A Soft Competition Among Arbitral Institutions

The institutional oligopoly of mixed arbitration

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Abstract

Arbitral institutions play a vital role beyond merely facilitating international arbitration between private parties and states; they actively shape international legal norms and influence global governance. Despite their strategic and policy-shaping role, scholarship on arbitral institutions remains limited mostly to doctrinal analyses of their procedural functions. Addressing this gap, this thesis presents a comparative case study, exploring the influence of four dominant arbitral institutions and their leading experts on the development and evolution of mixed arbitration. The study combines insider research and work in the archives of inter- and non-governmental organizations, states, and influential individuals. It also draws on numerous leaked diplomatic cables.

The thesis finds that the institutional market for treaty-based mixed arbitration constitutes an oligopoly of four institutions. Rather than from free market competition, this oligopoly emerged from a combination of factors, including brokering by international bureaucrats and arbitration experts during critical junctures, followed by subsequent path-dependent developments. This dynamic is historically embedded in the emergence of administered forms of contract-based mixed arbitration, which set the scene for the arrival of ICSID and the proliferation of treaty-based cases. While ICSID's arrival marks a significant milestone, other institutions thrived in lesser but still vital ways, leveraging factors such as the timing of state accessions to the ICSID Convention, geopolitical dynamics during the Cold War, the introduction of the UNCITRAL Arbitration Rules, new treaty provisions offering a forum choice, and lobbying by influential experts who possessed 'the right visibility at the right time'.

The study contributes to several strands of scholarship, including on the political economy of the investment treaty regime, the growing judicialization of international law, and the role of non-state actors in international relations. It also represents the first comparative case study of non-doctrinal aspects of arbitral institutions with a focus on mixed arbitration.

For Pauline, Emma, and Olivia.

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Selected Abbreviations

AAA	American Arbitration Association
AALCC	Asian-African Legal Consultative Committee
APPI	International Association for the Promotion and Protection of Private Foreign Investments
BIT	bilateral investment treaty
BLEU	Belgo-Luxembourg Economic Union
CCPIT	China Council for the Promotion of International Trade
CIETAC	China International Economic and Trade Arbitration Commission
ECOSOC	Economic and Social Council
ECT	Energy Charter Treaty
EDIT	Electronic Database of Investment Treaties
FETAC	Foreign Economic and Trade Arbitration Commission
FPS	Federal Public Service
GFA	German Federal Archives
HKIAC	Hong Kong International Arbitration Centre
ICA	International Court of Arbitration
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
LCIA	London Court of International Arbitration
NAFTA	North American Free Trade Agreement
NCUSCT	National Council for US-China Trade
OECD	Organization for Economic Cooperation and Development
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SCC	Stockholm Chamber of Commerce
SCC-AI	Stockholm Chamber of Commerce Arbitration Institute
UK T	Archives of the Treasury of the United Kingdom

UNAG	United Nations Archives Geneva
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference for Trade and Development
UNGA	United Nations General Assembly
USSR CCI	Chamber of Commerce and Industry of the Soviet Union

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Introduction

Prologue

Around 2010, high-ranking representatives of the International Chamber of Commerce ('ICC') met in Paris with representatives of the French state. Their goal was to negotiate favourable treatment from France for the ICC and its International Court of Arbitration by leveraging the prospect of moving the organization abroad.[1] Notable participants from the ICC included Jean-Guy Carrier (ICC Secretary General) and Gérard Worms (Chair of ICC France). The International Court of Arbitration ('ICA'), the ICC's branch administering international arbitrations, was represented by John Beechey (President of the ICA), Alexis Mourre (Vice President of the ICA), and Jason Fry (Secretary General of the ICA).[2] Their pitch was clear: the costs of staying in France were too onerous and their Paris offices unsuitable.[3]

For France, the stakes were high. The country risked losing a major international arbitral institution that had been based in Paris for over 80 years. Other countries and

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[1] Alexis Mourre, 'L'arbitrage ICC consolide en 2011 sa place de première institution mondiale d'arbitrage (ICC arbitration consolidates its position as the world's leading arbitration institution in 2011), Interview with Vice President of the ICA, Alexis Mourre' (2012) 93 Échanges Internationaux: Les Dossiers du Comité Français de la Chambre de Commerce Internationale 11, 13.

[2] Michel Prada and others, 'Rapport sur certains facteurs de renforcement de la compétitivité juridique de la place de Paris, établi par Michel Prada, Inspecteur Général des Finances Honoraire' (Ministry for the Economy, Finances, and Industry; Ministry of Justice 2011) Annex II, 5 <www.justice.gouv.fr/sites/default/files/migrations/textes/art_pix/1_Rapport_prada_20110413.pdf> accessed 31 July 2023; François Georges, 'Un homme de convictions, d'une grande humanité et surtout d'une grande simplicité, la marque des plus grands' (2020) 117 Échanges Internationaux: Les Dossiers du Comité Français de la Chambre de Commerce Internationale 5, 5; Victor Fung, 'Je n'aurais pu rêver meilleur collègue' (2020) 117 Échanges Internationaux: Les Dossiers du Comité Français de la Chambre de Commerce Internationale 5, 5.

[3] Prada and others (n 2), 3 and 5.

their capitals were poised to make tempting offers. For example, Switzerland promised formal international organization status and a prime lakeside location in Geneva near the World Trade Organization.[4] French officials, well aware of the looming loss, were on high alert.[5] As Alexis Mourre put it, the mission was about 'getting the French government to ensure that Paris remained competitive'.[6]

The ICC pursued a broad strategy. It co-sponsored the foundation of the non-profit *Paris Place d'Arbitrage*, in partnership with major international law firms based in Paris.[7] According to Mourre, a study was prepared to highlight the 'economic contribution of ICC's presence to Paris', which was estimated at least at '200 million euros per year for lawyers' and arbitration consultants' fees alone.'[8] Commenting on the study in 2012, Mourre observed that it had 'greatly contributed to raising the government's awareness of the importance of maintaining ICC in Paris, not only for the economic activities and jobs related to arbitration activities in Paris, *but also for France's legal influence in the world*'.[9]

If the ICC were to move, the consequences for France would have extended beyond economic loss to encompass geopolitical impacts. Such a move was perceived as weakening France's standing as a key player in international law and arbitration. The

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4 Squire Patton Boggs, 'Dernières nouvelles de la CCI' <https://larevue.squirepattonboggs.com/dernieres-nouvelles-de-la-cci_a1372.html> accessed 31 July 2023.

5 Prada and others (n 2) 1.

6 Mourre (n 1) 13, translated by the author, original: '*Il s'agissait donc d'amener le gouvernement français à faire en sorte que Paris reste compétitive par rapport à ces propositions.*'

7 Paris Place d'Arbitrage, 'A Propos' <http://parisarbitration.com/fr/a-propos/> accessed 12 September 2023.

8 Mourre (n 1) 13.

9 ibid, (emphasis added).

matter was so important that it caught the attention of then-Ministers Christine Lagarde and Michel Mercier, who commissioned a report on the economic impact of the ICC's presence. Lagarde knew the ICA, as she had previously consented to an ICA arbitration that culminated in a € 285 million award against a French state entity in the political *Tapie* affair.[10] The report confirmed that the ICA's presence was decisive for Paris' role in international arbitration, that it attracted many international law firms, and that it led to French law being chosen frequently as law of the seat in ICA arbitrations.[11]

Yet Lagarde did not wait for the outcome of the report before deciding to act. In a prompt and confidential letter to the ICC President, she promised the ICC:

> a real estate offer adapted to its needs, a tax optimization scheme appropriate to the essentially international nature of its activities and personnel, and the implementation of simplified procedures for the visas required for the stay and frequent travel of its agents and correspondents.[12]

This offer was precisely what the ICC was hoping for, and, in January 2011, the organization decided to retain its headquarters in France.[13] The French government in turn amended its tax code, offering an income tax exemption specifically for foreign employees of the ICC.[14] In 2013, the ICC moved to a building that the French state had

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[10] Les Décodeurs, 'Affaire Tapie : pourquoi Christine Lagarde a-t-elle été condamnée ?' *Le Monde.fr* (19 December 2016) <www.lemonde.fr/les-decodeurs/article/2016/12/19/affaire-tapie-de-quoi-christine-lagarde-est-elle-accusee_5051123_4355770.html> accessed 12 September 2023.

[11] Prada and others (n 2) 2 and 3.

[12] ibid 3; ICC France, 'Maintien du siège de l'ICC à Paris' (2011) 10 ICC France Info 2.

[13] ICC France (n 12).

[14] French Loi n° 2010-1658 du 29 décembre 2010 de finances rectificative pour 2010 (1) 2010, art 16; Code général des impôts (French General Tax Code) 2010, art 81(D); The parliamentary rapporteur introducing this legislative proposal in the Sénat explained: '[T]his is a competitiveness amendment aimed at taking a measure that seems useful for maintaining in Paris the "global" headquarters of the International Chamber of Commerce, a body that has consultative status with several international organizations, but which is not an international organization. It is particularly important for the legal attractiveness of our territory that France maintains the headquarters of this well-known organization

acquired for €13 million.[15] Thus, the ICC successfully leveraged its role as a major arbitral institution, and the considerable influence it conferred upon France, to secure significant concessions from the French government. In recognition of his achievement, the ICC's lead negotiator, Gérard Worms, was elected ICC President in 2011.[16]

Arbitral institutions like the ICC and its ICA interact with and influence states in profound ways. This impact extends far beyond the preferential siting of an institutional headquarters. It is perhaps most evident, and most profound, in their facilitation of the legal phenomenon of mixed arbitration, which opposes private entities and states. In mixed arbitration, the powers of arbitrators and arbitral institutions extend to core sovereign functions of the state itself. Over the course of the 20th century, leading arbitral institutions and their associated experts have played a significant role in brokering state consent to mixed arbitration and helped to spark path-dependent developments which led to the proliferation of mixed arbitration cases. Today, the institutional market for mixed arbitration is dominated by just four institutions: the ICC-ICA, the International Centre for Settlement of Investment Disputes ('ICSID'), the Arbitration Institute of the Stockholm Chamber of Commerce ('SCC-AI'), and the Permanent Court of Arbitration ('PCA'). This thesis tells their story.

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in Paris', French Senate, 'Compte rendu intégral des débats: Séance du 16 décembre 2010' <www.senat.fr/seances/s201012/s20101216/s20101216003.html> accessed 31 July 2023.

15 'Gestion du patrimoine immobilier de l'État : mission ministérielle, rapports annuels de performances, annexe au project de loi de règlement des comptes et rapport de gestion pour 2011' 52 <www.budget.gouv.fr/sites/performance_publique/files/farandole/ressources/2011/rap/pdf/DRGNORMALMSNYB.pdf> accessed 31 July 2023.

16 Georges (n 2) 5; Fung (n 2) 5; José Rosell, 'Un défenseur infatigable de l'arbitrage et de la Place de Paris' (2020) 117 Échanges Internationaux: Les Dossiers du Comité Français de la Chambre de Commerce Internationale 7, 7.

A Soft Competition Among Arbitral Institutions

Arbitral institutions are the primary fora facilitating the resolution of international investment and commercial disputes between private parties and states. The cases they oversee relate to all major industrial sectors, such as energy and natural resources, infrastructure and construction, agriculture, and pharmaceuticals. Both the size and the concentration of the institutional market for mixed arbitration are significant. Arbitral institutions have facilitated cases with a total value of over USD 620 billion.[17] More than 1000 treaty-based mixed arbitrations were administered by one of just four arbitral institutions.[18]

Dominating the mixed arbitration market, these four institutions play a critical role in shaping international legal norms and influencing global governance. Their rise to power followed from a series of developments within less than a century. It was driven by the pioneering work of a select group of arbitration experts with unparalleled access to insider knowledge and extraordinarily powerful professional networks. At key

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[17] UNCTAD, 'Investment Dispute Settlement Navigator, UNCTAD Investment Policy Hub' <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 31 July 2023. This represents the total amount claimed across all disputes in the UNCTAD dataset where such data is available. It should be noted that claim amounts are only provided for a subset of cases, suggesting that the actual total could be substantially higher.

[18] For the purpose of this project, mixed arbitration is defined as arbitration between private entities and states or their entities, see ibid. Data was sourced on July 6, 2023. The count of administered cases was determined by subtracting cases lacking an administering institution (75) and those with unavailable data (82) from the total number of treaty-based mixed arbitrations (1257). These cases were further sorted by administering institution. Over 98% of the known cases were overseen by one of four key institutions: ICC-ICA, ICSID, SCC-AI, and PCA. This percentage was calculated using UNCTAD's 'Administering Institution' search filter. Case counts per institution are as follows: ICSID (782), PCA (226), SCC-AI (56), and ICC-ICA (24).

moments in the history, these experts demonstrated remarkable foresight and international mobility to convince states to submit to international arbitration. Their interventions, outreach activities, and legal drafts, followed by subsequent path-dependent processes, significantly influenced the global success of mixed arbitration.

Arbitral institutions are participants in a global dispute resolution market that evolved over time. Subject to considerable market pressures, they strategize, innovate new procedures, actively promote their services, and increase their reach. In doing so, they develop specific relationships with sovereigns. Vitally, they develop such relationships in states where their headquarters are located and with important participants in the arbitral process, such as investors, law firms, arbitrators, and third-party funders. There should be little doubt that these relationships are influenced by economic and political incentives.

Despite their fundamental role in international investment law and arbitration, the existing scholarship on arbitral institutions is limited mostly to doctrinal analyses of the procedural functions of these institutions and their role in arbitral procedure.[19] However, the value of doctrinal approaches for the explanation of strategic aspects of institutional behaviour is limited for at least four reasons. Firstly, doctrinal approaches imply a focus on the role of an institution in a single arbitral proceeding. This contrasts with the fact that arbitral institutions emerge and evolve over relatively long periods covering many dozens or hundreds of cases. Secondly, doctrinal scholarship puts emphasis on the applicable rules and how they affect the immediate participants in arbitrations. Yet the institutions also develop and remake these rules over time. In doing so, it is reasonable

[19] For a more extensive review of existing scholarship on arbitral institutions, see Appendix A.

to assess that they are motivated by various market pressures, inter-institutional competition, economic and political incentives, and wider strategic considerations, each of which requires a different understanding. Thirdly, due to their focus on arbitral procedure, doctrinal approaches tend to overlook how arbitral institutions build specific relationships and generate constituencies of beneficiaries over time. And, fourthly, doctrinal approaches tend to focus on single institutions or single sets of institutional rules of procedure, while the arbitral institutions actually operate in a global market of mixed arbitration that is dominated by few, firmly established players. That is, they form part of an institutional oligopoly of mixed arbitration at the international level. Over time, their dominance is furthermore contested by ‘new entrants’, to be sure, who work to attract cases by offering new arbitration rules for investor-state arbitration, even if the new entrants thus far have had little success. An approach that focuses on a single institution or set of rules does not capture these inter-institutional dynamics.

Arbitral institutions did not start administering mixed arbitrations overnight. Today’s market for mixed arbitration is the outcome of mostly gradual, and at times momentous, historical developments. Each institution considered in this project – the ICC-ICA, ICSID, SCC-AI, and PCA – has played its own unique role in the evolution of mixed arbitration. Across all four of them, several significant milestones stand out. These are (1) the emergence of arbitration as a viable means for settling any international dispute; (2) the institutionalisation of arbitration, at the PCA and then the ICC-ICA, with the establishment of arbitration ‘houses’; (3) the emergence, again at the ICC-ICA and then the PCA, of administered forms of mixed arbitration; (4) the multiplication and diffusion of state consent thanks especially to the role of ICSID; and (5) the proliferation of mixed arbitrations as an ongoing bonanza for all four institutions, albeit to different degrees.

For each of these institutions, there was a specific founding moment. The oldest one, the PCA, was established upon Czar Nicholas II's initiative mostly by European countries and the United States in 1899 to moderate the use of gunboat diplomacy. However, the PCA was notably dormant for much of its history in the realm of mixed arbitrations. Save for an outlier case in 1934, the institution underwent a mixed arbitration renaissance with new cases arriving almost 100 years after its establishment. The other three institutions were established in 1917 in the case of the SCC-AI, in 1923 in the case of the ICC-ICA, and in 1966 for ICSID.

Each began to administer mixed arbitrations – or acting as the appointing or designating authority – at different stages of their trajectory. Two of them, the PCA and ICSID, were established after intergovernmental deliberations and the negotiation of an international convention, while the two others, the ICC-ICA and SCC-AI, were private-sector initiatives that led to 'not-for-profit' non-governmental organizations. As the historical circumstances allowed, the builders of each institution gave it a specific design. For ICSID, this design was exclusively and specifically tailored to mixed arbitration from the outset.[20] For the remaining three institutions, their designs, to varying degrees, allowed for the housing of arbitrations beyond mixed arbitration.[21] Perhaps unsurprisingly, all four of the institutions have today developed a focus which distinguishes them, to some meaningful extent, from each other. For example, they may

20 In this sense, ICSID can be called a single-domain institution specifically tailored to mixed arbitration.

21 These institutions can be called multi-domain institutions that accommodate various types of arbitrations, including, but not limited to, mixed arbitrations.

diverge in terms of the geographic origin of the disputing parties, the subject-matter of the arbitrations, the details of their procedures, or the premising of their powers on one or another kind of consent.

How does the design and functional focus of an arbitral institution influence its strategy in mixed arbitration? And how does the relative importance of treaty-, contract-, and law-based consents by states impact the norm-making role of the institution alongside the formation of its constituencies of beneficiaries? These two questions will be examined recurringly throughout the thesis.

1.1. The core argument

The institutional market for mixed arbitration, where it stems from states' consents in treaties or national laws, constitutes an oligopoly, which can be called simply the institutional oligopoly of mixed arbitration. This oligopoly is dominated today by four institutions. The market leader is ICSID, with the three other institutions retaining a significant but differentiated market share. Further, the oligopoly is complemented by another market for contract-based mixed arbitration. This more opaque market is also characterized by imperfect competition, but with an apparently lower concentration of market share by the four institutions.

The institutional oligopoly of mixed arbitration did not emerge from a free market competition. Rather, it emerged over time from other types of factors. These include lobbying and brokering by international bureaucrats and arbitration experts, especially at critical junctures. More widely, they include gradual institutional developments following path-dependent trajectories shaped by policy feedback and by the goal of increasing returns for growing clusters of beneficiaries. The oligopoly is also historically embedded in the emergence of administered forms of arbitration. Institutional practices of contract-based arbitration that involves states or state entities eventually paved the way for ICSID's arrival and the proliferation of the all-important advance consents of states in investment treaties. Almost certainly, the ICC-ICA was the dominant international institution to pioneer contract-based mixed arbitration as the antecedent to the subsequent proliferation of treaty-based arbitration. Yet the creation of ICSID marks the most significant milestone for today's institutional oligopoly of mixed arbitration. ICSID's importance was to revolutionize the procedure of mixed arbitration by introducing a two-stage consent – first, the state's, and then the investor's – and by drawing on the unparalleled advocacy of leading officials, especially Aron Broches, to draw in states. The other institutions tended to thrive in lesser but still vital ways, whether before or in response to ICSID. Depending on the institution, they benefitted from the timing of state accessions to the ICSID Convention after its conclusion; from state perceptions of other institutions during the Cold War; from the advent of the UNCITRAL Arbitration Rules in the 1970s; from an emerging 'cafeteria approach'[22] to mixed arbitration in the late 1980s and early 1990s; from the bargaining dynamics of negotiations towards the legal instruments that delivered states' consents; or from lobbying by influential experts and having the right visibility at the right time. The contributors to the success of each institution are explored throughout this thesis.

[22] For the purpose of this project, this approach is understood to be the practice of states providing advance consent to arbitration at several arbitral institutions or pursuant to several institutional rules in a single treaty or law.

The institutional oligopoly of mixed arbitration shares some characteristics of competition among private companies but also has many unique aspects. Like private companies, arbitral institutions are subject to 'the power of customers', 'the threat of new entrants', 'the threat of substitutes', and 'the power of suppliers'.[23] Intentionally or unintentionally, they exploit dominant positions, first-mover advantages, insider knowledge, the power of informal rules, and the 'incomplete contracts'[24] which underpin investment law. Their tactics and strategies have the effect of maintaining high barriers to entry and broadening the dominant institutions' reach. At the same time, the institutional oligopoly is distinct from a competition among private companies. It consists of a hybrid complex of intergovernmental and non-government organizations. To a greater degree than private companies, arbitral institutions must adapt to non-financial incentives and cooperate strategically. They must woo states delicately for sovereign consents or legislative concessions. They need to manage access to insider knowledge alongside the informal and formal rules governing their own processes. Simply put, they compete more softly.

Like all institutions, the arbitral institutions of mixed arbitration are also 'distributional instruments laden with power implications'.[25] Thus, they allocate resources and create or restrict opportunities for other actors in mixed arbitration. These other actors include states and investors, but also arbitrators, law firms, and third-party

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23 David Gaukrodger, 'Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement' (OECD 2018) Consultation Paper 15 <https://www.oecd.org/investment/investment-policy/ISDs-Appointing-Authorities-Arbitration-March-2018.pdf> accessed 30 July 2023.

24 Alexander Cooley and Hendrik Spruyt, *Contracting States: Sovereign Transfers in International Relations* (Princeton UP 2009) 6.

25 James Mahoney and Kathleen Thelen, *Explaining Institutional Change: Ambiguity, Agency, and Power* (CUP 2010) 8.

funders, each playing a role in the creation and distribution of insider knowledge. Perhaps needless to say, institutional strategizing is not always perfectly rational or fully predictive of a particular outcome. In the genesis of the oligopoly, bounded rationality and path-dependent developments shaped and limited the institutional results. Indeed, mixed arbitration was not always the primary concern of all of the institutions that now dominate the field; a considerable share of an institution's business may come from commercial arbitrations between private parties or from arbitrations between states. Moreover, a variety of other actors – such as powerful states or influential investors and their respective lobbies – may have had a more decisive impact on the emergence of the current international investment regime. The role of arbitral institutions in influencing outcome is also limited by their specific dispute settlement function, which calls strongly for a minimum appearance of neutrality. More than others in the marketplace, arbitral institutions must tread carefully to avoid undermining this perception of neutrality if they are to win and hold the trust of the parties, especially sovereign states. Even so, the institutions, and leading individuals associated with them, have had long-lasting impacts on the investment regime; one cannot expect to understand the regime without examining closely their competitive and cooperative parts within it.

1.2. Theoretical underpinnings

In the context of a comparative case study of arbitral institutions in mixed arbitration, a theoretical framework serves several purposes. It guides the research and helps shape research questions, methodology, and analysis. It also provides the required context for the research, connecting the work to existing insights and making the offered perspective intelligible for others participating in the intellectual discourse. Thus, the work is more clearly situated within the body of existing scholarship. A theoretical framework also has methodological implications. In qualitative and exploratory research, it may also support validity and help form explanations for what is observed.

Yet the scholarly research on the non-doctrinal aspects of arbitral institutions in mixed arbitration remains at an early stage.[26] Therefore, the present project is primarily exploratory, and proceeds based mainly on inductive reasoning.[27] Its theoretical framework must be relatively tentative, especially to support the goal of hypothesis-generation. To provide such a framework, the present project draws on different strands of oligopoly theory, historical institutionalism, and international relations theory in order to constitute a research environment.

The following section first considers theories of oligopolistic competition as an explanatory framework for the thesis, and, on a preliminary basis, identifies possible limitations to this current based on the preliminary findings of the present study of mixed arbitration. An analysis of the theoretical tradition of historical institutionalism is then provided as a useful supplement to oligopoly theory, particularly where it interacts with, connects to, and conceptualises inter-institutional competition. Here, certain elements of the theory of international organizations that appear relevant or useful for the focused study of arbitral institutions will also be considered.

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26 Appendix A contains a review of existing scholarship on the role of arbitral institutions in mixed arbitration.

27 Appendix B contains a discussion of the methodology used for this project.

1.2.1. Oligopolistic competition

In an oligopoly a small number of suppliers collectively has a substantial share of an industry's total supply.[28] Oligopoly theory combines the concept of the monopoly with elements of competition. Monopolies and perfect competition thus appear as opposites on a scale measuring the degree of competition in a market. While monopolies can be described as the 'absence of competition' in a market,[29] in perfect competition there is a large number of buyers and sellers with access to perfect information, all products are perfect substitutes, and new firms can freely enter and leave the market.[30] On this scale, an oligopoly is an intermediary example of imperfect competition.

The theory of oligopolistic competition originates in the seminal work of the French mathematician and philosopher Cournot, *Recherches sur les Principes Mathématiques de la Théorie des Richesses* published in 1838.[31] Cournot developed a mathematical model to describe competition among a low number of firms, departing from the example of a duopoly of two mineral water producers, where each firm determines its output independently and simultaneously. In this Cournot competition, each firm bases its decisions on the perceived output of its competitor(s), thus making strategic interaction between firms as to quantity the market's central characteristic. In Cournot's

28 Heinrich von Stackelberg, *The Theory of the Market Economy* (William Hodge 1952) 190.

29 Irving Fisher, *Elementary Principles of Economics* (Macmillan 1912) 329.

30 Robert Pindyck and Daniel Rubinfeld, *Microeconomics* (9th edn, Pearson 2018) 357.

31 Antoine-Augustin Cournot, *Recherches sur les principes mathématiques de la théorie des richesses* (L Hachette 1838).

model, a Nash equilibrium is reached, 'when each firm chooses an output level that maximizes profits given the outputs chosen by the rivals'.[32]

Bertrand critiqued this model in 1883, arguing that in a market of identical goods firms are more likely to compete on prices rather than quantities (Bertrand competition).[33] The assumption that an oligopoly necessarily had a determinate equilibrium, be it in quantity (Cournot) or in prices (Bertrand), was later challenged by Edgeworth. Edgeworth suggested that unlike in monopoly or perfect competition, equilibrium in oligopoly could be indeterminate, meaning that there could be multiple possible equilibria depending on the strategic choices of the firms involved.[34] Strategic interaction – that is, a situation in which the actions of one market participant significantly influence the decisions of other participants – appears as a common denominator.

Considering the preliminary research conducted for this thesis, the four dominant arbitral institutions in the mixed arbitration market indeed appear to interact strategically. For instance, information on the creation of a new institution or mechanism, or on other forms of procedural innovation, fluctuates very quickly among the institutions and other participants in the mixed arbitration market. Also, access to such information about other institutions appears, at least in some instances, to have impacted the strategy of another institution at a given moment. At the same time, the research demonstrates that

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32 Xavier Vives, *Oligopoly Pricing: Old Ideas and New Tools* (MIT 1999) 1; John Nash, 'Non-Cooperative Games' (1951) 54 Annals of Mathematics 286.

33 Joseph Bertrand, 'Review of "Théorie mathématique de la richesse sociale" and "Recherche sur les principes mathématiques de la théorie des richesses"' [1883] Journal des Savants 499.

34 Francis Edgeworth, 'The Pure Theory of Monopoly' in Francis Edgeworth (ed), *Papers Relating to Political Economy*, vol 1 (Burt Franklin 1925) 117-19; von Stackelberg (n 28) 190.

the institutions strategized in a multidimensional way that was not limited to issues of quality or quantity. A more complex understanding of the ways in which market participants react to oligopolistic competition, especially in a highly regulated and state-dependent market, is therefore required.

In relevant literature of the 20th century, economists such as Chamberlin and von Stackelberg further developed the concept of oligopolistic competition to explore other forms of reaction by suppliers. In contrast to Cournot, Chamberlin placed product differentiation at the Centre of his analysis and proposed the concept of monopolistic competition.[35] Combining elements of monopolies and perfect competition, he assumed a market structure in which many firms offer products that are substantially similar but not perfect substitutes.[36] In such a market, product differentiation leads to a downward-sloping demand curve for each firm's product.[37] Firms participating in an oligopoly retain a certain degree of control over prices by offering products that are distinct in the eyes of consumers.[38] Von Stackelberg's leader-follower model introduced the further element of sequencing, whereby a dialectic of reciprocal reactions to real and anticipated decisions of competitors ensued, thus destabilising any temporarily emerging equilibrium.[39]

In the study of arbitral institutions in mixed arbitration, it is useful to consider the concept of product differentiation as a form of strategic interaction. While all of the four

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35 Edward Chamberlin, *The Theory of Monopolistic Competition: A Re-Orientation of the Theory of Value* (6th edn, OUP 1949) 56-70.

36 ibid 9 and 129.

37 ibid 77-78.

38 ibid 56-70.

39 von Stackelberg (n 28) 190-204.

institutions examined here facilitate a highly specialised form of dispute resolution, they also appear to have developed somewhat differentiated profiles. For example, ICSID and the PCA administer almost exclusively treaty-based cases, whereas the ICC-ICA is more active in contract-based mixed arbitration. Similarly, the two private-sector institutions, the SCC-AI and ICC-ICA, have famously introduced emergency arbitration rules; in contrast, such rules are not available at ICSID or the PCA.

These distinctions correspond to the longstanding connection between imperfect competition, on the one hand, and, on the other, research and development, as made by the likes of Schumpeter and Arrow.[40] Again, innovation induced by imperfect competition is not necessarily unidimensional.[41] Some of the institutions examined here appear also to have developed a geographic focus, evidenced especially by the SCC-AI 's orientation to East-West arbitration during the Cold War. This focus could be considered a form of spatial competition.[42] Multiple other forms of product differentiation also appear to exist, such as the availability of mixed arbitration to dual national claimants or the non-signatory use of ICSID facilities via the Additional Facility Rules. As Tirole observes, '[a]ctual differentiation is multidimensional'.[43]

In 1970, Scherer made a major contribution to the field with his work *Industrial Market Structure and Economic Performance*, offering a comprehensive overview of the

40 Joseph Schumpeter, *Capitalism, Socialism and Democracy* (5th edn, George Allen & Unwin 1976) 81 and 86; Kenneth Arrow, 'Economic Welfare and the Allocation of Resources for Invention' in National Bureau Of Economic Research (ed), *The Rate and Direction of Inventive Activity* (Princeton UP 1962) 619-25.

41 Jean Tirole, *The Theory of Industrial Organization* (MIT 1988), para 10.7.

42 ibid para 7.1.

43 ibid para 7.4.

different dimensions of oligopolies.[44] Scherer examined in depth the behaviour of participants in oligopolies, including their price strategies and innovation policies.[45] In highly concentrated markets, firms were found to have the market power to engage in strategic behaviours such as price fixing, collusion and predatory pricing.[46] For present purposes, on the face of it, price fixing and predatory pricing appear to be less relevant for arbitral institutions, which appear to be more value-driven and less exclusively aimed at revenue-maximization.

However, the phenomenon of collusion – understood as a situation where, instead of competing, rival market participants tacitly or explicitly coordinate their strategies for their mutual benefit – may have more purchase for the present project.[47] Information, albeit filtered and selective, appears indeed to circulate among the institutions through joint colloquia, publications, staff fluctuation, and participation in the overarching interest groups. Such interaction may lower barriers to collusion, such as the barriers of detection or information lags.[48] Officials at incumbent institutions have even helped other arbitral institutions maintain or enhance their own market position, such as by providing insider knowledge and advice.

Finally, the concept of barriers to entry, as developed by economists studying different forms of imperfect competition, also appears relevant to the current study. Barriers to entry arise from asymmetries of cost between incumbents and new entrants

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44 Frederic Scherer and David Ross, *Industrial Market Structure and Economic Performance* (3rd edn, Houghton Mifflin 1990).

45 ibid chs 5-8.

46 ibid 235-36, 311-15, 426-47.

47 Chamberlin (n 35) 48; Tirole (n 41) para 6.1.1.

48 Tirole (n 41) 612.

which tend to favour incumbents.[49] The barriers to entry can be the result of the strategic actions of incumbents. As Encaoua and others observe, '[i]n the struggle to create, maintain and expand favourable market positions, firms' actions are intended not only to affect the current conduct of rivals directly, but also to have an indirect effect by altering market structure in a way which constrains the rival's subsequent actions'.[50] A large body of literature has examined how firms make strategic investments to raise barriers to entry.[51] The institutional oligopoly of mixed arbitration appears to be characterised by quite high barriers to entry. Besides the four institutions considered in this thesis, no other arbitral institution has administered a significant number of known treaty-based mixed arbitrations. And, despite the shifting market shares of these institutions, this market structure has been relatively stable since the early 1990s. As part of the present, it will therefore be useful to examine the possible barriers to entry more closely.

Despite the utility of aspects of oligopoly theory, some characteristics of the current group of arbitral institutions do not appear well-explained by this theory. Treaty-

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49 Georg Stigler, *The Organization of Industry* (Irwin 1968) 67; Carl von Weizsäcker, 'A Welfare Analysis of Barriers to Entry' (1980) 11 The Bell Journal of Economics 399, 400; Joe Bain, *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries* (Harvard UP 1956) 3.

50 David Encaoua, Paul Geroski and Alexis Jacquemin, 'Strategic Competition and the Persistence of Dominant Firms: A Survey' in Joseph Stiglitz and Frank Mathewson (eds), *New Developments in the Analysis of Market Structure* (Palgrave Macmillan 1986) 1.

51 Alex Jacquemin, 'Market Structure and the Firm's Market Power' (1972) 20 The Journal of Industrial Economics 122; Richard Caves, 'The Determinants of Market Structure: Design for Research' in Alexis Jacquemin and Henry De Jong (eds), *Markets, Corporate Behaviour and the State* (Springer 1976), part I; Richard Caves and Michael Porter, 'From Entry Barriers to Mobility Barriers: Conjectural Decisions and Contrived Deterrence to New Competition' (1977) 91 The Quarterly Journal of Economics 241; Michael Spence, 'Competition, Entry and Antitrust Policy' in Steven Salop (ed), *Strategy, Predation, and Antitrust Analysis* (Federal Trade Commission, Bureau of Economics 1981); Joseph Stiglitz, 'Potential Competition May Reduce Welfare' (1981) 71 The American Economic Review 184, 187.

based mixed arbitration has been characterized by a long time span. From the signature of an intergovernmental convention providing the first stage of state consents, to the signature of bilateral investment treaties providing the second stage of state consents, to the actual filing of an arbitration claim, decades may have passed. This relative *longue durée* challenges notions of strategic interaction, particularly where an institution's investments, for instance by brokering second-stage consent, may only bear fruit a generation later, and the prospect of returns is highly uncertain. In addition, the consents from which arbitral institutions derive their powers may be remote from the institution's influence. Its performance thus becomes dependent on external developments and opportunities. The next section seeks to offer a further refinement of these initial insights from oligopoly theory, drawing on the separate current of historical institutionalism.

1.2.2. Historical institutionalism

Historical institutionalism is a research approach in the field of political science that places particular emphasis on the mode, temporality, and sequence of institutional development and change. After sparking research on diverse political phenomena, such as welfare policies and collective bargaining, it has found entry to the study of international organizations and, more recently, to scholarship on investment law.[52] While definitions of historical institutionalism vary, it has been described as an 'attempt to illuminate how political struggles are mediated by the institutional setting in which

[52] Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (OUP 2018).

[they] take place'.[53] The centrality of political contestation relates well to ongoing debate on the depoliticization of investment disputes, on state backlash against treaty-based mixed arbitration, and on imperfect competition among dominant arbitral institutions.[54]

Historical institutionalist scholarship 'examines how temporal processes and events influence the origin and transformation of institutions that govern political and economic relations'.[55] Accordingly, it assumes that the sequence of events and their historical context have a significant impact on institutional change and that institutions shape individual behaviours and outcomes.[56] The emphasis on temporality allows for a detailed understanding of shifts of institutional functions over time. It considers the frequent reality that 'political needs that institutions were created to meet may be very different from the needs that they are pressed to meet at a later historical juncture'.[57] As such, besides the possibility of intentional and rational designs, this theoretical approach leaves space for the possibility of unintended or weakly intentional consequences.

Temporality, as an analytical category, directly impacts the way in which institutions influence the behaviour of relevant actors. According to Farrell and Newman, 'at any particular moment political actors' ability to adapt to a changing environment will

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53 Sven Steinmo, Kathleen Thelen and Frank Longstreth (eds), *Structuring Politics: Historical Institutionalism in Comparative Analysis* (CUP 1992) 2.

54 Michael Waibel and others, 'The Backlash Against Investment Arbitration: Perceptions and Reality' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010).

55 Orfeo Fioretos, Tulia Falleti and Adam Sheingate, 'Historical Institutionalism in Political Science' in Orfeo Fioretos, Tulia Falleti and Adam Sheingate (eds), *The Oxford Handbook of Historical Institutionalism* (OUP 2016) 1.

56 ibid.

57 Henry Farrell and Abraham Newman, 'Making Global Markets: Historical Institutionalism in International Political Economy' (2010) 17 Review of International Political Economy 609, 621.

be shaped, at least in part by previous institutional choices, which may have been taken without any cognizance of what their later historical consequences would have been'.[58] Particularly over long periods of time, some institutional development may generate consequences that were unintended or weakly intentional at the time the institution was established.

As an approach centred on 'real-world empirical questions',[59] historical institutionalism is aimed at 'improving our understanding and explanations of complex political phenomena'.[60] As such, it is not universally considered to be a distinct theory but rather a research approach proposing an analytical tool kit for the empirical study of institutions.[61] This research focus has sparked a considerable body of predominantly qualitative and comparative case studies on institutional geneses, including in investment law.[62] Such a qualitative and comparative methodology is also adopted here.

Imperfect competition and path-dependence

The primary object of this project is the oligopoly of arbitral institutions in mixed arbitration. A growing body of research has examined competition among judicial actors in the field of international arbitration. Third-party funders compete with 'lawyers offering

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58 ibid.

59 Sven Steinmo, 'Historical Institutionalism' in Donatella Della Porta and Michael Keating (eds), *Approaches and Methodologies in the Social Sciences: A Pluralist Perspective* (CUP 2008) 118.

60 Fioretos, Falleti and Sheingate (n 55) 1.

61 Steinmo (n 59) 118.

62 Stephan Schill, Christian Tams and Rainer Hofmann, 'International Investment Law and History: An Introduction' in Stephan Schill, Christian Tams and Rainer Hofmann (eds), *International Investment Law and History* (Elgar 2018) 34.

contingency fees',[63] states compete to attract arbitration business,[64] and investors compete for more favourable investment protection.[65] The study of institutional competition and inter-institutional relationships has also not been a stranger to historical institutionalist scholarship. At the domestic level, studies have examined competition among schools in secondary education;[66] among federal and state-levels of government in relation to welfare state conditionalities;[67] or as a feature of the impact of collective bargaining on firms.[68] The approach has also found its way into international relations, with studies on inter-statal competition over FTAs and East-West competition for trade concessions by developing countries.[69]

Early strands of historical institutionalism accommodated institutional competition and cooperation within so-called punctuated-equilibrium models that emphasize institutional stability and resistance to change.[70] Where earlier choices affect later outcomes, competition is usually limited by institutional stability and inertia. In practice, only a limited number of institutions have successfully established a strong market

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63 Eli Wald, 'Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Profession in a Global Age' (2011) 48 San Diego Law Review 489, 489; William Barker, 'Extrajurisdictional Practice by Lawyers' (2001) 56 Business Lawyer 1501, 1501-69.

64 Catherine Rogers, *Ethics in International Arbitration* (OUP 2014) 45; William Park, 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration' (1989) 63 Tulane Law Review 647, 680; Michael Mustill, 'Arbitration: History and Background' (1989) 6 Journal of International Arbitration 43, 53.

65 Jean Kalicki and Anna Joubin-Bret, *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff 2015) 400. See also Filip Batselé, 'Foreign Investors of the World, Unite! The International Association for the Promotion and Protection of Private Foreign Investments (APPI) 1958–1968' (2023) 34 European Journal of International Law 415.

66 Kathleen Thelen, *Varieties of Liberalization and the New Politics of Social Solidarity* (CUP 2014) 84.

67 ibid 127.

68 ibid 38.

69 Randall Stone, *Controlling Institutions: International Organizations and the Global Economy* (CUP 2011) 97, 101.

70 eg Stephen Krasner, 'Approaches to the State: Alternative Conceptions and Historical Dynamics' (1984) 16 Comparative Politics 223, 240-44.

position in mixed arbitration. Early institutionalists contended that institutional development is predominantly if not exclusively caused by exogenous shocks that occur at brief historical moments, so-called critical junctures. Critical junctures are defined as situations 'in which the structural (...) influences on political action are significantly relaxed for a relatively short period of time'.[71] The concept of critical junctures was further associated with the notion of path-dependent development. In this reading, critical junctures are the starting points 'of a path-dependent causal process that leads to the outcome of interest'.[72] In historical institutionalist accounts that emphasize stasis, once an institution is set on a specific developmental path there are several reinforcing and entrenching factors maintaining it on that path. These phenomena serve to institutionally lock-in, constrain, counteract, or weaken agency to change the institution. Some authors refer to institutional stasis or stickiness.[73]

Imperfect competition among arbitral institutions fits well within such punctuated-equilibrium models. The competition among arbitral institutions appears to be imperfect, that is, the number of market participants is limited due to prior, path-dependent developments. The time at which an arbitral institution successfully entered the mixed arbitration market will directly determine its competitiveness. '[E]arly competitive advantages may be self-reinforcing', and 'relative timing may have enormous

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71 Giovanni Capoccia and Daniel Kelemen, 'The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism' (2007) 59 World Politics 341, 343.

72 Tulia Falleti and Julia Lynch, 'Context and Causal Mechanisms in Political Analysis' (2009) 42 Comparative Political Studies 1143, 1155.

73 Wolfgang Streeck and Kathleen Thelen, 'Introduction: Institutional Change in Advanced Political Economies' in Wolfgang Streeck and Kathleen Thelen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economies* (OUP 2005) 24.

implications'.[74] In other words, if state consents to the rules or services of an institution are already diffuse, the institution has a competitive advantage. As the oligopoly emerges, arbitral institutions may be able to exploit dominant positions resulting from the combination of first moves and self-reinforcing developments in order to cement their dominance. As Pierson notes, 'actors who achieve a critical mass of political resources may be able to manipulate the rules of the game (...) and reallocate resources (...) in ways that increase their organizational advantages over potential competitors'.[75] By the same token, the sequencing of events can explain the consequences of those who failed to succeed in political contests at critical junctures by 'clarifying the likely long-term impact of initial defeats on (...) initial "losers" or groups that arrive at a later point in time'.[76] Indeed, newcomer institutions have so far struggled to break the oligopoly and enter the mixed arbitration market.

This is not to say that competition is the primary explanator of institutional outcomes or that institutions always consciously exploit first-mover advantages. On the contrary, perceptions of interest appear to 'rarely arise unambiguously from the world' but rather to 'emerge from processes of interpretation'.[77] Historical institutionalists have described numerous path-reinforcing mechanisms that may contribute to interest formation, including policy feedback and increasing returns. The notion of policy

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74 Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton UP 2004) 71.

75 ibid 73.

76 ibid 12.

77 Peter Hall, 'Politics as a Process Structured in Space and Time' in Orfeo Fioretos, Tulia Falleti and Adam Sheingate (eds), *The Oxford Handbook of Historical Institutionalism* (OUP 2016) 40.

feedback is based on the understanding that 'new policies create new politics'.[78] The adoption of a new policy sparks the generation of a constituency of beneficiaries with a vested interest in the maintenance or expansion of the policy. As emergent institutions generate beneficiaries, these vested interests solidify and gravitate around mixed arbitration as a preferred solution for the protection of private property or contractual rights. Relatedly, the notion of increasing returns describes a situation where 'each step along a path produces consequences which make that path more attractive in the next round and raises the costs of shifting to an alternative path'.[79] Beneficiaries of mixed arbitration generate such increasing returns over time, evolving into a lucrative industry.

Inter-institutional dynamics and hybrid regimes

International relations theory has also considered competitive dynamics and overlap among intergovernmental and non-governmental organizations. Scholars have observed a general proliferation of intergovernmental organizations, including an increased density of international adjudicatory bodies.[80] Arbitral institutions with access to mixed arbitration, however, appear not to have proliferated to the same extent as other adjudicatory bodies. The concentration of the mixed arbitration market is even greater than the oligopolistic market for institutional administration of commercial

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[78] Elmer Schattschneider, *Politics, Pressures and the Tariff: A Study of Free Private Enterprise in Pressure Politics, as Shown in the 1929-1930 Revision of the Tariff* (Archon Books 1963) 288.

[79] Pierson (n 74) 312; Dezalay and Garth have, for instance, described a process of increasing returns incurred by counsel advising investors in relation to large-scale construction projects or projects related to the exploitation of natural resources, see Yves Dezalay and Bryant Garth, *Dealing in Virtue. International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996) 94.

[80] This has given rise to concerns about the fragmentation of international law, Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden Journal of International Law 553, 599.

arbitrations between private disputing parties.[81] Where regulatory intergovernmental organizations overlap, they have been said to form regime complexes, understood as 'set[s] of overlapping [international organizations] that govern a single-issue space'.[82]

Arbitral institutions in mixed arbitration appear to form such a complex as their work functionally and strategically overlaps. The regime complex of these institutions is hybrid. It involves both intergovernmental ('IGOs') and non-governmental institutions ('NGOs') which deliver public international law functions.[83] This structure is in line with a growing importance of non-state actors in international relations and has several implications for the study of inter-institutional dynamics.[84] It also appears to have impacted the emergent oligopoly. Like groups of overlapping intergovernmental organizations, hybrid regime complexes are marked by 'unequal power and power-based strategies'.[85]

Both IGOs and NGOs are generally considered capable of competition, but the not-for-profit nature and the societal goal or missions of arbitral institutions in the oligopoly may allow for more strategic cooperation than among private companies.[86]

81 Michael Green, 'Crowded at the Top: An Empirical Description of the Oligopolistic Market for International Arbitration Institutions' (2022) 31 Minnesota Journal of International Law 281.

82 Richard Clark, 'Pool or Duel? Cooperation and Competition Among International Organizations' (2021) 75 International Organization 1133, 1133.

83 Kenneth Abbott and Benjamin Faude, 'Hybrid Institutional Complexes in Global Governance' (2022) 17 Review of International Organizations 263, 264.

84 Daniel Drezner, *All Politics Is Global: Explaining International Regulatory Regimes* (Princeton UP 2007) 26.

85 Abbott and Faude (n 83) 284.

86 Stephanie Hofmann, 'Overlapping Institutions in the Realm of International Security: The Case of NATO and ESDP' (2009) 7 Perspectives on Politics 45, 45-52; Karen Alter and Sophie Meunier, 'The Politics of International Regime Complexity' (2009) 7 Perspectives on Politics 13, 13-24; Bruno Frey, 'Outside and Inside Competition for International Organizations: From Analysis to Innovations' (2008) 3 Review of International Organizations 335, 335-50; Kenneth Abbott and others, 'The Governance

Institutional outcomes may be the ‘result of “ambiguous compromises” among actors who can coordinate on institutional means even if they differ on substantive goals’.[87] But such cooperation still requires negotiation over apportionment of benefits and risks as ‘actors face a choice between outcomes that distribute the gains from cooperation differently, even if they make all better off’.[88]

Non-governmental arbitral institutions are a special type of NGO. Like other NGOs, they are ‘“value actors” motivated by principled beliefs’[89] and created by ‘like-minded private individuals who share a founding idea’.[90] As such, they may be ‘less willing to make trade-offs and compromises that come naturally to interest actors’.[91] Related to their institutional mission, arbitral institutions engage in strategic advocacy, particularly through their policy-oriented sections and leading personnel. Despite their formal not-for-profit status, these institutions also generate a non-negligible income from the provision of services. Of course, for the disputing parties in major mixed arbitrations, the costs of administrative services ‘are very small relative to the stakes at play and the resources of the players’.[92] Yet, on the side of the institutions, competition for administrative fees may nevertheless be an incentive. Moreover, institutions sometimes

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Triangle: Regulatory Standards Institutions and the Shadow of the State’, *The Politics of Global Regulation* (Princeton UP 2009) 61.

87 Mahoney and Thelen (n 25) 8.

88 James Mahoney and Kathleen Thelen, ‘A Theory of Gradual Institutional Change’ in James Mahoney and Kathleen Thelen (eds), *Explaining Institutional Change: Ambiguity, Agency, and Power* (CUP 2010) 210.

89 Abbott and others (n 86) 60.

90 Drezner (n 84) 68.

91 Abbott and others (n 86) 61.

92 Kal Raustiala, ‘Institutional Proliferation and the International Legal Order’ in Jeffrey Dunoff and Mark Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012) 312.

use the institutional lock-in generated by the underlying ‘incomplete’ contracts in order to augment state consent and widen procedural rules.[93]

While non-governmental arbitral institutions, like other NGOs, produce informal rules, they also produce formal rules that bind states and therefore fulfil functions similar to public international law.[94] In some instances, particularly in politically sensitive areas, NGO arbitral institutions may have a decisive competitive advantage over intergovernmental arbitral institutions: their lack of transparency. As Drezner notes, private-sector institutions ‘are not accountable to home populations, they are less likely to have all of their activities publicly observed’, which ‘allows governments to make policy interventions behind the scenes’.[95] NGO arbitral institutions in mixed arbitration may therefore challenge existing notions of NGOs in international relations scholarship.

