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Current Developments in Investor-State Dispute Settlement: An Overview of Substantive and Procedural Change in the Past Fifty Years

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ARTICLE

CURRENT DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT: AN OVERVIEW OF SUBSTANTIVE AND PROCEDURAL CHANGE IN THE PAST FIFTY YEARS*

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I. INTRODUCTION

This paper is intended to provide context for the discussion on mitigating risks in cross-border investment. It focuses on the primary adjudicative mechanism to address investor grievances against a host State: Investor-State dispute settlement (ISDS). ISDS is the right given to a foreign investor to initiate dispute settlement proceedings with a sovereign State, most commonly through international arbitration. It is a unique right given to private persons and entities to claim a remedy against the host State in which they invested.

The cornerstone of ISDS is the written consent of both parties to the dispute. State consent may be found in international investment agreements (IIAs), in contracts between a foreign investor and host State, and in the domestic investment laws of host States. IIAs are the most common basis of consent invoked in ISDS cases and are the foundation for about seventy-five percent of all known cases.[1] These agreements include commitments between two (or more) States to treat foreign investors of the other signa-

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1. See INT'L CTR. FOR SETTLEMENT OF INV. DISPS., THE ICSID CASELOAD – STATISTICS 11 (Issue 2020-2), for a profile of the ICSID caseload, including the basis of consent invoked in ICSID cases.

tory State in accordance with certain standards of treatment. The commitments often encompass a promise not to expropriate an investment without fair compensation, not to discriminate on the basis of foreign nationality, or not to impose certain performance requirements or local content rules. Investment agreements often oblige States to treat foreign investors fairly and equitably, and to allow the transfer of funds in and out of the host State. ISDS provisions in these agreements also provide a remedy to an aggrieved investor. If a State is found in breach of the substantive obligations in the treaty, it may be found liable for damages by a tribunal and may receive compensation guided by principles such as "full reparation," "adequate compensation," and "fair market value." Although the framework of ISDS has remained constant in the last fifty years, the number of treaties and ISDS cases under treaties have increased, while the applicable procedures have adapted to party demands for increased transparency about the process, increased coherence in the jurisprudence, increased diversity among arbitrators, and a reduction in the time and cost involved in resolving a conflict.

II. International Centre for Settlement of Investment Disputes

The treaties, contracts, and laws that govern cross-border investment—and their dispute settlement provisions—are complemented by the International Centre for Settlement of Investment Disputes (ICSID), the leading forum for ISDS cases. ICSID was developed by the Executive Directors of the World Bank in the 1960s and was formally established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).[2] ICSID is one of the five organizations that comprise the World Bank Group, along with the International Bank for Reconstruction and Development, International Development Association, International Finance Corporation, and Multilateral Investment Guarantee Agency.[3] In contrast to the other organizations of the World Bank Group, ICSID does not offer financial services or advice. Rather, it is an impartial institution that provides rules of procedure for resolving international investment disputes—through arbitration, conciliation, and fact-finding—and extensive administrative support to the parties and tribunals.

In terms of structure, ICSID is comprised of an Administrative Council and a Secretariat. Each ICSID Contracting State has one seat on the Admin-

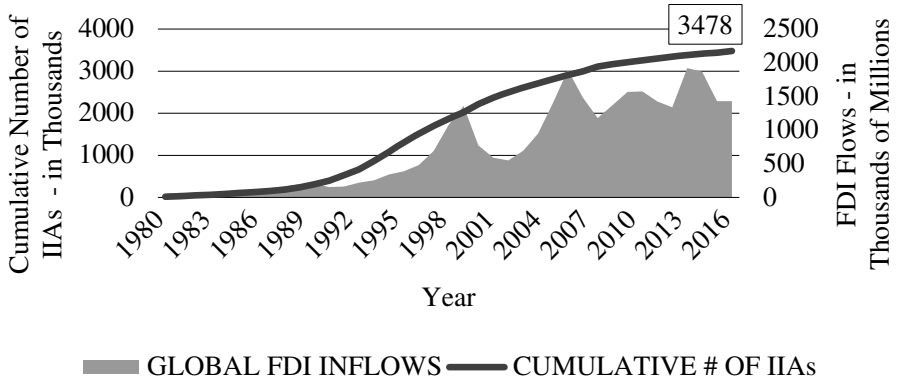
2. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966).

