

I. INTRODUCTION

International investment protection law is one of the most dynamic areas of international law, with active and ongoing developments in treaty-making and dispute settlement in investor-State Tribunals. A defining characteristic of investment protection law is the multitude of authorities that may become relevant in the dispute settlement process: from treaty and customary rules defining the primary obligations and customary law supplying the secondary rules of State responsibility; to different dispute settlement regimes provided by the treaties and rules that may have bearing on the conduct of the dispute settlement process; to finally rules addressing the enforcement of award and implementation of responsibility. This volume seeks to reproduce the documents with most relevance for appreciating the historical development, creation, interpretation and application of modern investment protection law. It does not set out particular cases (that are much more conveniently accessible in electronic form)¹ nor does it analyse developments in investment law.²

The decentralised nature of investment law makes the choice of a convenient structure of exposition not entirely unproblematic. This volume is divided into three general parts: Historical Background (Part B), International Investment Protection Rules (Part C) and International Investment Protection Dispute Settlement (Part D), with an Appendix listing parties to some of the more important multilateral treaties. Part B sets out the different (and largely unsuccessful) projects that form the background to the substantively and procedurally decentralised structure of the contemporary investment protection law. It also provides a number of historical landmark treaties. Part C sets out documents that mainly address obligations under investment protection law, including the more important multilateral treaties and bilateral treaties and model treaties. Part D deals with the documents that mainly address different aspects of the settlement of disputes over alleged breaches of investment treaties or contracts. The following sections will briefly outline the role and relevance of the documents reproduced.

The guiding principle in choosing documents has been not to include those documents that, while possibly having some bearing on investment protection, fall outside the investor-State dispute settlement paradigm and would require reproduction of further documents for their proper understanding. For example, the 2004 United States Model Bilateral Investment Treaty defines rules on expropriation, performance requirements and

¹ Information about cases is sometimes available on websites of arbitral institutions or institutions of the particular treaty: regarding International Centre for Settlement of Investment Disputes (ICSID) disputes at icsid.worldbank.org/ICSID/index.jsp; regarding Permanent Court of Arbitration (PCA) disputes at pca-cpa.org/showpage.asp?pag_id=1029; regarding Energy Charter Treaty disputes at www.encharter.org/index.php?id=213. There are also websites that provide information about all kinds of investment disputes: investmentclaims.com and italaw.com.

² See only some of the leading general texts: C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford, Oxford University Press, 2007); R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford, Oxford University Press, 2008); P Muchlinski, F Ortino and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford, Oxford University Press, 2008); A Reinisch (ed), *Standards of Investment Protection* (Oxford, Oxford University Press, 2008); Z Douglas, *The International Law of Investment Claims* (Cambridge, Cambridge University Press, 2009); I Marboe, *Calculation of Compensation and Damages in International Investment Law* (Oxford, Oxford University Press, 2009); A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (The Netherlands, Wolters Kluwer, 2009); C Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, Cambridge, Cambridge University Press, 2009); J Salacuse, *The Law of Investment Treaties* (Oxford, Oxford University Press, 2010).

non-conforming measures by reference to the World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights.³ The 2009 ASEAN Comprehensive Investment Agreement defines the obligations of States regarding transfers by reference to obligations under the Articles of Agreement of the International Monetary Fund.⁴ The interpreter of such treaties may be required to take into account WTO and IMF rules. However, these documents are not reproduced, primarily, because the added value compared with the considerable amount of materials may not be sufficient.⁵ For similar reasons, domestic laws relating to challenge and enforcement of international arbitral awards have not been included.

II. HISTORICAL BACKGROUND

While the decentralised nature of investment protection law seems firmly and almost inescapably entrenched in the contemporary legal order, it is worth pausing for a moment to consider the causes and rationale of why international law has chosen to address these issues in precisely this manner. The historical background to the contemporary investment law is addressed in Part B, considering separately historically important drafts, documents and resolutions (Part B.I) and treaty instruments (Part B.II). It appears that matters now falling under the rubric of investment protection law were historically addressed from a somewhat different perspective. Classic international law did not draw a clear distinction between primary rules and secondary rules of State responsibility, and the considerable amount of State practice and case law on the treatment of aliens resulted in an analytical conflation of these two issues. The issue of the protection of property of aliens (or foreign investment) was initially not addressed directly, rather approaching it from the dual perspectives of failure to protect aliens⁶ and denial of justice to aliens.⁷ The first relevant documents that sketch the intellectual background of the first third of the last century therefore address the treatment of aliens as part of the elaboration of the law of State responsibility, in private drafts by the International Law Institute⁸ and the Harvard Law School⁹ and public codification efforts

³ 2004 United States Model Treaty, [www.ustr.gov/sites/default/files/U.S. model BIT.pdf](http://www.ustr.gov/sites/default/files/U.S._model_BIT.pdf) arts 6(5), 8(3)(b)(i), 14(4).

