunal. Within this framework, disputes would be resolved by full-time adjudicators, appointed for a period of several years.[146] In addition, transparency in ISDS would be assured by incorporating the UNCITRAL Rules of Transparency in the Treaty-based Investor–State Arbitration within the system.[147] This is so because the UNCITRAL Rules

141 Currently, Article 7 of the draft Statute only stipulates that the centre should, upon a member's request, provide legal advice concerning an investment dispute, before or after its initiation. In this respect, the center can provide a preliminary assessment of the case. UNCITRAL, 2024, Draft statute of an advisory centre on international investment dispute resolution A/CN.9/1184, 25 April, (https://documents.un.org/doc/undoc/gen/v24/028/05/pdf/v2402805.pdf, 20. 10. 2024).

142 UNCITRAL, 2018a, para. 24; UNCITRAL, 2019, para. 10.

143 As indicated by James Crawford, the fact that arbitral decisions are made by *ad hoc* panels "presents at least the image of selectivity and of arbitrariness." Crawford, J., 2003, International Law and the Rule of Law, *Adelaide Law Review*, Vol. 24, No. 1, p. 11.

144 European Union and its Member States on A/CN.9/WG.III/WP.231.

145 UNCITRAL, 2024b, Possible reform of investor–State dispute settlement (ISDS) – Draft statute of a standing mechanism for the resolution of international investment disputes A/CN.9/WG.III/WP.239, 8 February, (https://documents.un.org/doc/undoc/gen/v24/008/78/pdf/v2400878.pdf, 20. 10. 2024).

146 For example, in the case of the CETA, as a general rule, the Tribunal should be comprised of fifteen members nominated for the period of five years. The Canada-European Union (EU) Comprehensive Economic and Trade Agreement (CETA) (signed 30 October 2016, entered into force provisionally 21 September 2017). The draft statute provides for adjudicators to serve full-time, "unless determined otherwise by the Conference [of the Contracting Parties]," *ibid.*, Art. 12(3).

147 This is included in UNCITRAL, 2024b; UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration (adopted 11 July 2013, came into effect 1 April 2014).

of Transparency prescribe that almost all case documents, including decisions and awards, should be published automatically.[148]

6.3. THE STANDING APPELLATE MECHANISM

Instead of creating a two-tier investment court, an alternative is to establish only a standing appellate body. UNCITRAL draft statute of a standing mechanism includes the option for the establishment of a standalone appellate mechanism. Under this mechanism, the parties could appeal an award or decision based on (manifest) errors in the application or interpretation of law and appreciation of the facts, which is absent in the current ICSID annulment mechanism.[149] By expanding the grounds of appeal, the appellate mechanism could ensure substantive correctness of decisions and consistent interpretation, due to which the mechanism would contribute to the efficiency in and of investment arbitration.[150] The introduction of the appellate mechanism could be considered more feasible since it would only supplement the currently existing *ad hoc* system, while the multilateral two-tier investment court system would require its abandonment. This would mean that under the latter reform the investors would be excluded from selecting adjudicators that would resolve the dispute – which is considered to be one of the main benefits of arbitration.[151]

6.4. THE DOCTRINE OF PRECEDENT[152]

The doctrine of precedent is the most stringent degree of precedent. The doctrine may be stronger or weaker.[153] Under the former, as Mohamed Shahabuddeen provided, the adjudicator has to decide in the same way as in the preceding decision, even when a good reason could be provided for not doing so.[154] In the case of the weaker version, they would

148 *Ibid.*, Art 3(1).

149 See ICSID Convention, Art. 52(1).

150 UNCITRAL, 2018, Possible reform of investor–State dispute settlement (ISDS): Consistency and related matters A/CN.9/WG.III/WP.150, 28 August, (https://documents.un.org/doc/undoc/ltd/v18/056/80/pdf/v1805680.pdf, 20. 10. 2024), para. 45.

151 Alvarez, E. J., 2021, ISDS Reform: The Long View, *ICSID Review – Foreign Investment Law Journal,* Vol. 36, No. 2, pp. 269–270.