3. *About the World Bank*, World Bank, https://www.worldbank.org/en/about (last visited Oct. 16, 2020).

istrative Council and one vote on matters tabled before the Council.[4] As of June 9, 2020, there are 155 ICSID Contracting States—the term given to States that have ratified the ICSID Convention.[5] Djibouti is the latest State to ratify the Convention.[6] The Administrative Council plays no role in the administration of individual cases. Rather, its responsibilities relate to the functioning of the Centre as a whole, such as adopting administrative and financial regulations for ICSID, electing the ICSID Secretary-General, and approving ICSID's annual budget.[7] The ICSID Secretariat manages the day-to-day functioning of the Centre. This includes acting as the registrar in proceedings, assisting with the constitution of tribunals and ad hoc committees, supporting parties and tribunals on aspects of ICSID procedure, organizing and assisting with hearings, and administering the finances of cases.

Since its establishment, ICSID has administered over seventy percent of all known ISDS cases.[8] The Centre's caseload has grown significantly over the last three decades, in a trend that correlates with the growth in IIAs and foreign investment more generally.

GROWTH IN IIAS AND FDI[9]



4. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *supra* note 2, at 164, 166.

5. *Resources*, INT'L CTR. FOR SETTLEMENT OF INV. DISPS., https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview (last visited Oct. 16, 2020).

6. *Djibouti Ratifies the ICSID Convention*, INT'L CTR. FOR SETTLEMENT OF INV. DISPS. (June 9, 2020), https://icsid.worldbank.org/news-and-events/news-releases/djibouti-ratifies-icsid-convention.

7. *Role of Member States*, INT'L CTR. FOR SETTLEMENT OF INV. DISPS., https://icsid.worldbank.org/about/member-states/role-of-member-states (last visited Oct. 16, 2020).

8. United Nations Conference on Trade and Dev., *Investor-State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019*, IIA ISSUES NOTE, July 2020, at 2.

9. United Nations Conference on Trade and Dev., *Data Center*, UNCTAD STAT, https://unctadstat.unctad.org/wds/ReportFolders/reportFolders.aspx (last visited Oct. 17, 2020); United Nations Conference on Trade and Dev., *International Investment Agreements Navigator*, INV. POL'Y HUB, https://investmentpolicy.unctad.org (last visited Oct. 17, 2020).

III. The Purpose and Roots of IIAs and ISDS

IIAs seek to encourage foreign direct investment (FDI) by enhancing investment climates, including by providing access to ICSID for the peaceful settlement of investment disputes. They are in part a reflection of the desire of States to attract FDI as a means to finance new projects, create jobs, and share technology and know-how in their jurisdiction.

IIAs and ISDS are also an answer to practical challenges in resolving cross-border investment disputes. Historically, foreign investors and their investments were subject to the jurisdiction of the host State, meaning claims had to be initiated in domestic courts. But foreign investors potentially faced legal and political hurdles that were often greater—or at least different—from those of a local investor, which made the host State less attractive to foreign investors.[10] Concerns included claims of absolute State immunity, the adoption of the Calvo Doctrine in certain States preventing foreign investors from invoking an international remedy prior to exhausting domestic remedies,[11] a lack of impartiality of local courts, and inefficiencies that made local courts an ineffective solution.[12]

At the same time, available remedies in international law were also limited. Traditionally, aggrieved foreign investors sought diplomatic protection. This could take different forms, ranging from a diplomatic note by the home State of the investor asking for the situation to be remedied to full espousal of the claim by the home State. In practice, however, home States are often reluctant to intervene—especially by taking on a legal claim against another State—given the range of diplomatic interests that would need to be weighed in parallel. Espousal of a claim by the home State is particularly unlikely for smaller investors that are less of a strategic or economic interest for the home State. Espousal is also subject to certain preconditions, including that investors must have the nationality of the home State (which poses a challenge when investment vehicles are multi-national), proved continuous nationality, and exhausted local remedies—which may be a time-consuming and ineffective remedy.[13]