On the other hand, intergovernmental organizations are at least formally the creation of states. In theory, IGO arbitral institutions are therefore accountable to their state principals. Yet the staff of IGO arbitral institutions does not always ‘act in conformity with the preferences of the majority of its principals’.[96] Even as state principals set clear mandates for IGO arbitral institutions, as part of a founding convention or in subsequent decisions of inter-statal bodies, the institutions sometimes

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93 Kathleen Claussen, ‘Gatekeeper Secretariats’ in Freya Baetens (ed), *Legitimacy of Unseen Actors in International Adjudication* (CUP 2019).

94 Pepper Culpepper, ‘Capitalism, Institutions, and Power in the Study of Business’ in Orfeo Fioretos, Tulia Falleti and Adam Sheingate (eds), *The Oxford Handbook of Historical Institutionalism* (OUP 2016) 460. The SCC-AI, for instance, has published emergency arbitration rules which retroactively bind states, Qian Wu, ‘Jurisdiction of Emergency Arbitrator in Investment Treaty Arbitration’ (*Kluwer Arbitration Blog*, 28 June 2019) <https://arbitrationblog.kluwerarbitration.com/2019/06/28/jurisdiction-of-emergency-arbitrator-in-investment-treaty-arbitration/> accessed 15 September 2023.

95 Drezner (n 84) 73.

96 Thomas Gehring and Benjamin Faude, ‘A Theory of Emerging Order within Institutional Complexes: How Competition Among Regulatory International Institutions Leads to Institutional Adaptation and Division of Labor’ (2014) 9 Review of International Organizations 471, 476.

push the boundaries of their mandates. In the context of international court secretariats, this phenomenon has been described as 'secretariat mandate creep', that is, the 'aggrandizement of the secretariat's role not sanctioned by parties or States'.[97] International relations scholarship assumes IGOs network with NGOs 'as a way of developing policy autonomy'.[98]

Powerful individuals and their influence

In certain instances, powerful individuals, such as international bureaucrats or leading arbitration experts, appear to have had considerable agency in the creation of investment law and in the emergence of arbitral institutions in mixed arbitration.[99] At first glance, one may assume this influence to create a tension with strands of historical institutionalism that emphasize how institutions shape and constrain individual agency. Understanding institutional design simply as the outcome of the rational choice of institution builders fails to explain instances where institutions constrain individual action. It also does not explain institutional lock-in. Historical institutionalists note that 'institutions may not only shape preferences but the power of actors to make those preferences stick'.[100] For instance, institutional appointment practices may shape the power of individual arbitrators to develop long-lasting and influential interpretations of substantive investment standards. More generally, different participants in arbitral

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97 Claussen (n 93) 162.

98 Drezner (n 84) 67.

99 St John (n 52); Joel Dahlquist, *The Use of Commercial Arbitration Rules in Investment Treaty Disputes: Domestic Courts, Commercial Arbitration Institutions and Tribunal Jurisdiction* (Brill Nijhoff 2021); Nicolás Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play By Their Own Rules* (OUP 2021). With a focus on commercial arbitration, see also Mikaël Schinazi, *The Three Ages of International Commercial Arbitration* (CUP 2021).

100 Farrell and Newman (n 57) 621.

proceedings may seek the vicinity of arbitral institutions to benefit from the power they confer.

This is not to say that historical institutionalism assumes individual actors to be irrational. Rather, in this thesis, it is assumed that powerful individuals view institutions as vehicles of cooperation which they can use to 'maximize their personal or individual gain'.[101] However, these individuals are also bounded rational in that they are affected by cognitive biases, such as salience and confirmation bias, as well as information asymmetry. To react to complex environments, even powerful expert individuals tend to 'filter information into existing "mental maps"'[102] and 'will rarely be able to predict and optimize across the full range of strategic possibilities latent in their structural blueprints'.[103]

Individual agency may be augmented, especially at critical junctures, as suggested by punctuated equilibrium models. This corresponds with findings in international relations scholarship, according to which international bureaucrats can have considerable power in the design-phase of intergovernmental institutions and in their later adaptation, even when state principals have diverging or opposing interest.[104] States have a 'need for bureaucratic expertise'.[105] Importantly, even IGO arbitral

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101 Steinmo (n 59) 126.

102 Shu-Yun Ma, 'Political Science at the Edge of Chaos? The Paradigmatic Implications of Historical Institutionalism' (2007) 28 International Political Science Review 57, 65.

103 Mahoney and Thelen (n 88) 126.

104 Tana Johnson, *Organizational Progeny: Why Governments Are Losing Control over the Proliferating Structures of Global Governance* (OUP 2014) 74-102; St John (n 52) 97.

105 Tana Johnson and Johannes Urpelainen, 'International Bureaucrats and the Formation of Intergovernmental Organizations: Institutional Design Discretion Sweetens the Pot' (2014) 68 International Organization 177, 177. On the cognitive influence of international bureaucracies on political actors, see also Frank Biermann and Bernd Siebenhüner, 'The Influence of International

institutions are not ‘created by states alone’[106] but involve the participation of various individual actors, such as private-sector representatives, arbitrators, and international law experts, as well as international bureaucrats of pre-existing international institutions.[107]

Individuals may use insider knowledge to gain power over states and other participants in the institutions and specific arbitral proceedings. In international arbitration, influential individuals who benefit from insider knowledge have been described as key power brokers.[108] Arbitral institutions, including in mixed arbitration, appear to play a vital role in enabling and controlling access to this insider knowledge. They hold and archive case files, communicate with most actors in the proceeding, and maintain databases of arbitrator candidates.

Access to insider knowledge is a competitive factor in arbitrator selection since ‘institutions compete for arbitration business on the basis of their capacity to select arbitrators *including based on non-public information*’.[109] In mixed arbitration, insider knowledge extends to state preferences, decision-making processes, and networks of officials. As some authors note, the ICSID Secretariat ‘may play a more prominent role behind the scenes, for instance, through institutional appointments of arbitrators, advice

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Bureaucracies in World Politics: Findings from the MANUS Research Program’ in Frank Biermann and Bernd Siebenhüner (eds), *Managers of Global Change* (MIT 2009).

106 Johnson and Urpelainen (n 105) 179.

107 ibid 182.

108 Malcolm Langford, Daniel Behn and Runar Hilleren Lie, ‘The Revolving Door in International Investment Arbitration’ (2017) 20 Journal of International Economic Law 301, 301.

109 David Gaukrodger and Kathryn Gordon, ‘Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community’ 48 <https://papers.ssrn.com/abstract=2207366> accessed 1 May 2023, (emphasis added).

to tribunals on precedents, assisting tribunals with the editing of drafts'.[110] The use of informal, besides formal, rules in IGOs may also 'allow exceptional access for powerful states to set the agenda and control particular outcomes', especially where overt control could not be integrated into institutional design for diplomatic reasons.[111]

The influence that powerful individual actors hold may be reinforced by institutional opacity since 'institutions that are transparent are more costly to manipulate'.[112] In mixed arbitration, particularly where investors bring claims against states, the benefits are usually concentrated among a small group of beneficiaries, while costs are widely distributed. In such cases, 'client politics is likely to result'.[113] The results often favour incumbent individuals, allowing them to control entry and inhibit growth of new entrants.[114]

Particularly at critical junctures, individual actors appear to have had significant impact on the emergence of the arbitral institutions considered here. But key developments may also have come from more gradual, endogenous, and ideational forms of change. This includes temporal convergence of the ideas of powerful actors, where ideas may 'function as devices that promote cooperation among agents whose interests are "given" but not yet realizable'.[115] When actors who once backed an institution grow dissatisfied – for instance, due to shifts in decision-making dynamics or

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110 Jonathan Bonnitcha, Lauge Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (OUP 2017) 73.

111 Stone (n 69) 13.

112 ibid 15.

113 Abbott and others (n 86) 11.

114 ibid 33.

115 Mark Blyth, *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century* (CUP 2002) 25.

past unsatisfactory experiences – and gain bargaining power at a critical juncture, they may ‘reinterpret or change the rules to their advantage’.[116]

Powerful ideas may take the form, for instance, of draft proposals emerging from diplomatic initiatives or state visits. These have contributed to the emergence of today’s highly concentrated oligopoly of arbitral institutions in mixed arbitration. Prominent examples are the work of Aron Broches for ICSID, Ulf Franke and Howard Holtzmann for the SCC-AI, and Pieter Sanders for the ICC-ICA and the development of the UNCITRAL Arbitration Rules. These individuals are discussed at various points in the thesis.

Dynamic institutional development

A theoretical approach that overemphasizes stability over exogenous shocks may fail to capture the gradual endogenous changes that occur over extended periods. It may also fail to consider the overt and hidden power dynamics surrounding institutions, as well as their status as entities that are constantly contested by actors with diverging interests. To address this conservative bias of first-generation institutionalists, some authors have developed new concepts of gradual and endogenous institutional change.[117] They identify a ‘tendency in the literature to understate the extent of change, or alternatively to code all observed changes as minor adaptive adjustments to altered

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116 Robert Keohane, ‘Observations on the Promise and Pitfalls of Historical Institutionalism in International Relations’ in Orfeo Fioretos (ed), *International Politics and Institutions in Time* (OUP 2017) 327.

117 Streeck and Thelen (n 73) 18-33; John Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars* (New ed, Princeton UP 2019) 161; Capoccia and Kelemen (n 71); Bruce Bueno de Mesquita and Alastair Smith, ‘Political Survival and Endogenous Institutional Change’ (2009) 42 Comparative Political Studies 167, 167-97.

circumstances in the service of continuous reproduction of existing systems',[118] thus foregrounding the transformative nature of gradual change. Rather than conceptualizing institutional change as merely bounded or adaptive, institutions are intricately linked to power.[119]

The definitions of the concept of 'institution' offered by this more recent strand of scholarship differs from those of first-generation institutionalists. Where early accounts often opposed the power of institutions to the concept of individual agency, more recent approaches have focused on how institutions can also be constitutive of 'people's motivations and actions'.[120] Moreover, institutions are distinguished from customs or moral considerations because they are constitutive of behaviour in ways that are formally sanctioned, have obligatory character, and are enforceable.[121] Considering the possibility of gradual institutional change, historical institutionalists have developed a range of topical processes of such change that can be observed in different contexts. The following section sketches out four topical modes of change: displacement, layering, conversion, and drift.

Displacement

The first mode of gradual institutional change is displacement. It occurs where 'traditional arrangements are discredited or pushed to the side in favour of new

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118 Streeck and Thelen (n 73) 1.

119 Mahoney and Thelen (n 88) 9.

120 Ha-Joon Chang, 'Breaking the Mould: An Institutionalist Political Economy Alternative to the Neo-Liberal Theory of the Market and the State' (2002) 26 Cambridge Journal of Economics 539, 556.

121 Streeck and Thelen (n 73) 11.

institutions and associated behavioural logics'.[122] Displacement is often linked to the rediscovery or reactivation of previously available alternatives that have been suppressed.[123] To be successful, displacement must be supported by a 'growing number of actors [that] defect to a new system'.[124] If a new system or institutional design obtains the relevant support, 'previously deviant, aberrant, anachronistic, or "foreign" practices gain salience at the expense of traditional institutional forms and behaviors'.[125]

As a form of gradual institutional change, displacement can be exogenous or endogenous, or a combination. Particularly, where it is caused exogenously, it requires significant efforts by external actors to support an alternative, promote this alternative to dominance over an existing design, and thereby 'move [it] from the periphery of the institutional system to its center'.[126] To be able to promote the adoption of an alternative path, actors must be ready to exercise power and expend resources. While not limited to critical junctures, displacement nevertheless occurs frequently at critical moments in history.

Instances of displacement appear to take place in the context of arbitral institutions. For example, individuals with an interest in expanding the PCA's mandate beyond inter-state disputes to include mixed disputes increasingly referred to the case of *Radio Corporation of America v. China*, which was previously seen as deviant. In this

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[122] ibid 20.

[123] Barrington Moore, *Injustice: The Social Bases of Obedience and Revolt* (ME Sharpe 1978) 376.

[124] Streeck and Thelen (n 73) 20.

[125] ibid.

[126] ibid.

case, a mixed arbitration between a state and a non-state party was for the first time considered to fall within the PCA's mandate. When the 1976 UNCITRAL Arbitration Rules were drafted, the reference to the case may have allowed for a further expansion of the mandate of the PCA Secretary General towards a more prominent role in UNCITRAL proceedings. Today, more arbitrations at the PCA are mixed than inter-state, that is, the type of proceeding that the PCA was originally designed to administer.[127]

Layering

Another topical mode of institutional change is layering. Layering describes a means for actors to promote institutional reform when facing an institution that is characterized by a strong lock-in and increasing returns. It is a process of 'path-altering dynamics through a mechanism of (...) differential growth'.[128] Where it occurs, a different institutional design is usually layered on top of an existing one. At the outset, implementation of the alternative frequently goes unnoticed and limited resources are initially expended in its support. Subsequently, differential growth then promotes the new design and gradually extinguishes support for the original design.

The concept of differential growth implies that, at a certain moment, the proposed alternative will grow stronger than the original. As such, layering is a means of institutional reform that can prevent resistance by powerful actors because it does not involve the rapid and overt dismantling of existing institutional design. Similar to

[127] The role of displacement in the development of mixed arbitration at the PCA will be examined in Chapter Five.

[128] Streeck and Thelen (n 73) 20.

displacement, in order to be successful, layering requires ‘active sponsorship of amendments, additions, or revisions to an existing set of institutions’.[129]

Particularly in intergovernmental arbitral institutions, hegemonic states that have a vested interest in maintaining an existing institution or institutional design may be unwilling to establish a new, separate institution and prefer to create subsidiaries instead. This can lead to multiple fora with overlapping mandates in the same institution. Layering also contributes to entrenchment. As Fioretos notes, ‘[w]ith layering, radical change in major institutions generally gets more difficult over time and shifts in the international balance of power may do little to alter the basic architecture’.[130]

Conversion

Conversion is another mode of gradual institutional change. It describes instances of incremental reform that occur ‘when old designs are redeployed for new purposes’.[131] In these instances, existing rules are reinterpreted to support and serve a new cause or to suit the interest of new and emerging constituencies.[132] Rather than a fully contingent or anonymous process, conversion can be associated with ‘political contestation over what functions and purposes an existing institution should serve’.[133] Those supporting change by conversion may exploit conceptual or emergent gaps in the institutional design.

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129 ibid 24.

130 Orfeo Fioretos, ‘Historical Institutionalism in International Relations’ (2011) 65 International Organization 367, 390.

131 ibid.

132 Giovanni Capoccia, ‘When Do Institutions “Bite”? Historical Institutionalism and the Politics of Institutional Change’ (2016) 49 Comparative Political Studies 1095, 1099.

133 Streeck and Thelen (n 73) 26.

Recent accounts identify several key reasons why gaps in institutional designs emerge and allow for conversion. The agents of institutions are cognitively limited and institutional designs may generate unintended consequences.[134] Unlike rational choice theorists, historical institutionalists do not 'assume an identity between design and effect'.[135] In practice, flaws in institutional designs may become apparent only decades after the institution was established. Moreover, institution building 'typically involves compromise'.[136] The founding conventions of an arbitral institution may, for instance, be negotiated at an intergovernmental convention where certain provisions or functions are framed in a deliberately vague way to allow for compromise. Flaws linked to this ambiguity are not necessarily the result of cognitive limitation but of diplomatic accord.

This does not mean that conversion is not influenced by rationality and self-interest. As Streeck and Thelen note, 'actors are strategic and even those not involved in the design of an institution will do everything in their power to interpret its rules in their own interest'.[137] According to the present research, self-interested actors appear to play a significant role in the context of mixed arbitration. Third-party funders, for instance, may have an interest in interpreting new rules about disclosure restrictively in ways that avoid legal recourse by states. Similarly, where the remuneration of arbitrators is based on the amount in dispute, as in ICA-administered arbitration, arbitrators may have an interest to award higher amounts of compensation.[138]

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134 ibid.

135 ibid.

136 ibid.

137 ibid.

138 Choosing 'commercial' arbitration rules as opposed to rules of intergovernmental arbitral institutions has been observed to be associated with higher amounts of compensation, Beth Simmons,

Drift

Another mode of gradual institutional change is drift. This concept is contrasted with earlier notions of the inherent stability or inertia of institutions. Streeck and Thelen observe that 'institutions do not survive by standing still, nor is their stable reproduction always simply a matter of positive feedback or increasing returns (...). Quite to the contrary institutions require active maintenance'.[139] According to this concept, in order to survive, institutional designs must be actively maintained by constituents or otherwise face gradual erosion.

Similar to other modes of gradual institutional change, drift can be hidden under a facade of stability. Consider the formal existence of the PCA for long periods despite a dearth of administered cases and increased competition from institutions with similar functions, such as the Permanent Court of International Justice or the International Court of Justice. In the early years of ICSID, again no cases were filed, and the institution engaged in active promotion of investment treaties. Accordingly, drift occurs where the surrounding environment of an institution evolves in ways that alter its function or render it outdated. Drift may be deliberate where 'old rules are intentionally not adapted to changing social conditions, with the purpose of gradually changing their effects'.[140] Institutions that have been drifting over time may, therefore, be more susceptible to influence or 'hijacking' by rogue actors.

'Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment' (2014) 66 World Politics 12, 37.

139 Streeck and Thelen (n 73) 27.

140 Capoccia (n 132) 1099.

1.3. Methodology and definitions

While a detailed description of the methodology is provided in Appendix B, this section briefly considers certain definitional and methodological aspects to assist the reader. The section focuses on why the four arbitral institutions were considered, their relevance in a historical institutionalist sense, their status as intergovernmental or non-governmental organizations, and the ordering of their examination in the thesis.

1.3.1. <u>Arbitral institutions are institutions in the historical institutionalist sense</u>

To assess the explanatory value of historical institutionalism for this project, a definitional question must be addressed. To what extent are arbitral institutions 'institutions' in the historical institutionalist sense? Any answer to that question must avoid the pitfall of colloquialism. In colloquial language, the term 'institution' frequently designates organizations or corporate entities. By way of contrast, historical institutionalists often define, as research objects, institutions that would not be considered institutions colloquially. Examples are historical institutionalist scholarship on railroad policy or vocational training.[141]

Streeck and Thelen offer a solution to this problem by observing that 'organizations come to be regarded as institutions to the extent that their existence and operation become in a specific way publicly guaranteed and privileged, by becoming

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[141] Colleen Dunlavy, 'Political Structure, State Policy, and Industrial Change: Early Railroad Policy in the United States and Prussia' in Frank Longstreth, Kathleen Thelen and Sven Steinmo (eds), *Structuring Politics: Historical Institutionalism in Comparative Analysis* (CUP 1992); Kathleen Thelen and Marius Busemeyer, 'Institutional Change in German Vocational Training: From Collectivism Toward Segmentalism' in Marius Busemeyer and Christine Trampusch (eds), *The Political Economy of Collective Skill Formation* (OUP 2011).

backed up by societal norms and the enforcement capacities related to them'.[142] This clarification is useful for the conceptualization of arbitral institutions as institutions *stricto sensu.* Indeed, the existence and operation of arbitral institutions are guaranteed through enforceable rules including domestic and public international law, conventions, and codes of conduct. Arbitral institutions are also privileged insofar as their mandate is exclusive. Only an institution that has been mandated to administer or act as an appointing or designating authority in a proceeding will be able to carry out the function. The present project therefore proceeds on the assumption that arbitral institutions acting in mixed arbitration can usefully be understood as institutions in the historical institutionalist sense.

1.3.2. <u>The choice of institutions and the sequencing of their examination</u>

The objects of interest for this project include all of the arbitral institutions that have been mandated by states, state entities, or state-owned enterprises to administer mixed arbitrations or to act as the appointing or designating authority in such proceedings. It is understood that mandates can be granted in investment treaties, in national investment laws, or in public-private contracts. For greater clarity, this thesis excludes institutions in their capacity to administer domestic forms of mixed arbitration. Although the project focuses on institutions having been granted such mandates, the conclusion will briefly consider further research opportunities on new entrants, which have attempted to enter the mixed arbitration market but with limited success, as well as some normative recommendations.

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[142] Streeck and Thelen (n 73) 12.

The exact number of institutions included in the research population for this project is not precisely known, for at least two reasons. Firstly, the legal instruments granting an institutional mandate may be confidential. Secondly, and particularly in contract-based arbitration, it often cannot be determined what rules apply to mixed arbitration until a case has arisen. However, these uncertainties are not obstacles to the project, but create limitations and impact generalizability. Moreover, the unit of analysis for this project is 'one arbitral institution active in mixed arbitration', as defined above. A sample of four institutions (that is, cases) is selected among all objects of interest. Case selection was information-based rather than random. In theory-building research it is common to use information-based or 'theoretical' rather than random sampling so that cases can 'be chosen to fill theoretical categories and provide examples of polar types'.[143] The four selected institutions are the ICC-ICA, ICSID, the SCC-AI, and the PCA.

The selection of these four institutions as the sample is justified. These institutions have administered or served as appointing or designating authority in nearly all known, treaty-based mixed arbitrations. For this type of proceeding, these institutions make up almost the entire research population. However, it is important to note some degree of uncertainty, stemming from unknown cases and the broad application of UNCITRAL Arbitration Rules, which theoretically allow any institution to serve as appointing authority or administer cases. Yet, according to relevant case databases, institutions other than the selected four have only been involved marginally in treaty-

[143] Kathleen Eisenhardt, 'Building Theories from Case Study Research' (1989) 14 Academy of Management Review 532, 537.

based cases.[144] Furthermore, while these four institutions dominate in treaty-based mixed arbitrations, it is acknowledged that the market is less concentrated in contract-based mixed arbitration, where other institutions like the American Arbitration Association ('AAA') or London Court of International Arbitration ('LCIA') may have a more significant presence.

Treaty-based consent is an attractive type of consent for arbitral institutions as it most frequently leads to participation of the state in its sovereign capacity, is usually open-ended (based on the state's advance consent) and is entrenched by the intergovernmental nature of the treaty. It may also tend to imply higher amounts in dispute and prestige. Investment treaties can deliver to arbitral institutions many cases over a long period. Together with advance consents under a state's own national law, treaty-based advance consent is the category of consent that features most prominently in the ongoing policy discussion about investor-state arbitration.[145]

The text is structured on an institution-by-institution basis. Why are the arbitral institutions considered in the order ICC-ICA, ICSID, SCC-AI, and PCA? This order draws on a range of elements, including the chronology of first-stage consent, second-stage consent (where applicable), and the emergence of cases. These stages can be considered as forms of market entry. For instance, a state gives its first-stage consent to mixed arbitration by ratifying the ICSID Convention. This ratification indicates a

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144 According to the UNCTAD database, out of 1182 administered treaty-based arbitrations, 1088 were administered by either the ICC-ICA, ICSID, the SCC-AI, or the PCA, see UNCTAD (n 17).

145 For an analysis of the policy implications of national investment laws: Jonathan Bonnitcha, Suzy Nikièma and Taylor St John, 'Rethinking National Investment Laws' (International Institute for Sustainable Development 2023) <https://www.iisd.org/system/files/2023-07/rethinking-national-investment-laws-en.pdf> accessed 31 July 2023.

general willingness to use ICSID for dispute resolution and enforce ICSID awards. Without this ratification, a state cannot use ICSID's services, making it a prerequisite for ICSID's involvement in the mixed arbitration market.[146]

However, ratification alone does not constitute state consent to arbitrate specific cases. Before ICSID can admit a case, the state must give additional consent – the 'second-stage consent'. This can be included in legal instruments, sometimes as 'advance consent' in investment treaties or national investment laws, or as 'simultaneous consent' in a public-private contract. At this stage, ICSID also competes with other institutions to be mentioned in these instruments. Therefore, having second-stage consent is another requirement for ICSID to handle a case. Even then, the legal instrument may not necessarily lead to disputes, or if disputes do arise, they might be referred to other institutions mentioned in the same instrument. ICSID thus also competes with other arbitral institutions for actual cases filed.

The situation is slightly different for the other institutions covered in this thesis and the ICSID Additional Facility. Neither the intergovernmental PCA nor ICC-ICA or SCC-AI usually require two stages of state consent. Despite the PCA's intergovernmental status, ratification of the Hague Conventions by the home or host state is usually not a prerequisite for the PCA to administer a mixed arbitration. Once a state has agreed to arbitration at one of these institutions, a case can usually be initiated. Therefore, for these other institutions, market entry is achieved either, when they are mentioned in a legal instrument or when an actual case has been filed.

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[146] With the exception of proceedings at the ICSID Additional Facility.

However, these elements are not exhaustive or applied orthodoxically. Other factors have also been considered. Firstly, the emergence of administered forms of mixed arbitration appears to have taken place on the basis of a diffusion of contract-based consents prior to the diffusion of treaty-based consents. Mixed arbitrations before the creation of ICSID in 1966 were mostly contract-based. The ICC-ICA appears to have been the first institution to have received a request for international mixed arbitration, in 1922, and the first to have acted as an appointing authority in a mixed case in 1928.[147] It was also the first to have developed a relatively consistent case administration practice before ICSID. Further, the ICC-ICA was also a prominent forum for policy discussions among mixed arbitration experts in the post-war era. In many ways, the ICC-ICA prepared the field for ICSID.

While the PCA was the first institution to be established and the second to administer a mixed arbitration, in 1934, its original profile was one of inter-state arbitration. The PCA also lay dormant from 1940 to 1988, administering only one additional mixed arbitration in this 48-year period.[148] Besides theoretical contributions, its officials do not appear to have played an active role in brokering state consent to mixed arbitration. More than any other arbitral institution, its success appears down to external factors, most notably the adoption and diffusion of the 1976 UNCITRAL Arbitration Rules. Since the PCA experienced a robust caseload only in and after the 1990s, it is the last institution to be considered here.

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147 ICC Commission on International Commercial Arbitration, 'International Commercial Arbitration Between States and Individuals: Memorandum by the Secretariat' (31 October 1958) ICC Doc No 420/91, 2, I thank Jérôme Sgard for sharing this document with me; Claire Lemercier and Jérôme Sgard, *Arbitrage privé international et globalisation(s)* (Rapport de Recherche, Mission de Recherche Droit et Justice, Editions CNRS 2015) 91.

148 This excludes the appointing authority and registry roles of the PCA in the Iran-US Claims Tribunal.

Instead, the second institution considered in this thesis is ICSID. It is by far the dominant institution in the institutional oligopoly of treaty-based mixed arbitration. The entry into force of its founding Convention in 1966 was itself the most momentous event in the emergence of mixed arbitration. Although cases where slow to emerge at ICSID, and the institution initially competed with others and most notably the ICC-ICA, ICSID was the second institution to achieve a relatively consistent mixed arbitration caseload. Also, ICSID officials and associated experts long sought to convince states of the institution's benefits. In addition, the interaction among World Bank and ICC-ICA officials warrants special consideration.

The third institution to be considered is the SCC-AI. This institution emerged slowly onto the mixed arbitration scene in the 1970s, with a strong focus on arbitration across the East-West divide. The SCC-AI appears to have benefitted most prominently from the quasi-diplomatic outreach of its own and allied, Soviet, Chinese, and American arbitration experts during that time. In significant part, its Cold War success seems related to the contemporary adoption of the 1976 UNCITRAL Arbitration Rules, which served as a basis for the 1977 *Optional Clause for Use in USA-USSR Trade* ('Optional Clause'). Based on publicly available information, the SCC-AI appears to have started administering mixed arbitrations later than the ICC-ICA and ICSID.[149] For these reasons, the SCC-AI is the third institution considered.

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[149] A comprehensive database of cases at the SCC-AI in the period 1930-1990 is not available. However, both ICSID and the ICC-ICA started to administer mixed arbitration cases prior to the signing of the 1977 Optional Clause for Use in US-USSR Trade and the first legal instruments signed by the PRC referencing the SCC-AI. These instances likely marked the entry of the SCC-AI in the mixed arbitration market.

The following structure is adopted. Chapter Two investigates the pioneering role of the International Chamber of Commerce and its International Court of Arbitration in the evolution of mixed arbitration. Chapter Three explores the emergence and now dominant position of ICSID in institutional mixed arbitration. Chapter Four examines how the Stockholm Chamber of Commerce Arbitration Institute came to occupy a specific niche in mixed arbitrations of East-West disputes. Chapter Five investigates the role of the Permanent Court of Arbitration as an institution that lay dormant for decades before a late ascension to become one of the most active institutional centres for mixed arbitration. Each chapter will also provide an overlook of the current framework, diffusion of state consent, and mixed arbitration caseload of the institutions. The Conclusion then synthesizes the findings and discusses the roles of the considered institutions in today's oligopoly in mixed arbitration. It also gives a brief outlook for further possible research, particularly on the barriers to entry that new institutions face.

Chapter Two

The International Court of Arbitration of the International Chamber of Commerce

[I]t is evident that, at present, while states so often conclude commercial contracts with foreign private companies, it would be extremely useful to have an Arbitration Court created by the states themselves under an international convention, like the Permanent Court of Arbitration in the Hague, to which each state could refer for the resolution of commercial disputes, even significant ones, between them and individuals.[150]

– Algot Bagge, President of the International Court of Arbitration of the ICC (1946)

2.1. Introduction

The International Chamber of Commerce ('ICC') is an international business organization seated in Paris representing the interests of private enterprise at a global scale. It was established in 1919 in the wake of the First World War, upon the initiative of a group of businessmen of the Allied states. It was their intention to rekindle 'the privately operated peacetime machinery of world industry and commerce' as opposed to

[150] ICC, 'Conférence sur l'arbitrage commercial international : Compte rendu des séances destiné aux membres de la conférence' (13 June 1946) 7, translated by the author, original: '*[I]l est évident qu'actuellement, alors que les États concluent si souvent des contrats commerciaux avec les entreprises privées étrangères, il serait extrêmement utile d'avoir une Cour d'Arbitrage créée par les États eux-mêmes aux termes d'une convention internationale, comme la Cour Permanente d'Arbitrage de la Haye, à laquelle chaque État pourrait s'en remettre pour juger des controverses commerciales, même importantes, entre eux et des particuliers*'. This document is on file with the author, and I thank Mikaël Schinazi for sharing this document with me.

a wartime economy marked by nationalisation and state control.[151] The founders of the ICC considered trade liberalization to be an antidote to war and envisaged to use the organization to 'collaborate and discuss ideas, like nation-states in the League [of Nations], in an established, regularly scheduled forum'.[152] In many respects, the organization copied the intergovernmental forum of the League, filling an important institutional gap, as no equivalent organization promoting trade and representing business interests at global level existed at the time. The 'Merchants of Peace', as the founders of the ICC called themselves, gave the organization its motto: 'world peace through world trade'.[153]

From its inception, the ICC fostered and maintained a special relationship with sovereign states. By 1921, ICC National Committees had been established in twelve states, allowing the ICC to recruit companies as members in these states and reaching out to state officials.[154] These states were Austria, Belgium, Czecho-Slovakia, Denmark, France, Great Britain, Italy, Luxemburg, the Netherlands, Poland, Sweden, and the United States.[155] At the time, especially private-sector entities investing in Belgium, France, Great Britain, Italy, and the Netherlands may have been interested in protecting foreign ownership in colonies. The United States, while not a colonial power in the European sense, also had significant territorial possessions.

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[151] George Ridgeway, *Merchants of Peace: The History of the International Chamber of Commerce* (Little, Brown and Company 1959) 30.

[152] Shane Tomashot, 'Selling Peace: The History of the International Chamber of Commerce, 1919 - 1925' (PhD thesis, Georgia State University 2015) 3.

[153] Dominic Kelly, 'The International Chamber of Commerce' (2005) 10 New Political Economy 259, 261.

[154] Tomashot (n 152) 60.

[155] ibid.

The ICC also obtained a privileged status as a consultant to the League of Nations in the 1920s.[156] Predating most international economic institutions, it represented global business at the 1944 Bretton Woods Conference and was the only private-sector organization to be granted accreditation at the 1945 United Nations Conference on International Organization.[157] Today, the ICC has official observer status at the United Nations General Assembly and engages in a range of activities that include dispute resolution, business advocacy, standard setting, as well as government relations and lobbying.[158] The ICC is registered in France as a 'non-profit' organization under French law. It has established several international subsidiaries, including for-profits in the United States, Brazil, and Singapore.[159]

The International Court of Arbitration ('ICA'), ICC's international arbitral institution, was inaugurated in 1923 as a subsidiary without separate legal personality.[160] Like other arbitral institutions, the ICA is not a court in the conventional sense as it does not

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[156] ibid 3.

[157] ICC, 'ICC and the UN: A Partnership for People, Planet and Prosperity' (24 October 2016) <https://iccwbo.org/news-publications/news/icc-and-the-un-a-partnership-for-people-planet-and-prosperity/> accessed 30 September 2023.

[158] ICC, 'ICC Granted UN Observer Status' (13 December 2016) <https://iccwbo.org/news-publications/news/un-general-assembly-grants-observer-status-international-chamber-commerce-historic-decision/> accessed 31 July 2023; ICC, 'Business Solutions' <https://iccwbo.org/business-solutions/> accessed 31 July 2023.

[159] 'ICC Services (PARIS 16) Chiffre d'affaires, résultat, bilans sur societe.com - 313975237' <https://www.societe.com/societe/icc-services-313975237.html> accessed 15 September 2023; 'SICANA, INC - A Business Based in United States of America (USA) Registered with State of Delaware Division of Corporations' <www.datalog.co.uk/browse/detail.php/CompanyNumber/USDE5027055/CompanyName/SICANA%2C+INC> accessed 15 September 2023; 'SICAS (53380597W)' <https://www.companies.sg/business/53380597W/SICAS> accessed 15 September 2023; 'Secretaria Da Corte Internacional De Arbitragem Brasil - Sciab Ltda, CNPJ de São Paulo / SP' (*Consultas Plus*) <https://consultas.plus/lista-de-empresas/sao-paulo/sao-paulo/28002218000102-secretaria-da-corte-internacional-de-arbitragem-brasil-sciab-ltda/> accessed 15 September 2023.

[160] Letter from Joost van Hamel to the Secretary-General' (22 January 1923) UNAG R395/10/25844/25542.

adjudicate but rather administers arbitral proceedings. As of 1 July 2021, the ICA consists of 177 regular members from 118 different states, 17 Vice Presidents and a President.[161] The functions of the ICA include registering and notifying requests for arbitration,[162] assisting with the constitution of arbitral tribunals,[163] deciding challenges to arbitrators,[164] scrutinizing arbitral awards,[165] and managing procedural finances, including the remuneration of arbitrators.[166] In its work, the ICA is assisted by a permanent secretariat consisting of several case management teams that carry out the day-to-day administration of ongoing proceedings and suggest decisions to be taken by the ICA.[167] The ICA's authority, or 'jurisdiction', to administer a specific arbitral proceeding is rooted in the consent of the parties to a dispute. In practice, such consent may be given in various legal instruments including contracts, national laws, and intergovernmental treaties, or manifested in a *compromis*.[168]

According to its statutes contained in the ICC Arbitration Rules ('Rules'), the ICA is declared to be independent from its parent organization. Specifically, Article 1(2) (Appendix I) of the 2021 version of the Rules asserts that as 'an autonomous body, [ICA] carries out [its] functions in complete independence from ICC and its organs'.

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161 'Court Members (List Effective as of 1 July 2021)' (*ICC*, 2021) <https://iccwbo.org/dispute-resolution/dispute-resolution-services/icc-international-court-of-arbitration/court-members/> accessed 31 July 2023.

162 '2021 ICC Arbitration Rules', art 4(1).

163 ibid art 12.

164 ibid art 14.

165 ibid art 34.

166 ibid art 37.

167 ibid app II, art 6.

168 A *compromis* is an agreement to arbitrate a dispute which is concluded after the dispute has arisen. It is usually contained in a separate, formal agreement specifically drafted to address how the dispute will be arbitrated, detailing the terms under which the arbitration will proceed, such as the applicable procedural rules, the number and method of selecting arbitrators, etc.

Additionally, Article 1(3) Appendix I clarifies that the Court's members 'are independent from the ICC National Committees and Groups'. However, the ICA does not exist in an institutional void; it constitutes an organ within the larger structure of the ICC. This is a feature shared with other institutions like the SCC-AI and ICSID, both of which are subsidiaries of larger parent organizations.

Founded as a subsidiary of ICC in 1923, the ICA's legal basis lies in private rather than public international law. Appendix I of the 2021 ICC Arbitration Rules resembles a constitutional document, *inter alia* defining the Court's function, composition, and role in the modification of the ICC Arbitration Rules. The ICA is a permanent subsidiary of the ICC with a longstanding history. The fact that its constitutional rules[169] and internal rules of procedure[170] are contained in the ICC Arbitration Rules, the application of which is subject to consent by the disputing parties, raises a range of questions. By consenting to mixed arbitration according to the ICC Arbitration Rules, do states formally vest the ICA, a non-governmental institution, with the power to amend the procedural rules that eventually bind them? What is the legal status of the ICA, an institutional body surviving single arbitral proceedings, with weekly and monthly meetings, specialized committees and commissions, and several different procedural functions? Further research could shed light on this status of the ICA as a permanent international institution mandated by states but lacking a permanent legal status.

169 '2021 ICC Arbitration Rules' (n 162) app I.

170 ibid app II.

2.2. The pioneering role of the ICC-ICA

The ICC was founded in the wake of the First World War. The world was marked by economic and geopolitical adversity and the colonial dominance of Western powers. The founders of the ICC, a group of businessmen, bankers, and industrialists, saw inter-state competition as a key obstacle to increasingly globalised business structures. Rooted in the traditions of economic liberalism and internationalist tendencies of the late 19th and early 20th century, this group considered an interconnected global economic system of nation-states to be a guarantor for peace.[171] In their account, war was a consequence of inter-state competition fuelled in part by the unequal distribution of natural resources.[172] The solution would be 'equalized' access to markets and commodities. At its first congress in 1921, the ICC thus declared the intention to end

> rivalries between nations in their search for raw materials, to stamp out the cause of economic conflicts which may threaten peace, to do away with the natural inequality arising from the fact that the riches of the world are unequally spread over its surface, and to assure the rapid restoration of the world's commerce.[173]

Arbitration was seen as crucial for this mission. The founders believed that through arbitration, the ICC could provide an efficient legal procedure. This procedure aimed to standardize international law, allow for the enforcement of awards irrespective of national borders, and balance the needs of increasingly internationalised enterprises

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171 Tomashot (n 152) 92.

172 ICC, *Proceedings of the First Congress: London, June 27 - July 1, 1921* (ICC Brochure N° 18, 1921) 13.

173 ibid; the establishment of the ICC appears to be directly linked to extractive industries, which have also been shown to have played a major role in the development of international investment law: Batselé (n 65).

with the persistence of the nation state.[174] Roberto Pozzi, the Italian delegate to the Second ICC Congress and later a member of the ICA Standing Committee, articulated this vision:

> This universal wish to establish an efficient legal procedure by which penalties might be enforced irrespective of national barriers, is at the very basis of the science of law. Law alone can make it really possible to develop international relations by basing them on the mutual protection of legitimate interests which is one of, if not the only, means of ensuring peace.[175]

Rather than just providing an administrative service, facilitating arbitration was more about influencing nation-states. As Tomashot observes, 'Pozzi suggested that international laws, conceived by non-governmental organizations such as the ICC, were influencing nation-state laws rather than the other way around'.[176] Pozzi's insight already anticipated the ICC setting international standards, as illustrated by state-consent to arbitration at the ICA and by the ICC Commission on Arbitration's involvement in modifying the ICC Arbitration Rules.

In the field of international arbitration, this called for the birth of a new kind of professional: the institutional arbitration expert. The establishment of the ICA in 1923 also signified a broader shift of individual power dynamics within the nascent arbitration market. Historically, trade bodies and guilds handled the arbitration of commercial disputes, and diplomats and state officials settled inter-state disputes. But the ICA's inception caused 'merchants and statesmen to become less important than technicians

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174 Tomashot (n 152) 98.

175 ICC, *Proceedings of the Third Congress: Brussels, June 21 - 27, 1925* (ICC Brochure N° 43, 1925) 49.

176 Tomashot (n 152) 109.

and the members of those [arbitral] institutions'.[177] These emerging experts would have privileged access to insider knowledge about institutional practices and benefit from influential professional networks. Schinazi describes these experts as the 'true members of the mercatocracy, who sought to consolidate the arbitration system by creating legal rules and methods'.[178] Their growing influence was a prerequisite for later moments of individual agency in the development of the institutional oligopoly of mixed arbitration.

The ICC took steps to establish an arbitration mechanism almost immediately after its inception, demonstrating the paramount importance it placed on dispute resolution from the very beginning. The ICC's Constitution of 1920 already alluded to the arbitration of contract-based disputes.[179] In 1921 and 1922, an ICC Committee formulated dedicated *Rules of Conciliation (Good Offices) and Arbitration*, which the ICC Council approved in July 1922.[180] These Rules proposed the creation of an 'Arbitration Court', which was set up in the same year and inaugurated in January 1923 under the leadership of then-ICC President Etienne Clémentel.[181]

Clémentel had held several high-ranking governmental positions in France and lobbied for state recognition of arbitration clauses.[182] For the inauguration, he invited James Salter, the Director of the Economic and Financial Section of the League of

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177 Schinazi (n 99) 32.

178 ibid.

179 ICC, *Organization Meeting of the International Chamber of Commerce: Proceedings Organization Meeting, June 23-30, 1920* (ICC Headquarters 1920) 204.

180 ICC, 'Rome Congress: Report of the General Secretary, ICC Headquarters, Paris' (1923) UNAG R389/10/27466/24789, 10.

181 ibid.

182 Lemercier and Sgard (n 147) 12 and 72.

Nations.[183] However, an internal advisor suggested that Salter decline, thinking it 'better that nobody should go from the Economic Section' and that Salter's 'presence might perhaps be used by the Secretariat of the International Chamber of Commerce for propaganda purposes'.[184] Instead, Joost van Hamel, then-director of the legal section of the League, was to attend the inauguration and represent the League's 'Secretariat as a whole'.[185] The event was also attended by the French president, and ambassadors of 30 countries received invitations.[186]

At the event, Clémentel described the Court in terms that evoked similarities to the Permanent Court of Arbitration, a pioneering intergovernmental arbitral institution established 24 years earlier. He emphasized that 'the Court of Arbitration of the ICC is not a Court which judges: it is the organization which appoints the arbitrators and directs the procedure of the disputes under consideration'.[187] Apparently addressing van Hamel and the League of Nations, Clémentel acknowledged the existence of other intergovernmental bodies mandated to facilitate arbitration.[188] He even felt compelled to highlight that the ICC 'does not wish to compete with these existing organizations, it merely wishes to complete their work by extending it as much as possible'.[189]

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183 Letter from Etienne Clémentel to Sir James Arthur Salter (6 January 1923) UNAG S141/91/28.

184 Letter from Frank H Nixon to Sir Arthur Salter (15 January 1923) UNAG S141/91/28.

185 Madeleine Herren, '"Dr Joost Adriaan van Hamel", LONSEA: League of Nations Search Engine' (*a database developed by the Projects A3 and A13, Cluster of Excellence "Asia and Europe in a Global Context", Heidelberg University, 2010–2016, since 2017 continued by the Institute for European Global Studies, University of Basel (Project Leader: Prof Dr Madeleine Herren)*) <www.lonsea.de/pub/person/5355> accessed 31 July 2023; Letter from Frank H Nixon to Sir Arthur Salter (n 184).

186 Letter from Etienne Clémentel to Sir James Arthur Salter (n 183).

187 Schinazi (n 99) 114.

188 ibid.

189 ibid 115.

The market for institutional arbitration, particularly for mixed arbitration, was still nascent. Recognizing the risk of state resistance against what was in essence a private competitor to state-led institutions, the ICC approached matters with caution and diplomacy. The capacity to build relationships with states and their officials, and to navigate their concerns emerged as a crucial competency for institutional advocates of mixed arbitration. This delicate balancing act involved a nuanced understanding of both state and private-sector dynamics.

For arbitration to function effectively outside states' judicial systems, it required recognition and enforcement by state judiciaries, even as it also undermined or displaced those judiciaries. The ICC lobbied states and the League of Nations from the early 1920s for such support, but initially the League was reluctant. Van Hamel recognized the strong interest of the private-sector in the newly created Court and understood what the ICC and its business constituents were seeking from the League. Reporting back to the League's Secretariat after the inauguration, he observed:

> What business circles seem to expect from the League, particularly from its Economic Committee is that it will pave the way for international arrangements by which the arbitration clause in international commercial contracts will find easier recognition in all countries. (...) My personal opinion is, that the proposals for such an international arrangement will meet with several and various difficulties before they can be realised and before they obtain the consent of Governments. The matter is very delicate and complicated.[190]

Van Hamel's observations anticipated a major challenge for arbitral institutions entering the market of mixed arbitration in the coming decades: gaining the trust of states. Even as the private sector demonstrated enthusiasm towards the establishment

[190] Letter from Joost van Hamel to the Secretary-General (n 160).

of an international arbitration court, governmental backing remained pivotal. Such support was indispensable for the recognition of arbitration agreements, and the recognition and enforcement of arbitral awards. For van Hamel, this support remained absent.

Even before the ICA's inauguration, businesses were already exploring the ICC's existing arbitration mechanism. In 1922, ICC Secretary General Édouard Dolléans received what was likely one of the institution's first requests for arbitration. A private company sought arbitration complaining 'of the action taken by a European State during the First World War in connection with the supply of corn to the Allies from a Balkan country'.[191] Dolléans, considering the admissibility of the claim, recognized a distinction between administrative and sovereign acts of states. In his view, the case 'involved an administrative act by a State and not one carried out in the exercise of its sovereignty: accordingly it would seem that the ICC can entertain the request'.[192] In a first, a private-sector arbitral institution confidently assumed authority to determine the admissibility of an international arbitration against a sovereign state. The outcome of this case, however, remains uncertain.

Interest in arbitration involving states or their entities grew and generated caseload at the ICA in the 1920s and 1930s. A year after the Court's inauguration the French company *Schneider et Cie* inquired whether the ICA would be willing to administer an

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191 ICC Commission on International Commercial Arbitration, 'International Commercial Arbitration Between States and Individuals: Memorandum by the Secretariat' (n 147) 2.

192 ibid.

arbitration against the Ottoman government.[193] Dolléans confirmed.[194] In 1928, the ICA acted as an appointing authority in an arbitration between the French government and German companies in a dispute related to the implementation of the Dawes Plan.[195] A similar claim was brought ten years later in 1938 in relation to a public tender for the construction of the port of Dunkerque.[196] In 1936, the UK National Committee of the ICC recommended that the ICC explore arbitration involving Soviet state-owned enterprises.[197] This initiative ultimately failed due to the lack of recognition of ICC arbitration clauses by the Soviet Union. Yet it illustrated a growing challenge that arbitral institutions and their associated experts would try to overcome in the coming decades: the facilitation of East-West arbitration.

The ICC pioneered institutional mixed arbitration in the inter-war period, preceding other institutions. The first mixed arbitration at the PCA, *Radio Corporation of America v. China*, was filed in 1934, 12 years later than the first case at the ICA. By 1934 and decades before the creation of ICSID, the ICC had already established itself on the emergent mixed arbitration market. Yet, its focus remained European, and cases were still infrequent.[198] The ICC's early involvement in mixed arbitration may be linked to its close ties with business circles, the priority given to allied powers in its internal

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193 ICC Archives, International Court of Arbitration, Document 26, 15th session of the Executive Committee, 8 September 1924, cited in Lemercier and Sgard (n 147) 91.

194 ibid.

195 ICC Archives, International Court of Arbitration, 48th and 49th sessions of the Executive Committee, 14 November and 17 December 1928, cited in ibid 92.

196 134th session of the Court, 29 June 1938, cited in ibid.

197 ICC Archives, Comité d'études de l'arbitrage, especially Document 9, 5th session, 17 March 1930 and Document 21, 52nd session of the Council of the ICC, 26 June 1936, International Court of Arbitration, Document 6, 116th session of the Court, 11 March 1936, all cited in ibid 91.

198 ibid 28 and 92.

organisation,[199] and its location in France. At least two of the mixed arbitrations filed before 1940 were linked to the First World War or Germany's subsequent reparations.[200]

Not all early mixed cases were filed by private entities; two cases before 1940 were filed by the French government against foreign companies.[201] Despite the low mixed arbitration caseload, the ICC soon associated arbitration and the protection of foreign-owned property. For instance, a 1931 ICC Resolution encouraged states to conclude international investment protection conventions, enforceable by arbitration.[202] In parallel to mixed arbitration, the ICA had become dominant in the market of international commercial arbitration between private disputing parties by 1936.[203] The competitor AAA acknowledged this dominance, evidenced by the publication of a joint ICA-AAA arbitration clause.[204]

Similar to the experience of other arbitral institutions at the time, the ICA caseload decreased during the Second World War.[205] From 1940 to 1943, due to the German occupation of Paris, the ICA relocated temporarily to Stockholm. During this time, Swedish Supreme Court Justice Algot Bagge presided over the Court. Bagge played a

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199 Tomashot (n 152) 91.

200 Lemercier and Sgard (n 147) 92.

201 ibid 91.

202 A document of the Cologne Society to Advance the Protection of Foreign Investments, points to this resolution 'International Convention for the Mutual Protection of Private Property Rights in Foreign Countries: Draft Presented by the Gesellschaft zur Förderung des Schutzes von Auslandsinvestitionen eV Köln (Society to Advance the Protection of Foreign Investments)' (November 1957) UK T 236/5429. I thank Taylor St John for sharing this document with me.