⁴ ASEAN Comprehensive Investment Agreement (done at Cha-Am, 26 February 2009; not in force) www.asean.org/documents/FINAL-SIGNED-ACIA.pdf art 13(4).

⁵ IMF documents are available at *Selected Decisions and Selected Documents of the International Monetary Fund* (35th Issue, Washington, DC, IMF, 31 December 2010) www.imf.org/external/pubs/ft/sd/2010/123110.pdf. WTO documents are available at *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge, Cambridge University Press, 1999) and www.wto.org/english/docs_e/docs_e.htm.

⁶ E Brusa, 'La responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute ou de guerre civile' (1898) 17 *Annuaire de l'Institut de droit international* 96; E Brusa and L von Bar, 'Règlement sur la responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute, d'insurrection ou de guerre civile' (1900) 18 *Annuaire de l'Institut de droit international* 47.

⁷ C de Visscher, 'Le déni de justice en droit international' (1935) 52 *Recueil des Cours de l'Académie de Droit International* 369; AV Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, Green and Co., London, 1938).

⁸ Resolution of the Institute of International Law on the International Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigner (1928) 22 *American Journal of International Law Special Supplement* 330.

⁹ Harvard Draft Convention on the Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigner (1929) 23 *American Journal of International Law Special Supplement* 133; J Crawford

at the 1930 Hague Conference.¹⁰ Perhaps not entirely without justification, the traditional respondent States perceived some elements of the earlier State practice as going too far, and therefore the proposed drafts did not command general approval.¹¹

The post-World War II practice shows a variety of approaches to the regulation of investment law. While the narratives of human rights, investment treaties and New International Economic Order may be intellectually distinct, the chronology shows how different efforts of law-making, breaking and conceptualisation took place largely in parallel. In 1959, the Abs-Shawcross Draft Convention on Investment Abroad was adopted.¹² While not leading to a binding instrument, it set out in a recognisably modern form such (now boilerplate) rules as fair and equitable treatment, observance of undertakings, indirect expropriation and investor-State dispute settlement. In 1961, the Harvard Draft on International Responsibility of States for Injuries to Aliens was adopted, 'hit[ting] a distinctly American mark' in 'most of [the drafters'] attempts to define particular, substantive standards' and therefore having a rather cold-shouldered reception.¹³ In 1961, the First Special Rapporteur on State Responsibility, García-Amador, proposed an imaginative synthesis of law of treatment of aliens, law of human rights and law of State responsibility, again perceived as going too far.¹⁴ After that, both for intellectual and pragmatic reasons the International Law Commission under the initial guidance of Roberto Ago drew a sharper distinction between primary rules on the treatment of aliens and secondary rules on State responsibility, concentrating solely on the latter.¹⁵

The 1960s and 1970s were characterised by a number of different multilateral approaches to international investment law. One line of thinking was reflected in the practice of the United Nations. In 1962, the General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources accepted the international obligation to compensate for expropriation and the binding nature of contracts.¹⁶ At the same time, two Resolutions adopted in 1974 reflected a much narrower view about the relevance that international law could have in this area.¹⁷ In other international fora, documents were adopted that argued for the protection of foreign investments by international law. In the

and T Grant, 'Responsibility of States for Injuries to Foreigners' in J Grant and J Baker (eds), *Harvard Research in International Law: Contemporary Analysis and Appraisal* (New York, W&S Hein and Co, 2007); L Laithier, 'Private Codification Efforts' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford, Oxford University Press, 2010) 54-56.

¹⁰ Bases of Discussion Drawn up in 1929 by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930) League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V); Text of Articles Adopted in First Reading by the Third Committee of the Conference for the Codification of International Law (The Hague, 1930) League of Nations publication, *V. Legal, 1930.V.17* (document C.351(c).M.145(c).929.V); C Bories, 'The Hague Conference of 1930' in Crawford (n 9) 65-66.

¹¹ S Rosenne, 'State Responsibility: *Festina Lente*' (2004) 75 *British Yearbook of International Law* 363, 364.

¹² (1960) 9 *Journal of Public Law* 116.

¹³ Crawford and Grant (n 9) 93-94, more generally 88-100.