As such, it was in large part the absence of effective domestic and international systems with jurisdiction that led to ISDS and ICSID. The goal of these systems is to ensure that rights and obligations enshrined in treaties are enforceable at the international level. The aim is also to depoliticize investment disputes—thus eliminating one of the major draw-

10. Christopher Dugan et al., Investor-State Arbitration, 11–19, (1st ed. 2008).

11. For further discussion, see *id.* at 16–19. The Calvo Doctrine provided that there could be no international responsibility so long as the domestic judicial or administrative system offered a recourse to the aggrieved foreign investor, and hence gave domestic courts exclusive jurisdiction where such a remedy was available.

12. *Id.* at 15–16.

13. *Id.* at 27–33.

backs of espousal—by ensuring the availability of a peaceful means of dispute resolution directly between the host State and foreign investor.

As the network of IIAs and ISDS provisions has grown, researchers have examined (and debated) their impact on FDI. Quantitative modeling has found an overall positive correlation between IIAs and FDI, often showing an increase in FDI in States that conclude IIAs.[14] At the same time, there are some examples of States with no IIAs but with increased FDI, and these are cited by some as the "counter-factual" in this debate. It is likely impossible to demonstrate empirically that IIAs always lead to increased FDI given the numerous factors that influence foreign investment patterns and the variations in IIAs. Nonetheless, most States see IIAs and ISDS as a key part of their treaty programs and broader investment policy.

IV. Trends in IIAs

IIAs have evolved considerably since their genesis in the late 1950s and 1960s. The trend has been towards longer, more detailed agreements, with more precise definitions of obligations, increasingly specific procedural requirements, and occasionally more stringent preconditions to accessing ISDS procedures. This trend is accompanied by—and informed by—the increased use of model investment treaties that States use as the template for negotiation. Model IIAs have proliferated greatly since the 2000s—with over eighty model treaties documented by UNCTAD and many others under development.[15]

There has also been growth in regional agreements (i.e., the Dominican Republic-Central America Free Trade Agreement), plurilateral agreements (i.e., the Comprehensive and Progressive Agreement for Trans-Pacific Partnership), and sectoral agreements (i.e., the Energy Charter Treaty). However, States have not agreed on global multilateral investment obligations. Negotiations at the Organisation for Economic Co-operation and Development (OECD) over a Multilateral Agreement on Investment concluded in 1998 without agreement on the text, and currently a global multilateral treaty is not under negotiation.[16]

Also notable are the geographic trends in investment-treaty making. While the first generation of treaties were primarily between developed and developing countries (i.e., North-South agreements), the last several decades have seen an increase in North-North, South-South and other combi-

14. *See, e.g.*, Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 World Dev. 1567, 1582 (2005).

15. United Nations Conference on Trade and Dev., *International Investment Agreements Monitor – Model Agreements*, Inv. Pol'y Hub, https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements (last visited Oct. 16, 2020).

16. *Multilateral Agreement on Investment*, Org. for Econ. Coop. and Dev., https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm (last visited Oct. 16, 2020).

nations. In turn, more variety in treaty partners leads to more variety in the claimants and respondents in ISDS cases. This is evident in the ICSID caseload, with claimants increasingly coming from emerging and developing economies.[17]

Potential emerging trends in investment agreements also include:

- Corporate Social Responsibility clauses in IIAs: Inclusion of Corporate Social Responsibility clauses is not yet widespread, although it is a feature of some newer agreements.[18]
- Multilateral Investment Court: The concept of a court-based model for ISDS—as an alternative to international arbitration—is under discussion in multilateral fora, with the European Union as a leading proponent. Its design is one of many topics of discussion amongst delegations to United Nations Commission on International Trade Law's (UNCITRAL) Working Group III on Investor-State Dispute Settlement Reform.[19]
- Increased use of Investment Contracts: Some States may return to "one-off" investment contracts offering a remedy only to the other contracting party, as opposed to the treaty model that offers a remedy to all who fall within its jurisdictional limits. While the contractual offer limits the potential number of claimants, it likely also disfavors small and medium-sized enterprises (SMEs) who are less able to negotiate such agreements or to negotiate necessary terms in such agreements.