203 Lemercier and Sgard (n 147) 28.

204 ICC Archives, Comité d'études de l'arbitrage, Document 40, Plan de coopération avec l'AAA, 29 December 1938, Documents 41 and 60, 15th session of the Comité d'études, 16 February 1939, cited and also argued in ibid 28.

205 ibid 92.

significant role in shaping the concept of administered mixed arbitration in subsequent years.[206] However, details about the ICA's involvement in mixed arbitrations during this relocation are sparse. The fact that both the ICA and the SCC-AI were located in the same city invites the question of collaboration between the two institutions. Further research, particularly in Swedish archives, could attempt to address this question.[207] Yet, the SCC-AI likely had a predominantly domestic arbitration caseload at this time, and the work of the two institutions remained substantially different.[208]

2.2.1. Post-war efforts to advocate for state recognition of mixed arbitration

The ICC's interest in mixed arbitration resurfaced immediately after the war. With the war's end, states increased investments to stimulate economic recovery. The onset of the Cold War marked heightened East-West tensions. At the same time, a growing number of state-owned and state-controlled entities of socialist states participated in global commerce, even as East-West trade remained limited. These factors, together with the beginning decolonization, increased the risk of mixed disputes, a fact that the ICC recognized swiftly.

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206 Sigvard Jarvin, 'The Move to Stockholm of the Court of Arbitration of the International Chamber of Commerce (ICC) During the Second World War' (2017) 63 Scandinavian Studies in Law 115, 119-20.

207 Some of these archives appear to have been sighted by Sigvard Jarvin, but still remain to be analysed with a specific focus on mixed arbitration, Lemercier and Sgard (n 147) 170.

208 According to Sven Swarting, '[i]n the beginning the Institute mainly dealt with domestic arbitration', Sven Swarting, 'Welcoming Address: Dr Mr [sic!] Sven Swarting, President Stockholm Chamber of Commerce' in ICCA (ed), *ICCA Congress Series No 5 (Stockholm 1990): Preventing Delay and Disruption of Arbitration / Effective Proceedings in Construction Cases* (Kluwer Law International 1990) 2.

In 1945, a report titled *Encouragement and Protection of International Investment* was presented by the ICC's British National Committee on behalf of the ICC Council.[209] This report, prepared by 'a small international group' made 'a very strong recommendation that a Code subject to arbitration should be set up' and 'recommended an International Tribunal to settle disputes arising under the Code'.[210] However, the ICC's early post-war proposals about the protection of foreign-owned property and investment did not clearly define whether such arbitrations should be mixed or inter-state. While there was a growing recognition of arbitration for resolving international disputes, the ICC maintained a cautious approach in its official policy recommendations. It remained strategically vague on procedural details.

Within the institution, however, experts expressed themselves more candidly. In 1946, the ICC held its first post-war congress in Paris dedicated in part to mixed arbitration.[211] The event brought together international experts, including Frances Kellor from the American Arbitration Association, Algot Bagge the then-president of the ICA, Pieter Sanders the then-Secretary of the Dutch Prime Minister, and Dimitri Ramsaizev, representing the USSR Chamber of Commerce Arbitration Commission.[212] The participants overwhelmingly agreed on the value of international arbitration between private and public entities. Bagge, who presided over the congress, asserted in his opening remarks that 'it would be extremely useful to have an Arbitration Court (…) to

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209 Michael Heilperin (ed), *Foreign Investment and Economic Expansion: Resolution Approved by the ICC's Executive Committee on April 1947 and Report of the ICC's Committee on Foreign Investments* (ICC Brochure N° 107, 1947) 18.

210 ibid.

211 ICC, 'Conférence sur l'arbitrage commercial international : Compte rendu des séances destiné aux membres de la conférence' (n 150) 1.

212 ibid 4.

which each state could refer for the resolution of commercial disputes, even significant ones, between them and individuals'.[213] Ramsaizev observed that the states, likely including the USSR, were concluding a growing number of commercial contracts with foreign enterprises, a development, he thought, would favour the growth of mixed arbitration.[214] He also saw mixed arbitration as a logical consequence of the emerging practice of private commercial arbitration.[215] Besides Bagge and Ramsaizev, other participants also expressed support for the institutionalization of mixed arbitration.[216]

Despite this general consensus, the precise institutional framework for mixed arbitration remained controversial at the congress. Bagge seemed to prefer the PCA.[217] He knew the Hague institution was willing to administer mixed arbitrations and cited a 1939 agreement between the AAA and the PCA to demonstrate this point. This agreement contained a model clause for mixed arbitration at the PCA and allowed the AAA to promote use of the clause among American businesses.[218] Ramsaizev took a different view. Apparently unaware of, or unwilling to mention, the PCA's readiness to administer mixed arbitrations, he thought the PCA's mandate was limited to inter-state

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213 ibid 7, translated by the author, original: '*[e]n vertu des conventions existantes, la Cour Permanente d'Arbitrage ne peut actuellement juger que des controverses entre États. Cependant, il est évident qu'actuellement, alors que les États concluent si souvent des contrats commerciaux avec des entreprises privées étrangères, il serait extrêmement utile d'avoir une Cour d'Arbitrage créée par les États eux-mêmes aux termes d'une convention internationale, comme la Cour Permanente d'Arbitrage de La Haye, à laquelle chaque État pourrait se remettre pour juger des controverses commerciales, même importantes, entre eux et des particuliers*'.

214 ibid 27.

215 ibid.

216 This includes Archie Dawson from the AAA, J G Allanby from the LCIA, and implicitly Sanders, ibid 30.

217 Algot Bagge cited in ICC Commission on International Commercial Arbitration, 'International Commercial Arbitration Between States and Individuals: Memorandum by the Secretariat' (n 147) 5.

218 A year later, at the end of his ICA presidency, Bagge was appointed Swedish member of the Permanent Court of Arbitration, Sture Petrén, 'Algot Bagge' [1971] Svensk Juristtidning 599.

arbitration and that it was therefore ill-suited for mixed arbitration.[219] In his view, a new intergovernmental convention was required to adapt the PCA to administer mixed disputes.[220] More generally, he considered the subject-matter of government contracts too varied to allow for arbitration at a single international organization.[221] Instead, he suggested disputing parties should choose a competent authority among existing commercial arbitral institutions on a case-by-case basis.[222]

Ramsaizev's rejection of a single international organization was carefully noted by the Western arbitration experts attending the congress. A 1958 memorandum of the ICC Secretariat commented in retrospect on Ramsaizev's view. According to the memorandum, Ramsaizev feared 'a monopolisation of "mixed" disputes by the Permanent Court'.[223] The memorandum also noted:

> The representatives of the different systems of arbitration taking part in this [1946] Conference seemed to feel that it was not practicable, or even desirable, to concentrate the settlement of such disputes in the hands of a single international arbitration body, but that there was no objection 'to existing organizations whose aim is to deal with disputes arising out of international trade – being called on to settle these disputes'.[224]

The view expressed by Ramsaizev would remain typical of the Soviet approach to mixed arbitration until the early 1970s. This approach favoured bilateral appointment mechanisms and the *ad hoc* designation of an administering institution in the

[219] ICC, 'Conférence sur l'arbitrage commercial international : Compte rendu des séances destiné aux membres de la conférence' (n 150) 28.

[220] ibid 29.

[221] ibid 28.

[222] ibid.

[223] ICC Commission on International Commercial Arbitration, 'International Commercial Arbitration Between States and Individuals: Memorandum by the Secretariat' (n 147) 5.

[224] Algot Bagge cited in ibid 5.

respondent's state. Soviet reluctance to agree to arbitration at a centralized international organization – especially if located in Western nations – remained an ongoing challenge for institutional officials in those nations.

The exchanges in 1946 were a form of quasi-official diplomacy between the USSR and Western representatives. Yet, the congress was not an intergovernmental meeting and participants did not officially represent states.[225] Ramsaizev expressly emphasised this fact, recalling that his organization represented 'Private Associations' and was therefore unauthorized to communicate an official position.[226] But this did not stop Western participants from using the congress as a platform to obtain information about Soviet state policy.

Western participants were especially keen to understand Soviet reservations about standardized language. Pieter Sanders, for instance, asked Ramsaizev whether he thought the *ad hoc* designation of administering institutions favoured by the USSR was compatible with the idea of formulating standardized international arbitration rules and a model arbitration clause for mixed arbitration.[227] Ramsaizev rejected such a standardized approach.[228] Moreover, Frances Kellor, representing the AAA, sought to understand why Soviet entities hesitated to agree to mixed arbitration at a centralized arbitral institution. Ramsaizev replied that the creation of such an organization was both

[225] Van Vechten Veeder, 'Lessons for the Future from the Past: Individual Hedgehogs and Institutional Foxes (Tenth Kaplan Lecture, 23 November 2016)' in HKIAC (ed), *International Arbitration: Issues, Perspectives and Practice. Liber Amicorum Neil Kaplan* (Kluwer Law International 2019) 238-39.

[226] ICC, 'Conférence sur l'arbitrage commercial international : Compte rendu des séances destiné aux membres de la conférence' (n 150) 29.

[227] ibid 29.

[228] ibid.

‘undesirable and unsatisfactory’.[229] While he did not mention political motives, he stressed that *ad hoc* arbitration offered better chances for amicable settlements and voiced concerns over unnecessary ‘[b]ureaucratic machinery’.[230]

The participants were also interested in the apparent preference of the USSR for arbitration to be seated in the defendant’s state. Kellor, for instance, inquired whether this was official Soviet policy and whether the USSR would be willing to accept a model clause respecting this approach.[231] Unwilling to provide an authoritative answer, Ramsaizev instead mentioned a separate ‘exchange of views in Washington on this particular point where the American Arbitration Association [had] made definitive proposals’.[232] According to Ramsaizev, the proposal the AAA had made at this separate meeting created ‘a new problem’ requiring ‘careful consideration’.[233] While the content of the proposal remains unclear, he reassured Kellor that the AAA might receive an answer ‘[a]fter careful consideration in Moscow’.[234]

Another AAA representative, Archie Dawson, was interested to know to what extent Ramsaizev, and the organization he represented, could act as a diplomatic backchannel to facilitate East-West arbitration. He asked whether Ramsaizev’s organization was ‘authorized to agree on a form of arbitration that Americans can use should disputes arise’.[235] Ramsaizev replied that

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229 ibid.
230 ibid.
231 ibid.
232 ibid 30.
233 ibid.
234 ibid.
235 ibid 32.

> [t]here is a fundamental difference between the arbitration system of Soviet Russia, and the United States Commission represented today. We do not recommend any kind of arbitration clause, but leave this question to the two parties concerned. They themselves can choose a formula. The difference is that the Americans propose a definite form whilst the Russians only take up the special cases in which parties have foreseen the dispute. I believe that the Americans should approach in the first place the Government in Washington or the U.S.S.R. Chamber of Commerce in Moscow; both ways can be used and there will be no complications.[236]

Western experts, including Sanders and AAA representatives, where apparently keen to probe Ramsaizev's influence on mixed arbitration within the Soviet administration. Ramsaizev delicately sidestepped any indication of such authority, emphasising the differing approaches between the blocs and hinting at more appropriate channels of communication.

Given the diverging views on the institutional setting of mixed arbitration, it soon became clear that the congress would not lead to the adoption of standardized rules or a model clause. Ramsaizev proposed that the participants simply support mixed arbitration without naming a specific organization in the congress resolutions.[237] Finally, no mention of mixed arbitration was made in the resolutions at all.[238] Although the ICA had already administered several mixed arbitrations, the resolutions thus did not raise the possibility of it playing a more prominent role in this respect. Yet, despite the lack of consensus at the congress, the ICC increasingly promoted mixed arbitration in subsequent years. This was evident in various proposals, including on a multilateral investment code, model bilateral agreements for the treatment of foreign-owned

236 ibid.

237 ibid 30.

238 ibid 61.

enterprises and public utility concessions, and a convention recommending arbitration in state-related commercial contracts. The following sections will examine these proposals more closely.

A multilateral investment code

The ICC and key individuals associated with it intended to broker mixed arbitration into existence through, as one option, a multilateral investment code. This initiative was led by Michael Heilperin, a Polish economist and neoliberal thinker of the Geneva school, who also served as rapporteur of the ICC Committee on Foreign Investments.[239] The general evolution of the code and its role in the emergence of the international investment regime has attracted scholarly attention.[240] For the present discussion, only the components of the code that are relevant to the evolution of mixed arbitration will be considered.

The code was mentioned a year after the congress, in a 1947 resolution of the ICC Executive Committee titled *Foreign Investment and Economic Expansion*.[241] This resolution noted that '[l]iberal [investment] policies should be adopted by governments individually and by bilateral agreement, as well as through the medium of an international code of fair practice'.[242] The resolution recommended that this code should be adopted by the UN Economic and Social Council ('ECOSOC') and suggested the creation of an international court of arbitration 'to obtain impartial decisions on disputes

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239 Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard UP 2018) 136.

240 ibid 74 and 136-38; Batselé (n 65) 19-20; St John (n 52) 68-99; Perrone (n 99) 53-59, 82.

241 Heilperin (n 209) 7, 8, 18, and 19-23.

242 ibid 6.

arising out of international investment contracts' and to 'decide between the parties on the basis of the contract concluded and of the law applicable'.[243] Essentially, the ICC sought to establish mixed arbitration between parties to public-private investment contracts.

In absence of a robust international enforcement regime, however, enforcement remained an important issue as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards would only be signed in 1958. The resolution therefore suggested that governments refer to the code in their contracts and undertake to 'abide by the decisions of the Court' in 'all transactions of international investment affecting government authorities'.[244] It also recommended three additional measures. Firstly, it stated that the code should mandate signatory states to 'enforce by domestic policy the verdicts of the Court'.[245] Secondly, it suggested that potential investors should reinforce the authority of the Court by 'withholding their funds in case verdicts of the Court are not implemented'.[246] Such 'sanctions on the part of potential investors' against governments were considered a 'very important instrument of informal but effective pressure'.[247] And thirdly, favourable public opinion was mentioned as essential for the respect of the Court's decisions.[248] Unlike ICSID, a private-sector institution such as the ICC could not rely on a founding convention for the recognition and enforcement of

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[243] ibid 21.
[244] ibid.
[245] ibid 22.
[246] ibid 21.
[247] ibid.
[248] ibid 22.

awards. Instead, the proposed Court would have to rely on decentralized enforcement obligations in different legal instruments, investor solidarity, and public pressure.

The 1947 resolution remained strategically open about the institutional setting of the Court, noting that its ‘precise form’ was ‘a matter that only a future international conference of experts can settle’.[249] The question was highly political, and the resolution prioritized the availability of the legal remedy of mixed arbitration over institutional choice. It is possible that the ICC anticipated that recommending arbitration at its own Court would have led to state resistance.[250] The ICC also hoped that the code would be mentioned in the Charter of the International Trade Organization (‘ITO’), which was under negotiation at the time.[251] Such a reference would have given the proposal intergovernmental legitimacy and would have placed the ICC in a prime position to influence the Court’s institutional design. However, the ICC’s aspirations took a setback when the 1948 Havana Charter adopted a restrictive stance on foreign investment protection.[252] Ultimately, the Charter was not ratified by the US Congress and the ITO never came into existence.

Despite its lack of direct success, the 1947 resolution is significant because it conceptualised a two-tiered consent structure similar to what would be adopted in the ICSID Convention two decades later. It suggested that states formally recognize mixed

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[249] ibid.

[250] The ICC Secretariat later acknowledged that the ‘title of “Chamber of Commerce” does the ICC a disservice’, see ICC Commission on International Commercial Arbitration, ‘International Commercial Arbitration Between States and Individuals: Memorandum by the Secretariat’ (n 147) 4.

[251] Heilperin (n 209) 7.

[252] ICC, ‘International Code of Fair Treatment for Foreign Investments: Drawn up by the ICC’s Committees on Foreign Investments and Foreign Establishments and Approved by the ICC’s Quebec Congress (June 1949)’, *Fair Treatment for Foreign Investment* (ICC Brochure N° 129, 1949) 9.

arbitration and undertake to enforce it in an intergovernmental code. States would then refer to that code in their subsequent 'transactions of international investment affecting government authorities'.[253] Such transactions could in principle involve any type of legal instrument, including investor-state contracts and investment treaties.

The ICC went on to publish concrete language for a code in 1949, despite earlier setbacks.[254] The new draft was more cautious than the 1947 resolution. It limited the jurisdiction of the Court to inter-state disputes.[255] An exception was made for certain claims by local representatives of aggrieved bondholders of creditor contracting states, whether from the private or public sector.[256] The draft again deferred the institutional design of the Court 'to be worked out by the negotiating governments'.[257] However, again the ICC had no success in rallying support for the code, and later attempts to get backing from ECOSOC, the International Bank for Reconstruction and Development ('IBRD'), or the International Finance Corporation ('IFC') in 1956 and 1957 were unsuccessful. Reflecting on these efforts, an ICC document of 1959 later observed that 'the time was clearly not ripe'.[258]

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253 Heilperin (n 209) 21.

254 ICC (n 252).

255 ibid art 13.

256 ibid art 10.

257 ibid art 14.

258 'The Promotion of International Private Investments – A Review of Recent Initiatives Governmental and Private, and of the ICC's Role', ICC Doc No 111/INT63, 24 September 1959, 50ZZ546/32, Archives TotalEnergies, cited in Batselé (n 65).

A model bilateral treaty and a commercial arbitration convention

Besides proposing a comprehensive multilateral investment code, ICC experts in the post-war period also advocated for mixed arbitration in other ways. This included a bilateral model agreement 'defining the legal status and treatment of enterprises established by the nationals of one country in the territory of the other'.[259] The ICC published such a model in 1947 as well as a supplementary protocol focusing specifically on private investments in public utilities in 1949.[260]

Public utility contracts presented lucrative opportunities for private investors, that had led to mixed disputes before.[261] The *Fair Treatment for Public Utility Concessions* protocol represented one of the earliest model treaties suggesting advance consent by states to institutional mixed arbitration. Article 3 of the protocol provided that

> any disputes between the concession-holder [a private company] and the grantor [usually a state entity] relating to or arising out of the concession shall immediately be referred to arbitration. The concession-holder shall appoint one arbitrator and the grantor another and the two arbitrators so appointed shall appoint an umpire.[262]

In the commentary on the article, the ICC stated as 'essential that the parties to the concession (...) be able to have recourse to arbitration by a body outside the jurisdiction of the granting authority'.[263] After 1949, however, records of the ICC's work on the

[259] ICC Brochure 120, adopted by the ICC's Montreux Congress in June 1947, cited in ICC (ed), *Resolutions Adopted by the Twelfth Congress of the ICC, Quebec, 13th - 17th June 1949*, 28.

[260] ibid 26-29.

[261] *Mavrommatis Palestine Concessions (Greece v Great Britain)* (1924) No 2 PCIJ Series A. Although an inter-state case at the PCIJ, this was originally a dispute opposing a concessionaire and a government.

[262] ICC, *Resolutions Adopted by the Twelfth Congress of the ICC, Quebec, 13th - 17th June 1949* (n 259) 28.

[263] ICC Brochure 120, adopted by the ICC's Montreux Congress in June 1947, cited in ibid.

protocol become sparse and it is uncertain whether states ever adopted this draft language.

In 1949, the ICC also sought to advance mixed arbitration with the help of the newly-created International Commercial Arbitration Commission ('ICAC'), a structure grouping various arbitral institutions and associations in the field of international law. The ICAC was supported by representatives of the ICC, the International Law Association ('ILA'), and the International Institute for the Unification of Private Law ('UNIDROIT').[264] Together, ICAC's supporters drew up a draft intergovernmental convention suggesting the use of mixed arbitration in commercial contracts signed by states or their entities. The drafters anticipated that states would be reluctant to submit their disputes to an arbitral institution that was connected to large businesses.[265] To address these concerns, the draft allowed for a choice between *ad hoc* arbitration, or administered arbitration at the PCA or the ICC-ICA. Reflecting on this draft convention in his 1951 lecture at the Hague Academy, Charles Carabiber, a member and eventual president of the ICA, observed:

> These variants have been proposed in anticipation of possible objections from governments that would be more inclined to accept an arbitration clause, whereby they would reserve the right to reach a compromise and appoint an arbitrator or arbitrators, at their choice, or to give preference to arbitration by the Permanent Court of Arbitration in The Hague. (...) States may give preference to [the PCA] due to its long-standing existence, especially because it was established to settle disputes between states and because it has no specific ties to the business world and large economic entities.[266]

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[264] Charles Carabiber, 'L'arbitrage international entre gouvernements et particuliers' (1950) 76 Recueil des Cours de l'Académie de Droit International 217, 296.

[265] ibid 297.

[266] ibid 296-98.

Yet, like earlier proposals supported by the ICC, this draft convention was never endorsed or adopted by states and failed to achieve its policy objective.

The fact that the ICC advocated state support for mixed arbitration during the late 1940s is evident in the above proposals. In doing so, ICC officials and experts associated with the organization apprehended, and actually faced, states' resistance. To assuage state concerns, the ICC displayed diplomatic flexibility, sought out strategic partnerships, and probed different channels. For states, choosing a suitable institution was a delicate task and ICC experts and officials refrained from openly promoting the ICC's own facility of the ICA. Instead, they floated ideas that remained intentionally vague or gave states different organizational choices. At this early stage of the institutional oligopoly, the ICC's priority was to convince states that mixed arbitration was desirable. Despite this strategy, however, its early efforts remained unsuccessful.

Mixed arbitration and the 1958 New York Convention

As if to concentrate on a more promising project, the arbitration experts associated with the ICC shifted their focus toward advocating for a revision or replacement of the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.[267] This initiative culminated in the adoption of the 1958 New York Convention, which became one of the ICC's most significant diplomatic achievements with profound implications for mixed arbitration at institutions other than ICSID. Following ICSID, the New York Convention is the second most important international instrument for the recognition and enforcement

[267] 'Convention on the Execution of Foreign Arbitral Awards (signed 26 September 1927, entered into force 25 July 1929)' 92 LNTS 301.

of mixed arbitration awards today. Awards rendered in mixed arbitrations at the ICC-ICA, SCC-AI, ICSID Additional Facility, or under the UNCITRAL Arbitration Rules are typically enforced on its basis.[268] The ICC's pivotal role in elaborating the New York Convention has been widely studied, and a detailed exploration goes beyond the scope of the present analysis.[269] The following discussion is therefore limited to the specific issue of mixed arbitration as it appeared in the *travaux préparatoires*.

The ICC shaped the intergovernmental discussions from the outset. The organization drew up a first draft as early as 1953.[270] This draft significantly influenced and framed the subsequent deliberations among state representatives. The ICC participated in these deliberations as an observer and was prominently represented by a five-member delegation, including Edwin Herbert, then-chairman of the ICC Commission on Arbitration, George Haight, and Frédéric Eisemann.[271] The Convention eventually established the multilateral recognition and enforcement of foreign arbitral awards the ICC needed to guarantee the effectiveness of its arbitration mechanism.

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268 Leonardo Borlini and Stefano Silingardi, 'Enforcement of Investment Arbitration Awards' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer 2021) 5.

269 eg Florian Grisel, 'Treaty-Making between Public Authority and Private Interests: The Genealogy of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2017) 28 European Journal of International Law 73; Renato Stephan Grion and Thiago Del Pozzo Zanelato, 'Historical Aspects of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Perspectives on the Resolution of International Commercial Disputes' (2021) 87 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 153; Pierre Tercier, 'The 1927 Geneva Convention and the ICC Reform Proposals' (2008) 2 Dispute Resolution International 19.

270 Pieter Sanders, 'The Making of the Convention', *Enforcing Arbitration Awards Under the New York Convention. Experience and Prospects.* (United Nations Publications 1999) 3.

271 George Haight, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of UN Conference, May-June 1958* (1958) 107.

The drafters of the text aspired to go 'further than the Geneva Convention in facilitating the enforcement of foreign arbitral awards'.[272] Several elements of the new Convention supported this objective: the need for double *exequatur*, a two-stage procedure previously required for the enforcement of foreign arbitral awards that involved the courts of the country where the award was made and the courts of the country where enforcement was sought, was eliminated; the grounds for refusal of enforcement were limited to an exhaustive list; the Convention was made applicable to awards rendered in any foreign state, whether or not a contracting party of the Convention; and the Convention's scope was detached from the nationality or place of residence of the disputing parties.[273]

According to Article I(1), the Convention applies 'to the recognition of enforcement of arbitral awards (...) arising out of differences between persons, whether physical or legal'.[274] Some scholars have discussed the applicability of the Convention to mixed arbitration in relation to this article. Considering that the Convention covers awards rendered in mixed arbitration, these scholars generally point to two elements. Firstly, they highlight the involvement of socialist countries, in which commerce was centrally planned, in the *travaux*. This is evidenced by the mention, in Article I(2), of awards rendered by 'permanent arbitral bodies'.[275] In socialist countries, such bodies typically

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272 UN ECOSOC, 'Report of the Committee on the Enforcement of International Arbitral Awards' (28 March 1955) UN Doc E/2704 = E/AC42/4/Rev1, here at 5.

273 Emmanuel Gaillard and George Bermann, *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards: New York, 1958* (Brill Nijhoff 2017) 12.

274 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed 10 June 1958, entered into force 7 June 1959)' 330 UNTS 3, art I(1).

275 Lionello Capelli-Perciballi, 'The Application of the New York Convention of 1958 to Disputes Between States and Between State Entities and Private Individuals: The Problem of Sovereign Immunity' (1978) 12 International Lawyer 197, 198; Albert Jan van den Berg, *The New York Arbitration*

existed under the auspices of chambers of commerce. Secondly, scholars refer to more specific elements of the *travaux* that seem to indicate a clear intent to include mixed arbitration awards within the Convention's scope.[276]

Irrespective of doctrinal interpretations of the Convention's scope, the ICC apparently did not address a possible application to mixed arbitration in its 1953 draft. On the contrary, the proposed scope in this draft remained ambiguous, simply referring to 'disputes between persons subject to the jurisdiction of different States or involving legal relationships arising on the territories of different States'. Instead, it was Belgium that recommended a clarification that 'public enterprises and public utilities (…) be deemed to be legal persons for purposes of this article if their activities were governed by private law' in March 1955.[277] Yet, the working group did not regard the suggested wording necessary at the March meetings, deeming instead that states and state entities were sufficiently covered by the term 'legal persons'.[278]

The question of an explicit reference nevertheless resurfaced again later in the same year. This time, the Society for Comparative Legislation ('SCL') and Austria submitted written comments suggesting a scope covering mixed arbitration. The non-

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Convention of 1958: Towards a Uniform Judicial Interpretation (Kluwer Law International 1981) 277-78; the state committee drawing up the Convention did not see the need to add an express reference to public enterprises and utilities as legal persons, UN ECOSOC, 'Report of the Committee on the Enforcement of International Arbitral Awards: 28 March 1955, E/2704 = E/AC42/4/Rev1' (n 272) 7.

276 Capelli-Perciballi (n 275) 198-200.

277 UN ECOSOC, 'Report of the Committee on the Enforcement of International Arbitral Awards: 28 March 1955, E/2704 = E/AC42/4/Rev1' (n 272) 7; UN ECOSOC, 'Recognition and Enforcement of Arbitral Awards: Report by the Secretary-General' (31 January 1956) UN Doc No E/2822, annex II, 10, <https://newyorkconvention1958.org/index.php?lvl=notice_display&id=3297> accessed 31 July 2023.

278 UN ECOSOC, 'Report of the Committee on the Enforcement of International Arbitral Awards: 28 March 1955, E/2704 = E/AC42/4/Rev1' (n 272) 7.

governmental observer SCL supported the Belgian proposal. It highlighted the recent growth of contract-based mixed arbitrations, especially at the ICC-ICA:

> [T]here have been cases in the past in which even States and public bodies or undertakings – State Railways and municipalities – have undertaken to refer disputes arising out of international contracts to private arbitration, have resorted to the prescribed arbitral procedure and have given effect to the arbitral awards made. This has happened several times, for example in cases dealt with by the Court of Arbitration of the International Chamber of Commerce. In our view it would be wholly desirable to encourage this practice by including the clause proposed, as the Belgian representative has requested.[279]

Similarly, Austria recommended a scope covering 'cases in which corporate bodies under public law, and particularly States, in their capacity as entities having rights and duties under private law, have entered into an arbitration convention for the purpose of the settlement of disputes'.[280] The Austrian and Belgian interventions were directly aligned with the ICC's earlier efforts and the SCL even expressly referred to the ICC-ICA's emerging mixed arbitration caseload. Yet, despite being represented at the meetings, the ICC remained silent on the issue.

A series of internal documents of the ICC Commission on Arbitration issued in 1955 sheds some light on the reasons for this omission. The Commission briefly touched upon the issue of mixed arbitration during a two-day meeting in November 1955. Several Commission members, including Charles Carabiber, submitted written comments before or during the meeting.[281] In his comments, Carabiber suggested that

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279 UN ECOSOC, ''Recognition and Enforcement of Arbitral Awards: Report by the Secretary-General' (n 277) annex II, 10.

280 ibid annex I, 11.

281 ICC Commission on International Arbitration and Commercial Law, 'Draft Convention of the United Nations on the Recognition and Enforcement of Foreign Arbitral Awards. Comments of the United States Council' ICC Doc 420/INT22, GFA B 141/10383; ICC Commission on International Arbitration

the ICC recommend a revision of the draft Convention's scope clarifying that 'persons' included 'States, public authorities, public establishments or utilities, provided that the disputes concerning them arise from a commercial contract or an act *de jure gestionis.*'[282] The Commission subsequently discussed Carabiber's suggestion but a majority of participants preferred the existing language of the ECOSOC draft 'for reasons of policy'.[283] As a result, the ICC did not raise the issue in the intergovernmental deliberations and did not include a specific reference to mixed arbitration in its subsequent reports to the UN.

At ECOSOC level, the discussion about including an explicit reference persisted at least until May 1958. Citing previous proposals by Austria and Belgium, some delegations were open to support an explicit reference, although they deemed it 'superfluous'.[284] Ultimately, ECOSOC was unconvinced of the need for such a reference

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and Commercial Law, 'Draft Convention of the United Nations on the Recognition and Enforcement of Foreign Arbitral Awards. Comments of the British National Committee' ICC Doc 420/INT25, GFA B 141/10383; ICC Commission on Arbitration and International Commercial Law, 'Réunion des 18 et 19 novembre 1955. Projet de convention pour la reconnaissance et l'exécution des sentences arbitrales internationales de droit privé. Suggestions quant à la rédaction de certaines dispositions du Projet de l'ECOSOC présentées par Me Charles Carabiber, président de la Cour d'Arbitrage' ICC Doc 420/INT28, GFA B 141/10383; ICC Commission on International Arbitration and Commercial Law, 'Projet de convention pour la reconnaissance et l'exécution des sentences arbitrales étrangères. Observations présentées par le Comité National Suédois' ICC Doc No 420/INT27, GFA B 141/10383.

282 ICC Commission on Arbitration and International Commercial Law, 'Réunion des 18 et 19 novembre 1955. Projet de convention pour la reconnaissance et l'exécution des sentences arbitrales internationales de droit privé. Suggestions quant à la rédaction de certaines dispositions du Projet de l'ECOSOC présentées par Me Charles Carabiber, président de la Cour d'Arbitrage' ICC Doc 420/INT28, GFA B 141/1038, 1, translated by the author, original: '*Ces dernières comprennent les États, Collectivités publiques, Etablissements publics ou d'Utilité publique, à condition que les litiges les concernant soient nés d'un contrat de nature commerciale ou d'un acte de gestion privée*'.

283 ICC Commission on International Arbitration and Commercial Law, 'Meeting of 18th November 1955: Summary Record' (18 November 1955) ICC Doc No 420/53, GFA B 141/10383, 4.

284 UN ECOSOC, 'UN Conference on International Commercial Arbitration: Summary Record of the Seventh Meeting Held at Headquarters, New York, on Friday, 23 May 1958, at 2.45 PM' UN Doc No E/CONF26/SR7, 3.

and adopted a version of Article I(1) without explicit mention of states or their entities as disputing parties.[285]

Several factors could explain why the ICC did not specifically address mixed arbitration in its 1953 draft or the *travaux.* Given the substantial role of the ICC in crafting the initial draft of the Convention, it may have positioned itself as a 'neutral' broker, limiting its ability to voice strong opinions during the deliberations.[286] This could explain the 'policy reasons' mentioned in the internal discussions of the ICC Commission on Arbitration. ICC delegates may have doubted the willingness of states to consent to a scope encompassing mixed arbitration after previous unsuccessful attempts to gain state consent. The ICC might also have focused more on the Convention's impact on its core business – private commercial arbitration – side-lining mixed arbitration in the discussions. Achieving ratification of the Convention was a paramount goal. The ICC Secretariat internally committed to 'leave no stone unturned in order to secure the signature and ratification of this new diplomatic instrument'.[287]

Another plausible reason is that ICC experts deemed an express reference to mixed arbitration unnecessary, a point supported by commentaries of Haight and Sanders on the New York Convention. Haight noted that states regarded 'as superfluous an express provision stipulating that the Convention was also applicable to cases where corporate bodies under public law, "in their capacity as entities having

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285 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (n 274) art I.

286 ICC, 'Enforcement of International Arbitral Awards: Report and Preliminary Draft Convention Adopted by the Committee on International Commercial Arbitration at Its Meeting of 13 March 1953' 9 ICC International Court of Arbitration Bulletin 31, 32.

287 ICC Commission on International Commercial Arbitration, 'Meeting of 31st October 1958: Summary Record' (31 October 1958) ICC Doc No 420/95, 2.

rights and duties under private law", entered into arbitration agreements'.[288] Both Haight and Sanders agreed with this interpretation.[289] Haight believed the term 'legal persons' included 'a state or department or agency thereof or a state-owned corporation'.[290] In his view, courts at the enforcement stage were unlikely to 'refuse enforcement on the ground that the state was not a legal person'.[291]

Haight and Sanders also mentioned the participation of the USSR and other socialist states in the deliberations. For Sanders, this participation warranted an interpretation inclusive of mixed arbitration.[292] So did Haight, who considered that '[o]therwise, the long debate on permanent arbitral bodies of totalitarian states, and even participation by such states in the Conference as a whole, would have been a waste of time'.[293] In a 1959 article titled *American Foreign Trade and Investment Disputes* he took the view that if the US were to accede to the Convention, US courts would recognize and enforce foreign awards against states.[294]

The ICC was instrumental in brokering the Convention into existence. Its experts and affiliated individuals promptly understood that the agreement would encompass

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288 ICC Commission on International Commercial Arbitration, 'International Commercial Arbitration Between States and Individuals: Memorandum by the Secretariat' (n 147) 2.

289 Pieter Sanders, 'Introduction' in Union Internationale des Avocats (ed), *International Commercial Arbitration: A World Handbook*, vol I (Martinus Nijhof) 298; UN ECOSOC, 'Report of the Committee on the Enforcement of International Arbitral Awards: 28 March 1955, E/2704 = E/AC42/4/Rev1' (n 272) 7.

290 UN ECOSOC, 'Report of the Committee on the Enforcement of International Arbitral Awards: 28 March 1955, E/2704 = E/AC42/4/Rev1' (n 272) 7.

291 ibid.

292 Sanders, 'Introduction' (n 289) 298.

293 UN ECOSOC, 'Report of the Committee on the Enforcement of International Arbitral Awards: 28 March 1955, E/2704 = E/AC42/4/Rev1' (n 272) 7.

294 George Haight, 'American Foreign Trade and Investment Disputes' (1959) 1 International Executive 27, 28.

mixed arbitration. Yet, despite internal discussions to include a reference to mixed arbitration in its recommendations, the ICC chose not to advocate explicitly for such a reference due to policy reasons. Additionally, its delegates and associated experts believed the existing language was already inclusive of mixed arbitration. Their assumption proved to be accurate, and the success of the New York Convention provided an unprecedented legal framework for mixed arbitration in the following decades.

2.2.2. The work of the Commission on Arbitration between 1958 and 1960

The ICC's engagement with the issue of mixed arbitration continued in the years following the Convention's adoption. Instead of a single group, different commissions of the ICC engaged in advocacy for mixed arbitration. The interests and objectives of these commissions were mostly but not always perfectly aligned, owing also to the different profiles of the commission members. The code of fair practice of the late 1940s was the work of the ICC Commission on Foreign Investment and Economic Development, led by Heilperin. Yet, from 1958 to 1960, it was the ICC Commission on Arbitration (the 'Commission') that most extensively discussed mixed arbitration.

This work found broad support within the wider organization, and ICC members considered that there was 'no other area where the ICC would be more qualified'.[295] The Commission's members were mostly legal experts in arbitration. For these experts,

[295] ICC, 'Conseil, 93ème session, 24-25 novembre 1959 : Investissements et développement économique, Déclaration de Sir Jeremy Raisman (Council, 93rd Session, November 24-25, 1959: Investment and Economic Development, Statement by Sir Jeremy Raisman)' ICC Doc 111/INT64, Paris City Archives 2ETP/1/7/20 4, 93e session 24, novembre 1959, 3.

it was natural to concentrate on arbitration itself without blending it with subject-matter issues such as investment protection, the treatment of concession-holders, or foreign-owned enterprises. In the following, the Commission's discussions will be examined.

The Commission's new focus was driven, in part, by a rising number of mixed arbitrations at the ICA. The ICC had already acknowledged this tendency in 1953, when it noted 'with satisfaction that its Court of Arbitration (...) has on several occasions been called upon to deal with international commercial disputes between States and individuals'.[296] The ICC had also recommended that states consent to arbitration at existing arbitral institutions in their contracts with private persons.[297] If arbitration under 'private arbitral jurisdiction' was not acceptable to states, the ICC suggested to use an alternative institution proposed by UNIDROIT or to adapt the PCA to mixed arbitration.[298] In the 1950s and early 1960s, it maintained this strategic flexibility and did not externally promote recourse to the ICA.

Internally, however, the Commission explored the possibility of ICA-administered mixed arbitration several times between 1958 and 1961. These discussions, which followed the adoption of the New York Convention, began with a 1958 memorandum of the ICC Secretariat. The memorandum raised the issue of mixed arbitration, citing the 1946 conference, Haight's commentary on the New York Convention, several earlier

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[296] ICC (ed), *Resolutions Adopted by the XIVth Congress of the ICC, Vienna, 18th - 23rd May 1953*, 91.

[297] ibid.

[298] ICC, *Resolutions Adopted by the XIVth Congress of the ICC, Vienna, 18th - 23rd May 1953* (n 296) 91. The fact that the ICC emphasised these alternatives may suggest that its experts anticipated a treaty-based form of mixed arbitration to emerge. The ICC was quick to recognize the potential of connecting the realm of investor-state contracts with public international law and the international responsibility of states. As early as 1960, it openly recommended umbrella clauses, particularly in public contracts for oil and gas exploration. These clauses would later allow foreign investors to bring claims for contract breaches under the 'umbrella' of investment treaties.

ICC resolutions concerning mixed arbitration, and a 1957 ruling by the Paris Court of Appeal.[299] In this decision, the Paris Court held that in certain situations the French state should be allowed to consent to mixed arbitration, as 'it would be contrary to the interests of the State to prohibit its representatives from accepting a method of settling its disputes in accordance with international commercial practice where its refusal would often lead to the breaking off of negotiations'.[300] This decision marked a departure from the general prohibition for the French state to enter into international arbitration agreements.

In its memorandum, the ICC Secretariat described these events as an opportunity for the ICC to position itself more prominently in the emerging market of mixed arbitration. It mentioned the option of a more formal intergovernmental – and perhaps treaty-based – approach to mixed arbitration, to provide for an alternative remedy in situations when contract-based mixed arbitration was not available. Yet, the ICC Secretariat acknowledged that the organizational setting of mixed arbitration was politically delicate.[301] It highlighted that the ICC had limited visibility of the diffusion of consent to ICA arbitration in public-private contracts as 'the parties to an arbitration agreement involving the ICC only inform it when there is a dispute requiring its intervention'.[302] Unlike ICSID, which leveraged its privileged access to governments to

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299 Karl-Heinz Böckstiegel, 'Arbitration of Disputes Between States and Private Enterprises in the International Chamber of Commerce' (1965) 59 American Journal of International Law 579, 584, footnote 8.

300 Christoph Schreuer, 'The Implementation of International Judicial Decisions by Domestic Courts' (1975) 24 International and Comparative Law Quarterly 153, 171.

301 ICC Commission on International Commercial Arbitration, 'International Commercial Arbitration Between States and Individuals: Memorandum by the Secretariat' (n 147) 2.

302 ibid 3.

keep comprehensive lists of consents to ICSID arbitration,[303] the ICC's non-governmental status made tracking consent more challenging. Over the subsequent decades, access to intelligence on consent diffusion and networks of government officials, would become an important factor of institutional success in mixed arbitration.

The memorandum demonstrated remarkable awareness by the ICC Secretariat of parallel discussions on mixed arbitration at other institutions, especially the World Bank. For instance, the Secretariat was well-informed about requests for mixed arbitration concerning 'nationalization' and 'public works contracts or supply contracts' that the World Bank had received.[304] It was also aware that the Bank had declined these requests due to a lack of mandate. World Bank representatives informed the ICC Secretariat about state officials' reluctance 'to entrust these disputes, irrespective of their nature, to existing systems of arbitration'.[305] In the Secretariat's view, 'the explanation' had to 'be sought in the facts which have so far been inadequately appreciated' and that 'the title of "Chamber of Commerce" does the ICC a disservice'.[306] Members of the ICC Secretariat understood full well that states hesitated to refer mixed disputes to the ICA due to its close ties with the very private-sector entities they could oppose in an arbitration.

This also seemed to explain the hesitation of newly independent states and the Eastern bloc to consent to arbitration at the ICA. In East-West disputes, mutual distrust between trading partners continued to limit the ICA's market potential. On the

303 St John (n 52) 187-88.

304 ICC Commission on International Commercial Arbitration, 'International Commercial Arbitration Between States and Individuals: Memorandum by the Secretariat' (n 147) 3.

305 ibid 3 and 4.

306 ibid 4.

multilateral stage, this distrust spurred the negotiations for the 1961 *European Convention on International Commercial Arbitration at the UN Economic Commission for Europe* (the '1961 Geneva Convention').[307] The Secretariat's memorandum noted that in East-West disputes there was a 'reluctance shown by the parties (...) to avail themselves of the arbitration services of institutions on either side'.[308] Instead, the USSR preferred *ad hoc* arbitration with bilateral appointment methods, where institutions in the claimant's and respondent's states would collaborate to act as default appointing authorities. This scenario was not much different from what Dimitri Ramsaizev had communicated as a Soviet preference at the 1946 conference in Paris.

Considering the doubts expressed by states at the World Bank and in the East-West context, the Secretariat asked the Commission if the ICC should find new ways to encourage more widespread use of its Arbitration Rules in mixed arbitration. It also inquired whether the ICC should collaborate more formally with the United Nations or 'other arbitral organizations' for that purpose.[309] Moreover, the Secretariat contemplated the creation 'of new arbitration facilities capable of gaining support of governments, governmental bodies'.[310] Rather than disincentivizing recourse to the ICA, the memorandum expressed the hope 'that such additional arbitration machinery would induce States or public bodies not to refuse any longer the settlement of many disputes

[307] This convention, aimed at providing a legal framework for the recognition and enforcement of arbitration agreements and arbitral awards in the context of East-West trade.

[308] ICC Commission on International Commercial Arbitration, 'International Commercial Arbitration Between States and Individuals: Memorandum by the Secretariat' (n 147) 4.

[309] ibid.

[310] ibid.

by arbitration'.[311] These questions were raised as a starting point for a more detailed discussion among the experts of the Commission. While previous unsuccessful attempts to advocate for mixed arbitration remained in the organization's memory, recent developments made revisiting the topic worthwhile.

The Commission met for the first time in October 1958 to discuss the Secretariat's questions. Herbert, Eisemann, and Haight, who had been part of the ICC delegation in New York, also attended the meeting. In addition, then-president of the ICA Charles Carabiber, Italian law professor Eugenio Minoli, and Dutch arbitration expert Pieter Sanders, were present. Minoli and Sanders had attended the intergovernmental deliberations in New York as Italian and Dutch delegates, respectively.[312] The October meeting was opened by Eisemann, who recollected a recent exchange between the ICC and an IBRD Vice President. The Vice President informed the ICC Commission on Foreign Investment and Economic Development about growing demand for the World Bank to arbitrate investment disputes. According to Eisemann, the Vice President expressed the need to overcome states' concerns:

> [The Vice President] said that, judging by the experiences of the International Bank, arbitration was at the present time no longer being called on to provide the solution merely to commercial disputes but also to disputes arising out of capital investments. This increased the need to make allowance for certain political and

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311 ibid 5.

312 Haight, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of UN Conference, May-June 1958* (n 271) 105; By 1958, Sanders was a central figure in international arbitration and a good friend of Aron Broches, who was to broker the ICSID Convention into existence in the following years. Comparing the two, Albert Jan van den Berg later observed that 'Pieter preferred commercial arbitration' and 'was also more [focused] on practice than Aron'. Broches, instead, focused on 'international organizations and public international law', Albert Jan van den Berg, 'Memories: Pieter Sanders - Centenarian' (*Kluwer Arbitration Blog*, 2012) <https://arbitrationblog.kluwerarbitration.com/2012/10/05/memories-pieter-sanders-centenarian-2/> accessed 31 July 2023.

> psychological factors likely to influence the decision of governments to have recourse to arbitration, and to explain the refusal of some of them to rely on such institutions as the ICC or other centres of arbitration, despite the fact that those institutions offered excellent arbitration services.[313]

The frankness of this exchange between the ICC and the World Bank years before the creation of ICSID is remarkable.[314]

Recognizing the importance of the World Bank's insights and the relevance of mixed arbitration for the protection of foreign investment, Eisemann urged the Commission to reflect on the Vice President's comments.[315] Yet, not all experts agreed that a distinct category of 'investment arbitration' was needed. Carabiber, for instance, believed that mixed arbitration was relevant for both commercial and investment disputes.[316] He saw the ICC as well-positioned, to lobby governments to recognize the right of public entities to resort to international arbitration.[317] While the ICA already had a proven mixed arbitration experience, Carabiber acknowledged that alternative institutions could be used or created.[318] However, similar to his observations in the Hague lecture, he expressed doubts about the PCA meeting the procedural efficacy standards that businesses required. Irrespective of the institutional setting of the mixed arbitration, he thought that '[p]sychologically the ground seemed ready'[319] for more formal state recognition and use of mixed arbitration.

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313 ICC Commission on International Commercial Arbitration, 'Meeting of 31st October 1958: Summary Record' (n 287) 5.

314 The document mentioning the exchange is dated 31 October 1958, ibid 1.

315 ibid 5.

316 ibid.

317 ibid.

318 ibid.

319 ibid.

In contrast, Sanders was not surprised that states hesitated to submit disputes to private arbitral institutions. He believed states favoured an intergovernmental organization and recommended the use of the PCA.[320] Sanders informed the other participants at the meeting that then-Secretary General of the PCA, Jean François, had signalled the willingness of the PCA to administer mixed arbitrations. As an expert deeply involved in the nascent Dutch arbitration scene, Sanders had published on mixed arbitration as a way to reinvigorate the PCA in 1952, regretting its inactivity.[321] He also went on to draft the PCA's 1962 *Rules of Arbitration and Conciliation for Settlement of International Disputes between Two Parties of Which Only One Is a State*.[322]

Herbert, who presided the Committee meeting and was also a member of the British National Committee of the ICC, recognized the varied opinions and struck a more diplomatic note. He remained hesitant to dismiss formal state support for mixed arbitration at the ICA, whose established value he thought 'was not in question'.[323] He believed that the Commission should aim to identify any gaps in the existing arbitration market for the administration of mixed disputes and contemplate whether and how the ICC could address them.[324] He then delegated the task of elaborating an action plan to

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320 ibid.

321 Sanders had co-founded the Netherlands Arbitration Institute in 1949, van den Berg (n 312); Pieter Sanders, 'De toekomst van het Permanente Hof van Arbitrage (The future of the PCA)' (1952) 384 Arbitrale Rechtspraak 353.

322 Pieter Sanders, 'Private Parties and the Permanent Court of Arbitration' (1993) 6 Leiden Journal of International Law 289, 289.

323 ICC Commission on International Commercial Arbitration, 'Meeting of 31st October 1958: Summary Record' (n 287) 5.

324 ibid 5-6.

a specialized subcommittee, including Carabiber, Haight, Minoli, and Sanders, which he would oversee.[325]

Informed by the subcommittee's findings, the Commission on Arbitration met again three times in 1960 to discuss mixed arbitration and the facilitation of East-West disputes. In February 1960, Herbert brought up World Bank Vice President Davidson Sommers' recent comments at an ICC congress in Washington DC. At the congress, Sommers had suggested that the ICC could 'make an important contribution to arbitration between States and individuals' but cautioned that the ICA 'in its present form was not always well suited to the settlement of disputes of this kind'.[326] Sommers proposed that the ICC modify the Court's functioning to adapt it to use in mixed arbitration.[327] Some World Bank officials were thus seemingly open to using the ICA for investment arbitration.

Herbert also updated the Commission on the subcommittee's work since the last meeting.[328] The subcommittee considered that changes to the functioning of the ICA and its appointing methods could support a more important role of the Court in mixed arbitration.[329] In the view of the subcommittee, such changes could address state concerns about any undue influence of the ICC National Committees on the nomination of arbitrator candidates.[330] The subcommittee believed, however, that such changes

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325 ibid 6.