152 The doctrine of precedent is used in the paper as a synonym for *stare decisis*, the doctrine of binding precedent or *de iure* precedent.

153 John Loughran distinguishes between static and dynamic doctrine of precedent. Loughran, T., J., 1953, Some Reflections on the Role of Judicial Precedent, *Fordham Law Review,* Vol. 22, No. 1, p. 2.

154 Shahabuddeen, M., 1996*, Precedent in the World Court*, Cambridge, Cambridge University Press.

be obliged to follow the previous decision unless a good reason could be given for not doing so.

It is argued that the architecture of the current ISDS system, comprised of mainly *ad hoc* tribunals and with no hierarchy, excludes the possibility for implementing the doctrine of precedent.[155] In addition, ISDS transparency is necessary in order for the system to be structurally compatible with the creation of precedent.[156] However, the possibility of implementing the doctrine of precedent within the standing appellate mechanism, as a potential solution for providing consistency and predictability in ISDS, was mentioned during the UNCITRAL Working Group III reform process.[157] The implementation of the doctrine of precedent would be possible in the case of the establishment of either a two-tier investment court system or a standalone appellate mechanism. Martin Jarrett suggests the introduction of the doctrine of precedent in the proposed investment court system for the sake of, *inter alia*, increasing efficiency.[158]

Both the establishment of the two-tier investment court system and the establishment of the appellate mechanism are expected to increase predictability, as well as efficiency. A de facto precedent regime could be developed in such a system,[159] which, contrary to the system of *de jure* precedent, would carry the unnecessary legal risk of tribunals departing from prior decisions without sufficient or any justification.[160] As demonstrated in the examples of intra-EU jurisdictional objections *ratione per-*

155 Zugliani, N., 2022, A Role for Precedent in the Determination of the Standard of Review Applicable by Investment Arbitral Tribunals? A Case Study of ECT-based Energy Disputes Against Spain, *The Italian Review of International and Comparative Law*, Vol. 2, No. 2, p. 379; Castellarin, E., Investment Arbitration and the International Rule of Law, in: Belov, M., (ed.), 2018, *Rule of Law at the Beginning of the Twenty-First Century,* The Hague, Eleven International Publishing.

156 Weidemaier, C. M. W., 2010, Toward a Theory of Precedent in Arbitration, *William & Mary Law Review,* Vol. 51, No. 5, pp. 1895–1958.

157 UNCITRAL, 2018a, para. 43; UNCITRAL, 2020, Report of Working Group III (Investor–State Dispute Settlement Reform) on the work of its resumed thirty-eighth session A/CN.9/1004/Add.1, 28 January, (https://documents.un.org/doc/undoc/gen/v20/007/33/pdf/v2000733.pdf, 06. 09. 2024), paras. 44, 57.

158 Jarrett, M., 2024. In addition, Anatole Boute points out that it is precisely the certainty provided by the formal doctrine of precedent that is needed in investment arbitration to facilitate the green energy transition. Boute, A., 2012, Combating Climate Change Through Investment Arbitration, *Fordham International Law Journal*, Vol. 35, No. 3, p. 663.

159 The *de facto* precedent was identified in the practice of the Appellate Body of the World Trade Organization. See Bhala, R., 1999, The Myth about Stare Decisis and International Trade Law (Part One of a Trilogy), *American University International Law Review*, Vol. 14, No. 4, pp. 845–956.

160 Bhala, R., 2001, p. 880.

sonae and *voluntatis,* under the current approach towards the use of precedents in ISDS, *i.e.*, the de facto precedent regime[161] or the "taking into account approach",[162] the parties continue to debate extensively even the most consistently interpreted treaty provisions. At the same time, tribunals continue to interpret the same treaty provisions, such as the ECT arbitration clause, in each case, regardless of the factual similarity with previously concluded cases. This approach contributes to the cost and time intensity of the proceedings of cases that could have been settled outside arbitration – had the outcomes been predictable enough.