V. TRENDS IN ISDS

In parallel with the evolution of IIAs, the procedure of investor-State dispute settlement has seen significant modernization. This is an outcome of changes to the dispute settlement provisions of IIAs, updates to the institutional rules of procedure used in ISDS—such as those of ICSID—and soft-law norms that reflect best practices.

A. Transparency

A focus on transparency in ISDS proceedings—which encompasses public access to proceedings and case-related awards, decisions, and orders—began in the 1990s as the number of ISDS cases increased. Older

17. INT'L CTR. FOR SETTLEMENT OF INV. DISPS., *supra* note 1 (setting forth statistics which classify the geographic regions based on the World Bank's regional system, including World Bank donor countries); *Where We Work*, WORLD BANK, https://www.worldbank.org/en/where-we-work (last visited Oct. 17, 2020).

18. *See, e.g.*, Yulia Levashova, *Imposing Conditions on Investor Protection: A Role of Investors Due Diligence*, KLUWER ARB. BLOG (June 20, 2019), http://arbitrationblog.kluwerarbitration.com/2019/06/20/imposing-conditions-on-investor-protection-a-role-of-investors-due-diligence.

19. *See generally Standing First Instance and Appeal Investment Court, with Full-Time Judges*, U.N. COMM'N ON INT'L TRADE LAW, https://uncitral.un.org/en/standing (last visited Oct. 23, 2020).

generation treaties were often silent on the question of transparency or required confidentiality. But starting with the investment chapter (Chapter 11) of the North American Free Trade Agreement (NAFTA), States increasingly undertook to publish case-related materials, provide public access to hearings, and allow the participation of non-disputing parties.[20]

Meanwhile, ISDS rules of procedure have also made proceedings more transparent. The first notable step in this direction was in 2006 when ICSID amended its procedural rules. Under the revision of 2006, ICSID was required to publish excerpts of awards if the parties did not consent to publication, allow the public to attend hearings (unless a party objected), and Tribunals could allow a non-disputing party to file a written submission if it assisted the Tribunal in deciding a relevant factual or legal issue.[21] Rules on transparency in the UNCITRAL Rules—which are the second most commonly used procedural rules for ISDS, after those of ICSID—were adopted in 2014.[22] This was followed by the entry into force of the Mauritius Convention in 2017. States ratifying the Mauritius Convention commit to applying the UNCITRAL Rules on Transparency to all arbitrations initiated pursuant to investment treaties concluded before April 1, 2014. To date, twenty-three countries have signed the Convention, and six have ratified it.[23]

Currently, ICSID is discussing further rule changes on transparency as part of a second—and much broader—amendment to its rules addressing transparency of proceedings.[24] Chapter X of the proposed new rules would further enhance access to case-related awards, decisions, and orders. This chapter includes rules on redaction and publication of awards, decisions, orders, and documents filed in a proceeding. It allows the public to observe hearings unless a party objects, includes a definition of confidential or protected information for the purposes of public disclosure, and permits submissions by non-disputing parties and participation by the non-disputing treaty party.[25]

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20. For an overview on transparency in ISDS, see U.N. CONF. ON TRADE AND DEV., TRANSPARENCY: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II (2012).

21. Aurelia Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID REV. FOREIGN INV. L.J. 427, 433, 435, 442 (2006).

22. U.N. COMM'N ON INT'L TRADE LAW, RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION (2014).

23. United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, *opened for signature* Mar. 17, 2015, United Nations Treaty Collection Registration No. 54749.