326 ICC Commission on International Commercial Arbitration, 'Meeting on 29th February 1960: Summary Record' (29 February 1960) ICC Doc No 420/101, 4.

327 ibid.

328 ibid.

329 ibid.

330 The ICC would try to address these concerns in the 2012 revision of the ICC Arbitration Rules: '2012 ICC Arbitration Rules', art 13(4)(a) .

should only be made if they were to lead to the support of states and intergovernmental organizations. To gauge such support, Herbert and Haight had met with Davidson Sommers, Oscar Schachter of the UN Legal Department, as well as Martin Domke and Paul Herzog of the American Arbitration Association in New York prior to the Commission meeting.[331] Despite indications of support from Sommers, the response was negative, and Herbert informed the Commission 'that United Nations support would not be forthcoming if the ICC's arbitration system were adopted along the lines contemplated'.[332]

The consistent lack of formal state support for mixed arbitration at the ICA was a significant obstacle for the organization. Yet, since 1949, circumstances had evolved. The ICA had quietly started to administer a growing number of mixed cases. The participants in the Committee meetings were aware of this development and understood its significance.[333] As the ICC Secretariat highlighted, the discussions were about complementing existing contract-based approaches to address state reluctance. The Commission members concluded that, without the support of the UN, 'any revision of the ICC's procedure would only be liable to have an unfavourable influence on the number of disputes likely to be submitted to the Court *which had already been seized of important cases involving governments'*.[334] For the Commission, it was prudent to discreetly let the ICA's emerging mixed arbitration practice run its course and only

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331 ICC Commission on International Commercial Arbitration, 'Meeting on 29th February 1960: Summary Record' (n 326) 4.

332 ibid.

333 ibid.

334 ibid, (emphasis added).

increase its visibility to potential (private-sector) users.[335] The experts believed that drawing attention through a change of the ICA's rules might adversely impact its ability to attract new mixed claims.[336]

Several Commission members lamented the lack of formal state support for the ICA. Herbert regretted having to 'witness the various attempts to set up new arbitration centres by circles completely ignorant of the ICC's arbitration and of its success in this sphere'.[337] Finding it 'difficult to make a clear distinction between investment problems and commercial disputes', he thought that all 'these disputes interested the ICC which should continue to make its services available for their settlement'.[338] The delegate of the Swiss National Committee also observed that 'in investment matters banks and other financial establishments could make use of their good relations with governments to induce them to consider resorting to private arbitration'.[339] Herbert and Sanders agreed.[340] The experts knew that the ICC lacked the networks of government officials, including in newly independent states, that the World Bank had developed.

Herbert's observation also exemplified a broader shift, linked to the growing need to protect foreign investments in newly independent states. Experts increasingly discussed mixed arbitration as linked to foreign investment rather than states' general commercial transactions with private entities.[341] This distinction did not convince Herbert

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335 ibid.

336 ibid.

337 ibid 5.

338 ibid.

339 ibid.

340 ibid.

341 Edwin Herbert would develop the idea of ICC-administered investment arbitration further in the coming years, see Edwin Herbert, 'International Arbitration Today' (1966) 15 International and

and other ICC experts, and the ICC never branded the ICA as an institution for investment arbitration. Instead, it opted for the 'lower' profile of commercial arbitration. Yet experts affiliated with the ICC knew and appreciated that a growing number of commercial arbitrations at the ICA involved states or their entities. In a July 1960 meeting, the Commission defined an official ICC policy generally encouraging mixed arbitration and emphasizing the competence of existing institutions in handling such cases.[342] It simply added that any new facilities should be 'practical and effective'.[343] No preference for the ICA's own services was mentioned.

Several experts of the Commission, including Sanders and Haight, subsequently channelled their efforts elsewhere. Sanders went on to develop mixed arbitration rules for the PCA,[344] while Haight helped formulate the 1961 Draft Convention on the Conciliation and Arbitration of International Investment Disputes of the American Bar Association.[345] This draft, influenced in part by the ICC Arbitration Rules and its Constitution, served as a basis for the ICSID Convention.[346]

Herbert, in contrast, deemed the creation of a new institution superfluous and continued to advocate the use of the ICA in subsequent years. When the ICSID

Comparative Law Quarterly 719; London Metropolitan Archives, CLC/B/016/MS17565/003, Summary Record of the ICC Congress in New Delhi, 6-13 February 1965, cited in Lemercier and Sgard (n 147) 94 and 95.

342 ICC Commission on International Commercial Arbitration, 'Meeting on 25th July 1960: Summary Record' (25 July 1960) ICC Doc No 420/107, 1-2.

343 ibid 1.

344 Sanders, 'Private Parties and the Permanent Court of Arbitration' (n 322) 289.

345 Batselé (n 65) 25-26.

346 'American Bar Association, Section of International & Comparative Law, Draft Convention on the Conciliation and Arbitration of International Investment Disputes, 20 October 1961. Included in the Letter from John Blair to Hester Boothroyd' (13 November 1961) UK T 312/251, 18. I thank Taylor St John for sharing this document with me. Also see Batselé (n 65) 25.

Convention was adopted, he predicted that ICSID arbitrations would closely resemble proceedings at the ICA and that the same individuals would likely act as arbitrators at both institutions.[347] Despite these reservations, Herbert approved of Aron Broches' objective of fostering state support for mixed arbitration:

> I cannot really believe that this new development is really necessary. As I have already said, there are plenty of arbitration facilities available, it is the will that is lacking. Nevertheless, the origin of the World Bank's initiative is the experience of its Director-General, who has undoubtedly been asked to arbitrate in important matters in which the Bank has not been directly concerned. It is really designed to overcome the suspicions to which I have already referred. If it succeeds in that aim, good work will have been done, and I certainly wish it all success.[348]

Despite Herbert's scepticism, the ICC Commission on Arbitration did not oppose the creation of ICSID, and the ICC later fully endorsed using the new Centre for the facilitation of investment arbitrations.[349]

2.2.3. The growing caseload in the 1960s

In the years following the discussions in the Commission, the ICA attracted a growing number of contract-based mixed arbitrations. This growth in caseload occurred despite the absence of formal multilateral support for the ICA. Haight observed in 1966 that the ICA was 'not infrequently used by government bodies and foreign nationals by 1959'.[350] According to case statistics published in the early 1960s, the ICA administered

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347 Herbert (n 341) 724.

348 ibid.

349 Perrone (n 99) 58; it also later encouraged the use of ICSID, see ICC, *Bilateral Treaties for the Encouragement of International Private Investment. Report of the ICC Commission on International Investments and Economic Development, Approved by the Executive Committee of the ICC* (ICC Headquarters 1970) 9.

350 Haight, 'American Foreign Trade and Investment Disputes' (n 294) 28.

12 arbitrations involving a state between 1945 and 1962; these cases represented 4% of the total ICC caseload during that period.[351] In subsequent years, this number rose significantly. In relative terms, in 1966 and 1967, 13% of all cases involved a state and 10% of additional cases were categorized as East-West arbitrations implicating public entities.[352] In absolute terms, 17 out of a total of 77 cases in 1966 involved a state or state entity.[353] In 1969, 31% of the more than 100 cases administered in that year involved a state or state entity.[354]

At the same time, the ICC started as best it could to monitor the diffusion of consent to ICA-administered arbitration in public-private contracts. In contrast to the state-centred ICSID, it likely obtained such information from its primary constituents, private corporations, and some allied officials in capital-exporting states. In 1965, the ICC counted 25 governments that had provided for ICA arbitration in their contracts.[355] Between 1965 and 1967, the ICC Council also noted consent to ICC arbitration in legal instruments of several state governments, the Food and Agricultural Organization, the Export-Import Bank of Japan, and the European Economic Community.[356] According to Lemercier and Sgard the ICC's 'National Committees appear to have been heavily involved in securing such decisions in each country, whether it be related to trade or

[351] Lemercier and Sgard (n 147) 93.
[352] ibid 94.
[353] ibid.
[354] ibid.
[355] ibid 93.
[356] ibid 94.

investment'.[357] Further research could assess the extent and success of ICC National Committees in lobbying for such state consent.

In 1961, the ICC scored a success with the signature of the 1961 Geneva Convention. Despite some disappointments for the ICC, this Convention contributed to the ICA's emerging role in mixed arbitration for at least three reasons.[358] Firstly, it did not create an intergovernmental competitor institution.[359] Secondly, it reaffirmed the right of disputing state parties to have recourse to a permanent arbitral institution.[360] And thirdly, it multilaterally affirmed the right of legal persons of public law to resort to arbitration.[361] Contract-based mixed arbitration had, for many years, faced the obstacle that in several states public-private contracts were not arbitrable and immunity of foreign states from enforcement was considered absolute.[362] The ratification by Belgium, France, and Greece disarmed such legal restrictions in these countries.[363] Particularly in the ICC's 'host' state France, this was a significant achievement.

At the same time, it became increasingly habitual for governments to refer to the ICA in their public-private contracts with foreign entities. In 1962, a British government

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357 The ICC National Committees appear to have been heavily involved in securing such decisions in each country, whether related to trade or investment, see ibid.

358 ibid 132-36.

359 'European Convention on International Commercial Arbitration (signed 21 April 1961, entered into force 7 January 1964)' 484 UNTS 349, art IV(1)(a); at a 1958 Arbitration Commission meeting, Herbert had already indicated that 'the Geneva work deserved to be supported by the ICC provided, however, that it did not have the result of jeopardizing its own well-tried arbitration services, which was to be feared in the event of the creation of an international intergovernmental arbitration centre', see ICC Commission on International Commercial Arbitration, 'Meeting on 29th February 1960: Summary Record' (n 326) 3.

360 'European Convention on International Commercial Arbitration' (n 359) art IV(1)(a).

361 ibid art II.

362 AALCC (ed), *Combined Report of Twenty-Sixth to Thirtieth Session Held in Bangkok (1987), Singapore (1988), Nairobi (1989), Beijing (1990) and Cairo (1991)* (AALCC Secretariat) 510.

363 Lemercier and Sgard (n 147) 135.

official noted that '[w]hen contracts are being negotiated between Western industrialized countries, there is normally no difficulty about arbitration since the accepted thing is to provide for ICC arbitration'.[364] Prior to 1965, IBM obtained consent to arbitration at the ICA in contracts with 90 states or state entities.[365] By the time ICSID was created, consent to contract-based mixed arbitration at the ICA was likely diffused through hundreds of public-private contracts. And consent was no longer limited to the realm of contracts: In 1965, the ICC was mentioned as appointing authority for mixed arbitration in the Germany-Iran BIT.[366] This appears to be one of the first instances of an intergovernmental treaty mentioning a private arbitral institution as appointing authority for mixed arbitration.

The ICA experienced a growing number of mostly contract-based mixed arbitrations in the 1960s, a trend preceded and supported by a proliferation of consents for such arbitrations. This development stands in contrast to the ICC's previous unsuccessful efforts to secure formal state support. Internal statistics highlight the rise in mixed and East-West cases at the ICA. Both the ICC Commission on Arbitration and the ICC leadership were aware of this trend and welcomed it. They understood, however, that formal state support remained unlikely and that changing the ICA's rules to garner such support could even undermine its quiet expansion. Further research could elucidate how the specific bargaining dynamics of contract negotiations, as

[364] Letter from Hester Boothroyd to Mr Mitchell Entitled 'IBRD and Arbitration' (6 February 1962) UK T 312/251. I thank Taylor St John for sharing this document with me.

[365] Lemercier and Sgard (n 147) 94.

[366] Germany - Iran BIT (1965), protocol, art 4.

opposed to investment treaty negotiations, influenced the increase in state consent for mixed arbitration at the ICA.

2.2.4. Competing proposals and a strengthened market position

The ICA Commission on Arbitration adopted a low-profile approach generally favouring mixed arbitration and allowing the ICA's caseload to grow quietly. At the level of the parent organization, the ICC, support for mixed arbitration was less unanimous. Not all of the ICC's constituents viewed arbitration as the best way to improve the business climate. A 1962 ICC survey of foreign investment firms found that only 16% of respondents 'recognized an improvement of the investment climate when an arbitration court is created'.[367] The survey's methodology and its respondent pool are unclear. The results do not rule out that businesses nevertheless considered ICA-administered mixed arbitration useful as a last resort. In fact, the rising number of government contracts referring to ICA arbitration appears to suggest such a perception of usefulness.

Within the ICC and its other commissions, alternative means to reduce the 'political risk' of foreign investments, such as investment guarantees or insurance schemes, were discussed in 1960 and 1963.[368] This does not imply, however, that all individuals associated with the ICC preferred these alternatives. As examined above, experts in the ICC Commission on Arbitration welcomed the ICA's emerging role in mixed arbitration and, while desirable, did not consider formal state support essential.

[367] 'Internal Note from Dr Berger, March 8, 1962, subject: "Vermittlungs- und Schiedsgerichtstätigkeit unter dem Schutze der Weltbank (Mediation and Arbitration Activities under the Protection of the World Bank)"' GFA B102/48464. I thank Taylor St John for sharing an excerpt of this document with me.

[368] St John (n 52) 100.

Their focus was on fostering subtle growth and securing the highest possible protection for foreign-owned property.

Driven by this overarching goal, the ICC endorsed ICSID as the go-to forum for investment disputes under bilateral investment treaties as early as 1970. In a brochure on investment protection the ICC noted that the 'World Bank Arbitration Center has recently published model clauses for bilateral investment treaties which, if adopted, would make disputes between a State and an investor, arising out of an investment protected by a bilateral agreement, subject to the jurisdiction of the Center'.[369] Recourse to the Centre was explicitly recommended.[370] This early endorsement is remarkable for several reasons. It came two years before ICSID administered its first case and preceded the proliferation of advance consents to ICSID arbitration. It also supported what might have been seen as a rival to the ICA. Possibly, the knowledge of the ICA's existing caseload, its reliance on contract-based rather than treaty-based consents, and a broader commitment to promote any form of mixed arbitration may have influenced this endorsement.

The ICA continued to experience a surge in consents and mixed arbitration cases in the 1970s. This development was likely influenced by the growing number of independent states and related disputes involving state interference with foreign-owned property. An OECD memorandum in 1972 acknowledged that the 'increasing trend towards participation by governments and state-controlled bodies in international trade

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369 ICC, *Bilateral Treaties for the Encouragement of International Private Investment. Report of the ICC Commission on International Investments and Economic Development, Approved by the Executive Committee of the ICC* (n 349) 9.

370 ibid.

means (...) that the [ICC] clause is used more and more in contracts between states and private parties'.[371] While the ICC's private-sector orientation raised some concerns by governments, the OECD considered that 'there may be some role to play for the I.C.C. Court of Arbitration in this field'.[372]

The proliferation of contract-based consents in the 1970s

Diplomatic cables and archival documents of the 1970s provide insight into the proliferating consent to ICA arbitration in public-private contracts. In the early 1970s, for instance, Abu Dhabi routinely referred to ICA arbitration in its public-private contracts.[373] This may be linked to the fact that the United Arab Emirates only signed and ratified ICSID in 1981.[374] More generally, a delay in a state's accession to ICSID appears to frequently explain consent by that state to arbitration at other institutions. As part of the 1975 Helsinki Accords, the US also recommended the ICA for resolving US-USSR commercial disputes, citing its established rules and global familiarity among businesses.[375] However, instead of supporting the ICA, the US and USSR later indirectly endorsed the SCC-AI as a preferred forum with the adoption of the 1977

371 OECD Development Assistance Directorate, 'Institutional Arrangements for International Settlement of Investment Disputes' (1972) GFA B 102/211210, 8.

372 ibid.

373 'Diplomatic Cable from the US Embassy in Abu Dhabi to the Dept of Commerce: Contracting Rules, Practices and Bargaining Techniques in Abu Dhabi' <https://search.wikileaks.org/plusd/cables/1977ABUDH00283_c.html> accessed 31 July 2023.

374 ICSID, 'Database of ICSID Member States' <https://icsid.worldbank.org/about/member-states/database-of-member-states> accessed 31 July 2023.

375 'Diplomatic Cable from the US Mission to Geneva to the Dept of State and the US Mission to the UN in New York: Eighth Session of UNCITRAL' <https://search.wikileaks.org/plusd/cables/1975GENEVA02722_b.html> accessed 31 July 2023.

Optional Clause for Use in US-USSR Trade mentioning the Stockholm Institute.[376] Unlike the USSR, Poland was willing to refer disputes with US nationals to the ICA and concluded agreements to this effect in the 1970s.[377] This may again be linked to the fact that Poland never ratified ICSID.[378]

Morocco also increasingly referred to the ICA, making it the standard forum in its military contracts by 1977.[379] At the same time, the country also prepared another standard clause for use in various types of public-private contracts referring to the ICA.[380] In 1976, the US companies Northrop and Delco had already signed agreements Morocco that mentioned arbitration at the Paris-based Court.[381] In 1978, the Moroccan ICC National Committee hosted a seminar on investment protection, export industries, and transfer of technology in Mohammedia. In a communication to the Moroccan king following the event, it recommended that the country 'extend concepts of international arbitration to cover investment of medium-sized firms as well as large firms'.[382] Unlike most other countries in the Middle East and North Africa region, Morocco swiftly ratified

[376] SCC, *Documents Exchanged January 12, 1977, between American Arbitration Association, USSR Chamber of Commerce and Industry and Stockholm Chamber of Commerce*, on file with the author, I thank Joel Dahlquist for sharing these documents with me.

[377] 'Diplomatic Cable from the Dept of State to the US Mission in Geneva: CSCE: Commercial Subcommittee Discussion on Arbitration' <https://wikileaks.org/plusd/cables/1973STATE213978_b.html> accessed 31 July 2023.

[378] Mahnaz Malik, '"The ICSID Club": List of Members and Non-Members' (2007) <https://www.biicl.org/files/2916_icsid_club__malik_.pdf> accessed 31 July 2023.

[379] 'Diplomatic Cable from the US Embassy in Rabat to the Dept of State: US Citizen Claims against GOM for Uncompensated Land Claims' <https://search.wikileaks.org/plusd/cables/1977RABAT02323_c.html> accessed 31 July 2023.

[380] ibid.

[381] 'Diplomatic Cable from the US Embassy in Rabat to the Dept of State: Status Report on Reactions to Ambassador's Aide Memoire on Outstanding Commercial and Economic Issues Between GOM and US Firms and Property Owners' <https://search.wikileaks.org/plusd/cables/1976RABAT00627_b.html> accessed 31 July 2023.

[382] 'Diplomatic Cable from the US Consulate in Casablanca to the Dept of Commerce: International Chamber of Commerce Seminar in Morocco Highlights GOM Desire Attract Investment Here' <https://search.wikileaks.org/plusd/cables/1978CASABL02594_d.html> accessed 31 July 2023.

ICSID.[383] Moroccan consent to ICA arbitration can therefore not be explained by the lack of alternatives. Other factors, such as the advocacy of the Moroccan National Committee or the ICA's location in France may have contributed to this decision.

The ICA was also referenced in public-private contracts involving Iran and Pakistan. In 1977, a contract between US-based Blount Brothers International and Iran's state-owned National Airlines Corporation for the expansion of the Arya Sheraton Hotel in Teheran also included consent to ICA arbitration.[384] Again, Iran never signed the ICSID Convention requiring alternative arbitration settings for foreign-owned assets.[385] By 1979, Pakistan also typically referenced the ICC Arbitration Rules in contracts involving advance financial guarantees from foreign bidders.[386] During the 1975 discussions leading to the 1976 OECD Guidelines for Multinational Enterprises, states then recommended the ICC-ICA for mixed arbitration as an alternative to ICSID.[387]

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383 Applying the World Bank definition of this region, including Algeria, Bahrain, Djibouti, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Malta, Morocco, Oman, Qatar, Saudi Arabia, Syrian Arab Republic, Tunisia, United Arab Emirates, West Bank and Gaza, Yemen; see 'World Bank Open Data for Middle East & North Africa' (*World Bank Open Data*) <https://data.worldbank.org> accessed 31 July 2023.

384 'Diplomatic Cable from the US Embassy in Tehran to the Depts of Commerce and State, and the US Embassy in Jidda: Major Projects/Hotel Construction-Sub-Contract' <https://search.wikileaks.org/plusd/cables/1977TEHRAN01468_c.html> accessed 31 July 2023.

385 Examples are the Iran-US Claims Tribunal the proceedings of which were conducted under the auspices of the PCA, the Case Concerning Oil Platforms (Iran v United States) at the ICJ, or ICC cases, such as *Crescent Petroleum Company International Limited, Crescent Gas Corporation Limited v National Iranian Oil Company* PCA Case No 2019-03.

386 'Diplomatic Cable from the US Embassy in Islamabad to the Dept of State: OPIC Insurance Coverage for On-Demand Letters of Credit Posted by US Contractors' <https://search.wikileaks.org/plusd/cables/1979ISLAMA06610_e.html> accessed 31 July 2023.

387 'Diplomatic Cable from the US Mission to the OECD to the Dept of State: Committee on International Investment and Multinational Enterprises, Meeting 30 September-1 October; Ad Hoc Drafting Group Meeting 2-3 October 1975' <https://wikileaks.org/plusd/cables/1975OECDP25804_b.html> accessed 31 July 2023.

The caseload continues to grow

With a growing number of consents in public-private contracts, new cases did not wait to follow. In 1973, the ICA administered an arbitration by Israeli companies against the Ugandan government.[388] The specifics of the case are unknown, but a subsequent telegram from Uganda's President Amin to Israeli Defence Minister Dayan, suggests the issue was related to the nationalization of foreign property ('now that we have put our economy in the rightful hands of its citizens'[389]). The case was part of temporary diplomatic tensions between the two countries.[390] When Amin subsequently shifted to a more diplomatic tone US diplomats explained it with the existence of the arbitration, noting that '[i]t is now clear that a prime motivation behind Amin's relatively temperate remarks and attitude toward Israel in last several days is his apprehension of Israeli legal Initiatives on international fronts'.[391]

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388 'Diplomatic Cable from the US Embassy in Kampala to the Dept of State: Amin Elaborates on Telegram to Dayan' <https://wikileaks.org/plusd/cables/1973KAMPAL02408_b.html> accessed 31 July 2023; 'Diplomatic Cable from the Dept of State to the US Mission in Geneva: CSCE: Commercial Exchanges Subcommittee: Arbitration' <https://wikileaks.org/plusd/cables/1974STATE094147_b.html> accessed 31 July 2023; Edwin Dale Jr, 'US and Poland in Pacts Expected to Triple Trade' *New York Times* (9 November 1972) <https://www.nytimes.com/1972/11/09/archives/us-and-poland-in-pacts-expected-to-triple-trade-us-and-poland-sign.html> accessed 31 July 2023.

389 'Diplomatic Cable from the US Embassy in Kampala to the Dept of State: Message from President Amin to General Dayan' <https://wikileaks.org/plusd/cables/1973KAMPAL02392_b.html> accessed 31 July 2023.

390 This sudden change of tone by Amin also came as a surprise to US Diplomats who highlighted Amin's 'civil tone', which was 'nothing short of remarkable' given his 'usual heavy-handed zionist imperialist-mercenary approach', 'Diplomatic Cable from the US Embassy in Kampala to the Dept of State: A "New" General Amin?' <https://wikileaks.org/plusd/cables/1973KAMPAL02393_b.html> accessed 31 July 2023; also see Dezalay and Garth (n 79) 80, for a consideration of the implications of Israeli-Arab tensions in the early 1970s for the evolution of commercial arbitration in the oil sector.

391 'Diplomatic Cable from the US Embassy in Kampala to the Dept of State: Amin Elaborates on Telegram to Dayan' (n 388).

Other arbitrations against African states followed. In 1974, US national Thomas Wood filed an ICA case against Zambia over financial disagreements.[392] The tribunal included notable jurists, such as the former US Supreme Court Justice Arthur Goldberg.[393] In 1978, the US company Lockwood obtained a USD 1.3 million ICA award against Libya.[394] The Swedish shipyard Gotaverken also secured a favourable award against Libya in the same year, leading to enforcement proceedings in 1979.[395] In the same year, a USD 7.5 million arbitration administered by the ICA involved a contract between US company Morrison-Knudsen and the Republic of Benin.[396] Although African states were frequent respondents in ICA arbitration in the 1970s, cases also involved other states. Around 1976, the US company Owens-Illinois commenced arbitration against Venezuela, with the ICA acting as appointing authority.[397] In 1977, the US company Sea Oil also initiated ICA arbitration against Indonesia.[398]

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392 ‘Diplomatic Cable from the Dept of State to the US Embassies in Lusaka and Nairobi: TAW Files Arbitration Claim’ <https://wikileaks.org/plusd/cables/1974STATE196220_b.html> accessed 31 July 2023; Douglas Cray, ‘Negro Named to Chase Boards’ *The New York Times* (23 July 1970) 39, the author distances himself from the racist language used in this article.

393 ‘Diplomatic Cable from the Dept of State to the US Embassies in Lusaka and Nairobi: TAW Files Arbitration Claim’ (n 392).

394 ‘Diplomatic Cable from the Dept of State to the US Embassy in Tripoli: Lockwood Corporation Arbitral Award’ <https://search.wikileaks.org/plusd/cables/1978STATE281303_d.html> accessed 31 July 2023; Dezalay and Garth have described the 1970s as a phase of the ‘great battles’ ignited by nationalisation of foreign-owned oil assets in Libya, see Dezalay and Garth (n 79) 81.

395 ‘Diplomatic Cable from the US Embassy in Stockholm to the Dept of State and Other Embassies: Atlantic Richfield (ARCO) Claim Against Libya’ <https://search.wikileaks.org/plusd/cables/1979STOCKH01929_e.html> accessed 31 July 2023.

396 ‘Diplomatic Cable from the Dept of State to the US Embassy in Cotonou: Morrison Knudsen’ <https://search.wikileaks.org/plusd/cables/1978STATE191003_d.html> accessed 31 July 2023.

397 ‘Diplomatic Cable from the US Embassy in Caracas to the Dept of State: Owens-Illinois Case’ <https://search.wikileaks.org/plusd/cables/1976CARACA12339_b.html> accessed 31 July 2023.

398 ‘Diplomatic Cable from the US Embassy in Jakarta to the Dept of State: PT Baud’ <https://search.wikileaks.org/plusd/cables/1977JAKART01217_c.html> accessed 31 July 2023; ‘Diplomatic Cable from the Dept of State to the US Embassy in Jakarta: Sea Oil/PT Baud Expropriation Claim’ <https://search.wikileaks.org/plusd/cables/1978STATE323458_d.html> accessed 31 July 2023.

Most ICA arbitrations in the 1970s mentioned in the diplomatic cables and state archives reviewed for this thesis involved newly independent states as respondents. These cases were extensively discussed among Western diplomats and often concerned factual circumstances related to fiscal or economic measures these states had adopted post-independence. Several cases concerned the exploration and use of natural resources and defence contracts. In contrast, none of the cases mentioned involve a capital-exporting state as respondent. It is reasonable to assume that the ICA substantially benefitted from mixed arbitrations filed in the post-independence context.

The knowledge broker John Blair

In the 1970s, one individual affiliated with the ICC played a pivotal role in sharing knowledge about early investment treaty negotiations and conclusions with capital-exporting state officials. This official was John Blair. As a member of the UK National Committee of the ICC and advisor to the Confederation of British Industry he was quick to realize the protective potential of treaty-based advance consent for private investors.[399] Blair wore multiple institutional hats to broker support for mixed arbitration in a more permanent institutional setting.[400] He had a varied and extensive professional background. In previous years, he had participated in the work of the influential Association for the Promotion and Protection of Private Foreign Investments ('APPI').[401] Blair was also a legal and international relations advisor at Royal Dutch Shell between 1958 and 1984 and had contributed to the first draft of the ICSID Convention alongside

399 Batselé (n 65) 14.
400 ibid 24.
401 ibid.

Haight in the early 1960s.[402] In the early 1970s, he chaired the ICC drafting committee for the ICC Guidelines for Foreign Investment.[403]

Serving as the rapporteur of the ICC Commission on International Investment and Economic Development, Blair requested that ICC National Committees acquire information on new investment treaties from their respective national governments.[404] Blair meticulously compiled lists of such treaties, which were especially valuable before the advent of online databases.[405] He was also well-connected with government officials in capital-exporting states, regularly sharing information about new investment treaties that contained consents to arbitration.[406] A German government official wrote to Blair in 1985: 'I am happy to send you some texts in exchange for the many agreements you have send me over the years'.[407] Blair's efforts show that ICC experts acknowledged the growing importance of ICSID in investment arbitration. By providing information on the availability of ICSID arbitration in new BITs, he underscored this growing acceptance and relevance of ICSID.

Blair's role in the dissemination of information and its impact on treaty negotiation dynamics appears underappreciated in existing research. Blair knew that sharing information about the successful outcomes of investment treaty negotiations involving Western capital-exporting states had strategic value. He understood that capital-

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402 ibid 14; St John (n 52) 132.

403 Perrone (n 99) 82, fn 3.

404 ICC Commission on International Investments and Economic Development, 'Bilateral Treaties for International Private Investment: Note to National Committees' (1975) ICC Doc No 111/260 Bis, GFA B 102/211210.

405 ibid.

406 Letter from John Blair to Ria Kemper (5 June 1981) GFA B 102/272814.

407 Letter from Hans-Martin Burkhardt to John Blair (14 August 1985) GFA B 102/392110.

importing states would be less likely to deny specific concessions to a Western negotiating partner if this partner knew that similar concessions had already been granted to other Western states. In this context, information about treaty negotiations was a potent instrument for Western negotiators. It allowed them to better prepare for upcoming negotiations and to anticipate, how far capital-importing states might be willing to go. Evidence of such strategic information-sharing can be found in state archives.[408]

2.2.5. The ICC-ICA as an alternative forum in investment treaties

In keeping with the growing trend of investment treaty negotiations during the 1980s, governments often viewed the ICC as a viable alternative to ICSID. Some adopted a so-called 'cafeteria approach', offering investors a choice among multiple sets of institutional arbitration rules. For instance, in 1981, German officials consulted the German National Committee of the ICC in an informal meeting. In the letter requesting the meeting, they asked:

> Is the business community interested in being able to invoke the World Bank's International Centre for Settlement of Investment Disputes (ICSID)? Are other institutions preferred? (e.g., International Chamber of Commerce Arbitration Court?)[409]

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408 See for instance Hans-Martin Burkhardt, 'Vermerk: Deutsch-französische Konsultationen über Investitionsschutz am 17.2.1984 in Bonn (Memo: Franco-German Consultations on Investment Protection in Bonn on 17 February 1984), Bonn, VC5 - 904 346/1' (20 February 1984) GFA B 102/272814; Hans-Martin Burkhardt, 'Vermerk: Investitionsförderungsverträge, hier: Fassung des Mustervertrags (Memo: Investment Protection Agreements, here: Draft Model Agreement), Bonn, VC5 – 740306' (6 March 1974) GFA B 102/211210, 2.

409 Letter from Hans-Martin Burkhardt to Mssrs Esser and Giesecke (28 September 1981) GFA B 102/272814, translated by the author, original: '*Ist die Wirtschaft interessiert, das Weltbank-*

While no formal records of this meeting appear to exist, the concept of the cafeteria approach resurfaced during 1984 consultations between the French and German governments. A German government memo described the French approach:

> Arbitration is of great importance to France. Specifically, France primarily seeks arbitration between investors and states (not provided for in the German model contract), while arbitration between states is secondary (…). According to the French perspective, investors should have the choice between ICSID, UNCITRAL, or ICC. It is preferred to avoid prior exhaustion of domestic remedies, with a possible requirement of a limited (6 to 12 months) prior recourse to national courts if necessary.[410]

France was also among the first states to refer to the ICC in its own investment treaties. Examples include the BITs with the Syrian Arab Republic and Korea, both signed in 1977, and with Sudan and El Salvador, signed in 1978. In the late 1970s and early 1980s, the ICC thus benefitted from this emerging cafeteria approach.

In 1985, the ICC also participated in the elaboration of the UNCITRAL Model law. Mixed arbitrations at the ICA rely more heavily on the support of national courts.[411] A supportive stance of these courts – especially at the seat of the arbitration and where enforcement of an award is sought – can significantly influence proceedings. To foster such support, the ICC advocated for the inclusion of provisions concerning mixed

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Schiedsgericht (ICSID) anrufen zu können? Werden andere Gremien vorgezogen? (z.B. Schiedsgericht der Internationalen Handelskammer'.

410 Burkhardt, 'Vermerk: Deutsch-französische Konsultationen über Investitionsschutz am 17.2.1984 in Bonn (Memo: Franco-German Consultations on Investment Protection in Bonn on 17 February 1984), Bonn, VC5 - 904 346/1' (n 408) 4, translated by the author, original: '*Sch. ist für F von großer Bedeutung. Und zwar strebt F vor allem Sch. zwischen Investor und Staat an (bisher nicht in deutschem Mustervertrag vorgesehen), Sch. zwischen Staaten ist für F nachrangig. Klausel über internationale Sch. hat auch Vorrang vor Klausel, wonach Rechtmäßigkeit von Enteignungsmaßnahmen gerichtlich nachprüfbar sein muß. Investor soll nach französischer Auffassung die Wahl haben zwischen ICSID, UNCITRAL oder ICC. Möglichst keine vorherige Erschöpfung des innerstaatlichen Rechtswegs, notfalls befristetes (6 bis 12 Monate) vorheriges Beschreiten des nationalen Rechtswegs.*'

411 Dahlquist (n 99) ch 3.

arbitration in the UNCITRAL Model Law. As an observer to UNCITRAL, it recommended that the Model Law clarify 'whether it applies to commercial transactions undertaken by sovereign States and State-owned enterprises'.[412] Although the final Model Law did not mention mixed arbitration, its provisions, as implemented in national laws, continue to affect many mixed arbitrations administered by the ICA.

In subsequent years, the ICA continued to be seen as an attractive alternative to ICSID and the UNCITRAL Arbitration Rules adopted in 1976. In treaty negotiations, this preference became especially relevant where a negotiating state had not (yet) ratified ICSID.[413] The Germany – Uruguay BIT of 1987, for instance, was negotiated before Uruguay ratified the ICSID Convention and the country only reluctantly agreed to include investor-state arbitration in the treaty at all.[414] As a compromise, the treaty provided for the ICA President as default appointing authority. Reporting on the negotiations after the signature of the BIT, a German official noted:

> For a long time, Uruguay was not willing to accept the provision for an independent investor-state arbitration, because – like most Latin American countries – the country was resistant to contractual limitations on full state sovereignty (here the jurisdiction of national courts. (…) It was only after several tough negotiations that the (…) compromise solution could be reached.[415]

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412 UNCITRAL, 'International Commercial Arbitration: Analytical Compilation of Comments by Governments and International Organizations on the Draft Text of a Model Law on International Commercial Arbitration, Report of the Secretary-General, Addendum' (1985) UN Doc No A/CN9/263/Add1.

413 Even if the creation of the ICSID Additional Facility in addressed this situation to some extent.

414 Hans-Martin Burkhardt, 'Vermerk: IFV-Verhandlungen mit Uruguay (Memo: Investment Promotion Agreement Negotiations with Uruguay), Bonn, VC5 – 957213' (19 February 1986) GFA B 102/392268.

415 'Memo: Entwurf eines Gesetzes zu dem Vertrag vom 4. Mai 1987 zwischen der Bundesrepublik Deutschland und der Republik Östlich des Uruguay über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (Draft Law on the Treaty of 4 May 1987 between the Federal Republic of Germany and the Eastern Republic of Uruguay on the Promotion and Reciprocal Protection of

The ICA was also chosen as an alternative forum in subsequent treaty negotiations of Germany with Latin American states, which tended to reject mixed arbitration based on the Calvo Doctrine.[416]

A rising number of treaties concluded in the late 1980s and early 1990s referred to investor-state arbitration under the ICC Arbitration Rules. While the ICA did not profit from the proliferation of investment treaties to the extent ICSID did, it nevertheless benefitted. A 1993 British government memo recommended:

> If ICSID is clearly not acceptable to a particular country we should suggest investment disputes should be submitted to other international arbitration procedures such as the International Chamber of Commerce or the UNCITRAL Arbitration Rules. But ICSID should be our first preference. An alternative is the à la carte provision of ICSID/ICC/UNCITRAL in the draft Euro-Arab Investment Convention.[417]

By the early 1990s, the ICA had established itself on the treaty-based market for mixed arbitration. Particularly for capital exporting states, it was attractive as an alternative to ICSID and the UNCITRAL Arbitration Rules, and when states wanted to offer investors several choices. The subsequent years saw a steady increase in the number of BITs consenting to arbitration at the ICA, peaking in 2001 with the conclusion of 34 new treaties. The diffusion of consent in investment treaties also started to

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Capital Investments)‘ (1 July 1987) GFA B 102/392270, translated by the author, original: ‘*Die erst in unseren neueren Investitionsförderungs- und Schutzverträgen aufgenommene Regelung für eine unabhängige Investor-Staat-Schiedsgerichtsbarkeit wollte Uruguay lange Zeit nicht akzeptieren, weil das Land – wie die meisten lateinamerikanischen Staaten – einer vertraglichen Einschränkung der vollen staatlichen Souveränität (hier der nationalen Gerichtsbarkeit) ablehnend gegenübersteht. (…) Erst nach mehreren zähen Verhandlungen konnte Uruguay (…) Kompromißlösung erzielt werden*‘.

416 Germany - Bolivia BIT (1987), art 11(2).

417 ‘Confidential: Model Investment Promotion and Protection Agreement, Jan 1990 Version, General Negotiating Brief’ 12, on file with the author, this document was communicated to me after a Freedom of Information Request in the United Kingdom.

generate caseload and the ICA administered its first treaty-based arbitration under its own Rules in 1996.[418] Since then, it has administered at least 43 treaty-based arbitrations and has served as the appointing authority in at least 16 treaty-based cases.[419]

2.2.6. The ICC-ICA's beneficiaries: the case of third-party funders

Mixed arbitration has created economic dynamics and fostered collaborative relationships at the ICC-ICA that sustain the institution's position in the oligopoly. Arbitrators, third-party funders, and other actors involved in mixed arbitration have developed significant economic interests in maintaining and expanding access to the ICC for arbitration. This constituency of beneficiaries was not exclusively generated by the institution's role in mixed arbitration. Instead it is the combination of the ICA's core business of private commercial arbitration and mixed arbitration that generates significant returns. Yet, several participants in ICC-ICA arbitration profited significantly from mixed cases.

Edwin Herbert's 1966 prediction holds true: arbitrators in ICSID proceedings are also frequently appointed in arbitrations administered by the ICA. The constituency of arbitrators benefitting from mixed arbitration thus overlaps (at least) the two institutions. The financial rewards for ICA appointees are significant. This stems from the fee structure in ICA arbitration, which calculates arbitrator remuneration as a percentage of

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418 Andrea Carlevaris and Joel Dahlquist, 'Investment Treaty Arbitration at ICC' 2017 ICC Dispute Resolution Bulletin 25, 25.

419 ICC, 'ICC Statistics 2020' 12 <https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf> accessed 31 July 2023.

the disputed amount.[420] High-stakes arbitrations involving state entities tend to be especially profitable. For instance, a recent claim by a Chinese investor against the Republic of Congo, seeking USD 8.8 billion over a revoked mining license, demonstrates the potential earnings.[421] Under the 2021 ICC Arbitration Rules, a three-member tribunal could earn fees ranging from USD 880,000 to USD 3,520,000.[422] The ICA determines whether the actual remuneration is closer to the lower or upper band, which gives it leverage over arbitrator conduct.[423]

However, incentives linked to financial returns are not limited to arbitrators. Third-party funders, attracted by potential gains, also seek the vicinity of the ICA. Some representatives of third-party funders have served in official capacities or collaborated with the ICC. Third-party funders regularly contribute to ICC events, including the ICC Institute of World Business Law's annual conferences and other arbitration-related events.[424] This symbiotic relationship also extends to capacity-building and educational initiatives. For instance, the director of US litigation funder Burford Capital recently hosted an event with the ICA's Regional Director for Africa, discussing the implications

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420 '2021 ICC Arbitration Rules' (n 162) app III, art 2.

421 Cosmo Sanderson, 'Burford Backs Miner's Claim Against Congo' (10 May 2021) <https://globalarbitrationreview.com/article/burford-backs-miners-claim-against-congo> accessed 31 July 2023.

422 These amounts have been calculated in accordance with the scales contained in app III, art 3, '2021 ICC Arbitration Rules' (n 162).

423 ibid art 38(2) and app III, art 2.

424 ICC, 'Sponsorship Opportunity: 42nd ICC Institute Annual Conference' <https://web.archive.org/web/20220123182439/https://iccwbo.org/about-us/partnerships/resources-for-businesses/icc-annual-conference-institute/> accessed 31 July 2023; ICC, 'Sponsorship Opportunity: 19th ICC Miami Conference on International Arbitration in Latin America' <https://web.archive.org/web/20210607150735/https://iccwbo.org/about-us/partnerships/resources-for-businesses/icc-miami-conference/> accessed 31 July 2023.

of the 2021 ICC Arbitration Rules for third-party funding.[425] Similarly, Bernardo Cremades, a frequent arbitrator, is associated with the ICC Institute of World Business Law and serves as advisor to the arbitration funder, Lex Finance.[426]

In some cases, staff transitioned from the ICA to third-party funders.[427] This is not limited to case managers but extends to high-ranking officials. John Beechey served as the ICA President from 2009 to 2015, *inter alia* overseeing the launch of the 2012 ICC Arbitration Rules, which introduced several new provisions related to mixed arbitration.[428] During his presidency, he joined the investment advisory panel of Woodsford Litigation Funding in 2014. The funder later prominently advertised Beechey's former role.[429]

Quentin Pak, from Burford Capital's Singapore office, also was an ambassador of the ICC Belt and Road Commission. According to the website of this Commission, ambassadors 'support and help to promote the Commission's work within their respective jurisdiction(s) and networks' and 'play a pivotal role in helping to keep the

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425 *Burford Briefings: Disclosure of Arbitration Finance and Security for Costs in ICC Arbitrations* (Directed by Burford Capital, 2021) <https://vimeo.com/502678675> accessed 31 July 2023.

426 Lex Finance, 'Our Team' <www.lex-finance.com/members-team/> accessed 31 July 2023.

427 Nivalion, 'Jonathan Barnett' <http://nivalion.com/en/about-us/investment-underwriting/jonathan-barnett> accessed 31 July 2023.

428 'John Beechey CBE' (*Arbitration Chambers*) <https://arbchambers.com/arbitrators/john-beechey-cbe?lang=en> accessed 6 August 2023.

429 Sarah Downey, 'How to Win Cases and Influence People: Litigation Funding Strives to Go Mainstream' (*The Judge*, 2013) <www.thejudgeglobal.com/how-to-win-cases-and-influence-people-litigation-funding-strives-to-go-mainstream/> accessed 31 July 2023; Steven Savage, 'Woodsford Litigation Funding and Leste Litigation Finance Announce a Global Cooperation Agreement to Serve the Growing Brazil and Latin America Market for Third Party Funding of International Arbitration and Litigation' (*Woodsford UK*, 23 March 2017) <https://woodsford.com/international-arbitration-leste-credit/> accessed 31 July 2023.

Belt and Road Commission informed of strategic developments'.[430] The Commission was established to specifically promote ICC-administered resolution of disputes that are linked to the Belt and Road Initiative, including 'in relation to infrastructure build and investment'.[431] It engages 'with corporates, state-owned enterprises and governments across all Belt and Road territories' and aims at 'promoting ICC's capabilities as widely as possible'.[432] Concurrently, Burford announced its financing of the USD 8.8 billion claim against the Republic of Congo, which may be linked to the Belt and Road Initiative.[433]

Moreover, Ania Farren, Managing Director of Vannin Capital, simultaneously chaired the arbitration programme of the UK National Committee.[434] According to the Committee's website, this programme 'provides a unique forum to build national consensus on international rules for arbitration, nominate representatives to ICC's international fora, promote ICC products and services and manage *the nominations of arbitrators to the Court*'.[435] Farren may therefore have the authority to nominate

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430 ICC, 'Belt and Road Ambassadors' <https://web.archive.org/web/20220524193702/https://iccwbo.org/dispute-resolution-services/belt-road-dispute-resolution/belt-and-road-ambassadors/> accessed 31 July 2023.

431 ibid.

432 ibid.

433 Sanderson (n 421); Christoph Wang, 'Countries of the Belt and Road Initiative (BRI)' (*Green Finance & Development Center*) <https://greenfdc.org/countries-of-the-belt-and-road-initiative-bri/> accessed 31 July 2023.

434 Diego de Barros Franco e Souza Mello, 'Ania Farren and Kim Franklin QC Are Appointed to the ICC UK Committee for Arbitration and ADR' (*ArbitralWomen*, 11 July 2019) <https://www.arbitralwomen.org/ania-farren-and-kim-franklin-qc-are-appointed-to-the-icc-uk-committee-for-arbitration-and-adr/> accessed 18 September 2023.

435 ICC United Kingdom, 'Press Release: Handing Over to the Next Generation, John Beechey CBE Steps Down as Chair of ICC's Arbitration Programme and Hands Over Leadership to Ania Farren, Managing Director at Vannin Capital' (24 June 2019) <https://iccwbo.uk/blogs/press-releases/handing-over-to-the-next-generation-john-beechey-cbe-steps-down-as-chair-of-icc-s-arbitration-programme-and-hands-over-leadership-to-ania-farren-managing-director-at-vannin-capital> accessed 31 July 2023.

arbitrator candidates for mixed arbitrations at the ICA. While conflict of interest rules might prevent her involvement in such nominations, it is uncertain whether these safeguards are effective in practice, and their enforcement remains unclear.[436] Opportunities for public scrutiny are also limited as nomination commission members must sign non-disclosure agreements covering communication between the ICA and the National Committee.[437]

In summary, the interplay between the ICA and third-party funders is evident in the above examples of 'double hatting'. The mutual benefits are not limited to mixed arbitration but relate to the entire caseload of the ICA. Yet, given the often substantial amounts in dispute, mixed arbitration at the ICA contributes significantly to these benefits.

436 If the Court were to request a proposal from the ICC National Committee in the UK in mixed arbitration, for instance, because it considers that the presiding arbitrator should be a UK national, rules in the 'Note to ICC National Committees and Groups on the Proposal of Arbitrators' would require Ms. Farren to be 'wholly excluded' from that process to avoid conflicts of interest, see ICC, 'Note to ICC National Committees and Groups on the Proposal of Arbitrators' <https://iccwbo.org/wp-content/uploads/sites/3/2016/11/Note-to-National-Committees-and-Groups-of-the-ICC-on-the-Proposal-of-Arbitrators-ENGLISH-1.pdf> accessed 31 July 2023; the UK National Committee committed to comply with the provisions in this note when signing the ICC Global Partnership Agreement in 2016, see ICC, 'ICC Global Partnership Agreement' <https://cdn.shopify.com/s/files/1/2992/1976/files/ICC_United_Kingdom_Global_Partnership_Agreement.pdf?2567> accessed 31 July 2023.

437 ICC, 'Note to ICC National Committees and Groups on the Proposal of Arbitrators' (n 436) para 21.

2.3. Mixed arbitration at the ICC-ICA today

Today, the ICA remains a significant player in the field of contract-based mixed arbitration. It also competes with the intergovernmental PCA and ICSID and the private-sector SCC-AI, as an alternative forum mentioned in investment treaties. This market position in mixed arbitration builds on the earlier proliferation of consents included in public-private contracts, investment treaties, and national investment laws. Commercial arbitration between private-sector entities nevertheless remains the ICA's core business. Its current institutional framework and its mixed arbitration caseload today offer insights into its position within the mixed arbitration oligopoly. The following will consider these aspects.

2.3.1. The institutional framework of the ICC-ICA

Today, the ICA continues to operate within the broader structure of the ICC, a complex organization comprising various agencies and subsidiary bodies. Certain institutional links between the ICA and the ICC's other institutional organs are relevant for mixed arbitration. The ICC's structure and functions are governed by its Constitution. Membership in the ICC is open to both legal and natural persons. They can either join a National Committee or Group of the ICC or become direct members in countries without such organized subsidiaries.[438] The ICC counts some of the world's leading arbitration law firms and multinational corporations among its members.[439] These members

438 ICC, 'ICC Constitution' art 2(1)(a) <https://iccwbo.org/icc-constitution/> accessed 31 July 2023.

439 ICC France, 'Membres' <https://www.icc-france.fr/membres/> accessed 31 July 2023.

collectively form the ICC World Council, which serves as the ICC's governing body.[440] The World Council has several powers directly impacting the ICA, including the election of its President and appointment of its Vice Presidents and members. *Ex officio,* the President of the ICA also attends the meetings of the World Council.[441]

Some National Committees, such as ICC China, are connected with state agencies. Yet, the majority of these Committees are run by private-sector representatives.[442] The ICC World Council does not formally include state representation. The ICC's institutional design is thus closely aligned with, and mostly controlled by, private enterprises, which are among the primary users of mixed arbitration, as administered by the ICA. This privatized design is also reflected at the management level of the organization, where the ICC Executive Board is 'responsible for developing and implementing the strategy, policy and programme of action of ICC'.[443] The Executive Board consists of 27 individuals, including at least 10 'senior businessmen', and five 'corporate heads or corporate board members'.[444] It also oversees the organization's finances.[445]

National Committees and Groups represent the ICC at the national level. According to the ICC Arbitration Rules, these Committees and Groups have the right to propose candidates for arbitrators when the ICA is responsible for making an

440 ICC (n 438) art 5(1).

441 ibid art 5(6).