¹⁴ 'Revised Draft on International Responsibility of the State for Injuries Caused in Its Territory to the Person or Property of Aliens' in FV García-Amador, 'Sixth Report on State Responsibility' in *Yearbook of the International Law Commission, 1961, Volume II*, UN Doc A/CN.4/SER.A/1961/Add.1 1 46; D Müller, 'The Work of García-Amador on State Responsibility for Injury Caused to Aliens' in Crawford (n 9).

¹⁵ A Pellet, 'The ILC's Articles on State Responsibility' in Crawford (n 9).

¹⁶ UN Doc. A/5217 of 14 December 1962.

¹⁷ UN General Assembly Resolution 3201 (S-VI) 'Declaration on the Establishment of a New International Economic Order', UN Doc. A/RES/S-6/3201 of 1 May 1974; UN General Assembly Resolution 3281 (XXIX); Charter of Economic Rights and Duties of States, UN Doc. A/RES/29/3281 of 12 December 1974.

OECD, the 1967 Draft Convention on the Protection of Foreign Property formulated concepts set out earlier in the Abs-Shawcross Draft in even more recognisably modern terms.¹⁸ The 1976 Declaration on International Investment and Multinational Enterprises suggested that national treatment should be applied to foreign investors.¹⁹

The considerable disagreement between States and the fora in which they expressed their views on existing and desirable rules of international law made the creation of multilateral rules somewhat problematic. The International Court of Justice in the *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* case famously drew attention to the fact that

the law on the subject has been formed in a period characterized by an intense conflict of systems and interests. ... Here as elsewhere, a body of rules could only have developed with the consent of those concerned. The difficulties encountered have been reflected in the evolution of the law on the subject.²⁰

Somewhat less famously but much more importantly, with ‘the finger pointing into the future’,²¹ the Court sagely nodded at the obvious way around the irresponsible customary law:

whether in the form of multilateral or bilateral treaties between States, or in that of agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments. The instruments in question contain provisions as to jurisdiction and procedure in case of disputes concerning the treatment of investing companies by the States in which they invest capital. *Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures.*²²

Since the ‘intense conflict of systems and interests’ made multilateral treaty-making less likely,²³ as a matter of exclusion of other alternatives investment law came to be largely expressed in the form of bilateral treaties.²⁴

The historical perspective shows a number of unsuccessful approaches to investment law that have been taken: investment law as State responsibility, investment law as human rights, even investment law as not being an issue addressed by international law at all. However, the investment protection law actually created draws upon the rather more mundane pedigree of bilateral treaties on Friendship, Commerce and Navigation (FCN). The International Court of Justice has interpreted some of these treaties (although not only the parts and aspects that relate to investment and economic matters), and it may be necessary to take into account these judgments to appreciate the circumstances of the conclusion of modern investment law treaties. In the *Ambatielos* case,²⁵ the International Court interpreted 1886²⁶ and 1926 Treaties of Commerce and Navigation between

¹⁸ Adopted 12 October 1967 (1968) 7 International Legal Materials 117; see OECD Draft Convention on the Protection of Foreign Property (1963) 2 International Legal Materials 241.

¹⁹ Done 21 June 1976 (1976) 15 International Legal Materials 976.

²⁰ [1970] ICJ Rep 3, para 89.

²¹ F Berman, ‘The Relevance of the Law on Diplomatic Protection in Investment Arbitration’ in F Ortino and others (eds), *Investment Treaty Law: Current Issues II* (London, BIICL, 2007) 69.

²² *Barcelona Traction* (n 20) para 89 (emphasis added).

²³ Cf. the 1998 failure to negotiate the Multilateral Agreement on Investment under the auspices of OECD: www.oecd.org/daf/mai/.

²⁴ M Paparinskis, ‘*Barcelona Traction*: A Friend of Investment Protection Law’ (2008) 8 *Baltic Yearbook of International Law* 105.

²⁵ *Ambatielos (Greece v UK)* (Jurisdiction) [1952] ICJ Rep 28; *Ambatielos (Greece v UK)* (Merits: Obligation to Arbitrate) [1953] ICJ Rep 10.

²⁶ Treaty of Commerce and Navigation between the United Kingdom and Greece (done at Athens, 10 November 1886; entry into force, 21 April, 1887; terminated on 10 December 1926) *British and Foreign State Papers: 1885-1886* (Volume LXXVII, London, William Ridgway, 1893) 100.

the United Kingdom and Greece.²⁷ In the *Elettronica Sicula S.p.A. (ELSI)* case,²⁸ the International Court addressed a 1949 FCN Treaty between Italy and the United States.²⁹ The International Court has also interpreted US FCN Treaties concluded in mid-1950s, although the issues addressed have less direct relevance for matters of economic law.³⁰ The instruments interpreted in these cases reflect the law-making just before the first small steps were made that led to the modern investment law regime: the first Bilateral Investment Treaty (BIT) was concluded in 1959;³¹ the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) was concluded in 1965;³² the first BIT with (probably qualified) access to investor-State arbitration was concluded in 1968,³³ and the first BITs with unqualified access to investor-State arbitration were concluded in 1969 and 1970.³⁴