24. *ICSID Rules and Regulations Amendment Process*, INT'L CTR. FOR SETTLEMENT OF INV. DISPS., https://icsid-archive.worldbank.org/en/amendments (last visited Oct. 17, 2020).

25. For the latest proposals, see Int'l Ctr. for Settlement of Inv. Disps., *Working Paper #4: Proposals for Amendment of the ICSID Rules* 64–68 (Int'l Ctr. for Settlement of Inv. Disps., Working Paper No. 4, 2020), https://icsid.worldbank.org/en/Documents/WP_4_Vol_1_En.pdf.

B. Consistency in Jurisprudence

Consistency in ISDS decision-making also came under scrutiny as case numbers grew in the 1990s and awards increasingly entered the public domain. This was motivated by concern among some commentators that differing interpretations of key standards in IIA—such as Fair and Equitable Treatment and Most-favored Nation Treatment—were a cause of unpredictability for States and foreign investors.[26] Importantly, there is no rule of precedent in international arbitration, so tribunals are not bound by the decisions of previous tribunals. However, parties will refer to previous decisions in their pleadings, and tribunals generally try to create a "jurisprudence constante."[27] Structural reforms are also being discussed as a means to enhance consistency. One option is an appeals mechanism for investor-State disputes. Another is a court-like system, as the EU has proposed, as noted above.

It is important to note that a certain amount of variance in jurisprudence is to be expected, given that tribunals make fact-based determinations on a case-by-case basis. But consistency can be supported in investment arbitration, most notably through transparency. When parties and tribunals have access to previous decisions, they are able to consider interpretation of similar provisions in other cases.

C. Arbitrator Qualifications, Impartiality, and Diversity

A number of issues related to arbitrators in ISDS cases have garnered attention. One relates to the qualifications of party-appointed arbitrators. A second is with respect to ensuring impartiality and absence of conflicts of interest. A third is on the diversity of arbitrators—i.e., in terms of gender, and national and legal background—of those who serve on tribunals.

It is important to note that, as a default in most investment arbitration, each party selects an arbitrator, and they agree on the third, presiding arbitrator.[28] As such, parties are empowered to select individuals that they believe will have good judgment and will settle the dispute fairly and impartially. In ICSID cases, arbitrators also have an obligation to make a declaration of independence and impartiality—and report any changes in

26. *See, e.g.*, Chester Brown, Federico Ortino & Julian Arato, *Lack of Consistency and Coherence in the Interpretation of Legal Issues*, EJIL:TALK! (Apr. 5, 2019), https://www.ejiltalk.org/lack-of-consistency-and-coherence-in-the-interpretation-of-legal-issues.

27. Abdulqawi A. Yusuf & Guled Yusuf, *Precedent & Jurisprudence Constante*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 71–81 (Meg Kinnear et al. eds., 2016).

28. *See, e.g.*, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *supra* note 2, at 184.

circumstance that has a bearing on an arbitrator's impartiality throughout the life of the case.[29]

On May 1, 2020, the ICSID and UNCITRAL secretariats also published a draft Code of Conduct for Adjudicators.[30] The draft is intended for discussion in the context of the work of UNCITRAL Working Group III (ISDS reform) and the process underway to amend ICSID's rules of procedure. The draft Code establishes the basic duties of an arbitrator to be independent and impartial, to disclose any matter that could reasonably affect their independence or impartiality, to maintain high standards of integrity and fairness, to ensure their availability to act in a timely manner, and to retain the confidentiality of non-public information obtained in the course of the proceedings. Article 12 requires voluntary compliance with the Code and applies the disqualification and removal procedures of the applicable rules.