442 For instance, ICC China is affiliated with the state agency China Council for the Promotion of International Trade ('CCPIT').

443 ICC (n 438) art 6(1).

444 ibid art 6(2).

445 ibid art 6.

appointment.[446] In 2012, a new provision was introduced in the ICC Arbitration Rules, which allowed the ICA to 'appoint directly to act as an arbitrator any person (...) where (...) one or more of the parties is a state or may be considered to be a state entity'.[447] In addition, an obligation of ICA members to be formally independent from National Committees and Groups, and to refrain from disclosing sensitive case-related information to them, was also introduced.[448] According to the 2012 ICC report *States, State Entities and ICC Arbitration*,

> [o]ne of the concerns expressed by states was the role played by National Committees in the appointment of a sole arbitrator or the president of an arbitral tribunal. There was a perception that ICC National Committees lacked neutrality owing to the fact that they are often composed of leading companies and business associations in their respective countries.[449]

Given the lack of formal state representation in the ICC World Council, these state concerns must have been communicated through a different channel. It remains unclear, which states expressed themselves and how. It is possible that the concerns may have been exacerbated by the fact that some ICA members concurrently served on nomination commissions of National Committees in the past.[450]

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446 '2021 ICC Arbitration Rules' (n 162) art 13(3).

447 ibid. This rule notably does not prevent the ICA from requesting and considering proposals by the ICC National Committees and Groups in arbitrations involving states or their entities. The rule was first introduced in 2012, implying that it was not applicable to any such cases that were filed prior to that date.

448 ibid app II, art 3.

449 ICC Commission on Arbitration and ADR, 'ICC Commission Report: States, State Entities and ICC Arbitration' (ICC 2012) 6.

450 One example is ICA Vice President Eduardo Zuleta, who is also acting as a Nomination Commission Member of the ICC National Committee of Colombia. For a list of ICC National Committee and Group Nomination Committee members, see ICC, 'National Committee Nomination Commissions' <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/national-committee-nomination-commissions/> accessed 31 July 2023.

It is reasonable to assess that the newly introduced provisions were an attempt to address these concerns. Despite the new safeguards, however, the ICA is not under an obligation to directly appoint arbitrators in mixed arbitration. Instead, it retains discretion to accept or reject nominations from National Committees. Candidates nominated by National Committees, including those with double-hatting ICA members, may thus nevertheless be appointed. Public scrutiny of the enforcement of these safeguards also remains limited.

The ICC Commission on Arbitration and Alternative Dispute Resolution, as it is called today, continues to have significant influence on mixed arbitration at the ICA. Today, the Commission 'counts over 1,300 members from more than 100 countries comprising lawyers, in-house counsel, arbitrators, mediators, law professors and experts in various dispute resolution fields'.[451] Leading investment arbitrators also advise the Commission.[452] Unlike the ICA, which focuses on administering specific arbitrations, the Commission is responsible for the strategic development of the ICC's dispute resolution services. It acts as the rule-making body for ICC arbitration, updates the ICC Arbitration Rules, and reports on emerging issues.

The Commission is expressly mentioned in the ICC Arbitration Rules. According to Article 9 of these Rules, the Commission approves Rule changes proposed by the ICA, before they are submitted to the ICC Executive Board. The inclusion of Article 9 suggests that when parties agree to arbitrate under these Rules, they are also implicitly

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451 ICC, 'Commission on Arbitration and ADR' <https://iccwbo.org/dispute-resolution/thought-leadership/commission-on-arbitration-and-adr/> accessed 31 July 2023.

452 Well-known arbitrator Gabrielle Kaufmann-Kohler, for instance, is part of the consultative advisory board of the Task Force on ADR and Arbitration, which revises the rules of the ICC, see ibid.

agreeing to grant the ICA and the Commission the authority to modify those Rules. It is unclear whether such modifications could have retroactive effect on states' advance consents in pre-existing investment treaties and national investment laws. The formal norm-making authority of the Commission may thus challenge some scholarly views, which suggest that non-governmental organizations can only develop informal, non-binding rules.[453]

2.3.2. The diffusion of consents and applicable rules

To attract mixed arbitrations, the ICC relies on the diffusion of consents in various legal instruments, including investment treaties, public-private contracts, and national investment laws. According to a 2012 report, 18% of all BITs in force in 2012 allowed for ICA-administered mixed arbitration.[454] Out of all BITs in force today, 308 either mention the ICC, the ICA, or their officials as appointing authority, or consent to mixed arbitration under the ICC Arbitration Rules.[455] Several of these treaties were signed by states that had developed model BITs with such mentions before. This includes BITs signed by the Belgo-Luxembourg Economic Union ('BLEU'), Germany, Austria, the United Kingdom, Croatia, and Denmark.[456] Table 1 indicates all BITs mentioning the ICC that have been

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453 Culpepper (n 94) 460.

454 'Commission on Arbitration and ADR' (n 451) para 11.

455 This is the result of a search on the EDIT Database, using the keywords 'ICC' and 'International Chamber of Commerce,' filtering for signed BITs in force as of the time of writing, see Wolfgang Alschner, Manfred Elsig and Rodrigo Polanco, 'Introducing the Electronic Database of Investment Treaties (EDIT): The Genesis of a New Database and Its Use' (2021) 20 World Trade Review 73.

456 This list takes into account all BITs signed by one of these countries, or country groupings, after the publication of a Model BIT mentioning the ICC as listed here: 'International Investment Agreements Navigator, UNCTAD Investment Policy Hub' (*UNCTAD*) <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 31 July 2023.

signed by one of these countries following the publication of a model BIT also mentioning the ICC.

State or country grouping with model BIT mentioning ICC	Number of BITs mentioning ICC, signed after publication of model BIT
Belgo-Luxembourg Economic Union	40
Germany	37
Austria	29
United Kingdom	24
Croatia	18
Denmark	10

Table 1 - References to the ICC in BITs based on prior model treaties

Other states that have more than 15 BITs mentioning the ICC include Cuba (32), Turkey (32), Poland (22), Taiwan (19), Cyprus (18), France (18), and Switzerland (16).[457] Notably, the United States, Russia, and China each have signed only one such BIT. Like most investment treaties, the vast majority of these BITs were signed between 1990 and 2005. Early outliers include five BITs signed by France in 1977 and 1978. Figure 1 shows the progression of new BITs signed that mention the 'ICC' or the 'International Chamber of Commerce', grouped in five-year intervals.

Besides BITs, the ICC is also mentioned in two multilateral agreements: the Third Lomé Convention and the Economic Cooperation Organization's Investment Agreement.[458] No other multilateral treaty appears to consent to arbitration under ICC

457 The number in brackets indicates the number of BITs mentioning the ICC.

458 'Convention of Lomé III, (signed 8 December 1984, entered into force 1 May 1985)' 1923 UNTS 3, art 238(3). 'Agreement on Promotion and Protection of Investment among Member States of the Economic Cooperation Organization, Signed 7 July 2005', art 9(2).

Arbitration Rules. The ICA may nevertheless act as an appointing authority or administering institution in UNCITRAL arbitrations, which are mentioned in multilateral treaties such as NAFTA or the ECT. However, it is reasonable to assume that it attracted less cases under these treaties than institutions that are explicitly referenced.

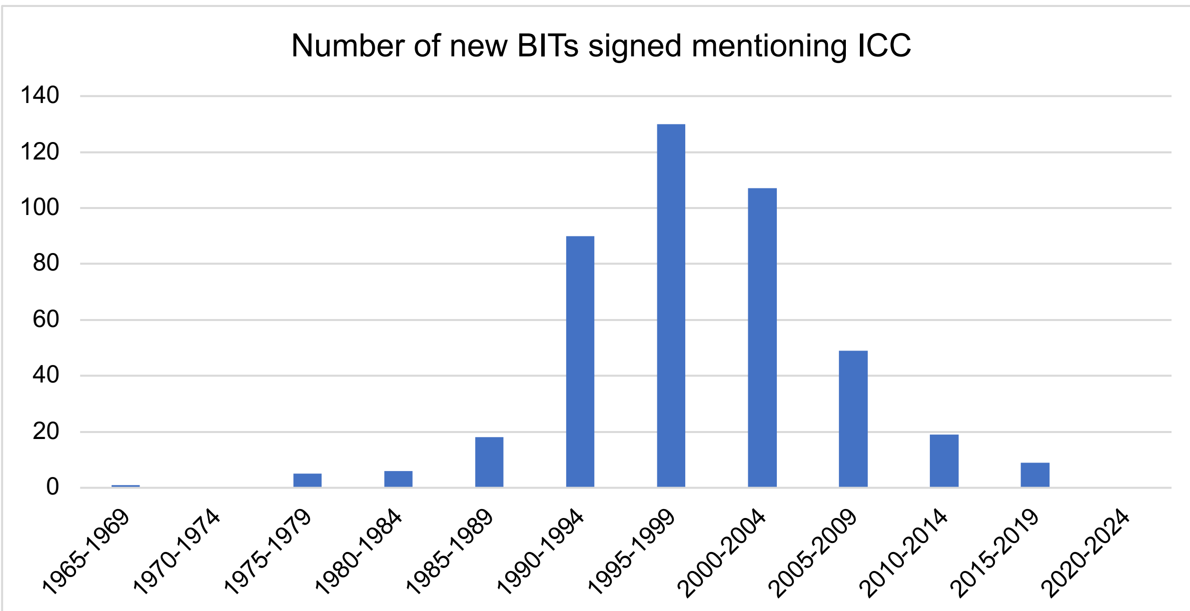

Figure 1 - Number of new BITs signed mentioning the ICC

As mentioned above, some treaties offer investors a choice among several *fora*, including the ICA. In such cases, investors may tend to opt for the ICA, because of the fact that its parent, the ICC, is driven and managed by private-sector entities. If an investor opts for the ICA, the institution is mandated *inter alia* to appoint arbitrators (including those presiding the arbitral tribunal), to decide on challenges by disputing parties alleging a lack of independence or impartiality of arbitrators, to manage procedural finances, and to scrutinize arbitral awards. It is reasonable to assume that investor claimants consider that vesting a private-sector interest group with such powers is in their strategic interest.

Given the inherent stability of the investment treaty regime, the diffusion of consent to ICA arbitration in bilateral and multilateral treaties will likely continue to provide the ICA with some treaty-based cases for years, if not decades. Yet, states, state entities, or state-owned enterprises seem to consent to ICA arbitration more often in legal instruments other than treaties. As mentioned above, consent to ICA arbitration is commonly found in public-private contracts. Although there are no comprehensive databases of such contracts, examples include major infrastructure agreements like those governing oil pipeline projects in Azerbaijan and Georgia.[459] At least six national investment laws also mention the ICC or its Rules. They include the national investment laws of Cabo Verde, Mozambique, Congo DRC, Moldova, Timor-Leste, and Kosovo.[460]

2.3.3. The mixed arbitration caseload of the ICC-ICA

In 2019, the ICA was the leading arbitral institution globally for commercial arbitration, based on the number of newly filed cases.[461] At the close of 2020, the ICA

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459 'Host Government Agreement Between and Among the Government of Georgia and State Oil Company of the Azerbaijan Republic, BP Exploration (Azerbaijan) Limited, Totalfinaelf E&P Caucasian Gas SA, LUKAgip NV, Statoil Azerbaijan AS, Naftiran Intertrade Co (Nico) Limited, Turkish Petroleum Overseas Company Limited' <https://www.bp.com/content/dam/bp/country-sites/en_az/azerbaijan/home/pdfs/legalagreements/gov-agreements/sha_eng_hga_host_government_agreement_georgia__english_.pdf> accessed 31 July 2023; 'Host Government Agreement Between and Among the Government of the Azerbaijan Republic and the State Oil Company of the Azerbaijan Republic, BP Exploration (Caspian Sea) Ltd, Statoil BTC Caspian AS, Ramco Hazar Energy Limited, Turkiye Petrolleri AO, Unocal BTC Pipeline Ltd, Itochu Oil Exploration Azerbaijan) Inc, Delta Hess (BTC) Limited, Signed' <https://www.bp.com/content/dam/bp/country-sites/en_az/azerbaijan/home/pdfs/legalagreements/gov-agreements/btc_eng_agmt1_agmt1.pdf> accessed 31 July 2023.

460 UNCTAD, 'Investment Laws Navigator, UNCTAD Investment Policy Hub' <https://investmentpolicy.unctad.org/investment-laws> accessed 31 July 2023.

461 Green (n 81) 320.

had pending disputes with an aggregate amount in dispute of USD 258 billion.[462] Although many of these cases involved states, state entities, or state-owned enterprises, only a fraction were treaty-based and most originated from contracts.[463] Between 1996 and 2020, the ICA administered 43 cases under BITs in accordance with ICC Arbitration Rules.[464] The ICA has also acted as appointing authority in 16 treaty-based cases under the separate *Rules of ICC as an Appointing Authority in UNCITRAL or Other Arbitration Proceedings*.[465] This shows that the ICC retains a smaller market share of treaty-based mixed arbitration than ICSID and the PCA.

According to ICC data, a large number of arbitrations at the ICA involve states or state entities (Figure 2). Between 2016 and 2020, ICC arbitrations involved 215 states and 641 state-owned entities as disputing parties.[466] In 2021, 21% of new cases included a state or a state entity, amounting to 33 states and 189 state entities.[467] Between 2016 and 2021, there was a 112% increase in cases involving state entities. However, the data does not specify whether any cases were initiated based on advance consent granted in national legislation, such as investment laws or codes.

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462 ICC, 'ICC Statistics 2020' (n 419) 17.

463 19,8% of the 929 new cases filed in 2020, involved a state or state entity. The total number of states and state-owned entities in these cases was 228, with 34 states and 194 state-owned entities. Since the first BIT claim was filed in 1996, 43 BIT cases have been administered by the ICC-ICA and in 16 additional cases it acted as appointing authority. See ibid 4, 11, 12.

464 ibid 12.

465 ibid.

466 ibid 11.

467 Claudia Salomon, 'Message from the President' [2022] ICC Dispute Resolution Bulletin 5, 5.

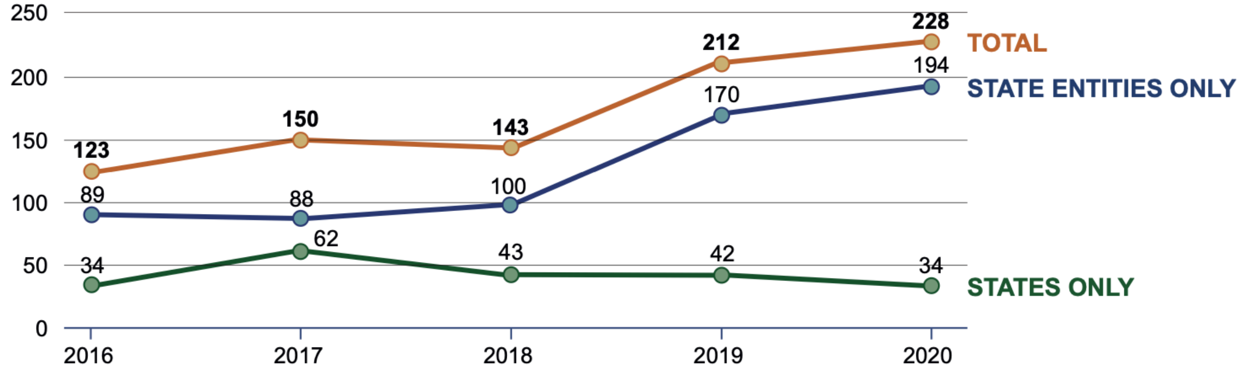

Figure 2 - Number of new mixed arbitrations filed at the ICC-ICA per year

2.4. Chapter conclusion

Since the ICA's inception, the ICC's efforts to promote mixed arbitration faced certain obstacles and not all of its experts unanimously believed that arbitration was the most effective means to ameliorate the business climate. At the level of the parent organization, alternative solutions, such as investment guarantees, and political risk insurance were also considered. This was especially the case, after the proposed investment code and similar proposals failed to gain traction in the late 1940s and early 1950s. However, experts within the Commission on Arbitration anticipated the potential of mixed arbitration, particularly where based on intergovernmental treaties. They persistently advocated for this approach, albeit with varying success.

These experts also discussed the best organizational setting for mixed arbitration extensively, taking into account the likely resistance from states and other political considerations. They were aware of alternative institutional options and were open to endorse these options if they promoted the overarching goal of brokering state consent. For instance, the ICC and its affiliated experts did not oppose the creation of ICSID as a primary forum for treaty-based mixed arbitration. At the same time, the ICC knew that governments were increasingly consenting to arbitration at the ICA in their public-private contracts and that this had led to a growing caseload of mixed arbitration. It is reasonable to assume that, at least in the 1960s and early 1970s, the ICA dominated the still emerging market for institutional mixed arbitration by the number of cases. Many cases at the ICA preceded the first mixed arbitration filed at ICSID.

Starting in 1970, despite regrets expressed by some of its affiliated experts, the ICC began to publicly endorse ICSID for treaty-based arbitration, acknowledging its growing importance for foreign investors. This reflected a broader strategy aimed at ensuring powerful, efficient, and accessible dispute settlement mechanisms for these investors. After all, some of them were among the ICC's main principals. The overarching goal of brokering state consent trumped possible apprehensions about an institutional competitor. The ICC leadership possibly also realized that ICSID and the ICA had differentiated profiles: ICSID soon focused on advance consent and investment disputes, while the ICA administered a broad range of contract-based mixed arbitrations, including those not directly related to foreign investments.

Especially in the 1980s and 1990s, the ICA started to benefit from the diffusion of advance consents in investment treaties, albeit to a more limited degree than ICSID or the PCA (through the UNCITRAL Arbitration Rules). Treaty-based consent led to a first case in 1996 and treaties have since then generated a steady caseload at the ICA. Yet, by far most mixed arbitrations at the institution continue to be based on public-private contracts. While no comprehensive databases exist, it is reasonable to assume that the ICA is the most frequently mentioned arbitral institution in international public-private contracts today. This focus on contract-based cases aligns well with the institution's core business of private commercial arbitration and its private-sector constituency.

The ICA's robust market position within the mixed arbitration oligopoly has generated significant financial returns for several beneficiaries. These returns tend to increase over time. Economic benefits and increasing returns are not limited to arbitrators, whose remuneration is calculated as a share of amounts in dispute. They also extend to other participants in mixed arbitration, such as third-party funders. To guarantee continued access to cases and visibility among clients, third-party funders seek out the vicinity of the ICC-ICA. This is illustrated by the numerous joint promotional activities and collaborations mentioned above. ICC officials also hold concurrent roles with funders and have at times transitioned to the third-party funding industry.

The increasing returns of beneficiaries of ICA arbitration are evidently not limited to mixed arbitration alone. Arbitrators, law firms, and third-party funders benefit from all types of cases administered by the ICA. Perhaps more than at any other arbitral institution, the constituency of the ICA's beneficiaries overlaps the markets of private and mixed arbitration. Yet, mixed arbitration contributes significantly. Cases involving states and state entities likely tend to involve higher amounts in dispute and are viewed as particularly prestigious. They may also be a steppingstone for beneficiaries profiting primarily from private arbitration, to gain access to the mixed arbitration market. As predicted by Edwin Herbert, the same individuals often act as arbitrators in ICA and ICSID proceedings. This appears to hold true for other participants in the arbitral process, including law firms and third-party funders.

The overlap between mixed and private arbitration also maps out in time, demonstrating that the role of dispute resolution in the 'grey area' between purely private and treaty-based investor-state arbitration may be underappreciated in current literature on investment arbitration. The strong market position of the ICC and the impact that its presence has on the local arbitration industry, including in mixed arbitration, has furthermore provided it with leverage to negotiate with the host country government of France. Successful negotiations for the maintenance of its seat in Paris clearly demonstrate this position. The 2011 report by Michel Prada emphasizes the crucial role of the ICC for France as a venue for international arbitrations. The presence of the ICC in Paris often motivates the choice of French law as the law of the seat of arbitration and justifies the presence of many international law firms in Paris. These facts underscore the significant influence of the ICC on the French and global arbitration landscape.

The following chapter will examine the emergence and evolution of ICSID, which is dominating the institutional oligopoly of mixed arbitration today. When it entered the market in 1966, the ICC-ICA had already developed a practice of contract-based mixed arbitration. Throughout the first years of ICSID's operation, the two institutions would also compete for contract-based consent, before ICSID, in large part due to its intergovernmental appeal and the work of Aron Broches, benefitted to a far greater extent from the proliferation of investment treaties.

Chapter Three

The International Centre for Settlement of Investment Disputes

I think ICSID was a fascinating experience, because -- really Broches had not succeeded in selling ICSID. He has to his credit that he created a convention which now is in use. But at the beginning, he just wanted to oversell it. Politically, the Europeans were not [in favour of ICSID]- *except as potential users taking advantage of the institution to protect their investors against developing countries. So it was all biased.*[468]

– Georges R. Delaume, Legal Advisor at ICSID (2004)

3.1. Introduction

The International Centre for Settlement of Investment Disputes ('ICSID') is an intergovernmental arbitral institution established by the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*. This Convention was signed in Washington on 18 March 1965 and entered into force on 14 October 1966. ICSID's establishment has been described as linked to a critical juncture that allowed for the emergence of investor-state arbitration.[469] It was linked to significant global changes such as decolonization, the rise of new independent states, shifts in

468 Robert Grathwohl, 'Interview with Georges Delaume, May 10 and 17, 2004' World Bank Group Archives, Oral History Program.

469 St John (n 52) 13.

international economic relations, and evolving notions of sovereignty and international law.[470]

ICSID's history and its role in the rise of investor-state arbitration have been extensively studied.[471] Yet several aspects of its ascension remain less examined. For instance, how did ICSID come to dominate the institutional oligopoly of mixed arbitration when other institutions, like the ICC-ICA, where already in play? How did inter-institutional dynamics influence ICSID's evolution and how did ICSID respond to competition? Were there specific strategies that allowed ICSID to outperform its competitors? How much did its intergovernmental status, market pressures, and strategic partnerships contribute to its ascent?

This chapter seeks to delve into these questions, examining the complex interplay of factors that have contributed to ICSID's unparalleled growth and influence in the mixed arbitration market. Special attention will be given to inter-institutional dynamics, ranging from the influence of early drafts of the Convention to strategic decisions that positioned ICSID favourably within the institutional oligopoly. By probing these aspects, this chapter aims to provide a nuanced understanding of the trajectory that led ICSID from its market entry to its current dominant position.

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470 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966)' 575 UNTS 159; St John (n 52) 13.

471 See for example Antonio Parra, *The History of ICSID* (2nd edn, OUP 2017); St John (n 52).

3.2. ICSID's path to market dominance

Like other arbitral institutions examined in this thesis, particularly the PCA and the ICC-ICA, ICSID has antecedents in historical methods of resolving disputes related to state interference with private property. These methods range from diplomatic protection and the use of force to early 20th-century initiatives to 'replace the use of force with arbitration'.[472] As St John observes, '[l]aw, force, and politics were bound together in the settlement of investment disputes in the eighteenth and nineteenth centuries'.[473] Capital-exporting states often protected their investors' assets in capital-importing states through armed intervention, such as in Haiti and Mexico.[474] On the side of capital-importing states, jurists such as Andrés Bello and Carlos Calvo had formulated doctrines that opposed the use of force, emphasised every state's right to non-interference, and argued that treatment of foreign investors should be limited to national treatment.[475]

Key figures who laid the groundwork for the Convention were influential arbitration experts and industry representatives, often organized in specialised interest groups. Notable among them were the director of Deutsche Bank, Hermann Abs, and general counsel of Royal Dutch Shell, Hartley Shawcross.[476] In addition, several individuals linked to major oil companies played a pivotal role.[477] Both Abs and Shawcross were well connected with government officials and rallied business support for their vision of

472 St John (n 52) 66.
473 ibid 55.
474 ibid.
475 ibid 56.
476 ibid 84; Perrone (n 99) 51-58; Batselé (n 65) 13.
477 Batselé (n 65) 4 and 8.

protecting foreign investments. They also developed proposals for international conventions aimed at this purpose.

In 1957, Abs proposed a *Magna Carta for the Protection of Foreign Interest*, which combined substantive protection standards for foreign investors with a powerful arbitration mechanism.[478] He promoted this idea through two business interest groups: the *Society to Advance the Protection of Foreign Investments* and the *International Association for the Promotion and Protection of Private Foreign Investments* ('APPI').[479] However, despite his connections with senior government officials, including the German chancellor Konrad Adenauer and minister for the economy Ludwig Erhard, Abs failed to garner sufficient support for his initial proposal.[480] His draft was later merged with that of Hartley Shawcross, who had developed a draft convention 'as a more feasible alternative to the Abs convention' to increase chances of acceptance by states.[481] Although this merged draft was later introduced to the OECD, it was never adopted, much like previous proposals for multilateral investment protection.

Like with proposals made by the ICC, states had several reservations about a comprehensive convention. A 1958 briefing by UK government officials cited concerns about the OECD draft that were also shared by the United States and Germany.[482] The briefing anticipated that such a convention could weaken rather than strengthen

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478 Ingo Venzke and Philipp Günther, 'International Investment Protection Made in Germany? On the Domestic and Foreign Policy Dynamics behind the First BITs' (2022) 33 European Journal of International Law 1183, 1192.

479 Batselé (n 65) 9-12.

480 St John (n 52) 82-86.

481 ibid 85.

482 'Anglo-German Economic Committee, Sixth Session, London, July 1958, Protection of Foreign Investors' UK T 236/5436. I thank Taylor St John for sharing this document with me.

protection standards and make states susceptible to particular interests. The President of the IBRD opposed the draft. The UK government also believed it jeopardized existing rights under customary international law.[483] Some provisions in the draft were also found to be incompatible with the UK's exchange control policy.[484] The authors of the briefing recommended that the UK pursue its goals through bilateral arrangements and existing institutions instead.

It has been argued that the UK's hesitance towards a convention was motivated in part by its balance-of-payment concerns and the related caution against promoting outward investment.[485] In addition to such concerns, British officials also apprehended the threat of arbitration against the UK. One official observed that the 'central question seems to me a simple one: are we prepared to agree to compulsory arbitration in advance in respect of any disputes about property in its widest sense owned by foreigners? The answer, I submit is "No"'.[486] This appears to mark a rare instance of capital-exporting state officials anticipating a future risk of facing arbitration claims by foreign investors.

Prior to the creation of ICSID, other arbitral institutions, such as the AAA, the PCA and the ICC-ICA, had already explored mixed arbitration. During the 1950s, disputing parties repeatedly asked the IBRD to arbitrate in public-private disputes. As discussed above, the ICC's Commission on Arbitration was aware of this development and discussed it in its meetings between 1958 and 1960. In exchanges with ICC

483 ibid.

484 ibid.

485 St John (n 52) 85-86; Batselé (n 65) 29.

486 'Note from ATK Grant' (15 April 1958) UK T 236/5436. I thank Taylor St John for sharing this document with me.

representatives, IBRD Vice President Sommers had highlighted states' hesitations concerning institutions like the ICC. As the ICC Commission on Arbitration remained unwilling to make the procedural changes Sommers thought would help overcome state concerns, a gap for a more formal mechanism for the settlement of investment disputes remained.

At the time World Bank officials started to contemplate a greater involvement of the organization in the settlement of investor-state disputes, various views existed among ICC constituents on a similar initiative. While some ICC members apparently favoured a multilateral investment guarantee scheme in the early 1960s, the organization's arbitration experts continued to support mixed arbitration.[487] For lack of state support, however, they chose to let the quiet expansion of the ICA's mixed arbitration run its course. Some, like Herbert, later considered the creation of ICSID redundant, believing the ICA's existing procedure to be sufficient.[488] This may nuance the view according to which the ICC preferred an investment guarantee scheme over mixed arbitration at the time of ICSID's creation.[489]

If institutional experts were aware of the of the ICA's increasing mixed arbitration caseload and the ongoing reluctance of states to formally endorse the ICA, then the preference for an investment insurance or guarantee scheme appears to be a 'softer' alternative. After it became clear that formal state support for mixed arbitration at the ICA would not be forthcoming, membership of the ICC's Commission on Arbitration

[487] 'Internal Note from Dr Berger, March 8, 1962, subject: "Vermittlungs- und Schiedsgerichtstätigkeit unter dem Schutze der Weltbank (Mediation and Arbitration Activities under the Protection of the World Bank)"' (n 367).

[488] Herbert (n 341) 724.

[489] St John (n 52) 100.

became more fluid, with key figures focusing on other, more promising institutional *fora*. Haight, for instance, contributed to a draft convention that would influence the text of the ICSID Convention.[490] In doing so, he was able to draw on insights gained in prior exchanges with IBRD officials discussing a multilateral investment code.[491]

The IBRD's interaction and collaboration with other arbitral institutions and their officials gave the drafters of the ICSID Convention the benefit of hindsight. Some of these drafters, such as Haight, had acted in multiple institutional roles or moved freely among organizations advocating for mixed arbitration. These roles allowed them to gain experience and witness failed attempts to broker more formal state support for mixed arbitration. They also gained access to an emerging body of institutional knowledge about state concerns that they knew would need to be addressed.

In 1960, it was the American Bar Association that asked the World Bank whether it would be willing to assume a greater role in investment protection.[492] This request was made while discussions on mixed arbitration at the ICC Commission on Arbitration were still ongoing. Responding to the request, bank officials considered 'that a promising approach was procedural – i.e., the establishment of new machinery for the international arbitration of investment disputes'.[493] This contrasted with more comprehensive proposals from groups like the ICC and APPI for a multilateral code

490 'American Bar Association, Section of International & Comparative Law, Draft Convention on the Conciliation and Arbitration of International Investment Disputes, 20 October 1961. Included in the Letter from John Blair to Hester Boothroyd' (n 346).

491 George Haight, 'Activities of the International Chamber of Commerce and Other Business Groups' (1960) 54 Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969) 200, 203.

492 Clifford Hynning, 'The World Bank's Plan for the Settlement of International Investment Disputes' (1965) 51 American Bar Association Journal 558, 559.

493 ibid.

combining rules of procedure with substantive standards for the protection of foreign investments.

During this period, the United Nations Economic Commission for Europe ('ECE') was also working on the 1961 Geneva Convention. This Convention was considered to have the potential to create a dispute resolution mechanism for foreign investors. However, the World Bank had two competitive advantages for establishing an investment arbitration mechanism. First, it provided a negotiation forum that excluded socialist countries, sidestepping their likely objections to a centralized dispute resolution body. And second, its membership included several newly independent countries, making their support more probable. From the beginning, discussions at the World Bank therefore differed from those at the ICC, which had focused *inter alia* on institutionalising East-West arbitration since the ICC's 1946 congress in Paris.

Following earlier lobbying efforts, the first draft of what would become the ICSID Convention was prepared by a group of lawyers at the American Bar Association ('ABA draft'). This group included Haight, who had gained experience discussing mixed arbitration at the ICC Commission on Arbitration and at the 1958 UN Conference on International Commercial Arbitration. By the time he contributed to the ABA draft, he had gained a detailed understanding of how far states would be willing to go. The ABA draft reflected this understanding. For instance, consistent with the recommendations of World Bank officials, the draft did not contain substantive standards for investment protection. It was also inspired by existing arbitral institutions and their procedural rules.

For instance, it borrowed the concept of a roster of arbitrators from the PCA and copied elements of the ICC's Constitution and Arbitration Rules.[494]

By the time the ABA draft was prepared, the ICA had already administered several mixed arbitrations albeit without a multilateral endorsement by states. The draft, which greatly influenced Aron Broches, was thus not elaborated in an institutional void; it was a deliberate response to an existing institutional landscape.[495] Georges Delaume, a legal counsel at the Bank, later observed that before the creation of ICSID, investment disputes 'were arbitrated under the auspices of the International Chamber of Commerce (ICC) in Paris'.[496] Delaume also 'had periodic meetings, colloquia' with the ICC, potentially even at this early stage.[497] During ICSID's design phase, experts and information fluctuated freely between the ICC-ICA and the World Bank. World Bank officials and those lobbying it were well-informed about existing institutional mechanisms for mixed arbitration and the obstacles they faced.

3.2.1. The conflicting interpretations of the emergence of ICSID

Divergent interpretations exist regarding the significance of such antecedents for the rise of mixed arbitration and the genesis of the ICSID Convention. Perrone conceptualises the rise of investor-state arbitration as an outcome of the world-making project of a group of private-sector 'norm entrepreneurs', who 'crafted the canon of legal

[494] 'American Bar Association, Section of International & Comparative Law, Draft Convention on the Conciliation and Arbitration of International Investment Disputes, 20 October 1961. Included in the Letter from John Blair to Hester Boothroyd' (n 346) 18.

[495] St John (n 52) 132.

[496] Grathwohl: (n 468) 12.

[497] ibid 15; St John (n 52) 133.

imagination in international investment law'.[498] In this view, Abs and Shawcross must not be 'described as two individuals on a sort of personal quest, rather than the most visible faces of a broad coalition in favour of international investment law'.[499] According to Perrone, the ICSID Convention was mostly a consequence of the work of these norm entrepreneurs in the 1950s and early 1960s. He cites evidence that the APPI 'contributed to the development and clarification of the ICSID Convention',[500] and notes that both 'Abs and Shawcross also had influential friends at the World Bank',[501] including then-World Bank President Eugene Black. Perrone further observes that

> Shawcross also had relevant information about the plans for the ICSID Convention; one of his assistants, John Blair, was involved in formulating the 1961 draft, alongside Broches, the bank's general counsel. The elaboration of this draft, moreover, was sponsored by the American Bar Association – which had lobbied the Vice-President of the World Bank in the summer of 1960 – and included the participation of other norm entrepreneurs, notably G. W. Haight, who also worked for Royal Dutch Shell and the International Chamber of Commerce.[502]

In Perrone's view, there is no hard distinction between those norm entrepreneurs and the drafters of the ICSID Convention. At least to some extent, the former influenced the latter. In contrast to certain norm entrepreneurs, however, the drafters of ICSID appeared to proceed more cautiously and strategically to broker the Convention into existence.

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498 Perrone (n 99) 8.

499 ibid.

500 ibid 57.

501 ibid.

502 ibid.

While agreeing with Perrone's observation that there was strong private-sector interest in the initiative from the outset, St John emphasises the heterogeneity of this group. In her view, private-sector representatives did not get what they wanted:

> If we take Hermann Abs, the most prominent norm entrepreneur in the text [of Perrone], the picture is mixed. Abs did not like bilateral investment treaties, and strongly preferred a global treaty or at least a Europe-wide one. Abs did not particularly like arbitration; he preferred a court, but investor-state arbitration was better than state-state dispute settlement, and all of those options were better than insurance. What did Abs get, though? Bilateral treaties with insurance, backed up by state-state dispute settlement.[503]

Proceeding with counterfactual reasoning and archival research, St John finds evidence of private-sector groups such as the ICC preferring a multilateral investment guarantee scheme at the time.[504] She also contrasts the idea of Abs and Shawcross to develop a comprehensive code for multilateral investment protection with the draft ICSID Convention, which focused exclusively on procedure.[505]

For St John, investors only gradually started to prefer investor-state arbitration over political risk insurance or a multilateral investment code.[506] Investor lobbying appears weak or absent in her account. For instance, she cites evidence that American business interest in the OECD initiative only arose in 1965, when the fate of the draft OECD Convention was already sealed.[507] When US officials suggested that the World

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503 Taylor St John, 'Review of Nicolás Perrone, Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules' (2022) 33 European Journal of International Law 304, 306.

504 St John (n 52) 100.

505 St John (n 52) 68-102.

506 ibid 41.

507 ibid 94.

Bank take over the OECD initiative, the bank declined.[508] For St John this indicates an intergovernmental organization acting with a significant degree of autonomy from its powerful principals.[509]

The role of other arbitral institutions, including the private-sector ICC, nevertheless featured prominently in the communication among World Bank officials, affiliated legal experts, and state representatives. In a 1961 note to the Executive Directors of the Bank, Aron Broches, then the Bank's General Counsel, reiterated the concerns about the limitations of private arbitral institutions like the ICC that Vice President Sommers had already communicated to in 1958. For Broches, 'tribunals set up by private organisations such as the International Chamber of Commerce are frequently unacceptable to Governments'.[510] The new mechanism proposed in the note implies what Broches considered to be the main shortcomings of such organizations. According to Broches, this mechanism should not exclusively rely on a single consent contained in a contract between a public and private entity.[511] Instead, Broches considered it important to first secure inter-governmental recognition, in principle, of the right of private entities to initiate arbitration against governments.[512] He also recommended that the new mechanism should elevate concrete agreements to arbitrate to the level of

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508 St John (n 52) 94-95.

509 ibid 97.

510 OECD Development Assistance Directorate (n 371) 9.

511 Aron Broches, 'Note by A Broches, General Counsel, Transmitted to the Executive Directors: "Settlement of Disputes between Governments and Private Parties"' in ICSID (ed), *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, vol II-1 (ICSID Publishing 1968) 2.

512 ibid.

‘binding international undertakings’.[513] Addressing the Executive Directors, Broches felt the need to justify the creation of a new institution, by highlighting the shortcomings of existing ones and by differentiating his proposal from existing approaches.

Broches’ proposal of a two-stage consent structure stemmed from the observation that governments sometimes failed to recognize the binding nature of arbitration agreements with private entities.[514] This exposed a key weakness in existing mechanisms relying on the New York Convention, which did not specifically address mixed arbitration and subjected the obligation of states to recognise arbitration agreements to the arbitrability of the dispute under national law.[515] To address this weakness, a new mechanism would have to enshrine the obligation to recognise investor-state arbitration agreements in an intergovernmental convention. The ICSID Convention would later achieve this objective.[516]

As the 1961 note shows, World Bank officials, especially Broches, approached the formulation of the Convention with strategic insight and diplomatic finesse. During the elaboration of the Convention, Broches was well-informed about state concerns and distanced himself from those entities and individuals too closely tied to business interests when necessary.[517] Yet privately, he maintained ties with private-sector arbitration experts, being a good friend of Pieter Sanders and collaborating on the ABA

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[513] ibid.

[514] ibid 3.

[515] ‘Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed 10 June 1958, entered into force 7 June 1959)’ (n 274) art 2(1).

[516] ‘Convention on the Settlement of Investment Disputes between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966)’ (n 470) preamble and arts 25(1), 25(3), 26, 52, 53, 54.

[517] St John (n 52) 132.

draft with individuals like Elihu Lauterpacht, Louis Sandberg, Haight, and Blair, who all had connections with Royal Dutch Shell.[518]

Broches also recognized the importance of winning over officials in capital-importing states. Instead of merely adopting suggestions from liberal norm entrepreneurs and specialised arbitration lawyers, Broches repeatedly proposed solutions he considered were more acceptable to states. This includes the 1961 World Bank memorandum, which revised the ABA draft to recognize the requirement to exhaust local remedies before having recourse to arbitration.[519] However, it also suggested states should be allowed to opt out of this requirement.[520]

Although much of the Convention had already been drafted, it was officially introduced by President Eugene Black to the World Bank Board of Governors only in 1961.[521] Before the meeting of the Board, Blair, who was an assistant to Hartley Shawcross at Shell at the time, informally conveyed the World Bank's upcoming proposal to British government officials.[522] Blair strongly advocated for the UK to support the initiative, arguing that an investment insurance scheme was 'much less desirable' than mixed arbitration.[523] However, the officials did not take Blair's announcement at face value and verified Blair's claims with Broches.[524] Broches

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518 Batselé (n 65) 26.

519 Broches, 'Note by A Broches, General Counsel, Transmitted to the Executive Directors: "Settlement of Disputes between Governments and Private Parties"' (n 511) 2.

520 ibid.

521 St John (n 52) 129.

522 Letter from Hester Boothroyd to Mrs Hedley-Miller, on the International Bank and Arbitration (7 November 1961) UK T 312/251; Letter from Peter Reilly to Hester Boothroyd (4 August 1961) UK T 312/251. I thank Taylor St John for sharing these documents with me.

523 ibid.

524 ibid.

confirmed the bank's willingness to support mixed arbitration but understated how advanced and official the initiative was.[525]

The British officials suspected that Blair had learned about the bank's plans through Shawcross. They noted that 'Lord Shawcross's ideas about the Bank's views have probably reached him via his connection with Shell' and that 'Shell have been pushing the idea of international conciliation and arbitration for some time and have been talking with the Bank staff'.[526] As St John demonstrates, British officials were wary of Shawcross' influence and Broches also 'distanced himself from him.[527] To foster state support, it was crucial to avoid being associated too closely with private-sector players.

Moreover, Broches and others needed to emphasize the advantages of the proposed mechanism over existing state-led initiatives. While some officials saw the bank as well-positioned to create a new mechanism, due to its good standing with developing countries many of whom were also borrowers, they also raised concerns.[528] One issue was whether a new institution might impinge on the work of the Permanent Court of Arbitration. British officials observed that 'the Permanent Court of Arbitration at the Hague is already in being but is very little used, and it might be simpler and more economical to make more use of it (provided this is feasible which Mr. Blair denies) than setting up new machinery'.[529] Both Broches in his note to the Executive Directors and Blair in his communication with the British officials downplayed the availability of the

525 Letter from Peter Reilly to Hester Boothroyd (n 522).

526 'International Convention for the Mutual Protection of Private Property Rights in Foreign Countries: Draft Presented by the Gesellschaft zur Förderung des Schutzes von Auslandsinvestitionen eV Köln (Society to Advance the Protection of Foreign Investments)' (n 202) 54.

527 St John (n 52) 85 and 131.

528 Letter from Hester Boothroyd to Mrs Hedley-Miller, on the International Bank and Arbitration (n 522).

529 ibid.

PCA for mixed arbitration.[530] It is likely that Broches did so deliberately, knowing that the PCA was willing to administer mixed arbitrations.[531] Both Broches and Blair felt the need to portray the competitor PCA as unsuitable or inaccessible when interacting with state officials.

Similarly, Broches emphasized the competitive advantages of the bank as opposed to the United Nations as a forum to set up the new mechanism. The 1961 Geneva Convention had been opened for signature earlier this year and some states were apparently considering whether to set up the new mechanism there.[532] A British government official reported a recent conversation with Broches that demonstrates that the bank was wary about intergovernmental competitors:

> Whatever is decided [at ECOSOC] the Bank would hope not to be frozen out. They would like to be consulted because, so it seemed to Mr. Broches, they could probably play a more useful role in this connection than the United Nations were discussions tend to become acrimonious. It might, therefore, be useful for the initiative to be passed to the bank.[533]

The existence of private- and public-sector competitors directly influenced the way in which the World Bank and those lobbying it approached the creation of ICSID even prior to the Convention's first official draft. Establishing ICSID as a new arbitration mechanism under World Bank auspices had to be justified.

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530 ibid.

531 Aron Broches, 'The Present Need for a Permanent Arbitral Tribunal, Address at the Institute on Permanent International Courts Organized by the Minnesota State Bar Association' (13 June 1962) World Bank Group Archives, Broches, M Aron-Articles and Speeches (1951–1982) - Vol 1, 1651418, 4.

532 Lemercier and Sgard (n 147) 133.

533 Letter from Peter Reilly to Hester Boothroyd (n 522) 1.

3.2.2. The diplomatic manoeuvres of Aron Broches

In a 1962 address, Broches confirmed the World Bank's ongoing efforts and advocated the creation of a new arbitration mechanism to settle investment disputes. He argued that compulsory arbitration would 'depoliticize' these disputes.[534] While 'some investors, including in particular large corporations in the field of extractive industry, have negotiated agreements with host States providing for international conciliation and/or arbitration', these agreements were sometimes not respected by host states.[535] Safeguards for arbitral proceedings to proceed where a respondent state failed to participate or appoint arbitrators were therefore required. It is likely that Broches implicitly alluded to the emergent practice of contract-based mixed arbitration at the ICC-ICA at the time.

Broches was well aware of state concerns, and, via the World Bank, he had privileged access to state positions on alternative means of investment protection.[536] Considering the OECD draft convention he stated in 1962, that

> in looking for a solution [for the settlement of investment disputes] we are subject to limitations imposed by the requirements of reasonableness as well as realism. For example, it would be both unreasonable and unrealistic to advocate a compulsory international jurisdiction for disputes between States and foreign investors which would be available without the prior exhaustion of local remedies. This would in effect amount to extra-territorial status for all foreign investment.[537]

Against the idea of an international court, he emphasised that 'we are forced to admit that at the present time any arrangement for the settlement of investment disputes by

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534 Broches (n 531) 5-6.

535 ibid 5.

536 St John (n 52) 110.

537 Broches (n 531) 7.

an international jurisdiction must be based on the consent of the parties'.[538] In his view, states would likely have failed to agree on such a court's composition.[539]

To convince capital-importing states of the proposed Convention's merits, Broches deployed various strategies. These included tailored rules of procedure for the drafting process, the strategic exclusion of substantive investment protection standards from the Convention, a narrative of depoliticization, strategic vagueness, and locking in emerging consensus. In 1963 and 1964, the Bank held four regional consultative meetings to present the draft Convention to state officials and garner support. The participants discussed the 1961 World Bank memorandum that Broches prepared on the basis of the ABA draft. Like this draft, the memorandum showed significant influences from other arbitral institutions. For instance, ICSID's structure, including an administrative council and a secretariat, drew inspiration from the organization of the PCA. The panel of arbitrators was also modelled on the PCA's list of members. Broches had in-depth knowledge of the PCA and was well-informed about developments at the Hague institution. This included an immediate awareness of the publication of the 1962 *Rules of Arbitration and Conciliation for Settlement of International Disputes between Two Parties of Which Only One Is a State*.[540]

Like the earlier ABA draft, the draft ICSID Convention absorbed features from other leading institutions, selecting those that appeared successful. For instance, the ICSID Panel of Arbitrators avoided certain limitations of the PCA list of members

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538 ibid 8.

539 ibid 9.

540 ibid 6.

offering greater flexibility in appointments. Commenting on these limitations, a group of arbitration specialists later observed that a ‘key characteristic of a smoothly-functioning system of constituting arbitral tribunals is that neither the parties, the party-appointed arbitrators, nor the appointing authority is limited to choosing members of the tribunal from an established list of arbitrators’.[541] They regretted that the PCA’s founding Conventions did not appear ‘to offer this element of flexibility (...), thus making it difficult for parties to select other experienced arbitrators who were, in their opinion, better qualified to decide their case’.[542] ICSID’s optional appointment mechanism overcame this limitation, reducing the control that contracting states had over arbitrator appointments.

The consultative meetings, which discussed the draft, aimed to create the impression of a member-driven process.[543] Yet, they were intentionally consultative rather than deliberative, and no votes were cast.[544] The objective was to project a sense of inclusivity without allowing for actual participation, and to disseminate information about the initiative. Participants were labelled ‘experts-designate’ rather than formal state representatives, and some were not even government officials.[545] To fragment and contain diplomatic resistance, especially from Latin American states, the regional meetings were also held separately.[546] For example, participants were not given

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541 Working Group on Improving the Functioning of the Permanent Court of Arbitration and Permanent Court of Arbitration International Bureau, *The Permanent Court of Arbitration: New Directions* (International Bureau of the PCA 1991) 19.

542 ibid.

543 St John (n 52) 135.

544 ibid 138.

545 ibid 137-38.

546 ibid 138.

summary records of previous consultative meetings.[547] In this way, Broches employed diplomatic skills and tools that were not utilized or inaccessible to private-sector arbitral institutions like the ICC-ICA.

Despite these strategies, brokering ICSID into existence remained a formidable task. State officials raised numerous concerns. They included the unclear jurisdictional scope of ICSID and uncertainties about the impact of mixed arbitration on states exercising core governmental functions related to public health or national security.[548] Broches countered that the Convention would also allow for claims to be brought by states against foreign investors.[549] However, he likely knew that treaty-based advance consent to ICSID arbitration would prevent such reciprocal use of the mechanism. At the Geneva meeting, the South African delegate questioned 'whether it was in fact a sound principle to elevate the individual to the status of a subject of international law'.[550] Latin American opposition was particularly strong; many experts-designate rejected the Convention outright during the Santiago meeting.[551] However, Broches and the World Bank leadership only needed enough support to secure a favourable vote from the Board of Governors.[552]

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[547] ibid.

[548] 'Réunion consultative d'experts juridiques sur le règlement des différends relatifs aux investissements, Bangkok, Thaïlande, 27 avril-1er mai 1964, compte rendu sommaire des travaux, Archives of the FPS Foreign Affairs, Belgium, 18.891 XII (Folder: 'Dossier 80, Ref 4: Convention pour le règlement des différends relatifs aux investissements entre États et nationaux d'autres États')' (20 July 1964), 8-9.

[549] ibid 7.

[550] ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, vol II-1 (ICSID Publishing 1968) 378.

[551] St John (n 52) 137.

[552] ibid 139-40.