III. INTERNATIONAL INVESTMENT PROTECTION RULES

According to the 2011 UNCTAD World Investment Report,

the IIA [International Investment Agreements] universe at the end of 2010 contained 6,092 agreements, including 2,807 BITs, 2,976 DTTs [Double Taxation Treaties] and 309 other IIAs The trend seen in 2010 of rapid treaty expansion – with more than three treaties concluded every week – is expected to continue in 2011, the first five months of which saw the conclusion of 48 new IIAs (23 BITs, 20 DTTs and five other IIAs).³⁵

²⁷ Treaty of Commerce and Navigation between the United Kingdom and Greece, and Accompanying Declaration (done at London, 16 July 1926; entry into force, 10 December 1926) 61 LNTS 15 [Registration Number 1425].

²⁸ *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* [1989] ICJ Rep 15.

²⁹ Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic (done at Rome, 2 February 1948; entry into force, 26 July 1949) 79 UNTS 171 [Registration Number 1040]; Agreement Supplementing the Above-Mentioned Treaty [of Friendship, Commerce and Navigation between the United States of America and the Italian Republic] Done at Washington, 26 September 1951; entry into force, 2 March 1961 404 UNTS 326 [Registration Number 1040].

³⁰ Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran (done at Tehran, adopted 15 August 1955; entry into force, 16 June 1957) 284 UNTS 110 [Registration Number 4132] in *United States Diplomatic and Consular Staff in Tehran (US v Iran)* [1980] ICJ Rep 3; *Oil Platforms (Iran v US)* (Preliminary Objections) [1996] ICJ Rep 803; *Oil Platforms (Iran v US)* [2003] ICJ Rep 161; Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua (done at Managua, 21 January 1956; entry into force, 24 May 1958) 367 UNTS 3 [Registration Number 5224]; *Military and Paramilitary Activities in and Around Nicaragua (Nicaragua v US)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392; *Military and Paramilitary Activities in and Around Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 14.

³¹ Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (done at Bonn, 25 November 1959; entry into force 28 April 1962) 457 UNTS 23 [Registration Number 1675].

³² Convention on the Settlement of Investment Disputes between States and Nationals of Other States (done at Washington, 18 March 1965; entry into force, 14 October 1966) 575 UNTS 159 [Registration Number 8359].

³³ Agreement on Economic Cooperation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia (done at Djakarta, 7 July 1968; applied provisionally, 7 July 1968; entry into force, 17 July 1971; partly terminated, 1 July 1995) 799 UNTS 14 [Registration Number 11386] art 11.

³⁴ Agreement between the Kingdom of Belgium and the Republic of Indonesia on the Encouragement and Reciprocal Protection of Investments (done at Djakarta, 15 January 1970; applied provisionally, 15 January 1970; entry into force, 17 June 1972) 843 UNTS 19 [Registration Number 12057] Art 10.

³⁵ UNCTAD, *World Investment Report 2011: Non-Equity Modes of International Production and Development* (Switzerland, United Nations 2011) http://www.unctad.org/en/docs/wir2011_embargoed_en.pdf 100. The report also noted that ‘it remains to be seen how the shift of responsibility for FDI from EU member States to the European level will affect the IIA regime (with EU member States being parties to more than 1,300 BITs with third countries) *ibid.*

It is a truism that there is a very considerable number of international investment treaties, that there are significant similarities in their content but that there are also important differences at the level of small print. Some of the more representative investment protection rules are addressed in Part C, considering separately rules of general relevance in the interpretation and application of international law (Part C.I) and the more important multilateral rules (Part C.II) and bilateral instruments (Part C.III).

Investment protection treaties are part of international law and need to be interpreted and applied with reference to general rules and concepts of international law. The 1969 Vienna Convention on the Law of Treaties equips the treaty interpreter and applier with the necessary analytical tools,³⁶ and even when it is not applicable as a matter of treaty law itself, the apparently irresistible pull of the “presumption of positivity” is very likely to lead to it being applied as customary law.³⁷ The 2001 International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts³⁸ have played a considerable (and sometimes arguably even excessive) role in investor-State arbitrations, as often assisting in the identification of applicable customary law as raising puzzling questions about the operation of responsibility incurred by States and accrued by investors.³⁹ The 2006 International Law Commission’s Articles on Diplomatic Protection further elaborate one aspect of the law of State responsibility pertaining to issues of nationality and exhaustion of local remedies in the admissibility of invocation of responsibility regarding injuries to aliens.⁴⁰