The diversity of arbitrators has clearly improved in recent years, although more work remains to be done. ICSID helps advance this agenda on a number of fronts: proposing qualified nominees from different States, proposing first-time nominees and female nominees to parties when they are selecting tribunal members, encouraging ICSID Member States to be mindful of diversity when appointing candidates to the ICSID Panels of Arbitrators and of Conciliators, and regularly publishing statistics concerning the diversity of appointed arbitrators in ICSID cases.[31]

D. Time and Cost

All parties share an interest in a time- and cost-efficient dispute resolution process. At the same time, ISDS cases are often complex and high-stake disputes, which is reflected in the time and cost they take to resolve. The average duration of investment disputes is close to four years, and the average cost per party is between $4–6 million USD.[32] All those involved in cases—i.e., parties, tribunals, and administering institutions—have a role to play in ensuring that cases are no more time and cost-intensive than necessary, while maintaining due process. For its part, ICSID is committed to ensuring its rules of procedure and case-administration practices are supportive of an efficient process.

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29. INT'L CTR. FOR SETTLEMENT OF INV. DISPS., ICSID CONVENTION, REGULATION AND RULES 106 (2006).

30. Int'l Ctr. for Settlement of Inv. Disps. & United Nations Comm'n on Int'l Trade Law, Draft Code of Conduct for Adjudicators (May 1, 2020) (unpublished manuscript) (on file with author).

31. INT'L CTR. FOR SETTLEMENT OF INV. DISPS., *supra* note 1, at 18–20.

32. Matthew Hodgson & Alastair Campbell, *Investment Treaty Arbitration: Cost, Duration and Size of Claims All Show Steady Increase*, ALLEN & OVERY (Dec. 14, 2017), https://www.allenovery.com/en-gb/global/news-and-insights/publications/investment-treaty-arbitration-cost-duration-and-size-of-claims-all-show-steady-increase.

Part of the answer to reducing cost and time is ensuring that new technology is leveraged effectively in cases. Towards that end, ICSID recently made all case filings electronic, and offers parties a range of options for virtual hearings. ICSID has also proposed a number of changes to its rules of procedure to reduce the time and cost of proceedings, which are currently under discussion with ICSID Member States. For example, the proposed amended rules encourage tribunals to be active case managers. This includes deciding when to convene a case management conference to address certain issues in dispute or decide a procedural matter. The proposed rules also introduce a range of new or shorter timelines for procedural steps in its regular arbitration rules, and even shorter timelines in a new set of expedited rules. The expedited arbitration rules are available with the consent of the parties, and once adopted, would reduce the length of a case by roughly half. The expedited rules are a flexible option for parties and intended for less complex cases or those involving small and mid-size enterprises.[33]

Finally, ICSID offers a range of other (non-arbitration) mechanisms for dispute resolution, including mediation, conciliation, and fact-finding.[34] Applied in the right circumstances, these alternative dispute resolution tools have been effective in helping parties find an amicable settlement to their dispute at less cost than arbitration or litigation.

VI. Conclusion

International investment law has been a remarkably fast-moving area of international law, both in terms of the substantive law and dispute resolution procedures. This will most likely continue to be the trend going forward. As noted, States are introducing innovative provisions in their new model IIAs, often with an eye to ensuring these treaties are aligned with broader sustainable development goals. In parallel, States and other interested stakeholders are involved in discussions on the reform of the rules of procedure for investment dispute resolution, including at ICSID and UNCITRAL. Nonetheless, the underlying goal has remained constant now for over fifty years—to ensure an effective means to resolve international investment disputes to encourage foreign investment.

33. *See* Int'l Ctr. for Settlement of Inv. Disps., *supra* note 25, at 33, 35–37, 45, 54, 61–62, 74–80 (particularly proposed Arbitration Rules 3, 9–12, 22, 31, 46, 58, and 75–86).

34. *See* Int'l Ctr. for Settlement of Inv. Disps., ICSID Convention, Regulation and Rules, 81–98 (2006) (conciliation rules); *see also* Int'l Ctr. for Settlement of Inv. Disps., ICSID Additional Facility Rules, 13–22, 23–42 (2006) (laying out Additional Facility Fact-Finding Rules and Additional Facility Conciliation Rules); *see also* Int'l Ctr. for Settlement of Inv. Disps., *supra* note 25, at 33, 35–37, 45, 54, 61–62, 74–80, 195–204, 215–26 (laying out proposed amendments to conciliation rules, proposed stand-alone fact-finding rules, and proposed mediation rules).