3.2.3. ICSID's relationship with existing institutions

The discussions at the meetings also delved into the role of existing arbitral institutions, the risk of unnecessary multiplication, and the distinct character of ICSID. Like in earlier 'bilateral' conversations with state officials, Broches was careful to differentiate ICSID from other institutions at the meetings. When the question arose whether the PCA Secretary General should also serve as ICSID's Secretary General, Broches advocated for independence of the two offices.[553] He argued that the election of the ICSID Secretary General should be balanced to reflect the interests of potential disputing parties, which included private entities and states. ICSID was, for him, 'something unique, unlike in the case of the International Chamber of Commerce or the Permanent Court of Arbitration, where two distinct groups of potential litigants have not been linked in the perception of the public with the organization'.[554]

The Japanese delegate, furthermore, expressed concerns that creating ICSID could undermine the PCA's existing work and that the Centre's relationship with the PCA should be revisited.[555] When questioned by the delegate about the need for a new institution, Broches replied that neither the ICC Arbitration Rules nor the PCA's 1962 Optional Rules guaranteed the internationally binding character of arbitration or the enforcement of arbitral awards.[556] Broches' arguments seemed to alleviate some state

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553 'Réunion consultative d'experts juridiques sur le règlement des différends relatifs aux investissements, Bangkok, Thaïlande, 27 avril-1er mai 1964, compte rendu sommaire des travaux, Archives of the FPS Foreign Affairs, Belgium, 18.891 XII (Folder: 'Dossier 80, Ref 4: Convention pour le règlement des différends relatifs aux investissements entre États et nationaux d'autres États')' (n 548) 16.

554 ibid 32.

555 ibid 102.

556 ibid.

concerns. For example, the Dutch delegate who initially had reservations about the multiplication of institutions later saw merit in creating a new mechanism.[557] The Netherlands advocated for strong collaboration with the PCA, including the use of its offices and services, and believed such collaboration should be mandatory.[558] The Australian delegate even suggested that organizational ties of ICSID with the World Bank should not be privileged over similar ties with the PCA.

Broches also attempted to address these concerns related to a multiplication of institutions and the relationship with the World Bank. For Broches, it was more likely that the World Bank would endorse the new mechanism than the PCA Administrative Council, reinforcing the rationale for a closer link with the Bank. At the same time, he mentioned that informal exchanges with the PCA had been positive, paving the way for future collaboration, but left open the intensity of such collaboration.[559] Moreover, Broches argued a privileged link with the Bank was warranted in light of prior requests for arbitration that it had received. These requests, he contended, illustrated a state preference over private-sector arbitral institutions:

> Experience has also shown that certain governments find it easier to have a conciliation or arbitration procedure under the auspices of an institution of which they are members, rather than under the auspices of an institution like the

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557 'Réunion consultative d'experts juridiques sur le règlement des différends relatifs aux investissements, Genève, 17-22 février 1964, compte rendu sommaire des tra-vaux' (1 June 1964) Archives of the FPS Foreign Affairs, Belgium, 18.891 XII, (Folder : 'Dossier 80, Ref 4: Convention pour le règlement des différends relatifs aux investissements entre États et nationaux d'autres États'), 8-9.

558 ibid 16.

559 'Réunion consultative d'experts juridiques sur le règlement des différends relatifs aux investissements, Bangkok, Thaïlande, 27 avril-1er mai 1964, compte rendu sommaire des travaux, Archives of the FPS Foreign Affairs, Belgium, 18.891 XII (Folder: 'Dossier 80, Ref 4: Convention pour le règlement des différends relatifs aux investissements entre États et nationaux d'autres États')' (n 548) 22.

> International Chamber of Commerce. However, it is also evident that other governments have utilized the services of the ICC.[560]

Some states also suggested that the new centre use existing lists of arbitrators. For instance, the German delegate proposed that ICSID could benefit from the ICC's extensive experience and existing lists of arbitrator candidates when constituting arbitral tribunals.[561] While ICSID was never under an obligation to draw on the ICC's list, many arbitrators appointed by ICSID today also have extensive experience in arbitration at the ICC- ICA.[562]

During the regional consultative meetings, Broches went to great lengths to promote ICSID as an independent entity, distinct from existing competitors. To differentiate it from private-sector options, he highlighted the limitations of mixed arbitration mechanisms based on public-private contracts and relying on the New York Convention. To promote ICSID as an alternative to other intergovernmental initiatives, Broches emphasized the benefits of negotiating a convention under the World Bank's auspices rather than the United Nations. He also pointed to procedural and structural deficiencies within the PCA.

To alleviate Dutch concerns about the risk of the PCA losing its significance, Broches strategically conceded that ICSID would collaborate with the PCA. However,

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560 ibid 23, translated by the author, original: '*[L]'expérience a également prouvé que certains gouvernements trouvent plus facile d'avoir une procédure de conciliation ou d'arbitrage sous les auspices d'une institution dont ils sont membres plutôt que sous les auspices d'une institution comme la Chambre Internationale de Commerce. Ils se rendent toutefois compte que d'autres gouvernements ont utilisé les services de la C.I.C.*'

561 ibid 416.

562 This has been determined by conducting case searches by arbitrator names on the UNCTAD and ICC databases; see UNCTAD (n 17); ICC, 'ICC Arbitral Tribunals' <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/icc-arbitral-tribunals/> accessed 10 October 2023.

this collaboration was later confined to sharing office space and secretarial services, ensuring that ICSID retained control over crucial functions like the selection of arbitrators. Unlike private-sector arbitral institutions, ICSID, being an intergovernmental organization, had to align its policies with the intentions of its state principals to some extent when it came to inter-institutional cooperation.

3.2.4. The adoption of the Convention and early expansion efforts

Despite the opposition of several states, a resolution supporting the adoption of the Convention was put to a vote at the 1964 meeting of the World Bank Board of Governors. Several Latin American governors voted against the resolution – an episode later termed the 'No de Tokio'. Yet, the Board nevertheless approved the resolution and recommended that a convention be drawn up by the Executive Directors with the help of legal experts (the 'Legal Committee').[563] At that stage, large parts of the text of the Convention were already established and later finalised during meetings of the Legal Committee in 1964 and the Executive Directors in February and March 1965.[564] It was formally approved for signature and ratification on 18 March 1965.[565]

While the regional consultative meetings had created the impression of a member-driven process and managed to contain state resistance, the initiative still had to convince a sufficient number of capital-importing states to sign and ratify the

563 'Réunion consultative d'experts juridiques sur le règlement des différends relatifs aux investissements, Bangkok, Thaïlande, 27 avril-1er mai 1964, compte rendu sommaire des travaux, Archives of the FPS Foreign Affairs, Belgium, 18.891 XII (Folder: 'Dossier 80, Ref 4: Convention pour le règlement des différends relatifs aux investissements entre États et nationaux d'autres États')' (n 548) 23.

564 Parra (n 471) 64-72.

565 *St John (n 52) 141.*

Convention. The final stage of the drafting process allowed the World Bank to build this support. Notably, the Legal Committee members had limited deliberative authority as 'the formal power to change the document remained with the Chair (Broches) and the Bank'.[566]

There are signs that powerful capital-exporting states, like he United States, deliberately took a backseat during the elaboration of the Convention. An official briefing for the US Secretary of State noted that the 'United States has at all times indicated its support for the Convention, but has deliberately not led the way, since the thought has been that this Convention, unlike the OECD Convention, should not have the appearance of being prepared by the capital exporting countries for signature by the capital importing countries'.[567] Similarly, Georges Delaume later observed that '[p]olitically, the Europeans were not for [ICSID] except as potential users taking advantage of the institution to protect their investors against developing countries. So it was all biased'.[568]

The Convention first entered into force on 14 October 1966.[569] On 2 February 1967, Broches was elected Secretary General of ICSID by the Administrative Council.[570] After taking office he negotiated, and, in 1968, signed the Memorandum of

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566 *ibid.*

567 Memo from Leonard Meeker for the Secretary of State, concerning "Circular 175 Authority for Signature of World Bank Convention on Settlement of Investment Disputes: Action Memorandum," undated, likely March 1965, US LA: Bill S.3498 cited in ibid 149.

568 Grathwohl: (n 468) 25.

569 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966)' (n 470).

570 Administrative Council Resolution AC(IM) RES/1, Election of the Secretary-General, 2 February 1967, reprinted in ICSID, *First Annual Report 1966/1967*, 15.

General Arrangements with Jean François, the then-Secretary General of the PCA.[571] As anticipated in the consultative meetings, this memorandum formally allowed for the inter-institutional use of the respective facilities in Washington and The Hague for arbitration hearings.[572] As a result, the memorandum arguably made the PCA less attractive as a mixed arbitration venue, since ICSID arbitration could now also be conducted in The Hague.

Signatures and ratifications of the ICSID Convention grew steadily in the following years. Capital-exporting states were quick to ratify, and many likely assessed that they faced no risk of being a respondent in ICSID arbitration.[573] The UK, for instance, ratified the Convention in December 1966 and 'many states emerging from British colonialism ratified quickly' as did 'most sub-Saharan African states'.[574]

Despite the initial momentum, many countries, especially those from the Soviet bloc, only acceded after 1990. Romania was the first socialist country to ratify the Convention in 1975, followed by Hungary in 1987. Russia has never ratified the Convention. Initially, China was listed as a contracting state after Taiwan ratified the Convention in 1968, but the People's Republic of China ('PRC') requested not to be considered a contracting state in 1980.[575] The PRC later ratified the Convention in 1993.[576] As will be explored further below, the Stockholm Chamber of Commerce

571 ICSID, *Second Annual Report 1967/1968*, 6.

572 Parra (n 471) 117.

573 ICSID (n 374).

574 St John (n 52) 170.

575 Doc. AC/80/5, Communication Received from the Government of the People's Republic of China: Report and Recommendation of the Chairman, September 24, 1980; Doc. AC/80/6, Fourteenth Annual Meeting Summary Proceedings, October 30, 1980, cited in Parra (n 471) 122.

576 ICSID (n 374).

Arbitration Institute appears to have benefitted particularly from this delay in ICSID ratifications, filling a market gap in East-West disputes. At least 26 bilateral investment treaties signed by China or Soviet states before 1990 refer to the SCC-AI, and 17 of these remain in force today.[577]

ICSID's initial strategy aimed to secure the support of capital-exporting states while mitigating resistance from capital-importing states through strategic concessions. However, after the Convention came into force, ICSID targeted officials of capital-importing states to promote accession.[578] The expansion of ICSID membership and the promotion of state consent to ICSID were central topics at early Administrative Council meetings. Before the Council's first annual meeting, in September 1967, then-World Bank President George Woods urged the British government to ratify the Convention, 'because there would not be any common-law countries represented at the first Administrative Council meeting, and (…) the meeting would be dominated by newly independent African countries'.[579]

At the meeting, he also called on 'countries that had not yet decided to join the Centre to consider the possibility carefully in view of the role that the Centre could play in helping them to attract urgently needed private foreign investment on equitable terms'.[580] Aron Broches, now ICSID Secretary General, 'also appealed to Contracting States to supplement the efforts that he and his staff had been making, through

577 This is a result of a keyword search using 'Stockholm Chamber of Commerce' and 'SCC' as keywords and filtering for China PRC and Soviet countries on EDIT; see Alschner, Elsig and Polanco (n 455).

578 St John (n 52) 148-49.

579 Letter from R. E. Radford to the Foreign Office (9 May 1966), cited in St John (n 52) 175.

580 Parra (n 471) 114.

speeches and articles, to create awareness of the availability of the Convention and Centre'.[581] Broches also hoped that state officials of contracting parties, who viewed the Convention favourably, would help promote further accessions.[582]

Compared to other institutions like the ICC-ICA, ICSID officials closely monitored the diffusion of state consent to ICSID arbitration from the outset. Broches mentioned early examples of second-stage consent in his speeches at the 1968 annual meeting of the ICSID Administrative Council.[583] These included Afghanistan's investment law, the Indonesia–Netherlands BIT of 1968, and investment contracts concluded by the governments of Ivory Coast, Iceland, Mauritania, and Senegal.[584]

By contrast, private-sector institutions, such as the SCC-AI and the ICC-ICA, often lacked the necessary government contacts for such information. Interestingly, despite its intergovernmental status, the PCA did not use its network of state officials to monitor state consent to the extent ICSID did. There may be several reasons for this. They include the fact that the PCA's own arbitration rules had no success in mixed arbitration, the importance of the external UNCITRAL Arbitration Rules for mixed arbitration at the PCA, and the lack of a larger intergovernmental parent comparable to the World Bank.

The ICC developed draft intergovernmental agreements implying advance state consent to mixed arbitration years before ICSID was created. Yet, Broches appears to have been the first official of an arbitral institution to explicitly mention the possibility of

581 ibid.

582 'Address by Aron Broches, Secretary-General, to the First Annual Meeting of the ICSID Administrative Council, September 25, 1967'.

583 'Address by Aron Broches, Secretary-General, to the Second Annual Meeting of the ICSID Administrative Council, September 30, 1968' 1.

584 ibid.

treaty-based advance consent to institutional mixed arbitration. He understood that a robust diffusion of treaty-based consents would lay the groundwork for the use of the Centre. However, Broches also recognized it would ‘take time before the contracting states and other states which have not yet joined the Centre fully realize and exploit the potential benefits’, and that ICSID should try to ‘help bring about this realization’.[585] The expansion of membership and the diffusion of second-stage consent were thus made priorities.

In the following years, ICSID promoted these priorities in diplomatic meetings, publications, and through the financial autonomy of the Centre, which did not require financial contributions from contracting states in its early years. Broches actively engaged with representatives of both capital-importing and capital-exporting states to encourage consent to ICSID arbitration in their states’ legal instruments. For example, British archival documents frequently refer to Broches as an authoritative voice supporting the inclusion of ICSID arbitration clauses in model investment treaties.[586] He also dissuaded states from using other institutions. For instance, an OECD briefing that was available to German government, reiterated Broches’ view that arbitration at the ICC-ICA was often unacceptable to governments.[587]

Leveraging his extensive network, like Blair, Broches shared information about early bilateral investment treaties with governments of capital-exporting states. This facilitated the harmonisation of emerging ‘best practices’ in treaty-making. As indicated

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585 ibid 2.

586 St John (n 52) 197-98.

587 OECD Development Assistance Directorate (n 371) 9.

above, for a capital-exporting state, knowing the treaty practices of its peers provided a negotiation advantage. Such knowledge enabled capital-exporting states to negotiate more effectively with capital-importing states, often pushing for terms as favourable as those granted in previous treaties with other capital-exporting states. A 1984 German government briefing highlighted that France, the US, the UK, and Switzerland preferred ICSID arbitration over other *fora* in their investment treaties.[588] According to the briefing, these states would consider alternative options like the UNCITRAL Arbitration Rules only if their negotiating partner had not ratified ICSID.[589] By the early 1980s, a preference for ICSID arbitration had thus emerged among several capital-exporting states.

Broches' advocacy and technical advice was not confined to Europe. The 1968 ICSID Annual Report indicates that he 'continued to address interested groups privately and publicly on the subject of the Convention' and that during travels 'to Australia, Indonesia, the Philippines and Singapore devoted largely to the affairs of the Centre, he had the opportunity of talking to groups of officials in several of these countries'.[590] In 1969, Broches also 'visited several countries in Africa and Europe for conversations with officials about the affairs of the Centre'.[591] To support these activities, the ICSID Secretariat prepared model clauses for contract-based consent to ICSID arbitration as

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588 Hans-Martin Burkhardt, 'Vermerk: Investitionsförderungsverträge, hier: Schiedsgerichtsbarkeit (Memo: Investment Protection Agreements, here: Arbitration), Bonn, VC5 – 740306 (16 June 1983) GFA B 102/272814, 2.

589 ibid.

590 ICSID, *Second Annual Report 1967/1968* (n 571) 4.

591 ICSID, *Third Annual Report 1968/1969*, 3.

early as 1968.[592] In 1969, the Secretariat also published and widely disseminated a model clause for treaty-based consent to ICSID arbitration.[593]

However, ICSID nevertheless faced challenges similar to those of the PCA, which experienced a lack of cases during several decades. Due to this lack of claims filed, the ICSID Secretariat initially promoted the number of legal instruments granting second-stage consent to ICSID arbitration as an indicator of the Convention's success. The absence of cases was later framed as the result of a deterrent effect, indicating the Convention's practical use for investment protection.[594] At a 1969 meeting, Broches emphasized that the 'Centre serves a useful role through its very existence', but that this did 'not mean the Centre should remain entirely inactive, pending the submission of disputes'.[595] In a 1979 article, Broches argued that both 'the small number of cases and the high incidence of settlement by mutual agreement after the institution of proceedings are an eloquent demonstration of the strong inducement toward amicable settlement provided by binding arbitration agreements'.[596]

Another factor that likely eased the accession to the Convention, especially for capital-importing states facing resource constrains, was the World Bank's financial

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592 ICSID, *Second Annual Report 1967/1968* (n 571) 4.

593 'Model Clauses Relating to the Convention on the Settlement of Investment Disputes Designed for Use in Bilateral Investment Agreements' (1969) 8 ILM 1341.

594 St John (n 52) 187; Robert Asher, 'Interview with Aron Broches, May 23, 1984' World Bank Group Archives, Oral History Program.

595 'Address by Aron Broches, Secretary-General, to the Third Annual Meeting of the ICSID Administrative Council, September 29, 1969'.

596 Aron Broches, 'The "Additional Facility" of the International Centre for the Settlement of Investment Disputes' (1979) IV ICCA Yearbook Commercial Arbitration 373, 375.

support during ICSID's early years.[597] Soon after its inception, ICSID entered into a Memorandum of Administrative Arrangements with the World Bank.[598] This agreement formalized the Bank's 'commitment to provide the Centre with free office accommodation as long as the Centre has its seat at the headquarters of the bank and to underwrite, within reasonable limits, the basic overhead expenditures of the Centre for some years after its establishment'.[599]

As a result of the Memorandum, ICSID's contracting states incurred no expenses related to ICSID's operation 'for nearly 40 years', before the 'subvention became more and more difficult to sustain as ICSID's budgetary requirements escalated in the period 2000 to 2010'.[600] This lack of financial burden may have significantly eased acceptance of the Convention. It made it easier for officials of capital-importing states with limited resources to 'sell' an accession to the Convention to their respective governments.

To further its cause, ICSID officials also actively published in peer-reviewed journals to address perceived misconceptions and promote awareness about the Convention. Notably, in 1971, Paul Szasz, then a member of the Secretariat, directly addressed Latin American opposition based on the Calvo Doctrine in a journal article.[601] He emphasised that the Convention sidestepped the issue of diplomatic protection by introducing a mechanism for private investors to directly initiate arbitration against host

597 ICSID, 'Resolutions of the Administrative Council with Text of the Memorandum', in ICSID, *First Annual Report 1966/1967* 15-16; this memorandum had not been formally denounced by 2012, see Parra (n 471) 113.

598 ICSID (n 597) 15.

599 ICSID, *First Annual Report 1966/1967* (n 570) 6.

600 Parra (n 471) 244.

601 Paul Szasz, 'The Investment Disputes Convention and Latin America' (1971) 11 Virginia Journal of International Law 256.

states.[602] Szasz also noted that the Convention did not establish any substantive investment standards, thereby leaving national treatment unaffected.[603] In his view, the Convention added only a minimal layer of protection, and states were still free to require the exhaustion of local remedies.[604]

3.2.5. The threat of substitutes: establishing the Additional Facility

Despite efforts to broker state consent and promote the use of ICSID, the first decade was marked by institutional inactivity. This led officials of the institution to deem ICSID a failure at the time. In the words of Georges Delaume, 'Broches had not succeeded in selling ICSID'.[605] The effect of the growing number of advance consents in BITs would only become apparent decades later. The introduction of the ICSID Additional Facility can be seen as an institutional innovation born out of this pressure to demonstrate utility and relevance. This innovation may be explained by dynamic theories of institutional change in historical institutionalist scholarship, which posit that periods of relative inactivity can drive institutions to adapt and evolve, especially when faced with competition or a need to justify their continued existence.[606] During these periods, institutional officials are susceptible to ideas that deviate from the usual practices of an institution and push its mandate to the limits. Competition with other market participants may further add to such pressure.

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602 ibid 261.
603 ibid 262.
604 ibid.
605 Grathwohl: (n 468) 25.
606 eg Streeck and Thelen (n 73) 27.

The *Rules of Arbitration and Conciliation of the ICSID Additional Facility* ('Additional Facility Rules') were drafted between 1976 and 1978 and were formally adopted at ICSID's annual meeting in 1978. One of the primary motivations for the creation of the Additional Facility was to address perceived limitations in the ICSID Convention, which World Bank officials thought had caused the lack of cases.[607] Indeed, between 1966 and 1976, the Centre's caseload was low with only five cases registered during this period.[608]

For Broches, two aspects of the Convention were especially inhibitive to caseload growth, i.e., the nationality requirements and the limitation to investment disputes as defined in Article 25 of the Convention.[609] According to the nationality requirement, both the home state of the foreign investor and the host state of the investment must be parties to the ICSID Convention in order for the Centre to have 'jurisdiction' to administer a case. Disputes must also arise directly out of an investment, although this term is not defined in the Convention. ICSID thus excluded a range of mixed arbitration cases, which were increasingly filed at other institutions such as the ICC-ICA.

In the 1970s, demands for an expansion of ICSID's jurisdiction were growing. In 1979, Broches noted that:

> [f]or some years the ICSID Secretariat has been receiving inquiries from business circles as well as from some governments whether some way could be found to make the Secretariat's services available in connection with proceedings

[607] Parra (n 471) 8.

[608] ibid 141.

[609] ICSID Administrative Council, 'Summary Proceedings: Tenth Annual Meeting, October 7, 1976, Administrative Council Doc. AC/7640A, Annex, Statement by Mr. A. Broches', 4.

> between States and foreign non-State parties which are outside the scope of the Convention.[610]

An extension of the scope was especially relevant given the changing and often overlapping definitions of ‘investment’ and ‘commercial transactions’. According to Parra the notion of the term ‘investment’, which later underwent significant change through arbitral interpretation, was not seen to encompass certain contractual relationships between states and private entities, prior to the adoption of the Additional Facility Rules.[611] Some of these matters were instead regarded as ‘“commercial” transactions’,[612] a terminology more familiar to private arbitral institutions and commercial arbitration practitioners.[613] The partial overlap of the terms ‘investment’ and ‘commercial transaction’, demonstrates that institutionalist research on mixed arbitration must not be limited to one of these categories, if it is to understand institutional outcomes. During ICSID’s design phase and throughout its early years these terms were still in flux.

Several additional factors motivated the creation of the Additional Facility. Broches was well-versed in the evolving landscape of commercial and contract-based arbitration. His friendship with Sanders and regular exchanges between ICSID and officials of the ICC-ICA and the AAA may have contributed to this awareness.[614] It is likely that Broches knew the ICA’s mixed arbitration caseload was growing and that not all of

610 Broches, ‘The “Additional Facility” of the International Centre for the Settlement of Investment Disputes’ (n 596) 375.

611 Parra (n 471) 142.

612 ibid.

613 Delaume later emphasized the greater familiarity of practitioners with arbitration within the framework of the 1958 New York Convention as another motivation for the creation of the ICSID Additional Facility, see Grathwohl: (n 468) 28.

614 ibid.

these cases were related to capital investments. He recognized that ICSID missed out on these cases and business circles specifically lobbied him for an extension of ICSID's *ratione materiae* jurisdiction.[615] Broches also must have known that the United States had recently ratified the New York Convention in 1971. A new set of arbitration rules that would rely on this instrument for enforcement had therefore gained the support of a major jurisdiction.

Another development may have had an even greater influence on Broches: the adoption of the 1976 UNCITRAL Arbitration Rules. Before floating the concept of the Additional Facility, Broches participated in the intergovernmental deliberations leading to the publication of these Rules. While their role in mixed arbitration will be considered more extensively in the following chapters, the fact that they were adopted just before Broches introduced the idea of the Additional Facility merits closer examination.

Members of the International Council for Commercial Arbitration ('ICCA') – a major arbitral interest group involved in work at UNCITRAL – already discussed a possible applicability of the Rules to mixed arbitrations as early as January 1975.[616] During the deliberations, an article specifying that the Rules could apply to disputes involving 'legal persons of public law' had been suggested.[617] It is possible that this article already figured in the original draft that Pieter Sanders had prepared around 1974. It may also have been included after private-sector arbitration experts had provided comments on

615 Broches, 'The "Additional Facility" of the International Centre for the Settlement of Investment Disputes' (n 596) 375.

616 ICCA (ed), 'Notes, Fifth International Arbitration Congress' <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/009.pdf> accessed 31 July 2023.

617 This can be inferred from ibid.

this draft. In any event, it appears to have been the intention of private-sector actors to advocate for a scope of the Rules inclusive of mixed arbitration.

In internal communications among ICCA experts, around January 1975, Broches reacted to this proposed applicability to mixed arbitration. Criticizing a draft commentary accompanying the rules, he took concern with ‘the mistaken impression that Article 1, para 2 [of the Rules] recognizes the right of “legal persons of public law” to conclude valid arbitration agreements’.[618] Broches, visibly annoyed by this passage, noted that the ‘Rules can of course do no such thing although a Convention may’.[619] In his view, the article referring to ‘legal persons of public law’ should clarify ‘that the UNCITRAL Rules *may* be made applicable to arbitration clauses or agreements to which a Government, State agency or State Organization is a party’.[620] In his exchanges with ICCA, Broches thus attempted to draw attention to a key feature that distinguished the new Rules from ICSID: the lack of an underlying multilateral convention recognizing states’ right to consent to mixed arbitration. In light of ICSID’s ongoing lack of cases, it is reasonable to assess that Broches was alert to potential competition for ICSID.

Irrespective of ICCA’s internal discussions, state delegates at UNCITRAL were sceptical about the reference to ‘legal persons of public law’ in the Rules. In April 1975, the Greek delegate cautioned that if the term were included, it should specify that it only covered acts of states *de jure gestionis.*[621] Eventually, the reference was removed, as several delegations felt that the application to states or state entities was better left to

[618] ibid.

[619] ibid.

[620] ibid, (emphasis added).

[621] UNCITRAL, ‘Summary Record of the One Hundred and Sixty-First Meeting, Held on Wednesday’ (9 April 1975) UN Doc No A/CN9/9/SR161, 113.

the applicable law.[622] In April 1976, Broches attended one of the final meetings of the UNCITRAL Committee of the Whole as the World Bank's delegate.[623] Notably, he only took the floor once to make a minor technical recommendation but otherwise simply observed the proceedings.[624]

The UNCITRAL Arbitration Rules were adopted on 28 April 1976 providing particularly the smaller SCC-AI and later also the PCA with robust procedural bases to administer mixed arbitrations. These rules presented several elements that disputing parties could have perceived as competitive advantages over the ICSID Convention. Notably, the new Rules offered greater flexibility than ICSID, which some perceived as too 'rigid'.[625] Unlike the ICSID Convention, the UNCITRAL Rules did not require ratification before a state could consent to arbitration, making them accessible to any state. Moreover, the new Rules sidestepped the contentious issue of designating an appointing authority, allowing the disputing parties to choose any institution to act as such an authority. The subject matter scope of the UNCITRAL Rules was also broader, encompassing any kind of mixed arbitration, whether related to an 'investment' or a 'commercial transaction'. A flexible set of rules elaborated at the multilateral UNCITRAL may also have been politically acceptable to some states that rejected arbitration under the auspices of the World Bank. Given these advantages, the UNCITRAL Arbitration Rules posed a competitive threat to the relatively inactive ICSID.

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622 ibid 114-15.

623 UNCITRAL, Ninth Session, Committee of the Whole (II), Summary Record of the 1st Meeting' (1976) UN Doc No A/CN9/9/C2/SR1, 4.

624 Broches only made a technical comment on the ambiguity of the term 'rules' in what was then art 1(1) of the draft Rules, see ibid.

625 Grathwohl: (n 468) 27.

Importantly, the drafters of the UNCITRAL Rules may not have anticipated their use in investment treaties, but this would not have lessened concerns about increased competition. All ICSID cases registered up to 1976 were contract-based. Broches also likely believed that the Rules would mostly be used in such contract-based cases, since states had almost exclusively focused on this type of arbitration in the preparatory work at UNCITRAL.

State support for the UNCITRAL Rules was swift. After their adoption in 1976, the UNCITRAL Commission invited the UN General Assembly to endorse the Rules, which it did later in the same year.[626] The Asian-African Legal Consultative Committee ('AALCC'), an intergovernmental forum of Asian and African states, also endorsed the Rules in 1976, and recommended that its members join the New York Convention.[627] The AALCC even went further, to recommend that UNCITRAL prepare a protocol to the New York Convention, prohibiting government agencies participating in arbitration from invoking sovereign immunity.[628]

Many members of the AALCC were former colonies, where strong investment protection was particularly relevant for capital-exporting states. Promoting accession by AALCC members to the ICSID Convention may therefore have been an important objective of ICSID's officials. At the time AALCC endorsed the UNCITRAL Arbitration

626 AALCC (ed), *Report of the Seventeenth, Eighteenth and Nineteenth Sessions held in Kuala Lumpur (1976), Baghdad (1977) and Doha (1978)* (AALCC Secretariat) 140; UNGA, 'Arbitration Rules of the UN Commission on International Trade Law' (15 De-cember 1976), UNGA Res 31/98, UN Doc No A/31/251&Add1, 108.

627 AALCC, *Report of the Seventeenth, Eighteenth and Nineteenth Sessions held in Kuala Lumpur (1976), Baghdad (1977) and Doha (1978)* (n 626) 140; James Wall, 'The Asian-African Legal Consultative Committee and International Commercial Arbitration' (1980) 17 Canadian Yearbook of International Law 324, 332.

628 Wall (n 627) 332.

Rules, only 18 of its 35 full members had ratified the ICSID Convention.[629] AALCC member states also expressed concerns about ICSID's geographic remoteness. James Wall, then Canadian High Commissioner in New Delhi, observed in a 1979 article that '[o]ne of the reasons advanced by the A.A.L.C.C. to explain the infrequent use of I.C.S.I.D. is the reluctance of parties in the African-Asian region to incur the administrative problems and financial expense of pursuing arbitration in Washington'.[630] It is likely that this apparent preference of AALCC states raised concerns among Broches and other ICSID officials.

In response to this competitive landscape, Broches proposed the Additional Facility to the ICSID Administrative Council in October 1976, a mere six months after the adoption of the UNCITRAL Arbitration Rules. Soon after, in May 1977, he presented the Administrative Council with a draft.[631] Broches' draft suggested a scope limited to mixed arbitration, excluding disputes between private disputing parties. Most importantly, the draft did not require both the home and host state to have ratified the ICSID Convention.[632] Moreover, the draft also covered disputes arising from 'a commercial transaction', not just investments.[633] In addition, Broches reassured states

629 AALCC, *Report of the Seventeenth, Eighteenth and Nineteenth Sessions held in Kuala Lumpur (1976), Baghdad (1977) and Doha (1978)* (n 626) 2-3; Malik (n 378).

630 Wall (n 627) 330.

631 Parra (n 471) 142.

632 Doc AC/77/1 Administration by the Centre of Proceedings Outside the Scope of art 25 of the Convention: Draft Report and Recommendations of the Secretary-General, May 13, 1977, cited in ibid 142.

633 ibid.

that adopting the Additional Facility would require no ‘structural change’ and ‘would have no significant budgetary implications’.[634]

However, the Additional Facility Rules remained a hard sell. Broches had the task of justifying that the creation of the Additional Facility was within the Centre’s existing mandate and could be executed without amending the Convention. This required sophisticated legal manoeuvring pushing ICSID’s mandate to the limit. To convince states of this possibility, Broches argued that

> the Additional Facility would be established by decision of the Administrative Council in the exercise of its power to administer the Centre and, in particular, to adopt the administrative and financial regulations of the Centre (Convention, Article 6(1)(a)). This power could admittedly not be used to extend the applicability of the Convention to parties or disputes not falling within the jurisdiction of the centre as defined in Article 25 of the Convention. If this were desired, an amendment of the Convention would be required. However, the proposal does not contemplate any extension of the jurisdiction of the Centre, but merely an extension the activities of its Secretariat and this would appear to be within the powers of the Administrative Council.[635]

To support this expansive reading of ICSID’s mandate, Broches cited two precedent decisions of the Permanent Court of Arbitration, considered to be a similar intergovernmental organization: the 1934 decision of the PCA Administrative Council allowing the PCA to act as registry in the mixed arbitration of *Radio Corporation of America v. China* and the same Council’s adoption, in 1962, of Optional Rules for mixed

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634 Doc AC/77/1 Administration by the Centre of Proceedings Outside the Scope of Article 25 of the Convention: Draft Report and Recommendations of the Secretary-General, May 13, 1977, para 11, cited in ibid 143.

635 Doc AC/77/5, Administration by the Centre of Proceedings Outside the Scope of Article 25 of the Convention: Draft Report and Recommendations of the Secretary-General, September 6, 1977, cited in ibid 144.

arbitration.[636] In both decisions, Broches argued, the PCA's member states had endorsed the administration of cases in ways not initially foreseen by the PCA's founding Conventions.[637] ICSID member states should therefore be in a position to empower the Secretariat to administer the new category of cases covered by the Additional Facility, despite their falling outside the Convention's initial scope.

The following developments are well-documented by Parra.[638] Some states responded to the May 1977 draft with concerns that allowing non-ICSID states or their nationals to use ICSID 'could deprive such States of the incentive to become parties to the Convention'.[639] Many states did not comment on the draft, and discussions were postponed to the following year.[640] Revised drafts in June and August 1978 addressed these concerns and others that had arisen in the interim.[641] Specifically, the drafts aimed to mitigate fears that the Additional Facility would disincentivize ICSID membership, divert cases away from ICSID's 'ordinary' jurisdiction, or attract cases related to 'ordinary commercial transactions' in a way that deviated from the initial intention of the Convention's signatories.[642]

The August draft clarified at least four points. First, it stated that cases based on the Additional Facility Rules would not benefit from the Convention's self-contained enforcement mechanism and its exclusion of state court review at the enforcement

636 ibid.

637 ibid.

638 ibid 143-50.

639 ibid 143.

640 ibid.

641 ibid 144.

642 Docs AC/78/8-AC/78/12, Draft Additional Facility Rules and Additional Facility Administrative and Financial Rules, Conciliation Rules, Arbitration Rules and Fact-Finding Rules, August 15, 1978, cited in ibid.

stage.[643] Second, it mandated that at least one of the states involved – either the home or host state – must be an ICSID member.[644] Third, it introduced a requirement for the ICSID Secretary General's prior approval for arbitration under Additional Facility Rules, mirroring the *prima facie* review operated at other arbitral institutions.[645] In cases where both the home and host states had become ICSID members after consenting to arbitration at the Additional Facility but prior to claim registration, such approval would be withheld until the disputing parties agreed to arbitration under the existing ICSID Arbitration Rules.[646] Lastly, the draft also copied elements of the UNCITRAL Arbitration Rules, including provisions regarding applicable law and the availability of interim measures.[647]

Despite these changes, some ICSID contracting states remained sceptical. Several informal meetings were held in the run-up to the Administrative Council meeting on 27 September 1978. One such meeting, convened by the US delegation to the OECD on 19 September, raised additional concerns. The US, understanding that arbitral practice under both the ICSID and ICSID Additional Facility Rules could influence each other, thought the narrow definition of 'investment' in the August draft could adversely impact the existing Convention.[648] The Swiss delegation, accepted 'that providing in ICSID another forum for settlement of commercial disputes between

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643 ibid 145.

644 ibid.

645 ibid 145-46; '2021 ICC Arbitration Rules' (n 162) art 6(4); '2023 SCC Arbitration Rules', art 12.

646 Parra (n 471) 145-146.

647 ibid 147.

648 'Diplomatic Cable from the US Mission to the UN in NY to the Dept of State: ICSID Additional Facility' <https://search.wikileaks.org/plusd/cables/1978USUNN03727_d.html> accessed 31 July 2023.

investors and states would benefit investors without cost to ICSID'.[649] Yet, it also 'frankly noted that [the] Swiss Arbitration Association could nonetheless be expected to oppose [the] creation of [a] competitor forum'.[650] The British delegation opposed the initiative entirely, arguing that it would undermine the ICSID Convention and 'might have [a] negative impact on [the] new UNCITRAL Rules'.[651] According to a US diplomatic cable, the UK had been lobbying against the Additional Facility for several weeks before the Administrative Council meeting, even claiming its creation would exceed ICSID's mandate.[652] When US delegates cited the previous Administrative Council decisions at the PCA that Broches had already mentioned, the British were unaware of these decisions.[653] In light of the concerns expressed during the meeting, US delegates were uncertain about the prospects of the upcoming vote on the Additional Facility.[654]

As the vote drew near, diplomatic chatter ratcheted up. In a meeting convened by Broches one week before the vote, a decision was made to remove from the rules a list explicitly identifying certain 'ordinary commercial transactions' as excluded from the Additional Facility.[655] This broadened the subject-matter scope in line with business preferences. Instead, a separate comment was introduced:

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649 ibid.

650 ibid.

651 ibid.

652 ibid.

653 ibid.

654 'Diplomatic Cable from the US Mission to the UN in NY to the Dept of State: IGWG on a Code of Conduct Relating to Transnational Corporations: September 22 (Environment; IGWG Schedule; ICSID)' <https://search.wikileaks.org/plusd/cables/1978USUNN03796_d.html> accessed 31 July 2023.

655 Parra (n 471) 148.

> Economic transactions which (a) may or may not, depending on their terms, be regarded by the parties as investments for the purposes of the Convention, which (b) involve long-term relationships or the commitment of substantial resources on the part of either party, and which (c) are of special importance to the economy of the State party, can be clearly distinguished from ordinary commercial transactions. Examples of such transactions may be found in various forms of industrial cooperation agreements and major civil works contracts.[656]

This comment elegantly navigated the concerns expressed internally by the United States, as it remained agnostic to a specific interpretation of the word ‘investment’. The provision would also conveniently work as a filter for the new Facility, ensuring that only cases that were economically significant could be filed. The comment thus gave the Additional Facility a competitive edge over non-governmental arbitral institutions, which often faced cases involving lower stakes.

Despite its reservations, the US aimed to build consensus in favour of the Additional Facility, with some of its delegates remaining sceptical on the eve of the vote.[657] The ICSID Administrative Council resolution adopting the Additional Facility Rules did pass, but only by a narrow margin. Of the 51 ICSID members at the meeting, 25 voted ‘yes’, 2 voted ‘no’ and 24 abstained.[658] Supporters included the United States, France, Sweden, and Switzerland, while the United Kingdom abstained.[659] This narrow vote was a setback for Broches. As Delaume later observed, ‘[o]f course, the Additional Facility at the beginning was regarded as an admission of failure by Broches, because

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656 Doc AC/78/16, Proposed Amendments to the Additional Facility Rules: Memorandum of the Secretary General, September 25, 1978, annex 3, cited in ibid.

657 ‘Diplomatic Cable from the US Mission to the UN in NY to the Dept of State: IGWG on a Code of Conduct Relating to Transnational Corporations: September 22 (Environment; IGWG Schedule; ICSID)’ (n 654).

658 Parra (n 471) 149, fn 210.

659 ibid.

he pushed for it and it almost didn't pass'.[660] Broches nonetheless knew what was required to ensure that his project would not fall victim to emerging competitive forces.

In subsequent years, the Additional Facility Rules gained increasing acceptance among states. When Heribert Golsong, Broches' successor, suggested abolishing the Additional Facility to the Administrative Council in 1983 for lack of cases, ICSID's contracting states disagreed.[661] The Additional Facility Rules simplified treaty negotiations for capital-exporting states, which often negotiated with non-ICSID states and required alternatives to ICSID's standard procedure. This link between the Additional Facility and the diffusion of consent to ICSID arbitration in investment treaties was also noted by Delaume.[662]

Many capital-exporting states had developed a preference for ICSID as the preferred forum for arbitration by the 1980s. For instance, a 1981 briefing on the British Model Investment Promotion and Protection Agreement recommended,

> [i]f ICSID is clearly not acceptable to a particular country, we should investigate their willingness to submit investment disputes to other international arbitration procedures such as the International Chamber of Commerce or the UNCITRAL Arbitration Rules. But omission of ICSID should only be conceded in the very last resort, or we risk undermining the reputation of the Centre. In any event it is essential to obtain proper arrangements for the impartial settlement of investment disputes.[663]

[660] Grathwohl: (n 468) 28.

[661] ICSID, 'Doc AC/83/3, Additional Facility, Report to the Administrative Council: Note of the Secretary General' (27 July 1983) GFA B 102/272814.

[662] Grathwohl: (n 468) 27.

[663] 'Confidential: Model Investment Promotion and Protection Agreement, Jan 1990 Version, General Negotiating Brief' (n 417).

A German government briefing echoed these priorities, noting that states like France, the US, the UK, and Switzerland preferred ICSID for their investment treaties.[664] The same briefing noted that UNCITRAL would only be an option if the negotiating partner state was not a Convention member.[665]

Golsong also advocated for the use of ICSID over the UNCITRAL Rules in his correspondence with capital-exporting state officials. When the German government consulted him in 1982, he discouraged adding UNCITRAL as an alternative in Germany's investment treaties.[666] He highlighted ICSID's advantages, such as its self-contained enforcement mechanism and broader ratification compared to the New York Convention at the time. Golsong also pointed to the lack of an institutional framework and submitted that politically, developing countries viewed ICSID as favourably as UNCITRAL. For him, the UNCITRAL Rules could be referenced where the negotiating partner had not joined ICSID. Yet, even in such cases states sometimes accepted *ad hoc* rules modelled on ICSID with the ICSID Secretary General as 'nominating authority'.[667] Interestingly, Golsong did not mention the Additional Facility in his reply to the German officials. It is reasonable to assume that Golsong omitted this reference as the Additional Facility's continued operation was unlikely at the time the reply.[668]

The *1978 ICSID Arbitration (Additional Facility) Rules* offered specific benefits over their main competitor, the UNCITRAL Arbitration Rules. They provided for a more

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664 Burkhardt, 'Vermerk: Investitionsförderungsverträge, hier: Schiedsgerichtsbarkeit (Memo: Investment Protection Agreements, here: Arbitration), Bonn, VC5 - 740306' (n 588).

665 ibid 2.

666 Letter from Heribert Golsong to Ministerialrat Hans-Martin Burkhardt (15 October 1982) GFA B 102/272936, 1.

667 ibid 2.

668 Parra (n 471) 149.

important role of the institution and more robust mechanisms to overcome procedural deadlocks.[669] Broches himself emphasized these advantages, pointing out that the Rules enabled the administration, at a specialized institution, of cases involving non-signatory states or their nationals.[670] The Additional Facility Rules, also covered disputes not directly arising out of an Investment.[671]

In 1983, the Administrative Council recognized that states were increasingly entering 'new forms of association' with foreign investors, that fell under the scope of the Additional Facility Rules.[672] These included

> profit-sharing, service and management contracts, contracts for the sale and erection of industrial plants, turn-key contracts, international leasing arrangements, agreements for the transfer of know-how and technology, industrial or business concessions and also claims to money or to any performance under contracts having financial or economic value'.[673]

Thus far, disputes related to this type of transaction had been the core business of private-sector arbitral institutions. ICSID's reach into this market segment intensified competition with institutions, such as the ICC-ICA and SCC-AI. Particularly the ICC-ICA, was an alternative forum in negotiations with states that were not ICSID members. For several decades, mixed arbitration at the ICC-ICA was significantly more frequent than at ICSID. Prior to 1996, ICSID never administered more than five predominantly

669 For instance, art 9 of the 1978 ICSID Arbitration (Additional Facility) Rules contained methods of constituting the tribunal in absence of party agreement.

670 Broches, 'The "Additional Facility" of the International Centre for the Settlement of Investment Disputes' (n 596).

671 '1978 Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes', art 2(b).

672 ICSID, 'Doc AC/83/3, Additional Facility, Report to the Administrative Council: Note of the Secretary General' (n 661) 2.

673 ibid.

contract-based cases per year, while the ICC-ICA administered more than 30 mixed arbitrations in 1969 alone.[674]

The Additional Facility Rules allowed ICSID to cover nearly all instances where private entities might seek international arbitration against states, without undermining the ratification of the original Convention. To date, a small but notable 8,4% of all cases registered at ICSID have been filed under the Additional Facility.[675] Moreover, these rules are the third most frequently cited set of rules for investor-state arbitration in investment treaties, following ICSID's conventional arbitration rules and the UNCITRAL Rules.[676] In the decades following the Additional Facility's inception, states have shown a growing preference for ICSID arbitration in their investment treaties. Of all institutions, ICSID benefitted most from the proliferation of BITs. It has also notably been included in NAFTA and the Energy Charter Treaty. The following section will briefly examine the emergence of a growing constituency of beneficiaries at ICSID, which overlapped to a large extent with those of other arbitral institutions.

3.2.6. Formation of a constituency of beneficiaries and staff fluctuation

Alongside the growing diffusion of consent to ICSID arbitration and the proliferation of cases administered by ICSID, a group of beneficiaries began to form. This constituency had overlapping interests with the beneficiaries of other arbitral institutions.

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[674] ICSID, 'ICSID Statistics 2023-1' 7 <https://icsid.worldbank.org/sites/default/files/Caseload%20Statistics%20Charts/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf> accessed 31 July 2023; of the 33 cases registered at ICSID in or before 1996, only 6 were treaty-based, see UNCTAD (n 17); Lemercier and Sgard (n 147) 95.

[675] ICSID, 'ICSID Statistics 2023-1' (n 674) 8.

[676] This is the result of a keyword search on the EDIT database, see Alschner, Elsig and Polanco (n 455).

Georges Delaume had already initiated regular interactions with officials at the ICC-ICA and other institutions in the 1970s and 80s. In a 2004 interview, Delaume noted that from the late 1970s onward, he frequently visited 'Paris (...) to establish contacts with the Chamber of Commerce (...) to exchange ideas and information'.[677] He also observed that '[t]hese institutions and their lawyers had plenty of experience'.[678] ICSID officials would share their expertise about institutional arbitration with these other institutions, which were market participants in the same oligopoly for mixed arbitration. At these meetings Delaume would ask practical questions, such as '[w]hat do you do in this situation? I know your roles, but could you change it? Is that an advantage?'[679]

Building on Delaume's efforts, ICSID began co-hosting an annual conference with the ICC and the American Arbitration Association starting in 1983.[680] This event became a significant platform for dialogue among participants in mixed arbitration, including arbitrators, law firm representatives, institutional officials, investors, and academics.[681] ICSID also began entering into various inter-institutional cooperation agreements. For example, in 1979, it concluded an agreement with AALCC for reciprocal use of facilities with the Regional Centre for Commercial Arbitration that AALCC had established in Kuala Lumpur.[682] Against the backdrop of the earlier endorsement by the AALCC of the UNCITRAL Rules, this agreement was a strategic success for ICSID as it removed the

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677 Grathwohl: (n 468) 27.

678 ibid.

679 ibid.

680 'World Bank Hosts an ICSID, AAA, ICC Symposium' *News from ICSID* (Winter 1984) 3.

681 'The International Chamber of Commerce Hosts a Third ICSID, AAA, ICC Symposium' *News from ICSID* (Winter 1986) 8, 8. Interestingly, none of the 'News from ICSID' issues usually reporting on participation at these annual conferences point to the presence of PCA officials.

682 ICSID, *Thirteenth Annual Report 1978/1979*, 4.

obstacle of perceived geographic remoteness in ICSID proceedings. More recent collaborations include agreements with the International Chamber of Commerce,[683] Stockholm Chamber of Commerce,[684] and the Energy Charter Secretariat.[685]

ICSID officials have taken on multiple roles in the mixed arbitration market, including at other institutions discussed in this thesis. Former ICSID Secretaries General have continued to work in the arbitration industry as arbitrators and counsel.[686] After their tenures, both Broches and Golsong were designated members of the ICSID Panel of Arbitrators by the Chairman of the Administrative Council.[687] Moreover, Broches, after retiring from ICSID, served as an observer for ICCA in the UNCITRAL Working Group meetings that prepared the UNCITRAL Model Law. In these meetings, he generally advocated for a greater autonomy of the arbitral process from domestic law. For instance, he considered that 'the actual place of arbitration was becoming more

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683 ICSID, 'Press Release: ICSID Concludes Cooperation Agreement with the ICC' (14 March 2016) <https://icsid.worldbank.org/news-and-events/news-releases/icsid-concludes-cooperation-agreement-icc> accessed 31 July 2023. According to the press release, the 'Agreement is based on Article 63 of the ICSID Convention and formalizes a long-standing collaborative relationship between the two organizations in sharing hearing facilities. ICSID and the ICC are continuing to discuss future opportunities to work together on bringing better and more cost effective services to users.'

684 ICSID, 'Press Release: ICSID and SCC Strengthen Ties to Promote International Dispute Resolution' (10 January 2023) <https://icsid.worldbank.org/news-and-events/news-releases/icsid-and-scc-strengthen-ties-promote-international-dispute> accessed 31 July 2023.

685 Energy Charter, 'Press Release: Energy Charter Secretariat and ICSID Conclude Cooperation Agreement' (12 February 2021) <www.energycharter.org/media/news/article/energy-charter-secretariat-and-icsid-conclude-cooperation-agreement/> accessed 31 July 2023.

686 Broches was appointed arbitrator in at least three proceedings, including *Société d'Investigation de Recherche et d'Exploitation Minière v Burkina Faso,* ICSID Case No ARB/97/1; *Maritime International Nominees Establishment v Republic of Guinea (II),* ICSID Case No ARB/84/4; *Société Ouest Africaine des Bétons Industriels v Senegal,* ICSID Case No ARB/82/1; Golsong was appointed in one proceeding by the claimant in *AMT v Democratic Republic of the Congo,* ICSID Case No ARB/93/1; Shihata was appointed in one proceeding by the disputing parties in *Generation Ukraine, Inc v Ukraine* ICSID Case No ARB/00/9; St John (n 52) 308.