In quantitative terms, investment protection law is dominated by bilateral treaties. However, there are also important multilateral treaties, largely of a regional character. The prominent exception to this pattern is the 1994 Energy Charter Treaty that (with admittedly largely European membership) provides protection for investments in the energy sector (Part C.II.A).⁴¹ The 1992 North American Free Trade Agreement (NAFTA) has played

³⁶ (done at Vienna, 23 May 1969; entry into force, 27 January 1980) 1155 UNTS 331 [Registration Number 18232]. See materials of the International Law Commission: untreaty.un.org/ilc/guide/1_1.htm; 1966 Draft Articles on the Law of Treaties with Commentaries: untreaty.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf; materials of the Vienna Conference on the Law of Treaties: untreaty.un.org/cod/diplomaticconferences/lawoftreaties-1969.html; E Corten and P Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (Oxford, Oxford University Press, 2011).

³⁷ A Pellet, ‘L’adaptation du droit international aux besoins changeants de la société internationale’ (2007) 329 *Recueil des Cours* 9, 39–41.

³⁸ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10*, UN Doc A/56/10. See materials of the International Law Commission: untreaty.un.org/ilc/guide/9_6.htm; the 2001 ILC Articles on Responsibility of States with Commentaries: untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf; J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford, Oxford University Press, 2010).

³⁹ J Crawford, ‘ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect’ (2002) 96 *American Journal of International Law* 874, 887–8; Z Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’ (2003) 74 *British Yearbook of International Law* 151; M Paparinskis, ‘Investment Arbitration and the Law of Countermeasures’ (2008) 79 *British Yearbook of International Law* 264; Z Douglas, *The International Law of Investment Claims* (Cambridge, Cambridge University Press, 2009); Z Douglas, ‘Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID’ in Crawford (n 9).

⁴⁰ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10*, UN Doc A/56/10. See materials of the International Law Commission: untreaty.un.org/ilc/guide/9_8.htm; the 2006 Articles on Diplomatic Protection with Commentaries: untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf; C Amerasinghe, *Diplomatic Protection* (Oxford, Oxford University Press, 2008); J Dugard, ‘Diplomatic Protection’ in Crawford (n 9).

⁴¹ (done at Lisbon, 17 December 1994; entry into force, 16 April 1998) 2080 UNTS 95 [Registration Number 36116]. See the official website of the Secretariat: www.encharter.org; section on investor-State dispute settlement: www.encharter.org/index.php?id=213.

an important historical role in investment protection law, particularly by demonstrating both the promises and possible pitfalls of investor-State arbitration (Part C.II.B).⁴² The 2004 Dominican Republic-Central America-United States Free Trade Agreement reflects the experience gained in NAFTA, partly following and partly changing and clarifying the earlier approaches (Part C.II.C).⁴³ MERCOSUR has adopted two Protocols on investment protection that are not yet in force (Part C.II.D).⁴⁴ The Association of Southeast Asian Nations (ASEAN) has from the end of 1980s adopted a number of regional investment protection treaties.⁴⁵ The 2009 ASEAN Comprehensive Investment Agreement upon its entry into force in 2012 has replaced the earlier instruments (Part C.II.E).⁴⁶ Some of the more important other regional instruments are included in this volume (Part C.II.F).⁴⁷ Another multilateral instrument that approaches investment protection from a slightly different perspective is the 1985 Convention Establishing the Multilateral Investment Agency (Part C.II.G).⁴⁸

The considerable number of BITs raises the challenge of choosing the most appropriate instruments for this volume.⁴⁹ Two types of instruments have been included. First, a

⁴² (done at Washington, 8 and 17 December 1992, at Ottawa, 11 and 17 December, and Mexico City, 14 and 17 December; entry into force, 1 January 1994) (1993) 32 International Legal Materials 297. See the official website of the Secretariat: www.nafta-sec-alena.org; websites of Parties on investor-State dispute settlement: www.state.gov/s/l/c3439.htm, www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta.aspx?lang=en, www.economia.gob.mx/swb/en/economia/p_Solucion_Controversias_InvEdo; an unofficial website on investor-State dispute settlement: naftalaw.org.

⁴³ (done at Washington, 5 August 2004; entry into force, 1 March 2006), www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta UNCTAD, *International Investment Instruments: A Compendium* (Volume XIV, New York and Geneva, United Nations, 2005) 85.