7. Conclusion

Efficiency is an important aspect of the ISDS system, which has raised many concerns and triggered different reforms. The 2022 ICSID Arbitration Rules, the ICSID Mediation Rules and the UNCITRAL Draft Provisions aim to improve efficiency in investment arbitration through different procedural tools. Namely, these tools seek to a) accelerate the process of the constitution of the tribunal, b) facilitate communication and process through electronic submissions and remote hearings, c) dismiss claims lacking legal merit early in the proceedings, d) incentivize the use of the "costs follow the event" approach when allocating costs, e) secure costs when there is a risk of non-compliance with the award f) speed up the conduct of the tribunal through the imposition of different timelines, g) offer expedited arbitration, and h) offer mediation proceedings.

However, as identified during the UNCITRAL Working Group III reform process, the concerns related to ISDS, including inefficiency and unpredictability, are intertwined. For this reason, the introduction of the mentioned procedural tools does not address the inefficiency that exists due to the lack of unpredictability. Predictability may not only improve efficiency in investment arbitration but also efficiency of investment arbitration. On the one hand, predictable arbitral outcomes could improve efficiency of investment arbitration by resulting in more settlements, since the parties would have the stable law based on which to negotiate. On the other hand, proceedings would become more efficient through stabilized interpretations, since the parties would not raise all plausible arguments if they were certain they would be rejected. The same logic applies in the case of annulment proceedings.

161 Reed, L., 2010, The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management, *ICSID Review – Foreign Investment Law Journal*, Vol. 25, No. 1, pp. 95–103; Kaufmann-Kohler, G., 2007.

162 Zarra, G., 2018, p. 163.

The parties in the Spanish saga cases have extensively discussed the intra-EU jurisdictional objections. Although jurisdictional objection *ratione personae* was consistently rejected by all the tribunals in this similar line of cases, discussions on the matter continue to contribute to the time and cost intensity of the proceedings. As the reasoning of the Tribunal in *Green Power Partners* has shown, it is not surprising that the parties continue to raise all plausible arguments, even those that have been consistently rejected. The tribunal in the respective case decided to go in a different direction when it comes to determining its jurisdiction *ratione voluntatis* and make the most certain arbitral outcome in the Spanish saga cases an uncertain one. Accordingly, these examples demonstrate that the degree of predictability needed to enhance efficiency in and of investment arbitration cannot be achieved in the current system, where *ad hoc* arbitrators "take into account" earlier decisions or where they operate in a de facto precedent regime. Rather, it would be necessary to introduce into the ISDS system one of the following mechanisms: preliminary rulings, multilateral two-tier investment court system, or a standing appellate mechanism. If the latter two mechanisms were to be established, the doctrine of precedent could be included as a useful efficiency tool.

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DRAGULJ SKRIVEN IZA PREDVIDLJIVOSTI: RASPRAVA O EFIKASNOSTI INVESTICIONE ARBITRAŽE

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APSTRAKT

Cilj ovog članka je analiza efikasnosti u investicionoj arbitraži, uz predlog kako predvidljivost arbitražnog ishoda može poboljšati efikasnost u investicionoj arbitraži, u užem smislu, i investicione arbitraže u širem smislu. Prvo, ovaj članak će se baviti troškovima i trajanjem investicione arbitraže. Drugo, razmotriće odredbe ICSID Arbitražnih pravila i pravila medijacije, kao i UNCITRAL Nacrta odredbi radne grupe III, čiji je cilj povećanje efikasnosti u investicionoj arbitraži. Treće, predstaviće efikasnost u investicionoj arbitraži i investicione arbitraže, s jedne strane, i predvidljivost, s druge strane, kao isprepletena pitanja. Četvrto, koristiće unutar EU prigovore nadležnosti *ratione personae* i *voluntatis* kao primere kako nepredvidljivost arbitražnih ishoda smanjuje efikasnost u investicionoj arbitraži i investicione arbitraže. Najzad, predstaviće potencijalna rešenja koja bi dovela do poboljšanja efikasnosti u oba smisla.

Ključne reči: investiciona arbitraža, efikasnost, predvidljivost, unutar EU prigovori nadležnosti, ICSID, UNCITRAL, precedent.

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