687 Parra (n 471) 129.

and more of a fiction'[688] and supported an exclusive interpretation of the principle of *Kompetenz Kompetenz.*[689] He later joined the New York law firm Holtzmann, Wise & Shepard established by the US delegate to UNCITRAL, Howard Holtzmann.[690]

Today, many of the same law firms, arbitrators, and third-party funders benefit from ICSID arbitration that also benefit from other institutions considered in this thesis. This constituency of beneficiaries has a vested interest in maintaining and enhancing the access to and use of ICSID arbitration. The generation of beneficiaries also offers avenues for further research. For instance, the degree of double hatting of institutional officials of other institutions as ICSID-appointed arbitrators could be mapped out. While having an official role at another arbitral institution, such as that of President, Vice President, or Member of the International Court of Arbitration at the ICC usually limits the cases in which these individuals can act as arbitrators at the same institution, they frequently appear to have been appointed concurrently by ICSID. Further research could investigate such instances of institutional double hatting, where individuals concurrently act in institutional and dispute resolution roles at two or more of the leading institutions that form part of the mixed arbitration oligopoly.

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688 UNCITRAL, '310th Meeting: Monday, 5 June 1985' (1985) XVI Yearbook of the United Nations Commission on International Trade Law 418, 419.

689 UNCITRAL, '315th Meeting: Monday, 10 June 1985' (1985) XVI Yearbook of the United Nations Commission on International Trade Law 437, 440.

690 Aron Broches, 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution' (1987) 2 ICSID Review 287, 287.

3.3. Mixed arbitration at ICSID today

Today, ICSID is the world's leading arbitral institution for mixed arbitration based on investment treaties. More than any other institution, it benefits from the wide diffusion of state consent to ICSID arbitration in the investment treaty regime, and likely also in domestic investment laws. In treaty-based mixed arbitration, ICSID competes with other institutions that have benefitted from a delay in ICSID ratifications or other factors. Moreover, ICSID administers a significant number of contract-based arbitrations. Its contract-based caseload is likely lower than that of the ICC-ICA, but it retains a significant market share. The following section will provide an overview of the institutional framework of ICSID today, the diffusion of consent to ICSID arbitration, and the Centre's caseload.

3.3.1. The institutional framework of ICSID

ICSID is part of the World Bank Group. Its history is closely intertwined with its intergovernmental parent organization. In the context of the World Bank Group, it coexists with other World Bank branches such as the Multilateral Investment Guarantee Agency ('MIGA') and the International Bank for Reconstruction and Development ('IBRD'), which also engage in international investment policy. Unique among its sister organizations, ICSID is not a financial institution and is the only World Bank branch with a governing body that does not rely on weighted voting.[691]

[691] Parra (n 471) 6.

ICSID's governance copies that of the Permanent Court of Arbitration in some respects. Both organizations are overseen by an administrative council consisting of contracting state representatives and operate day-to-day through a secretariat. ICSID maintains a panel of arbitrators, much like the PCA. However, ICSID was exclusively designed for mixed arbitration, differing from the broader focus of the PCA, which also administers state-to-state cases.

The close relationship between ICSID and the World Bank is exemplified by their interconnected governance. The President of the World Bank serves as the *ex officio* Chairman of ICSID's Administrative Council, albeit without voting rights.[692] The Council itself includes a representative from each contracting state and 'in the absence of a contrary designation, each governor and alternate governor of the Bank appointed by a Contracting State shall be *ex officio* its representative and its alternate respectively'.[693] Article 6 of the ICSID Convention outlines the Administrative Council's functions. These include adopting the 'administrative and financial regulations'[694] of ICSID, adopting rules of conciliation and arbitration procedure, approving 'arrangements with the Bank for the use of the Bank's administrative facilities and services',[695] defining ICSID's annual budget, and approving its annual report.[696] The Council also has the right to 'exercise

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692 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966)' (n 470) art 5.

693 ibid art 4(2).

694 ibid art 6(1)(a).

695 ibid art 6(1)(d).

696 ibid art 6(1)(f) and (g).

such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention'.[697]

The President of the World Bank has functions directly related to the administration of ICSID arbitrations. In cases where disputing parties fail to constitute an arbitral tribunal, the Chairman may, 'at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed'.[698] In practice, he has exercised this power more than 700 times in arbitrations pursuant to the ICSID Rules and Additional Facility Rules.[699] This feature underscores the intertwined relationship between ICSID and its parent.

ICSID's Secretariat handles the day-to-day operations of the Centre and is led by a Secretary General, elected by the Administrative Council. The Secretary General is 'the legal representative and the principal officer of the Centre and shall be responsible for its administration, including the appointment of staff, in accordance with the provisions of this Convention and the rules adopted by the Administrative Council'.[700] In the first years, it was common for World Bank staff to be seconded to the Secretariat and the Secretaries General Aron Broches, Heribert Golsong, Ibrahim Shihata, and Ko-Yung Tung were also Vice Presidents and Secretaries General of the World Bank.[701]

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697 ibid art 6(3).

698 ibid art 38.

699 While ICSID's appointment statistics combine the appointment of arbitrators, conciliators, and annulment committee members, there has only been a low number of conciliations, implying that the number of arbitrators directly appointed by the President of the World Bank significantly exceeds 700, see ICSID, 'ICSID Statistics 2023-1' (n 674) 17.

700 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (n 470) art 11.

701 World Bank, 'Broches, Aron' <https://oralhistory.worldbank.org/en/archive/oralhistory/persondetail> accessed 31 July 2023; 'Heribert Golsong, 1927-2000' *News from ICSID* (Spring 2000) 7; World

The Secretariat administers arbitrations, but the extent of its involvement depends on the specific rules governing each case. In practice, the Secretariat manages arbitrations and, where applicable, annulment proceedings under the ICSID Rules, Additional Facility Rules, UNCITRAL Rules, or other *ad hoc* rules. The administrative functions of the Secretariat under the ICSID Arbitration Rules and ICSID Additional Facility Rules are similar to those of other arbitral institutions.

ICSID's Panel of Arbitrators has a specialized role, particularly where the institution is making default appointments. Each contracting state may designate up to four persons to the Panel, and the Chairman may designate an additional 10.[702] Currently, one panel member designated by the Chairman, Olufunke Adekoya, is also Vice President of the ICC International Court of Arbitration.[703] Disputing parties may select these Panel members as arbitrators, but they are not obligated to do so. In arbitration based on the ICSID Rules, the Chairman must appoint Panel members, where the disputing parties have failed to constitute the arbitral tribunal.[704] The roster of Panel members has expanded over the years, but in the first decades of operation, many contracting states did not make any designations. As Parra notes, '[a]s of late

Bank, 'Remembering the Contributions of WBG General Counsel Ibrahim Shihata' <https://www.worldbank.org/en/archive/history/exhibits/Remembering-WBG-General-Counsel-Ibrahim-Shihata> accessed 25 September 2023; The International Arbitration Club of New York, 'Ko-Yung Tung' <https://www.arbitrationclub.org/members/ko-yung-tung/_res/id=File1/ko-yung-tung.pdf> accessed 31 July 2023.

702 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (n 470) arts 12-16.

703 ICSID, 'Database of ICSID Panels' <https://icsid.worldbank.org/about/arbitrators-conciliators/database-of-icsid-panels> accessed 31 July 2023.

704 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (n 470) art 38.

1996, almost half of the Contracting States had made no designations at all to the Panels'.[705]

3.3.2. <u>The diffusion of consents</u>

To attract new cases, ICSID relies on a two-stage consent structure. First-stage consent consists of the ratification of the ICSID Convention. Second-stage consent is provided in various legal instruments, including investment treaties, public-private contracts, and national investment laws. The following will consider the state of diffusion of consent to arbitration at ICSID.

Ratifications of the ICSID Convention

The pattern of signatures and ratifications of the ICSID Convention are a useful indicator of state support and the timing of that support. Initially 48 states signed the Convention before it took effect, including the United States, Japan, South Korea, as well as 23 African and 15 European states.[706] The significant number of African states may be linked to the relevance of the Convention, and investment protection more generally, in the context of decolonization. Conversely, Latin American states were noticeably absent among the initial signatories, largely due to the prevailing influence of the Calvo Doctrine in this region.[707] Initial participation from Asian states was also minimal, with increased membership occurring gradually over more than a decade. This delay in accessions may be linked to concerns about the geographic remoteness of

705 Parra (n 471) 207.
706 ICSID (n 374).
707 St John (n 52) 114 and 208.

ICSID. The AALCC, of which many of these states were a member, instead sought to develop regional arbitral institutions, such as the Asian International Arbitration Centre in Kuala Lumpur.[708]

After a period of rapid growth in the first five years, the expansion of ICSID membership slowed down for approximately two decades. This delay in accessions seemingly compelled ICSID's leadership to justify the continued relevance of ICSID to the contracting states.[709] Membership only surged again after 1989 (see Figure 3), paralleling shifts in foreign investment policies of former Soviet states. As of the time of writing, the Convention has 165 signatories and has been ratified by 156 states.[710] Its membership is slightly smaller than that of the 1958 New York Convention, which is in force in 172 states.[711] Notably, several states, including Brazil, Qatar, Iran, South Africa, and Poland have ratified the New York Convention but have not signed ICSID.[712]

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708 AALCC, *Report of the Seventeenth, Eighteenth and Nineteenth Sessions held in Kuala Lumpur (1976), Baghdad (1977) and Doha (1978)* (n 626) 148.

709 St John (n 52) 187-188.

710 ICSID (n 374).

711 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (n 274).

712 ICSID (n 374); 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (n 274).

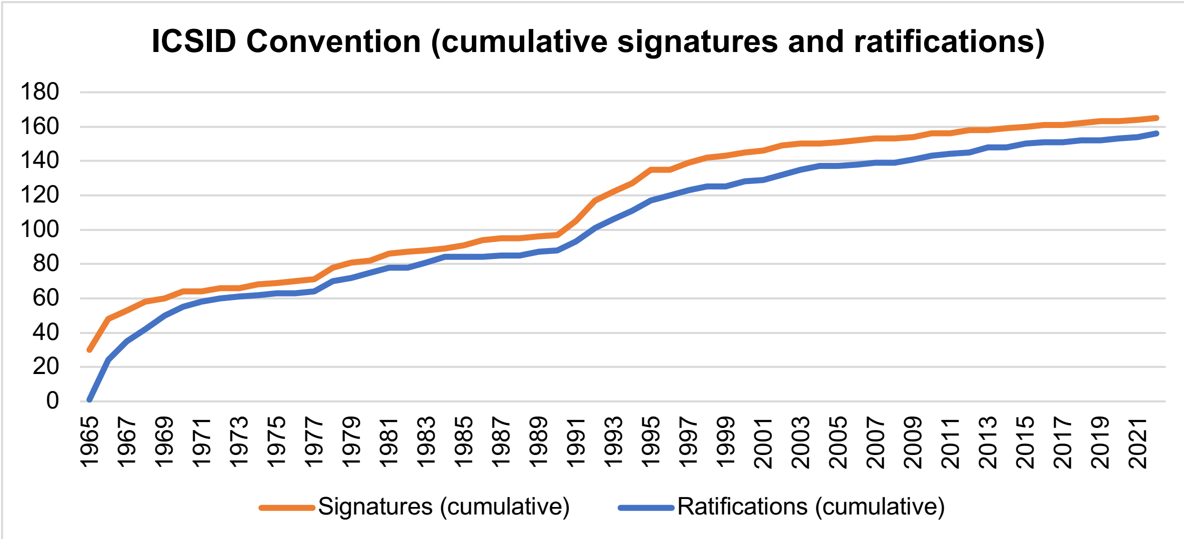

Figure 3 - Cumulative signatures and ratifications of the ICSID Convention

Diffusion of second-stage consent

Advance consent by states given in investment treaties and national investment laws is a key ingredient in ICSID's success. The high number of cases based on advance consent clearly illustrates this fact.[713] ICSID is mentioned in more than 2000 bilateral investment treaties (Figure 4).[714] Today, it is the arbitral institution with by far the highest number of references in BITs.[715] However, this position is relatively recent and during ICSID's first 35 years of operation, the number of treaty-references never exceeded 300 treaties.

713 ICSID, 'ICSID Statistics 2023-1' (n 674) 11.

714 This figure includes all bilateral investment treaties whether or not in force or terminated as listed on EDIT. Alschner, Elsig and Polanco (n 455).

715 This is the result of a keyword search on EDIT, using 'ICSID' and 'International Centre for Settlement of Investment Disputes' as keywords; see ibid.

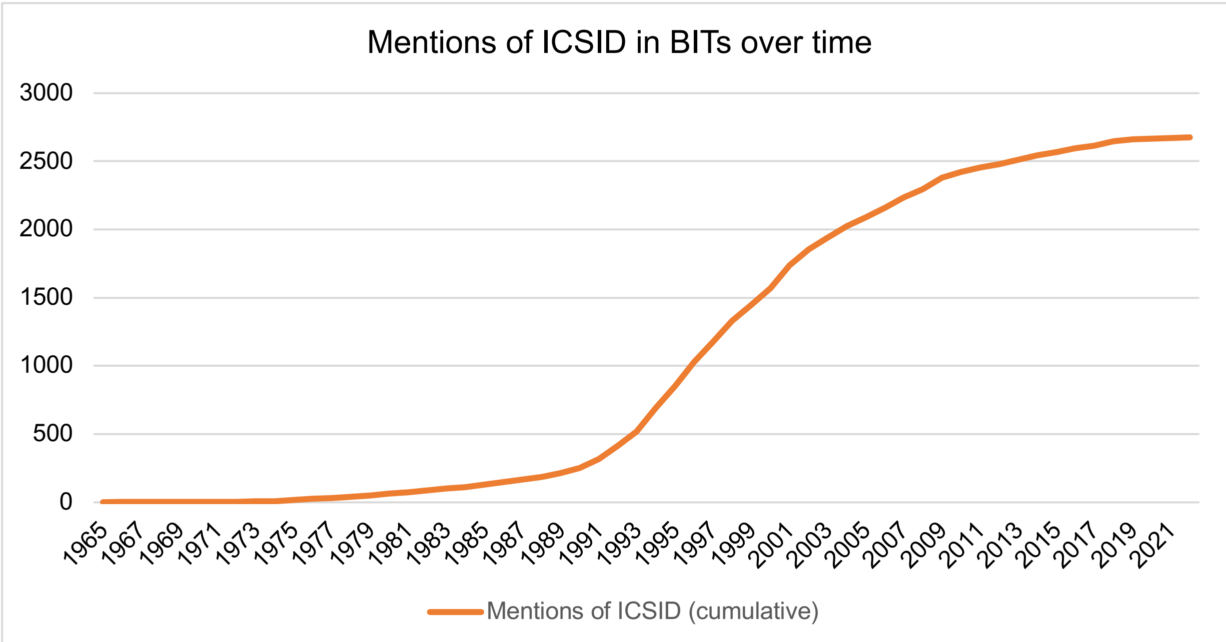

Figure 4 - Mentions of ICSID in BITs over time

'Simultaneous' consent, as included in investor-state contracts was less frequent but nevertheless significant. No comprehensive databases of such contracts exist, and their significance can only be inferred from the contract-based caseload. As of 2018, '[i]nvestment contracts have provided the basis of consent for nearly 17 percent of [ICSID] cases'.[716] Contract-based arbitration thus makes up a relatively small but still significant share of ICSID's caseload.

The relative proportion of consent to ICSID arbitration by type of legal instrument has not been constant over time. Of the first 23 investor-state arbitrations registered with ICSID between 1972 and 1988, 20 were based on investor-state contracts including concession and joint venture agreements.[717] Investment treaties then

[716] St John (n 52) 8.

[717] Parra (n 471) 134.

gradually outpaced contracts as the basis of consent in ICSID arbitration and today represent by far the most frequently invoked type of legal instrument.[718] This may be linked to the role that ICSID officials played in the proliferation of investment treaties.

3.3.3. The mixed arbitration caseload of ICSID

The practices of publishing caseload statistics vary significantly among the arbitral institutions considered in this thesis. Yet, ICSID is likely the institution with the highest treaty-based mixed arbitration caseload. As of 31 December 2022, the institution had registered 897 arbitrations under ICSID Rules and the Additional Facility Rules.[719] In 710 of these cases, consent was based on a treaty and 135 cases were based on investor-state contracts.[720] While ICSID is the market leader in treaty-based mixed arbitration, it likely lags behind the ICC-ICA in contract-based cases. The ICC-ICA administered 60 contract-based mixed arbitrations between 1945 and 1969 alone and has seen a surge in such cases in recent years.[721] ICSID also administered 63 cases based on domestic investment laws, likely making it the market leader in law-based mixed arbitration.[722] Furthermore, ICSID cases often last years, and the financial year 2022 saw the institution administer its highest annual number of cases ever, totalling 346.[723]

[718] ICSID, 'ICSID Statistics 2023-1' (n 674) 23.
[719] ICSID, 'ICSID Statistics 2023-1' (n 674) 8.
[720] ibid 9 and 11.
[721] This can be inferred from the numbers mentioned in Lemercier and Sgard (n 147) 93 and 94.
[722] ICSID, 'ICSID Statistics 2023-1' (n 674) 11.
[723] ibid 10.

While the current caseload of ICSID is high, historically, the growth in registered cases did not immediately follow the trend of Convention signatures and ratifications (see Figure 5). In the first 30 years of its existence, from 1966 to 1996, ICSID never registered more than five new cases per year.[724] This slow initial uptake can be attributed to the time needed to disseminate consent and for disputes to arise. During this period, it seems that the ICC-ICA was the leading arbitral institution in the emerging oligopoly of institutional mixed arbitration.

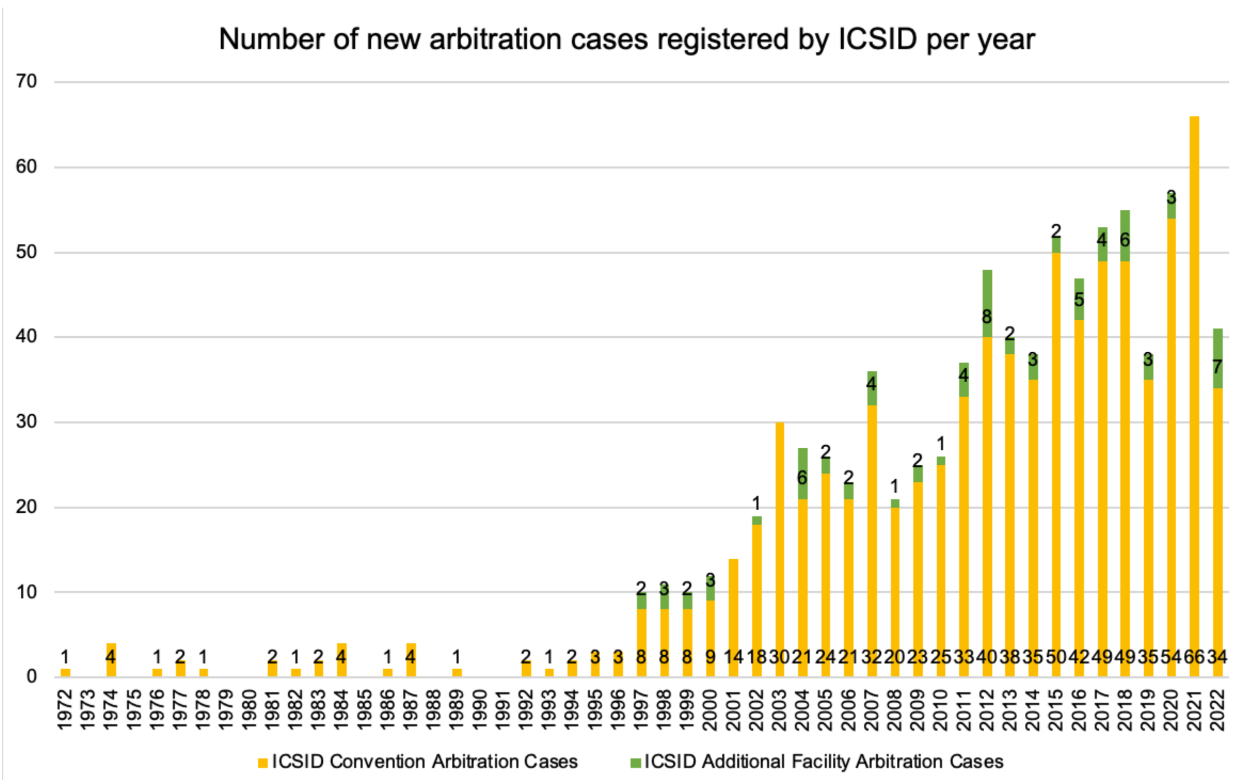

Figure 5 - Number of new arbitration cases registered by ICSID per year

724 ibid 8.

The period from 1996 to 2022 witnessed a proliferation of ICSID cases, reaching a peak in 2021 with 66 new cases filed.[725] This delayed onset may be linked to the two-consent structure of the Convention, requiring states to consent to ICSID arbitration through separate legal instruments, such as investment treaties, contracts, or domestic investment laws. Provisions granting such consent were slowly diffused through the network made up of instruments of international investment law, during the first decades of the Centre's operation.

Today, ICSID occupies the dominant position in the institutional oligopoly for mixed arbitration based on advance-consent. As has been observed, other arbitral institutions such as the ICC have attracted far lower numbers of treaty-based mixed arbitrations than ICSID. With 346 cases in the financial year 2022, the ICSID Secretariat administered its highest yearly number of cases in history.[726] In comparison, in 2021, the Permanent Court of Arbitration administered 195 investor-state arbitrations arising under a treaty, a national investment law, or contracts involving a state, intergovernmental organization, or other public entity (including UNCITRAL Rules and other arbitration rules).[727]

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725 ibid 7.

726 ibid 10.

727 PCA, *Annual Report 2021*, 20.

3.4. Chapter conclusion

The conclusion of the ICSID Convention in 1965 was the most momentous step in the oligopoly of advance-consent mixed arbitration. Despite an initially modest caseload, ICSID strengthened its position in the institutional market and, over time, became dominant. Particularly the support and intergovernmental standing of its parent in the early years helped the nascent institution in this endeavour. Through diplomatic outreach, tailored messaging, by providing expert advice to governments, and by publishing and disseminating knowledge about ICSID, the institution's officials brokered state consent. These efforts were predominantly led by Aron Broches.

Broches' efforts notwithstanding, cases were slow to emerge. Initially, ICSID's case load was significantly smaller than that of the ICC-ICA. In 1976, 13 years after its inception, ICSID was threatened by the emerging substitute of the UNCITRAL Arbitration Rules. These rules operated without an organizational superstructure and without an intergovernmental convention. Broches' reaction was swift. He convinced ICSID's principals to create the Additional Facility, expanding ICSID's reach to states reluctant to ratify the Convention and addressing the growing threat of substitutes. The design of the Additional Facility carefully shielded incentives to join the ICSID Convention. It also responded to calls from the private-sector to broaden the subject-matter scope of disputes that could be managed by the Centre. Major capital-exporting states, including the US, France, and Germany backed this initiative.

Simultaneously, ICSID and its leadership was agile in responding to competition and market pressures, both by discouraging recourse to other arbitral institutions and by building strategic inter-institutional networks. It collaborated with other institutions such as the ICC-ICA, SCC-AI, and the AAA, as well as their respective officials. Together with ICSID's increasing market share, these efforts generated a constituency of beneficiaries overlapping with other institutions and benefitting from increasing returns. They also led to a greater mobility of influential individuals within the international arbitration industry, including Secretaries General who occupied multiple roles. Furthermore, ICSID was uniquely positioned to benefit from the surge in bilateral investment treaties and the related expansion of consent to arbitration within the emerging investment treaty regime.

Throughout its history, ICSID has demonstrated a strategic blend of adaptability, collaboration, and innovation. This has not only helped it to respond to competitive threats but also to establish itself as a dominant player in the treaty-based mixed arbitration market. The next chapter will explore the evolution of the Stockholm Chamber of Commerce Arbitration Institute, which, despite its earlier establishment, entered the mixed arbitration oligopoly several years after ICSID.

Chapter Four

The Arbitration Institute of the Stockholm Chamber of Commerce

Gentlemen: We acknowledge receipt from you of the texts of the "Optional Arbitration Clause for Use in Contracts in US-USSR Trade – 1977" (Prepared by American Arbitration Association and USSR Chamber of Commerce and Industry) and the Abbreviated Form of that clause (herein referred to collectively as the Clause).

Your two organisations have requested the Stockholm Chamber of Commerce to agree to perform various functions referred to in the Clause. This letter is to inform you that the Stockholm Chamber of Commerce agrees (...).[728]

– Sven Swarting, Managing Director of the Stockholm Chamber of Commerce (1976)

4.1. Introduction

The Arbitration Institute of the Stockholm Chamber of Commerce ('SCC-AI') is an arbitral institution based in Stockholm, Sweden. Established in 1917, it operates as an independent but formal part of its parent organization, the Stockholm Chamber of Commerce ('SCC').[729] From 1917 to 1970, the SCC-AI mainly administered domestic arbitrations, which still constitute half of its current caseload.[730] According to its most recent arbitration rules, the SCC-AI serves as 'a body providing administrative services

[728] SCC (n 376) on file with the author. I thank Joel Dahlquist for sharing these documents with me.

[729] 'Our History' (*SCC-AI*) <https://sccarbitrationinstitute.se/en/about-scc/our-history> accessed 31 July 2023.

[730] SCC-AI, 'SCC Statistics 2021' 1 <https://sccarbitrationinstitute.se/sites/default/files/2023-02/scc-statistics-2021.pdf> accessed 31 July 2023.

in relation to the settlement of disputes'.[731] Its main function today is to 'administer domestic and international disputes in accordance with the SCC Rules and other procedures or rules agreed upon by the parties; and [to] provide information concerning arbitration and mediation'.[732]

While the SCC-AI has received limited scholarly attention, its role in mixed arbitration is noteworthy.[733] Despite having a smaller staff size and less extensive mixed arbitration caseload compared to its intergovernmental and private-sector competitors, the SCC-AI plays a significant role in the institutional oligopoly of mixed arbitration. Several questions arise from its unique profile and market share: How did it transition from a domestic-focused, small private-sector institution to an international player in mixed arbitration? What role has the Cold War and the development of East-West arbitration played in its history? Who were the key individuals that promoted state consent for mixed arbitration at the SCC-AI? And how has it maintained its position in the mixed arbitration oligopoly despite its private-sector status and small size? This chapter explores these questions, tracing the SCC-AI's genesis from its domestic focus on Sweden to becoming a leading institution in mixed arbitration. The analysis concentrates on the subtle diplomacy of a select group arbitration experts, the relevance of the geopolitical context of the Cold War, Sweden's unique role as the institution's host, and the impact of the proliferation of investment treaties on the SCC-AI's market share.

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731 '2023 SCC Arbitration Rules' (n 645) app I, art 1.

732 ibid app I, art 2.

733 Dahlquist (n 99).

4.2. The SCC-AI: a Cold War detour through the East

Sweden has a longstanding tradition of alternative dispute resolution, dating back to mentions of arbitration in 14th-century provincial codes.[734] It was also one of the first countries to enact a specific arbitration code in 1887, amended for the first time in 1919.[735] The Arbitration Institute was established in 1917, initially 'to meet the Stockholm regional grain industry's need for efficient alternative dispute resolution'.[736] Similar to many trade-specific arbitral institutions of its time, its primary focus was on settling domestic disputes in a specific area of trade.[737] Domestic cases dominated the SCC-AI's caseload in the first decades and continue to make up a large share of its cases today.[738]

Sweden has long been considered a neutral venue for the settlement of international disputes. In the wake of the Napoleonic Wars, Sweden took first steps toward a foreign policy neutrality, a stance it maintained during the 19th century and both World Wars.[739] This neutrality earned Sweden the trust of other states for resolving conflicts, including those involving the interference with and expropriation of private property. These early dispute settlement mechanisms often involved Swedish state officials and diplomats. For instance, Swedish consuls were the default appointing

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734 Jan Sandström, 'Arbitration in Sweden: Book Review' (1979) 27 American Journal of Comparative Law 704, 705.

735 ibid.

736 Annette Magnusson and Kristin Campbell-Wilson, 'Foreword' in Jakob Ragnwaldh, Fredrik Andersson and Celeste Salinas Quero (eds), *A Guide to the SCC Arbitration Rules* (Kluwer Law International 2019), ix.

737 Schinazi (n 99) 45-50.

738 Swarting (n 208) 2; SCC-AI (n 730) 1.

739 Mikael af Malmborg, 'Neutrality in the Era of Balance of Power, 1815-1917' in Mikael af Malmborg (ed), *Neutrality and State-Building in Sweden* (Palgrave Macmillan 2001).

authorities in the arbitration procedure outlined in the Additional Financial Agreement imposed on Soviet Russia by the Central Powers by force of arms as part of the Brest-Litovsk Treaties in 1918.[740] It established a procedure by which experts were to determine the compensation for individuals who had been expropriated by Russia.[741] The experts were to be jointly appointed by Russia and the affected individual. If these experts could not reach a consensus on a presiding expert, the appointment would be made by 'the competent Swedish consul'.[742] Similar to the role of the Swedish consul in this arrangement, the SCC-AI's role in mixed arbitration would later be inextricably linked to Sweden's longstanding policy of foreign neutrality.

After the SCC-AI was founded, Sweden continued to take policy steps to facilitate international arbitration. In the interwar period, it became a party to the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Convention for the Execution of Foreign Arbitral Awards.[743] Sweden also enacted a separate Arbitration Law in 1929, specifically addressing arbitrations with a foreign element, and amended it in 1971 to align with the New York Convention.[744] Unlike many other European states, Sweden maintained important diplomatic ties with Soviet Russia and communist China throughout the Cold

740 Van Vechten Veeder, 'Chancellor Wirth and the Mologales Concession 1923-1927: The German-Speaking Origins of the 1965 ICSID Convention' in Christina Binder and others (eds), *International Investment Law for the 21st Century* (OUP 2009) 378-79.

741 'Financial Agreement Supplementing the Russo-German Supplementary Treaty to the Treaty of Peace Between Russia and the Central Powers, Signed at Berlin 27 August, 1918' in Texts of the Russian Peace with Maps (US Government Printing Office: Washington, 1918), art 11 (pages 199-200).

742 ibid 200.

743 'Protocol on Arbitration Clauses (signed 24 September 1923, entered into force 28 July 1924)' 27 LNTS 157; 'Convention on the Execution of Foreign Arbitral Awards' (n 267).

744 Swedish Arbitration Act 1929 (SFS 1929:145); Kaj Hobér, 'The Doctrine of Separability under Swedish Arbitration Law, Including Comments on the Position of American and Soviet Law' (1983) Svensk Juristtidning 261, fn 4.

War. For instance, it concluded a Trade and Payments Agreement with the USSR in 1940, which included provisions for arbitration, and was the first European country to recognize the People's Republic of China as a sovereign state.[745]

4.2.1. Institutionalizing East-West arbitration

After the Second World War, facilitating East-West arbitration became a key objective of several arbitral institutions. Commercial arbitration involving foreign trade corporations in socialist countries was inherently mixed due to the central planning of economies in those countries. Legal issues concerning the public nature of these corporations became a major topic of discussion at various arbitral institutions, including the ICC-ICA.[746] As indicated above, experts of the ICC-ICA closely monitored and participated in the negotiations at UNECE, which resulted in the 1961 European Convention.[747] While the ICC-ICA officially endorsed the outcome of these negotiations, internally experts were disappointed that the Convention required arbitration to occur in the defendant's home state.[748] The ICC-ICA was also cognizant of the distrust that

745 Alexander Muranov, 'The Forgotten Bilateral Arbitration Agreement Between Sweden and The USSR: A New View on Enforcement of Sweden and Russia' (*Kluwer Arbitration Blog*, 27 August 2010) <https://arbitrationblog.kluwerarbitration.com/2010/08/27/the-forgotten-bilateral-arbitration-agreement-between-sweden-and-the-ussr-a-new-view-on-enforcement-of-sweden-and-russia/> accessed 31 July 2023; Michael Moser, 'Ulf Franke, Stockholm Arbitration, and the Bridge to China' in Kaj Hobér and others (eds), *Between East and West: Essays in Honour of Ulf Franke* (JurisNet 2010) 344.

746 ICC, 'Conférence sur l'arbitrage commercial international : Compte rendu des séances destiné aux membres de la conférence' (n 150) 27-32.

747 See for instance ICC Commission on International Commercial Arbitration, 'Meeting of 31st October 1958: Summary Record' (n 287) 3.

748 ICC Commission on International Commercial Arbitration, 'Meeting on 29th February 1960: Summary Record' (n 326) 3.

Soviet countries had toward international arbitration at existing institutions in the West.[749]

In an environment of mutual scepticism, socialist foreign trade corporations from the Soviet Union seemed to insist on arbitration in the defendant's country.[750] Under this approach, arbitral institutions from the disputing parties' respective states would collaborate to appoint arbitral tribunals. This differed from the preference of Western experts for a single appointing authority based in a third country.[751] Bilateral agreements between Western private-sector institutions and public institutions in socialist countries became increasingly common, introducing a public-private dynamic into inter-institutional relations.[752] A prominent example is the American Arbitration Association. Upon the initiative of the jurist Martin Domke, who 'actively solicited'[753] such agreements in the 1950s, the AAA concluded bilateral agreements with the Chamber of Commerce of the Romanian People's Republic in 1957 and with the Polish Chamber of

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749 ICC Commission on International Commercial Arbitration, 'International Commercial Arbitration Between States and Individuals: Memorandum by the Secretariat' (n 147) 4.

750 Agreement of November 17, 1971, between the Indian Council of Arbitration, New Delhi, Federation of Indian Chambers of Commerce and Industry, New Delhi and the USSR Chamber of Commerce and Industry, Moscow, cited in Robert Coulson, 'Agreements Between Arbitration Institutions. Potential for Control: Danger of Abuse' in Pieter Sanders (ed), *ICCA Congress Series No 1 (Hamburg 1982): New Trends in the Development of International Commercial Arbitration and the Role of Arbitral and Other Institutions*, vol 1 (Kluwer Law International 1983), 36. According to its preamble, the purpose of the agreement was to 'facilitate a wider use of commercial arbitration in transactions between Indian (...) parties (...) and Soviet Foreign Trade organizations'. It also recommended a joint clause providing for arbitration 'at the place and under the administration of the arbitration institution at the place of the defendant'.

751 See for instance Dawson's, Jaffe's, and Ramsaizev's comments, ICC, 'Conférence sur l'arbitrage commercial international : Compte rendu des séances destiné aux membres de la conférence' (n 150) 30.

752 Coulson (n 750) 36-38.

753 ibid 37.

Foreign Trade in 1962.[754] These agreements focused on mutual cooperation and information sharing.[755]

The 'bilateral' approach to appointment in East-West arbitration required Western trading partners to trust arbitrator selection made, at least partially, by public institutions in countries like the Soviet Union or China. For many Western corporates this prospect was unsatisfactory. In the 1960s and 70s, socialist countries began to make new concessions in contracts with Western companies, increasingly opting for appointing authorities in third countries instead of bilateral appointment mechanisms. Unlike the ICC-ICA and other Western institutions, the SCC-AI appears to have significantly benefitted from this policy shift, likely due to Sweden's foreign policy neutrality. However, this shift was gradual. While the number of international contracts providing for arbitration in Sweden rose during the 1960s, the SCC-AI had a limited visibility regarding the inclusion of its rules in public-private contracts for reasons similar to those at the ICC-ICA.[756]

It can be assumed that knowledge about the ICSID Convention and its new arbitration mechanism influenced mixed arbitration at the SCC-AI. Sweden immediately ratified the ICSID Convention in 1965.[757] By the early 1970s, SCC-AI officials were already familiar with ICSID. Sture Petrén, a Swedish judge at the International Court of Justice and the then-Chairman of the board of the SCC-AI, was appointed presiding arbitrator in ICSID's first case, the contract-based *Holiday Inns v. Morocco,* filed in

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754 ibid 47.

755 ibid 34.

756 Robert Coulson and Ulf Franke, 'International Arbitration in Sweden' (1982) 76 Proceedings of the Annual Meeting (American Society of International Law) 166, 167.

757 Åke Hassler and Thorsten Cars, *Skiljeförfarande* (2nd edn, Nörstedts Förlag 1989) 22.

1972.[758] In a 1973 letter to former Swedish Supreme Court Justice, Hans Danelius, Petrén wrote:

> Seven years ago, the World Bank's International Centre for Settlement of Investment Disputes was established, with the intention of creating a forum for the increasingly common disputes between developing countries and foreign companies, whose facilities became subject to nationalization. Only after six years a dispute was submitted to this Centre, namely a dispute about large hotel businesses in Morocco, where the counterparts to this country's government are the Swiss company Holiday Inns S.A. and the American company Occidental Petroleum Inc. I have been chosen as the chairman by the arbitrators appointed by both parties in the arbitration court that will judge the dispute. We started our meetings last year in the premises of the Permanent Court of Arbitration here in the Peace Palace in The Hague, but due to the inadequate technical equipment (...) we have had to move the continued meetings to the World Bank's premises in Paris and only intend to hold the final meeting for the judgment in the Peace Palace, when the day comes, perhaps sometime this fall. (...) For me, it represents a welcome break from the slow moving syrup which especially the deliberations in the International Court under current conditions only too often remind of.[759]

758 Hans Danelius, 'ICSID, UNCITRAL and SCC as Investment Fora' in Kaj Hobér and others (eds), *Between East and West: Essays in Honour of Ulf Franke* (JurisNet 2010) 108; *Holiday Inns SA and others v Morocco* ICSID Case No ARB/72/1.

759 Sture Petrén cited in Danelius (n 759) 109, translated by the author, original: '*För sju år sedan tillkom ju Världsbankens International Centre for Settlement of Investment Disputes, varmed avsikten var att få till stånd ett forum för de allt vanligare tvisterna mellan u-länder och utländska bolag, vilkas anläggningar blev föremål för nationalisering. Först efter sex års förlopp anhängiggjordes en tvist vid detta Centre, nämligen en tvist om stora hotellföretag i Marocko, där motparter till detta lands regering är det schweiziska bolaget Holiday Inns S.A. och det amerikanska företaget Occidental Petroleum Inc. Tvisten är omnämnd på sid. 4 i Centrets årsrapport för 1971/1972, varav ett exemplar här bilägges. Till ordförande i den skiljedomstol som skall döma i tvisten har de båda partsutsedda skiljedomarna utsett mig. Vi inledde våra sammanträden i fjol i den permanenta skiljedomstolens lokaler här i Fredspalatset i Haag, men på grund av härvarande bristfälliga tekniska utrustning, som omöjliggor bl.a. simultantolkning av partsanföranden och vittnesutsagor, har vi fått flytta de fortsatta sammanträdena till Världsbankens lokaler i Paris och avser endast att hålla slutsammanträdet för domsavkunnandet i Fredspalatset, när den dagen kommer, kanske någon gång i höst. Det är en stor och invecklad tvist som gäller stora värden och där de agerande på båda sidor är många och pläderingsglada, något av en juridisk opera där två världar, två sätt att tänka konfronteras med varandra. För mig innebär den ett välgörande avbrott i det långsamma mörandet i sirap som framför allt överläggningarna i den internationella domstolen under nuvarande förhållanden blott alltför ofta erinrar om*'.

Petrén's involvement not only marked a key instance of knowledge transfer from ICSID to the SCC-AI, but also shed light on the operational intricacies of the Permanent Court of Arbitration.

In the 1970s, Stockholm became an increasingly frequent venue for arbitration across the East-West divide. Since the early 1970s, it had for instance been common practice for contracts between German construction companies and Chinese foreign trade corporations to specify Stockholm as the seat of arbitration.[760] Moreover, the SCC-AI would benefit from the need for a neutral forum to facilitate mixed arbitration between the United States and the Soviet Union. During President Nixon's visit to Moscow in May 1972, the US and the USSR negotiated a trade agreement in a sign of rapprochement of the two blocs. The agreement encouraged arbitration between trading partners but instead of the SCC-AI referred to the ECE Arbitration Rules, adopted in 1966. Concurrently, the two countries set up a US-USSR Commercial Commission, which was to negotiate 'an agreement establishing an arbitration mechanism for settling commercial disputes'.[761] However, the trade agreement was never ratified and effectively shelved when the US Congress passed the Jackson-Vanik Amendment. This amendment effectively denied the Soviet Union 'Most-Favoured Nation' trading status should it refrain from adopting a more liberal emigration policy.[762]

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760 Robert Heuser, 'Arbitration in Sweden, Published by the Stockholm Chamber of Commerce: Book Review' (1979) 39 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 384, 385.

761 Richard Nixon, 'Communique, About a Joint United States-Soviet Union Commercial Commission, 26 May 1972' in Gerhard Peters and John Woolley (eds), *The American Presidency Project* <www.presidency.ucsb.edu/node/254857> accessed 31 July 2023.

762 United States Trade Act of 1974, 19 USC §2432(a), 'Freedom of Emigration in East-West Trade', s 402.

Following the failure of the trade agreement, interest seemed to shift towards the SCC-AI as a viable alternative for arbitration across the East-West divide. This shift may also be linked to the fact that the UNECE was viewed as lacking experience in international commercial arbitration.[763] Additionally, neither the USSR nor China were ICSID members and mixed arbitration at the Centre was therefore not available before the creation of the ICSID Additional Facility.[764] To account for its growing importance in international arbitration, Sweden updated its 1929 arbitration law in 1971, just before ratifying the New York Convention in 1972.[765] This legislative change ensured that Swedish courts would recognize and enforce arbitration agreements for cases seated in Sweden. The country would later be the seat chosen in the majority of international arbitrations administered by the SCC-AI.[766]

Diplomatic exchanges between the SCC-AI and officials from the Soviet Union and China also increased during this period. In 1973, the UNCITRAL Commission tasked its Secretariat 'to prepare a draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade'.[767] Pieter Sanders, then a consultant to the Secretariat, prepared the first draft of these rules.[768] Delegates from the Soviet Union, China, and the United States actively participated in the subsequent deliberations

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763 Chun Gu, 'The Applicable Law and Dispute Settlement in East-West Trade' (1988) 46 University of Toronto Faculty of Law Review 96, 110, fn 51.

764 ICSID (n 374).

765 Hassler and Cars (n 758) 22.

766 According to SCC Statistics of 2021, '[i]n 74% (122) of the cases commenced in 2021, Stockholm was selected as the seat of arbitration. (...) Seats outside of Sweden remain relatively rare in SCC arbitrations', see SCC-AI (n 730) 6.

767 UNCITRAL, 'Official Records of the General Assembly, Twenty-Eighth Session, Supplement No. 17 (A/9017)' (1973) IV Yearbook of the United Nations Commission on International Trade Law Part One II, para 85.

768 van den Berg (n 312).

discussing and amending this draft. Their delegates, Sergei Lebedev, Ren Jianxin, and Howard Holtzmann became key interlocutors of the SCC-AI in subsequent years.

Lebedev, a leading Soviet expert on international arbitration, had studied in the US in the early 1960s.[769] He also served as the long-term president of the Maritime Arbitration Commission and a member of the Presidium of the International Commercial Arbitration Court of the USSR.[770] Jianxin served as the Vice Chairman of the China Council for the Promotion of International Trade ('CCPIT') in the 1970s. He later became Chief Justice of China's Supreme People's Court and the supreme commander of the Chinese security apparatus.[771] Holtzmann, a Yale graduate and US national, initially focused on domestic arbitration but later represented the US at UNCITRAL.[772] He also served as a judge on the Iran-United States Claims Tribunal, and President of the American Arbitration Association.[773] These three individuals played a crucial role in the rise of mixed arbitration at the SCC-AI during the 1970s, that will be examined in the following.

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769 Ulf Franke, 'Sergei Lebedev 1934-2016' (13 April 2016) <https://www.arbitration-icca.org/sergei-lebedev-1934-2016> accessed 31 July 2023.

770 ibid.

771 Moser (n 745) 347.

772 'Diplomatic Cable from the Dept of State to the US Mission in Geneva: USDel to Eighth Session of UNCITRAL, Geneva April 1-18, 1975' <https://search.wikileaks.org/plusd/cables/1975STATE071156_b.html> accessed 31 July 2023.

773 Lebedev and Holtzmann, together with Tang Houzhi (the 'founding father' of the China International Economic and Trade Arbitration Commission [CIETAC] established by CCPIT in 1956) were honoured for their role in facilitating arbitration in Stockholm with Order of the Polar Star by Sweden's king in 2003, see Johan Gernandt, 'Ulf Franke: Thirty-Five Years and Afterwards' in Kaj Hobér and others (eds), *Between East and West: Essays in Honour of Ulf Franke* (JurisNet 2010) 169; Franke (n 770).

4.2.2. The 1977 Optional Clause

In the *liber amicorum* honouring Ulf Franke, the SCC-AI's long-term Secretary General, Khvalei suggests that 'the history of the SCC is mystically linked with Russia'.[774] This relationship seemed to crystallize in the 1970s. In 1973, the SCC-AI collaborated with the AAA and the USSR Chamber of Commerce and Industry ('USSR CCI') on a study of the Swedish Arbitration Act, focusing on its application to international commercial arbitration.[775] Likely involving Holtzmann and Lebedev, this study was published in 1977 as the book *Arbitration in Sweden*.[776] This book made 'the system of arbitration in Sweden more readily available to the general public' by translating and explaining key provisions of Swedish arbitration law.[777] Given Sweden's frequent role as a seat in SCC-AI arbitrations, access to knowledge about Swedish law was especially important.

The US government also took an interest in the SCC-AI. A series of diplomatic cables exchanged in 1974 between the US Department of State and the American embassy in Stockholm coordinated a visit by state attorney Daniel Stein of the US Department of Commerce's Bureau of East-West Trade.[778] One diplomatic cable noted in its customarily abbreviated style, that Stein would be

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774 Vladimir Khvalei, 'Enforcement of SCC Arbitral Awards in CIS Countries: Reflections on Arbitration History' in Kaj Hobér and others (eds), *Between East and West: Essays in Honour of Ulf Franke* (JurisNet 2010) 269.

775 Gernandt (n 774) 169; Coulson and Franke (n 757) 166.

776 SCC, *Arbitration in Sweden* (1977).

777 Coulson and Franke (n 757) 167.

778 'Diplomatic Cable from the Dept of State to the US Embassy in Stockholm: Visit of Daniel D Stein to Stockholm Chamber of Commerce' <https://search.wikileaks.org/plusd/cables/1974STATE153150_b.html> accessed 31 July 2023; 'Diplomatic Cable from the US Embassy in Stockholm to the Dept of State: Visit of Daniel D Stein to

> stopping in Stockholm August 26-29 on way to Moscow to serve as director of trade development at Polymery 74 exhibition. Stein is an attorney and is interested in arbitration of East-West commercial disputes. Most U.S.-Soviet contracts presently call for arbitration of commercial disputes in Sweden under the Jurisdiction of the Stockholm Chamber of Commerce. Stein would like to meet with the legal advisor, house counsel or other appropriate officials of the Stockholm Chamber of Commerce to discuss Swedish arbitration procedures and previous experience the Stockholm Chamber may have had in East-West arbitrations.[779]

By 1974, Stockholm had become the preferred venue for contract-based arbitration between the US and the USSR, and the SCC-AI raised the interest of the US administration.

From 1974 to 1977, the AAA, the USSR CCI, and the SCC, with input of Holtzmann and Lebedev, negotiated a joint optional clause for the arbitration of US-Soviet trade disputes.[780] Holtzmann and Lebedev had met during parallel discussions at on the UNCITRAL Arbitration Rules in New York City, and likely knew that state participation in commercial arbitrations had been raised as part of these discussions. By 1974, several other institutions had already negotiated joint optional clauses across the East-West divide.[781] The new clause, however, designated the SCC as the default appointing authority and specified Stockholm as the seat of the arbitration and the place

Stockholm' <https://search.wikileaks.org/plusd/cables/1974STOCKH03604_b.html> accessed 31 July 2023.

779 'Diplomatic Cable from the Dept of State to the US Embassy in Stockholm: Visit of Daniel D Stein to Stockholm Chamber of Commerce' (n 779).

780 Anna Grishchenkova and Manfred Heider, 'In the Seat: Dr Manfred Heider' (*Russian Arbitration Association*) <https://arbitration.ru/en/press-centr/news/in-the-seat-dr-manfred-heider/> accessed 31 July 2023.

781 Coulson (n 750) 36.

of the award.[782] The joint optional clause thus represented a significant shift away from Soviet insistence on arbitration in the defendant's country.

The *Optional Arbitration Clause for Use in U.S.–U.S.S.R. Trade* ('Optional Clause') became effective in January 1977 'upon an exchange in New York City of letters between the American Arbitration Association and the USSR Chamber of Commerce'.[783] The exchange, though not officially mandated by the organization's respective governments, echoes the semi-official diplomacy visible in past encounters of arbitral institutions, such as at the 1946 ICC congress in Paris. Subtle diplomacy of this nature became a hallmark of the efforts of powerful individuals and experts to broker state consent to SCC-AI arbitration.