⁴⁴ Protocolo de Colonia para la Promoción y Protección Recíproca de Inversiones en el MERCOSUR (done at Colonia, 17 January 1994; not in force) (MERCOSUR/CMC/Dec. No. 11/ 93, UNCTAD, *International Investment Instruments: A Compendium* (Volume II, New York and Geneva, United Nations, 1996) 513; Protocolo sobre Promoción y Protección de Inversiones Provenientes de Estados no Partes del MERCOSUR (done at Buenos-Aires, 5 August 1994; not in force) (MERCOSUR/CMC/Dec. No. 11/94), UNCTAD, *International Investment Instruments: A Compendium* (Volume II, New York and Geneva, United Nations, 1996) 527.

⁴⁵ Agreement among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the Promotion and Protection of Investments (done at Manila, 15 December 1987; entry into force, 2 August 1988; termination, 29 March 2012) (1988) 27 International Legal Materials 612; UNCTAD, *International Investment Instruments: A Compendium* (Volume IX, New York and Geneva, United Nations, 2002) 293; Protocol to Amend the Agreement among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments (done at Jakarta, 12 September 1996; not in force) UNCTAD, *International Investment Instruments: A Compendium* (Volume IV, New York and Geneva, United Nations, 2000) 61; Framework Agreement on the ASEAN Investment Area (done at Makati, 7 October 1998; entry into force, 25 May 1999; termination, 29 March 2012); UNCTAD, *International Investment Instruments: A Compendium* (Volume IV, New York and Geneva, United Nations, 2000) 227; Protocol to Amend the Framework Agreement on the ASEAN Investment Area (done at Hanoi, 14 September 2001; not in force) UNCTAD, *International Investment Instruments: A Compendium* (Volume IX, New York and Geneva, United Nations, 2002) 29.

⁴⁶ Done at Cha-Am, 26 February 2009; entry into force, 29 March 2012 [www.aseansec.org/documents/ASEAN Comprehensive Investment Agreement \(ACIA\) 2012.pdf](http://www.aseansec.org/documents/ASEAN%20Comprehensive%20Investment%20Agreement%20(ACIA)%202012.pdf) art 47.

⁴⁷ Unified Agreement for the Investment of Arab Capital in Arab States (done at Amman, 26 November 1980; entry into force, 7 September 1981), UNCTAD, *International Investment Instruments: A Compendium* (Volume II, New York and Geneva, United Nations, 1996) 211; Investment among Member States of the Organisation of the Islamic Conference (done at Baghdad, 1–5 June 1981; entry into force, 23 September 1986) UNCTAD, *International Investment Instruments: A Compendium* (Volume II, New York and Geneva, United Nations, 1996) 241; Investment Agreement in the COMESA Investment Area (done at Nairobi, 22 and 23 May 2007; not in force) [programmes.comesa.int/attachments/104_Investment agreement for the CCIA FINAL_English_.pdf](http://programmes.comesa.int/attachments/104_Investment%20agreement%20for%20the%20CCIA%20FINAL_English_.pdf).

⁴⁸ (done at Seoul, 11 October 1985; entry into force, 12 April 1988) (1985) 24 International Legal Materials 1605. See the Commentary on the Convention Establishing the Multilateral Investment Guarantee Agency: www.miga.org/documents/commentary_convention_november_2010.pdf; the official website: www.miga.org.

⁴⁹ Texts of bilateral investment treaties are available at a number of websites, including: www.unctadxi.org/templates/docsearch.aspx?id=779; www.investmentclaims.com and www.kluwerarbitration.com.

number of more recent Model Bilateral Investment Treaties have been reproduced (Part C.III.A). Models reflect the position of particular States regarding the most appropriate form and content of treaties and constitute the starting point of the negotiating process. At the same time, sometimes it might be necessary to take the Models with a grain of salt, as they are an evolving experience in treaty drafting and negotiations. Secondly, a number of BITs that have caused most investor-State disputes are also reproduced. Since Tribunals often attribute considerable importance to consistency of earlier decisions on a particular issue, the most arbitrated treaty instruments would be likely to have the greatest contribution to the creation of *jurisprudence constante*. At the same time, since most of these BITs fall under one of two categories (of either Argentinean or US BITs), one should exercise some caution regarding the generality of arbitral perceptions on the basis of what might be peculiar treaty-making or litigation strategies of a limited number of States.

IV. INTERNATIONAL INVESTMENT PROTECTION DISPUTE SETTLEMENT

While it is somewhat artificial to draw the line between investment obligations and investment disputes, documents in Part C largely address investment protection rules imposing obligations and documents in Part D largely address investment protection rules dealing with different aspects of dispute settlement. Investment protection treaties usually provide the investor with a choice of a number of fora to which the particular dispute can be brought (and the consent to the settlement of investment disputes may also be included in a domestic law or in an investment contract). Part 4 sets out documents that may be relevant for different fora and different aspects of investment dispute settlement.

The International Centre for the Settlement of Investment Disputes (ICSID) is the most prominent institution for investment dispute settlement.⁵⁰ The ICSID documents provided include the ICSID Convention,⁵¹ the Report of the Executive Directors on the ICSID Convention⁵² as well as the relevant Rules and Regulations,⁵³ in particular the Arbitration Rules (Part D.I).⁵⁴ If only one State – host State or the home State of the investor – is a Party to the ICSID Convention, the dispute may be submitted to a Tribunal operating under ICSID Additional Facility (Part D.II).⁵⁵ Importantly, according to Article 3 of the

⁵⁰ icsid.worldbank.org/ICSID/index.jsp. See C Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, Cambridge, Cambridge University Press, 2009).

⁵¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (done at Washington, 18 March 1965; entry into force, 14 October 1966) 575 UNTS 159 [Registration Number 8359].

⁵² (done at Washington, 18 March 1965) (1965) 4 International Legal Materials 524.

⁵³ Administrative and Financial Regulations (amended and effective, 10 April 2006) *ICSID Convention, Regulations and Rules* (Washington D.C., ICSID, April 2006) 51; Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules) (amended, 10 April 2006) *ICSID Convention, Regulations and Rules* (Washington D.C., ICSID, April 2006) 73; Rules of Procedure for Conciliation Proceedings (Conciliation Rules) (amended, 10 April 2006) *ICSID Convention, Regulations and Rules* (Washington D.C., ICSID, April 2006) 81.

⁵⁴ Rules of Procedure for Arbitration Proceedings (Arbitration Rules) (amended, 10 April 2006) *ICSID Convention, Regulations and Rules* (Washington D.C., ICSID, April 2006) 99.

⁵⁵ Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (Additional Facility Rules) (amended, 10 April 2006) *ICSID Additional Facility Rules* (Washington D.C., ICSID, April 2006) 7; Schedule A Fact-Finding (Additional Facility Rules) (amended, 10 April 2006) *ICSID Additional Facility Rules* (Washington D.C., ICSID, April 2006) 13; Schedule B Conciliation (Additional Facility) Rules (amended, 10 April 2006) *ICSID Additional Facility*

Rules Governing the Additional Facility, '[s]ince the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre [ICSID], none of the provisions of the [ICSID] Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein.'

The traditional list of arbitral fora in investment treaties that the investor may choose from is ICSID, ICSID Additional Facility and UNCITRAL. Documents produced by the United Nations Commission on International Trade Law (UNCITRAL) are relevant to different aspects of investment arbitration (Part D.III).⁵⁶ The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards applies to the enforcement of non-ICSID awards, whether rendered by UNCITRAL or non-ICSID institutionalised Tribunals.⁵⁷ The 1985 UNCITRAL Model Law on International Commercial Arbitration, amended in 2006,⁵⁸ has provided an influential starting point for drafting domestic laws on international arbitration.⁵⁹

The 1976 UNCITRAL Arbitration Rules provide the most popular alternative to ICSID.⁶⁰ In 2010, revised UNCITRAL Arbitration Rules were adopted,⁶¹ and 'parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration'.⁶² However, '[t]hat presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date'.⁶³ Since the offer by States is made when the particular treaty comes into force (or is provisionally applied), it seems that the 2010 Rules

Rules (Washington D.C., ICSID, April 2006) 23; Schedule C Arbitration (Additional Facility) Rules (amended, 10 April 2006) *ICSID Additional Facility Rules* (Washington D.C., ICSID, April 2006) 43.

⁵⁶ See the UNCITRAL webpage on arbitration: www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html.

⁵⁷ (done at New York, 10 June 1958; entry into force, 7 June 1959) 330 UNTS 3 [Registration Number 4739]. See AJ van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (The Hague, Asser, 1981); E Gaillard and D Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards* (London, Cameron May, 2008); AJ van den Berg (ed), *50 Years of the New York Convention* (Alphen aan den Rijn, Kluwer Law International, 2009); H Kronke and others (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Alphen aan den Rijn, Kluwer Law International, 2010).

⁵⁸ UN General Assembly Resolution 61/33 'Revised articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York, 10 June 1958' UN Doc. A/RES/61/33 of 18 December 2006. See relevant materials and *travaux préparatoires*: www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html; P Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (London, Sweet & Maxwell/Thomson Reuters, 2010).

⁵⁹ See the list of States that have enacted laws based on the Model Law: www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

⁶⁰ UN General Assembly Resolution 31/98 'Arbitration Rules of the United Nations Commission on International Trade Law' UN Doc. A/RES/31/98 of 15 December 1976. See relevant materials and *travaux préparatoires*: www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html; UNCITRAL Notes on Organizing Arbitral Proceedings (adopted in 1996) *Report of the United Nations Commission on International Trade Law on the work of its twentieth session, Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*; D Caron, L Caplan and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford, Oxford University Press, 2006); T Webster, *Handbook of UNCITRAL Arbitration: Commentary, Precedents and Materials for UNCITRAL Based Arbitration Rules* (London, Sweet & Maxwell, 2010).

⁶¹ UN General Assembly Resolution 65/22 'UNCITRAL Arbitration Rules as revised in 2010' UN Doc. A/RES/65/22 of 10 January 2011. See relevant materials and *travaux préparatoires* www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html.

⁶² 2010 UNCITRAL Arbitration Rules art 1(2).

⁶³ *ibid.*

do not apply when this has happened before 15 August 2010 (unless the treaty itself requires the application of UNCITRAL Arbitration Rules in force at the moment of commencement of arbitration). Another issue of direct relevance to investment arbitration is the ongoing work of UNCITRAL on a legal standard of transparency in treaty-based investor-State arbitration.⁶⁴

While ICSID and UNCITRAL arbitrations appear to be the most common, investment arbitrations may and do take place under other arbitral rules. Investment arbitration may take place under the auspices of the Permanent Court of Arbitration (Part D.IV).⁶⁵ Investment arbitrations may also take place under the arbitration rules of the London Court of International Arbitration,⁶⁶ Stockholm Chamber of Commerce⁶⁷ and the International Chamber of Commerce (Part D.V).⁶⁸ The final section of this volume includes miscellaneous documents of possible relevance in investment arbitration (Part D.VI). The 1975 Panama Inter-American Convention on International Commercial Arbitration is an important regional instrument on the recognition and enforcement of awards.⁶⁹ The 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property is not yet in force but reflects the most recent thinking by States on the issue of State immunity that might have relevance beyond treaty law.⁷⁰ Documents of the International Bar Association on Conflicts of Interest⁷¹ and Taking of Evidence may provide authoritative suggestions regarding international consensus on particular issues.⁷² Finally, an Appendix provides a list of parties to the ICSID Convention, the New York Convention and the Energy Charter Treaty (Part E).

⁶⁴ See the materials of Working Group II (Arbitration and Conciliation): www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

⁶⁵ Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State (adopted 6 July 1993) pca-cpa.org/showfile.asp?fil_id=194; Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or Environment (adopted 19 June 2001) pca-cpa.org/showfile.asp?fil_id=520.

⁶⁶ (effective 1 January 1998) www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx. See P Turner and R Mohtashami, *A Guide to LCIA Arbitration Rules* (Oxford, Oxford University Press, 2009).

⁶⁷ (effective 1 January 2010) www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler_eng_ARB_TRYCK_1_100927.pdf. See T Madsen, *Commercial Arbitration in Sweden: A Commentary on the Arbitration Act (1999:116) and the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce* (R Ben-Dor (tr), 3rd edn, New York: Oxford University Press, 2007); Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce; K Hober, *Arbitration in Sweden: the Law and Practice of International Commercial Arbitration* (Oxford, Oxford University Press, 2008).

⁶⁸ International Chamber of Commerce Rules of Arbitration (effective 1 January 1998; cost scales effective 1 May 2010) www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf. 2012 International Chamber of Commerce Rules of Arbitration (effective 1 January 2012) http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf. See M Bühler and T Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (London, Sweet & Maxwell, 2008).

⁶⁹ (done at Panama, 30 January 1975; entry into force, 16 June 1976) 1438 UNTS 249 [Registration Number 24384].

⁷⁰ UN General Assembly Resolution 59/38 'United Nations Convention on Jurisdictional Immunities of States and Their Property' UN Doc. A/59/38 of 2 December 2004. See materials of the International Law Commission: untreaty.un.org/ilc/guide/4_1.htm; 1991 Draft Articles on Jurisdictional Immunities of States and Their Property with Commentaries: untreaty.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf; materials of the *Ad Hoc* Committee on Jurisdictional Immunities of States and Their Property: www.un.org/law/jurisdictionalimmunities/index.html; H Fox, *The Law of State Immunity* (2nd edn, Oxford, Oxford University Press, 2008).

⁷¹ International Bar Association Guidelines on Conflicts of Interest in International Arbitration (approved 22 May 2004) www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

⁷² International Bar Association Rules on the Taking of Evidence in International Arbitration (approved 29 May 2010) www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.