This is not to say that states were disinterested in the Optional Clause, because it was negotiated between the AAA, the USSR CCI, and the SCC. Visits of US state officials to the SCC suggest otherwise. On the contrary, as Bergsten observes, 'the relevant ministries of all countries followed the negotiations [of the Optional Clause] closely'.[784] US and Soviet state officials likely knew that the Clause represented a significant change. The Clause indeed sparked an increase in state consent to mixed arbitration in Stockholm in subsequent years, reinforcing both the city's and the Arbitration Institute's standing as major arbitration venues. As Franke, who had joined the SCC-AI as legal counsel in 1975, later noted in a press release:

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782 'American Arbitration Association-USSR Chamber of Commerce and Industry: Optional Arbitration Clause for Use in US-USSR Trade' (1977) 16 ILM 444, para 3.

783 ibid 444.

784 Eric Bergsten, 'Teaching International Arbitration in Law Faculties' in Kaj Hobér and others (eds), *Between East and West: Essays in Honour of Ulf Franke* (JurisNet 2010) 33.

> [S]ince 1977 when the Russian Chamber and the AAA first entered into an agreement for arbitration in Sweden, Stockholm has increasingly emerged as a leading center for resolving trade and other disputes not only between Russian and American parties but in East-West transactions generally.[785]

The Optional Clause was thus a major milestone in the development of mixed arbitration at the SCC-AI.

The Optional Clause also had a major impact on the UNCITRAL Arbitration Rules. The Clause stipulated that the new UNCITRAL Rules, adopted in 1976, were to apply to the proceedings. According to a footnote in the publication of the clause in *International Legal Materials,* this marked 'the first major use of the UNCITRAL Arbitration Rules', indicating that these rules were employed for mixed arbitration from the start.[786] Bergsten, who presided over the International Trade Law Branch of UNCITRAL from 1968 to 1979, later noted that the 'political significance' of the Optional Clause 'for the future of the UNCITRAL Arbitration Rules would be difficult to overlook'.[787] To him, the Clause demonstrated that the UNCITRAL 'Rules were acceptable both technically and politically, not only to developing countries (...) but also to the major players in the Cold War confrontation that was then current'. [788]

Four years before the Algiers Accords of 1981 would famously direct the Iran-US Claims Tribunal to use a modified version of the UNCITRAL Rules, the Optional Clause had already pioneered these rules in East-West arbitration. Its impact was immediate, generating significant demand for mixed arbitration in Stockholm. Over time, more East-

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[785] ibid 34.

[786] 'American Arbitration Association-USSR Chamber of Commerce and Industry: Optional Arbitration Clause for Use in US-USSR Trade' (n 783).

[787] Bergsten (n 785) 33.

[788] ibid 34.

West contracts started to include the Clause, which achieved quasi-official status in the Soviet Union.[789] This included contracts between Soviet foreign trade organizations and companies from the US, the UK, France, and Germany.[790] According to a US diplomatic cable, for instance, by 1978, the US Commercial Service, part of the US Department of Commerce, advised American companies to include Swedish law as substantive law in their contracts with Soviet entities.[791] Despite this, the cable also noted that the USSR continued to pressure US trade partners to agree to arbitration under Soviet law and at a Moscow institution. This indicated that some degree of Soviet scepticism remained about arbitrations seated outside the jurisdiction of the Union.[792]

In 1979, the Optional Clause was also used in the contract for the construction of the US embassy in Moscow, which eventually led to a complex arbitration case in 1984 at the SCC-AI.[793] This case involved allegations of construction delays and eavesdropping, marking the political sensitivity of the project.[794] The inclusion of the Clause in such diplomatically sensitive contracts illustrates that US and USSR political elites were aware about the Clause and not afraid to use it. At the same time, the SCC-AI started to administer East-West arbitrations that were not based on the Optional Clause. These arbitrations included a case 'between a party in the Federal Republic of

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789 Khvalei (n 775) 269.

790 Sandström (n 734) 704.

791 'Diplomatic Cable from the US Embassy in Moscow to the Depts of Commerce and State: Arbitration Language in Soviet Trade Contracts' <https://search.wikileaks.org/plusd/cables/1978MOSCOW16255_d.html> accessed 31 July 2023.

792 ibid.

793 Kaj Hobér, 'Arbitrating in Stockholm during the Cold War: The US Embassy in Moscow' in Ulf Franke, Annette Magnusson and Joel Dahlquist (eds), *Arbitrating for Peace: How Arbitration Made a Difference* (Kluwer Law International 2016).

794 ibid 126 and 130.

Germany and a party in the German Democratic Republic, one between an Italian party and a Soviet party, and one between a French party and a Soviet party'.[795]

Under the leadership of Ulf Franke, who became Secretary General of the SCC-AI in 1980, the Institute maintained close ties with the USSR CCI, even amid the cooling relations between the West and the Soviet Union. Despite escalating tensions on the geopolitical stage, including the Soviet invasion of Afghanistan and the election of the anti-communist leaders Margaret Thatcher and Ronald Reagan, Franke managed to maintain channels of communication. During this period, conferences, including to celebrate the anniversary of the Optional Clause, were held in Stockholm and Moscow, providing rare opportunities for dialogue between arbitration experts from East and West.[796]

In 1986, Franke also represented the SCC-AI in a meeting 'at the Swedish consulate in New York to review and reconfirm the Optional Clause'.[797] This came at a time when US-Soviet relations were thawing again under Mikhail Gorbachev's new political course. In the context of summits between the US and USSR political leadership, Franke had suggested the meeting in New York as timely.[798] In his letter to Lebedev he noted 'brightening prospects in U.S.-U.S.S.R. trade' and the fact that some 'Soviet trade organizations have complained that they now and then meet American corporations which do not know about the agreement'.[799]

795 Gillis Wetter, 'East Meets West in Sweden' (1979) 13 International Lawyer 261, 264.

796 Gernandt (n 774) 170-71; Dahlquist (n 99) 42.

797 Dahlquist (n 99) 42.

798 ibid.

799 Letter from Ulf Franke to Professor S. Lebedev (cc Professor Pozdniakov), cited in ibid.

The interaction of the SCC-AI leadership with Soviet and American arbitration experts was thus directly linked to and influenced by the geopolitical context. Dahlquist considers it ‘clear that the SCC Secretary-General acted as intermediary in a time and environment when Soviet and American organizations could not easily communicate directly’.[800] Franke and the SCC-AI thus had a function in addition to actual dispute settlement: They assumed a quasi-diplomatic role in the specific fields of international commercial relations and dispute settlement.

In the Soviet Union, the Optional Clause had a particular weight. The USSR CCI was not a private-sector entity like most chambers of commerce in the West but an extension of the state. In the Soviet Union, the state controlled most aspects of the economy and the government set production targets and prices. The CCI’s endorsement of the Optional Clause was essentially directive in nature, facilitating the Clause’s widespread adoption in contracts between Soviet entities and their Western counterparts. This adoption was a diplomatic success for the SCC-AI. The importance of the agreement is further illustrated by the fact that it was updated and reconfirmed in later years, including in 1992 with the USSR CCI’s successor in the Russian Federation.[801]

4.2.3. <u>Arbitration in Western trade with China</u>

Besides administering commercial arbitrations between Western companies and the Soviet Union, the SCC-AI also built strong relationships with China, particularly

800 ibid.

801 Gernandt (n 774) 169.

under the leadership of Franke.[802] These initiatives were closely aligned with the efforts of the AAA and its leading expert, Howard Holtzmann. Notably, the early interactions between China's Council for the Promotion of International Trade and the SCC-AI occurred alongside parallel efforts by the AAA and the National Council for US-China Trade ('NCUSCT') to foster Chinese support for international arbitration in a third country. The NCUSCT was a US private-sector interest group focused on bolstering economic ties with China.

Before December 1973, NCUSCT met with Chinese officials to 'arrive at mutually satisfactory arbitration and other dispute settlement procedures with the Chinese'.[803] In December, NCUSCT members briefed Donald Straus, then-President of the AAA, about a recent meeting with CCPIT in Beijing. This meeting had been 'devoted to the subject of dispute settlement, including conciliation and arbitration'.[804] The letter also welcomed the AAA offer to help prepare 'draft recommendations on an arbitration agreement and model arbitration and conciliation contract clauses'.[805] Around the same time, the CCPIT sent a letter to the SCC-AI proposing 'an exchange of arbitration information and materials from time to time and carrying out friendly cooperation between our sides'.[806] This illustrates the CCPIT's growing interest in strengthening ties and exploring a more formalized dispute settlement system.

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802 Dahlquist (n 99) 41-42.

803 Letter from Christopher Phillips to Donald Straus (4 December 1973) Holtzmann Archive Box 151 Folder 4, 1.

804 ibid.

805 ibid.

806 Letter from the CCPIT to the SCC (December 1973) cited in Moser (n 745) 344.

In January 1975, the AAA was invited by the CCPIT to discuss these issues. The delegation, comprising Straus and Holtzmann, arrived with a wealth of experience. Holtzmann, who had recently started negotiations on the Optional Clause with the USSR CCI, extensively prepared the trip. He drafted a 23-page memorandum that raised many of the questions previously discussed with the USSR CCI, such as the willingness of Chinese entities to arbitrate in a third country and the use of the new UNCITRAL Rules.[807] Holtzmann also carefully suggested a 'Possible Method for Friendly Resolution of Commercial Disputes', with arbitration to be administered by an institution 'outside of China or the United States'.[808] During the visit, talks between CCPIT officials, Ren Jianxin, Straus, and Holtzmann also touched on an arbitration clause specifying 'a locale in Sweden and the Swedish arbitration procedure'.[809]

Like the Optional Clause, the US administration closely monitored the AAA's visit to China. According to a December 1974 diplomatic cable from the US Department of State's East Asian and Pacific Affairs Bureau to the US Liaison Office in Beijing, Straus informed the US administration of the visit. Interestingly, he also requested a meeting with George H. W. Bush, then US Ambassador to China, during the visit.[810] The cable also advised caution regarding the AAA initiative. While the author expected 'the discussions (...) to be largely exploratory and that there will be few concrete results', the

807 Howard Holtzmann, 'Preliminary Outline of Subjects for Discussion Concerning Chinese Practices for Resolving Commercial Disputes' Holtzmann Archive Box 151 Folder 4.

808 Howard Holtzmann, '[Illegible] for Friendly Resolution of Commercial Disputes, Prepared by AAA for Discussions and as Basis for Mutual Exploration of Fundamental Principles at Meeting with CCPIT in Peking' (January, 1975) Holtzmann Archive Box 151 Folder 4.

809 Howard Holtzmann, 'Notebook: Arbitration Mission to Peking, Commencing January 16, 1975' Holtzmann Archive Box 151 Folder 1.

810 'Diplomatic Cable from the Dept of State to the US Liaison Office in Beijing: Business Travel, American Arbitration Association' <https://search.wikileaks.org/plusd/cables/1974STATE279189_b.html> accessed 31 July 2023.

Liaison Office was advised to only ‘provide normal assistance’ and ‘avoid endorsing any positions (for example, on language for a model US-PRC arbitration clause) which AAA may take’.[811] The US was concerned that any informal agreement between the CCPIT and the AAA might pre-empt a bilateral trade agreement with China, which would likely include specific provisions for settling commercial disputes. The cable noted:

> Legislative authority to extend MFN to the PRCTrade Act of 1974 (…) would require a bilateral trade agreement which must contain, inter alia, arrangements for settlement of commercial differences and disputes. Therefore, question of arbitration procedures could in the future become a subject for government-to-government negotiations.[812]

In later BIT negotiations between the US and China, the US aimed to rely on its Trade Representative’s model treaty instead, which contained consent to the ICSID Additional Facility.[813] However, China may have resisted consent to the Additional Facility due to Taiwan’s then-membership in ICSID.[814]

After its meeting with the AAA in January 1975, the CCPIT reached out to the SCC-AI in September of the same year. The letter from the CCPIT to the SCC-AI was extensive, asking a series of questions aimed at understanding the SCC-AI and its procedure more deeply, before Chinese officials could endorse its use:

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811 ibid.

812 ibid.

813 ‘Treaty Between The United States of America And ... Concerning the Reciprocal Encouragement And Protection of Investment Attached to a Letter from the Don Hasfurther of the Chamber of Commerce of the US to All Members of the NME Task Force’ (22 December 1982) GFA B 102/272937, art VII(2).

814 Taiwan’s membership had led to friction among ICSID members in previous years, see ‘Diplomatic Cable from the Dept of State to the US Embassy in Tapei: Move to Oust ROC from IBRD/IMF’ <https://wikileaks.org/plusd/cables/1973STATE222043_b.html> accessed 31 July 2023.

> Could you give us some information about the history, organizational structure, leading figures, staff and other important features of the Arbitration Institute of the Stockholm Chamber of Commerce? How many cases have been [seized] and administered by the Institute, so far? Which countries' citizens or legal persons were disputing parties? What were the results of the cases? How about the enforcement of the awards? What was the cost of the arbitration? How to carry out the examination of cases if either or both of the disputing parties have selected citizens of non-Swedish nationality as arbitrators who dwell far away from the territory of Sweden? How do the Swedish friends look upon [the UNCITRAL Rules]? What are the prospects for them? We understand Sweden has [acceded to] the Convention on the Recognition and Enforcement of Foreign Arbitral Awards…Could we understand in this way: Enforcement of the award should be legally ensured by the country of the [losing] party ...?[815]

This letter was followed by further correspondence involving additional questions.[816]

At the Institute, relations with the CCPIT had in the meantime become Franke's responsibility. He drafted several replies to the Chinese inquiries and later specifically recalled the CCPIT's curiosity.[817] The exchanges between the two organizations further intensified when, in September 1975, Jianxin led a CCPIT delegation on a visit to Stockholm and the SCC-AI.[818] Then-SCC president, Martin Dworen, subsequently discussed the visit with Holtzmann. In an internal AAA memo dated October 1975, Holtzmann recalled the conversation from the perspective of the AAA:

> The Chinese brought with them a prepared list of questions which they presented to the Stockholm Chamber. The Stockholm Chamber prepared written answers which they gave to the Chinese before they left Sweden (…). It will be recalled that during the AAA visit to Peking we told the CCPIT of our joint study of Swedish law and we gave them a copy of our legal questionnaire to the Swedish Chamber. The Chinese inquired about the progress of the joint legal study and the Stockholm Chamber gave them a copy of their reply to our legal

815 Letter from the CCPIT to the SCC dated September 1975, cited in Moser (n 745) 345.

816 Moser (n 745) 345.

817 ibid 345-46.

818 'Diplomatic Cable from the US Liaison Office in Beijing to the Dept of State, the US Embassies in Bern, Stockholm, Taipei, Tokyo and the US Consulate in Hong Kong: CCPIT Delegation to Sweden' <https://search.wikileaks.org/plusd/cables/1975PEKING01071_b.html> accessed 31 July 2023.

> questionnaire. (…) The Chinese questions indicate a serious interest in the use of Sweden as a locale in trade between China and third countries.[819]

Holtzmann's detailed awareness of the CCPIT visit to Stockholm and the specific concerns and questions raised by the Chinese delegation demonstrate how rapidly information was exchanged among select officials of arbitral institutions and how this exchange contributed to states' preference formation. In the same memo, Holtzmann explicitly reflected this inter-institutional dimension, noting that it 'is interesting that the Chinese showed interest in (…) [r]elations between the Stockholm Chamber, and the ICC, the AAA, the Soviets and others'.[820]

Franke's replies and the visit seemed to have influenced the CCPIT to tentatively conclude an 'ad referendum agreement (...) on [the] use of [the] Swedish arbitration mechanism' with NCUSCT in Washington in October of the same year.[821] Although no joint optional clause comparable to the AAA-USSR CCI initiative was agreed upon, in 1977 CCPIT's arbitral institution, Foreign Economic and Trade Arbitration Commission ('FETAC'), began recommending 'the Stockholm Rules, if the foreign party did not accept the CIETAC Rules'.[822] By 1985, the Chinese government even 'expressed a

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819 Howard Holtzmann, 'AAA, Memorandum to Files: CCPIT Visit to Stockholm Chamber of Commerce', Holtzmann Archive Box 170 Folder 3, 2.

820 ibid 3.

821 'Diplomatic Cable from the Dept of State to the US Liaison Office in Beijing: CCPIT Visit; Discussions with NCUSCT' <https://search.wikileaks.org/plusd/cables/1975STATE235359_b.html> accessed 31 July 2023.

822 Gernandt (n 774) 169.

strong preference to refer to the SCC Institute as an alternative to arbitration in China'.[823]

The official endorsements initiated a series of visits and exchanges between the CCPIT and the SCC-AI. In 1982 and the following years, Franke would make 'more than a dozen visits to China', coinciding with the opening up of the Chinese economy to foreign trade.[824] The cooperation between the CCPIT and the SCC-AI was formalized and extended in 1984, when the two organizations signed a cooperation agreement. The preamble of this agreement stated that 'the use of arbitration would lend confidence and stability (…) to international commercial transactions'.[825] This agreement was later revised and reaffirmed in 1987.

Under Franke's leadership, and with assistance from senior AAA officials, the SCC-AI succeeded in gaining the trust of high-ranking Chinese state officials responsible for foreign trade policy. More than the other institutions examined in this thesis, the Institute benefitted from its host state Sweden's foreign policy neutrality. As Dezalay and Garth note, there is a 'delicate combination of proximity and distance between the holders of power and those who embody the legitimacy of justice.'[826] Other institutions, such as the ICC-ICA, may also have been politically unacceptable to China due to Taiwanese participation.[827] While the ICC-ICA does not have state principals, it

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823 Hans Bagner and Ulf Franke, 'International Commercial Arbitration in Sweden', Law Society Gazette, November 13, 1985, 3276, cited in Edwin Alley, 'International Arbitration: The Alternative of the Stockholm Chamber of Commerce' (1988) 22 The International Lawyer 837, 839.

824 Moser (n 745) 346.

825 ibid.

826 Dezalay and Garth (n 79) 70.

827 Thomas Pelle and Marsha Cohan, 'Dispute Resolution in China' (1988) The China Business Review 46.

does have a Taiwanese National Committee, which may have led to a reluctance by China to use its arbitration mechanism. Similarly, Taiwan's ICSID membership may have contributed to China's delayed accession to the ICSID Convention. As a result, the SCC-AI became an appealing and geopolitically acceptable option for China.[828]

4.2.4. From contracts to treaties: the 1983 China-Germany BIT

In the 1980s, states also started to reference the SCC-AI in bilateral investment treaties.[829] Several factors could explain this development. During that time, the BIT programs of many capital-exporting states were still in their early stages, even though different arbitration options had already emerged in the 1970s. The SCC-AI provided an alternative to ICSID when neither state had ratified the ICSID Convention. In this case, recourse to ICSID or its Additional Facility was unavailable. The SCC-AI may also have been considered an alternative, if one state had ratified ICSID but would not use its Additional Facility for political reasons. In this context, Sweden's neutrality placed the SCC-AI in a good position to administer East-West disputes.

In addition to these possible explanations, archival evidence offers another perspective. By the 1980s, Western companies and foreign trade corporations in the Soviet Union and the People's Republic of China had developed a preference for the SCC-AI in their contracts. These corporations were influenced by arbitration experts of the USSR CCI and the CCPIT and the official policies of these organizations. Since

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828 'Diplomatic Cable from the Dept of State to the US Embassy in Tapei: Move to Oust ROC from IBRD/IMF' (n 815).

829 Examples are China – Germany BIT (1983), China – France BIT (1984), or China – Finland BIT (1984).

both the USSR CCI and the CCPIT were quasi-statal agencies, any recommendation to use the SCC-AI in contracts with foreign investors was likely quasi-obligatory and may also have carried over into the treaty realm. In fact, the first 10 BITs that mentioned the SCC or the SCC-AI were concluded by China.[830]

The 1983 China-Germany BIT was the first investment treaty to designate the SCC as a default appointing authority. While it is unclear whether the CCPIT directly participated in the negotiations leading to the conclusion of this treaty, the negotiation file in the German Federal Archives contains several references to the CCPIT.[831] During these talks, which lasted from 1981 to 1983, the choice of an arbitration forum was a significant point of contention leading to an extensive back-and-forth among the delegations.[832] Early drafts did not specify the place of arbitration or designate an arbitral institution. Internally, German officials were even briefed on the alternative of

830 This is the result of a keyword search on EDIT, using 'SCC' and 'Stockholm Chamber of Commerce' as keywords, see Alschner, Elsig and Polanco (n 455). These BITs are China – Germany BIT (1983), China – France BIT (1984), China – Finland BIT (1984), China – Norway BIT (1984), China – Italy BIT (1985), China – Denmark BIT (1985), Austria – China BIT (1985), China – Singapore BIT (1985), China – Kuwait BIT (1985), and China – Sri Lanka BIT (1986).

831 'Circular from the Embassy of the German Federal Republic in Beijing to the Federal Foreign Office (Auswärtiges Amt), subject: "Die Außenhandelsschiedsgerichtsbarkeit in der VR China (Foreign Trade Arbitration in the People's Republic of China)"' (22 July 1981) GFA B 102/239127, 2; 'Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade, Adopted on March 31, 1956 at the Fourth Session of the China Council for the Promotion of International Trade, GFA B 102/239127'; National Committee on United States-China Relations, 'Name List of Economic Legislation Research Center of the State Council of China Delegation' GFA B 102/272937.

832 'Vermerk: IFV mit der VR China (IIA with the PRC)' (6 November 1981) GFA B 102/239127, 1; 'Circular from the German Federal Ministry for the Economy to the Federal Foreign Office, the Federal Ministers for Finance, Justice, Economic Cooperation, the German Federal Bank, and the Federal Agency for Foreign Trade Information, subject: "Investitionsförderungsvertrag mit der VR China (Investment Promotion Agreement with the People's Republic of China)"' (16 April 1982) GFA B 102/272936, 3.

arbitration at FETAC.[833] As negotiations progressed, German officials increasingly advocated for international arbitration at ICSID, another institution, or via *ad hoc* arbitration.[834]

In October 1981, the Chinese negotiators then agreed to a clause allowing future disputes to be submitted to ICSID, conditional upon China joining the ICSID Convention in the future.[835] Until then, compensation for expropriation was to be determined through domestic legal channels.[836] The German delegation, sceptical about domestic dispute resolution in China, pointed to the ICSID Additional Facility as an alternative.[837] But the Chinese counterparts remained reluctant.

Faced with the continued unwillingness of the Chinese delegation to submit to international arbitration, the German government sought input from ICSID officials, other capital-exporting states that were in the process of negotiating investment treaties with the PRC, and the experience of corporates in negotiating investor-state contracts with Chinese state entities. In 1982, Heribert Golsong was made aware that German officials were considering referring to arbitration rules of institutions other than ICSID in investment treaties that Germany was currently negotiating.[838] In a letter to the German

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833 'Circular from the Embassy of the German Federal Republic in Beijing to the Federal Foreign Office (Auswärtiges Amt), subject: "Die Außenhandelsschiedsgerichtsbarkeit in der VR China (Foreign Trade Arbitration in the People's Republic of China)"' (n 832) 1.

834 'Anmerkungen zu den Formulierungsvorschlägen der chinesischen Delegation vom 8 August 1981 (Comments on the Chinese Delegation's Drafting Proposals of 8 August 1981)' (21 September 1981) GFA B 102/239127, 2.

835 Hans-Martin Burkhardt and Hans Boie, 'Vermerk: Investitionsförderungsvertrag mit der VR China (Memo: Investment Promotion Agreement with the People's Republic of China)' (2 November 1981) GFA B 102/239127, 1.

836 ibid.

837 ibid.

838 Letter from Heribert Golsong to Ministerialrat Hans-Martin Burkhardt (n 666).

government, Golsong advised against such an approach.[839] He portrayed ICSID as without alternative, underlining ICSID's strong enforcement mechanism, broader ratification compared to the New York Convention, and the limited grounds for review by national courts at the enforcement stage.[840] According to Golsong, these features were not available in *ad hoc* arbitration or arbitration at the ICC-ICA.[841] Moreover, he noted that

> UNCITRAL rules, as such, are not an alternative to ICSID, as they do not offer an institutional framework. The main interest in these rules arises from the fact that developing countries have also contributed to their development; this is not the case with the ICC rules. However, ICSID was developed with the active participation of developing countries. From the standpoint of these countries, ICSID and UNCITRAL rules are politically valued equally, as far as a comparison is even possible.[842]

Golsong also generally advised Germany against the inclusion of both ICSID and UNCITRAL Rules in its BITs, with the exception of negotiations with non-ICSID members.[843]

Besides consulting ICSID officials, Germany also looked at the treaty practice of its neighbour France. In 1982, France was also in the process of negotiating a BIT with China and its progress and possible divergences with Germany's experience was therefore valuable information.[844] German officials took particular note of the fact that

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839 ibid.

840 ibid.

841 ibid.

842 ibid.

843 ibid 2.

844 Hans-Martin Burkhardt, 'Memo: Stand der Verhandlungen über einen Investitionsförderungsvertrag (IFV), Bonn, VC5 – 963213' (3 May 1982) GFA B 102/272936; Hans-Martin Burkhardt, 'Vermerk: Investitionsförderungsvertrag mit der VR China (Memo: Investment Promotion Agreement with the People's Republic of China)' (14 March 1983) GFA B 102/272937.

France had proposed to include a reference to the SCC-AI as an appointing authority in its BIT negotiations with the PRC.[845]

Later that year, German government officials also consulted representatives of German companies, including Volkswagen ('VW'), Commerzbank, and Busch KG regarding a potential Sino-German BIT.[846] These corporates had previously gathered experience in negotiating investment contracts with the Chinese state or its entities.[847] VW, for instance, confidentially shared information about its ongoing contract negotiations for a joint venture in China, which included an arbitration clause.[848] The German official briefed by VW later reported the back-and-forth between VW and the Chinese entity about applicable arbitration rules:

> China has proposed subjugation under UNCITRAL rules. Supplementary proposal VW: Location: Zurich, application of Swiss law. Counter-proposal China:

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845 'Projet d'accord entre le gouvernement de la République française et le gouvernement de la République populaire de Chine sur l'encouragement et la protection réciproques des investissements (Draft Agreement Between the Government of the French Republic and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments), attached to Circular: Investitionsförderungsvertrag mit der VR China (Investment Promotion Agreement with the PRC)' (8 February 1983) GFA B 102/272937, comment on art 8.

846 The German government invited company officials to an informal meeting about the investment promotion agreement with China, see for instance Letter from Mr Burkardt to Mr Busch (Busch KG) (20 December 1982) GFA B 102/272937. Interest groups of German industry were also invited, see Letter from Mr Burkhardt to Mr Fink (Ostausschuß Der Deutschen Wirtschaft (20 December 1982) GFA B 102/272937. German government official Hans Boie later reported in detail on this informal meeting, see Hans Boie, 'Vermerk: Über das Ergebnis eines Gesprächs mit Vertretern der Wirtschaft über Fragen der IFV – Verhandlungen mit China am 14 Januar 1983 im BMWi (Vorsitz: MR Dr Burkhard, Teilnehmer s Anlage) (Memo: On the Result of a Discussion with Representatives of the Business Community on Questions of the Investment Treaty Negotiations with China at the Federal Ministry for the Economy on January 14, 1983 (Chair: Ministerialrat Dr Burkhard, Participants see Attachment)), Bonn, VC5 - 963213' (25 January 1983) GFA B 102/272937.

847 Boie (n 847).

848 Hans-Martin Burkhardt, 'Vermerk: VR China (Memo: PRC), Bonn, VC5 - 963213' (26 October 1982) GFA B 102/272936. Volkswagen also provided the German government with a draft investment agreement the US was negotiating with China at the time. It had itself obtained this draft from the US Chamber of Commerce, see Letter from Mr Messmann (Volkswagen AG) to Mr Burkhardt (18 February 1983) GFA B 102/272937, letter and attachment.

> Location: Zurich, but no determination of the applicable law. Finally, China's compromise proposal: Stockholm, Swedish law.[849]

However, while such compromises seemed possible in the realm of investor-state contracts, the German treaty negotiators continued to struggle to obtain a concession on international arbitration in the BIT.

In January 1983, the German government then learned that several other German companies had successfully negotiated arbitration agreements in contracts with Chinese state entities, providing for international arbitration in a third country.[850] In these exchanges, German industry representatives also emphasized that a Sino-German BIT would offer better protection than individual investor-state contracts.[851] In April of the same year, VW informed the German government that it had successfully agreed on the 'Stockholm arbitral tribunal, to apply Swedish procedural law' in contracts with the Shanghai Tractor and Automobile Corporation and the Bank of China.[852]

Despite progress, investor-state arbitration remained a sticking point in the BIT talks between Germany and China until July 1983.[853] By then, China had started to

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849 Burkhardt, 'Vermerk: VR China (Memo: PRC), Bonn, VC5 - 963213' (n 849), translated by the author, original: '*China hat Unterwerfung unter UNCITRAL-Regeln vorgeschlagen. Ergänzungsvorschlag VW: Ort: Zürich, Anwendung Schweizer Rechts. Gegenvorschlag China: Ort: Zürich, jedoch keine Festlegung des anzuwendenden Rechts. Zuletzt Kompromißvorschlag China: Stockholm, schwedisches Recht*'.

850 Boie (n 847) 3.

851 ibid.

852 In these negotiations, the applicable substantive law was an equally contentious issue. VW failed to obtain an exclusion of Chinese law as substantive law. Instead, it negotiated a provision according to which the SCC-AI tribunal would determine the applicable law, which had to be 'statutory in detail, formally promulgated, commonly accessible, and understandable to the Swedish arbitral tribunal', see Letter from Mssrs Ehinger and Messmann (Volkswagen AG) to Mssrs Burkhardt and Dittmar (Federal Ministry for the Economy) (20 April 1983) GFA B 102/272937, 2.

853 'Circular from the German Federal Ministry for the Economy to the Federal Foreign Office, the Federal Ministers for Justice, Finance, Economic Cooperation, and the German Federal Bank,

warm up to the idea of international *ad hoc* arbitration but only for issues related to compensation for expropriation.[854] In reply, Germany proposed Switzerland as the default location for such *ad hoc* arbitration, which China rejected.[855] At the same time, an internal German government memo noted that 'the Federal Government must decide whether it wants to settle for such a limited jurisdiction of arbitration, as proposed by the Chinese'.[856] In the eyes of German officials, China was only slowly opening up.[857]

At the end of July 1983, a proposal to designate the Chairman of the SCC-AI as fallback appointing authority had been made.[858] While archival records do not confirm, which side made this proposal, it is likely that it was the Chinese delegation in a bid to reach a compromise.[859] The treaty, as signed in October 1983, retained this provision, marking the SCC-AI's first appearance in the investment treaty regime.[860] Interestingly,

subject: "Verhandlungen mit VR China über Investitionsförderungsvertrag (Negotiations with the PR of China regarding Investment Promotion Agreement)"' (11 May 1983) GFA B 102/272937, 2.

854 Hans-Martin Burkhardt, 'Memo addressed to Staatssekretär Dr Schlecht: Gespräch mit dem chinesischen Delegationsleiter, Herrn Chin Lu, in den Verhandlungen über einen Investitionsförderungsvertrag am 15 Juli 1983, 9:30 Uhr (Conversation with the Head of the Chinese Delegation, Mr Chin Lu, in the Negotiations for an Investment Promotion Treaty on July 15, 1983, 9:30 AM)' (14 July 1983) GFA B 102/272938, 2.

855 Letter from Hans-Martin Burkhardt (Federal Ministry for the Economy) to Mr Messmann (Volkswagen AG) (25 August 1983) GFA B 102/272938.

856 Hans-Martin Burkhardt, 'Memo addressed to Staatssekretär Dr Schlecht: Gespräch mit dem chinesischen Delegationsleiter, Herrn Chin Lu, in den Verhandlungen über einen Investitionsförderungsvertrag am 15 Juli 1983, 9:30 Uhr (Conversation with the Head of the Chinese Delegation, Mr Chin Lu, in the Negotiations for an Investment Promotion Treaty on July 15, 1983, 9:30 AM)' (n 855).

857 Hans-Martin Burkhardt, 'Memo addressed to the Minister: Verhandlungen mit der VR China über einen Investitionsförderungsvertrag (IFV) (Negotiations with the PR of China for an Investment Protection Agreement), Bonn, VC5 – 963213' (19 July 1983) GFA B 102/272938, 2.

858 'Commentary on the draft agreement' (15 July 1983) GFA B 102/272938, 24.

859 Hans-Martin Burkhardt, 'Vermerk: VR China (Memo: PRC), Bonn, VC5 – 963213' (n 849).

860 This is the result of a keyword search on EDIT, see Alschner, Elsig and Polanco (n 455); The BIT concluded between China and Sweden a year earlier did not contain an investor-state arbitration provision, see Damien Charlotin and Lisa Bohmer, '[Update] Chinese Network Company Notifies Sweden of Alleged BIT Breaches' (*IAReporter*, 6 January 2021) <https://www.iareporter.com/articles/chinese-network-company-notifies-sweden-of-alleged-bit-breaches/> accessed 31 July 2023.

archival records suggest that the German government assumed only German investors would use treaty-based arbitration against China in the future, without considering the possibility of claims by Chinese investors against Germany.[861]

The choice of the SCC-AI as a fallback authority appears to have been influenced by various factors. These include industry preferences for the SCC-AI in contracts with Chinese state entities, parallel BIT negotiations by other capital-exporting states with the PRC, Chinese reluctance to submit to other *fora*, and the fact that the PRC was not an ICSID member at the time. The importance of the delay in ICSID ratification as a factor in adopting provisions referring to alternative *fora* is also corroborated by the fact that none of China's investment treaties signed after 1993 – the year in which China acceded to ICSID – refer to the SCC-AI.[862]

4.2.5. Expansion in investment treaties

In the years following the signature of the Sino-German treaty, BITs that mentioned the SCC-AI became increasingly common, typically spanning the East-West divide. France, Finland, Norway, and Denmark all concluded such BITs with China

[861] None of the files related to the negotiation of the BIT with China in the German Federal Archives suggest that officials contemplated a risk of Chinese investors initiating arbitration claims against Germany. Instead, German industry officials advocated for better legal protection of their investments in China. See Letter from Mssrs Ehinger and Messmann (Volkswagen AG) to Mssrs Burkhardt and Dittmar (Federal Ministry for the Economy) (n 853); Boie (n 847).

[862] This is the result of a keyword search on EDIT, see Alschner, Elsig and Polanco (n 455). This finding contrasts with Dezalay and Garth ((n 79) 278) who observe a shift from Chinese use of Stockholm to CIETAC for commercial arbitration and explain it as a result of China's increased bargaining power. In the context of treaty-based mixed arbitration, several Chinese treaty-consents to arbitration at the SCC-AI survived despite this increase in bargaining power.

between 1984 and 1985.[863] The Belgo-Luxemburg Economic Union ('BLEU') also began incorporating the SCC-AI in its BITs, often giving investors multiple options for arbitration rules, additionally including ICSID and UNCITRAL.[864] Notably, early treaties had designated the SCC or SCC-AI as appointing authority but did not specify that the Institute should also administer proceedings. In 1986, BLEU's BIT with Hungary became the first to provide that the SCC-AI was to administer arbitrations in addition to its appointing authority role.[865] Increasingly, treaties referring to the Institute were no longer limited to the East-West context. Especially BLEU and Italy would refer to the SCC-AI in many treaties with states outside of the East-West context in the late 1980s and early 1990s.[866]

Both BLEU and Italy also incorporated the SCC-AI as an optional forum for arbitration in their model treaties.[867] This inclusion served as a catalyst for the growing diffusion of references to the Institute in the investment treaty regime. By being featured in these model treaties, the SCC-AI was automatically considered in every new treaty negotiation of these countries. This not only bolstered the organization's visibility among the influential audience of international treaty negotiators but also helped the Institute in extending its reach beyond its initial focus on the East-West context.

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863 China – France BIT (1984), China – Finland BIT (1984), China – Norway BIT (1984), China – Denmark BIT (1985).

864 Early examples are BLEU – Hungary BIT (1986), BLEU – Poland BIT (1987), and BLEU – Bolivia BIT (1990).

865 This is based on a keyword search on EDIT, see Alschner, Elsig and Polanco (n 455).

866 A keyword search on EDIT returns 10 BITs signed by BLEU and 11 BITs signed by Italy between 1986 and 1996; see ibid.

867 'Model Bilateral Investment Treaty, Italy, August 2022' art 22(2)(b) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6438/download> accessed 31 July 2023; 'Model Bilateral Investment Treaty, BLEU, 2002' art 10(3) <https://edit.wti.org/document/show/9c8a9ec5-0727-4a33-8292-468690f232c6> accessed 31 July 2023.

In the 1980s, the SCC-AI's also started to experience a caseload growth beyond its conventional East-West focus.[868] Sven Swarting, then-president of the SCC, highlighted this evolution in a speech in 1990:

> The number of cases handled as well as the inquiries to the institute have increased considerably – especially during the last ten to fifteen years. The cases involve parties, both private and government bodies, from a great number of countries in both the industrialized and the developing parts of the world.[869]

At the same event, Laila Freivalds, then-Swedish Minister of Justice, expressly endorsed the role of Swedish Judges in arbitration proceedings. In her view, this practice of judges accepting to sit as arbitrators was an 'expression of the positive attitude in Sweden towards arbitration' and an 'advantage both for the tribunals and the courts'.[870]

Linked to this supportive stance towards arbitration, efforts to lobby for a reform and liberalization of Sweden's arbitration law simultaneously gained momentum. In 1990, the SCC-AI was in the process of revising its arbitration rules. Britta Blom, then-President of the Svea Court of Appeal and chairperson of the SCC-AI considered that besides the revision of the Institute's rules, 'law reform was also needed'.[871] In pursuit of this goal, she took 'the initiative to request of the Government to set up a committee

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868 Ulf Franke, 'International Arbitration in Sweden' [1985] International Construction Law Review 159, 160.

869 Swarting (n 208) 1.

870 Leila Freivalds, 'Welcoming Address: Mrs Laila Freivalds Minister of Justice' in ICCA (ed), *ICCA Congress Series No 5 (Stockholm 1990): Preventing Delay and Disruption of Arbitration / Effective Proceedings in Construction Cases* (Kluwer Law International 1990) 5-6; Dezalay and Garth also speak of judges 'commercializing the authority available to them from their positions', see Dezalay and Garth (n 79) 203.

871 Brigitta Blom, 'Welcoming Address: Mrs Brigitta Blom President, Svea Court of Appeal, Chairman Arbitration Institute of the Stockholm Chamber of Commerce' in ICCA (ed), *ICCA Congress Series No 5 (Stockholm 1990): Preventing Delay and Disruption of Arbitration / Effective Proceedings in Construction Cases* (Kluwer Law International 1990) 4.

with a view to draft a new law on Arbitration'.[872] The SCC-AI had already lobbied the Swedish government in previous years.[873] Prompted in part by the advocacy of the Institute, the Swedish government took the decision to update the Arbitration Act in the 1990s and a revised version was later adopted in 1999.[874]

The position of the SCC-AI on the international market for mixed arbitration was further strengthened in the early 1990s, when a reference to its arbitration rules was included in the Energy Charter Treaty ('ECT'). This treaty was negotiated in the particular geopolitical context following the end of the Cold War and the related potential for European investment in the vast energy resources of the former Soviet republics. The negotiations which began in 1991 and led to the signature of the treaty in 1994, involved the European Economic Community and its member states, as well as most former Soviet republics.[875] The negotiations were a complex process spanning several years and generating a voluminous archive that bears significant potential for further research. A full analysis of this negotiation history exceeds the scope of this project.

The decision of the negotiating states to include a reference to the SCC-AI, however, was made in the specific context of the negotiation of the treaty's investor-state arbitration provision. Contrary to the view expressed by Franke,[876] the *travaux préparatoires* suggest the proposal to reference the SCC-AI was first made by the

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872 ibid.

873 ibid.

874 Swedish Arbitration Act 2019 (SFS 1999:116).

875 'Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998)' 2080 UNTS 95, art 26(4)(c).

876 Dahlquist (n 99) 44.

Norwegian delegate as a compromise in March 1991.[877] This proposal followed an intense discussion about the type of arbitration rules to be included, with delegates considering an arbitration provision offering different options, including ICSID and the UNCITRAL Arbitration Rules.[878] Several states that actively participated in the negotiations had not ratified ICSID by the time Norway suggested referencing the SCC-AI. These states included the Russian Federation, which eventually never ratified the ECT, and several Eastern European and Central Asian states.[879] For this reason, the negotiators may have considered alternative *fora* and arbitration rules.

The SCC-AI appears to have been unaware of Norway's proposal at the time it was made. Yet, the Institute was promptly informed by Swedish government officials attending the negotiations.[880] According to Dahlquist, Franke later explained,

> how he got a phone call from the Swedish government's representative in the ECT negotiations who asked, when the matter appeared to already be *fait accompli*, if the SCC would object to be included in the treaty's arbitration provision. Ulf Franke did not object. A Swedish government official, who recalls the 'Eastern European states' – particularly Russia – pressing for the SCC to be included alongside ICSID and UNCITRAL, confirms this account.[881]

Although the provision was first proposed by Norway – which signed but never ratified the ECT – it was acceptable to former Soviet states, where referencing the Institute's rules had become standard practice. For the Swedish delegation, the

877 Energy Charter, Audio Recording, travaux préparatoires of the ECT, Energy Charter Archive, file M07041992EN7_16, deliberations in the afternoon of 7 March 1991.

878 See ibid. The Norwegian suggestion was immediately supported by the Swedish delegation.

879 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (n 470). For instance, the ICSID Convention was ratified by Armenia on 16 September 1992, by Azerbaijan on 18 September 1992, by Belarus on 10 July 1992, by Bosnia and Herzegovina on 14 May 1997, by Bulgaria on 13 April 2001.

880 Dahlquist (n 99) 44.

881 ibid.

provision likely presented a prestigious accomplishment that promised a consistent stream of profitable arbitration business. The proposed reference was thus immediately supported by former Soviet states and the Swedish delegation.[882] While several EU Member States have recently announced withdrawals from the ECT, Sweden has remained conspicuously silent.[883] Over the years, the ECT has emerged as the treaty generating the highest number of mixed arbitrations at the SCC-AI accounting for a quarter of its treaty-based caseload as of 2021.[884]

When the treaty entered into force in 1998, it led to the creation of the Energy Charter Secretariat, the treaty's permanent administrative body. The Secretariat has frequently collaborated with the SCC and its Arbitration Institute.[885] Notably, former Secretary General of the SCC-AI, Annette Magnusson, served on a Legal Advisory Task Force assisting the Secretariat. The task force has notably helped 'drafting (…) balanced and legally coherent Model Agreements for cross-border oil and gas pipelines' and 'is currently supporting the work of the Energy Charter Secretariat in discussing

882 Audio Recording (n 878).

883 'EU föreslår gemensamt utträde ur omstritt energiavtal (EU Proposes Joint Withdrawal from Controversial Energy Agreement)' *Dagens Nyheter* (4 July 2023) <https://www.dn.se/varlden/eu-foreslar-gemensamt-uttrade-ur-omstritt-energiavtal/> accessed 31 July 2023.

884 Christoffer Coello Herzberg, *Green Technology Disputes at the SCC Arbitration Institute: November 2022* (SCC-AI ed, SCC-AI 2022) 25 <https://sccarbitrationinstitute.se/sites/default/files/2022-12/report_green_technology_disputes.pdf> accessed 31 July 2023.

885 Energy Charter, 'Decision of the Energy Charter Conference: Programme of Work Priorities for 2017' (20 November 2016) Energy Charter Doc CCDEC 2016 30 WPR <www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201630.pdf> accessed 31 July 2023; Energy Charter, *Annual Report 2019*, 19; Energy Charter, *Annual Report 2016*, 38; Energy Charter, 'Leaflet: Investment Arbitration Masterclass, 3rd Edition' <www.energycharter.org/fileadmin/DocumentsMedia/Trainings/TP12-Leaflet.pdf> accessed 31 July 2023; Energy Charter, 'Brussels International Energy Charter Forum: Mobilising Investments for a Sustainable Energy Future' <www.energycharter.org/fileadmin/DocumentsMedia/Events/20170518-Brussels_International_Energy_Charter_Forum.pdf> accessed 31 July 2023; Energy Charter, 'Cases up to 18 May 2018' <www.energycharter.org/what-we-do/dispute-settlement/cases-up-to-18-may-2018/> accessed 31 July 2023.

improvements to the dispute settlement mechanisms under the Energy Charter Treaty as well as policy options in relation to some general clauses contained in investment treaties (investor-state contracts) in the energy sector'.[886] Today, these model agreements serve as negotiation templates for investment contracts in the energy sector, especially where both the host and the home state of the investor are ECT contracting parties.

Since the 1980s, the SCC-AI has significantly expanded its presence and position in the international investment treaty regime. During this phase, the Institute benefitted from the proliferation of investment treaties, particularly those signed by states that had not (yet) joined ICSID. References to the Institute in numerous BITs and in the ECT have provided it with a strong basis for continued relevance on the institutional market for mixed arbitration.

4.2.6. Influencing legislative processes and pioneering procedural innovations

Drawing on its long-established reputation as an international arbitral institution, the SCC-AI has recently advocated for a new reform of Swedish Arbitration Law. Both the SCC and its subsidiary participated in the legislative process that led to the enactment of the 2019 Swedish Arbitration Act. Along with the Swedish National Committee of the ICC, both provided detailed feedback during this process.[887] This feedback and its impact on new legislation will be examined in the following.

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[886] Energy Charter, 'Legal Advisory Task Force' (17 March 2015) <www.energycharter.org/who-we-are/legal-advisory-task-force/> accessed 31 July 2023.

[887] Swedish government, Margot Wallström and Morgan Johansson, 'Regeringens proposition: En modernisering av lagen om skiljeförfarande (Government Proposal: A Modernization of the

In February 2014, the Swedish government appointed, Johan Munck, a former Minister of Justice, as a special rapporteur to review the 1999 Arbitration Act and prepare proposals for its revision.[888] Munck subsequently formed an expert group, which included Annette Magnusson, then-Secretary General of the SCC-AI, and Kaj Hóber, a former board member and later chairman of the SCC-AI.[889] This group submitted a report in April 2015, outlining legislative proposals for revising the Arbitration Act.[890] Various interest groups focusing on arbitration, including the SCC, SCC-AI, the Swedish National Committee of the ICC, and the Swedish Arbitration Association, also submitted comments on these proposals.[891] The new Act entered into force on 1 March 2019.[892]

Parliamentary documents reveal that the Swedish government frequently adopted provisions closely aligned with those suggested by the SCC and the SCC-AI. For instance, in relation to a ground for setting aside arbitral awards for excess of mandate, both organizations proposed that the revised Act should require evidence that such an excess likely influenced the outcome of the case.[893] The government essentially adopted this language; section 34 of the revised Act now specifies that an award can only be set aside 'if the arbitrators exceeded their mandate, in a manner that probably

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Arbitration Law)' (2018) Prop 2017/18:257 <https://data.riksdagen.se/fil/FE8EB703-4F0B-4892-9AB8-0C824528C0F0> accessed 31 July 2023.

888 Johan Munck and others, 'Översyn av lagen om skiljeförfarande (Review of the Arbitration Act)' (2015) SOU 2015:37 3 <https://www.regeringen.se/contentassets/78c079328bef401abd6b57f90744e504/oversyn-av-lagen-om-skiljeforfarande-sou-201537/> accessed 31 July 2023.

889 ibid.

890 Munck and others (n 889).

891 Swedish government, Wallström and Johansson (n 888).

892 Robin Oldenstam, *Mannheimer Swartling's Concise Guide to Arbitration in Sweden* (2nd edn, Mannheimer Swartling Advokatbyrå 2019) 21.

893 Swedish government, Wallström and Johansson (n 888) 47.

influenced the outcome'.[894] The new provision places the burden of proof on the party seeking to set aside the arbitral award, significantly increasing the threshold for a successful challenge of an award on procedural irregularity grounds.[895]

Moreover, the previous version of the Act did not contain provisions on how arbitral tribunals should determine the law applicable to the merits of a case. This is a significant point of contention, especially in regulatory disputes involving foreign investors and sovereign states. A state might, for instance, view it as a matter of public policy for an arbitral tribunal to base its decision on domestic laws related to environmental protection, public health, or labour standards. Yet, few BITs explicitly specify the law applicable to the merits of the case, often leaving the decision to the discretion of the tribunals. In practice, tribunals in arbitrations pursuant to the SCC-AI Arbitration Rules typically rely on Swedish procedural law when determining the law applicable to the merits of the case. The legislative report for the revised Act suggested that, in the absence of an agreement between the disputing parties, arbitrators should apply the law most closely connected to the issues in dispute.[896] However, the SCC argued against such a rule, and the government concurred, stating that it would unduly restrict arbitrators' freedom.[897] The revised version of the Act did not contain a requirement to apply the law with the closest connection.[898]

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894 Swedish Arbitration Act 2019 (SFS 1999:116, updated as per SFS 2018:1954), s 34.

895 Oldenstam (n 893) 108.

896 Swedish government, Wallström and Johansson (n 888) 37.

897 ibid.

898 Swedish Arbitration Act 2019 (SFS 1999:116, updated as per SFS 2018:1954).

In contrast, some suggestions made by the SCC and SCC-AI did not find the support of the Swedish government. For instance, both the SCC and the ICC's Swedish National Committee backed the expert group's recommendation to remove the violation of public policy as a mandatory ground for the invalidity of arbitral awards.[899] The expert group had previously suggested replacing this ground with a narrower criterion.[900] Had the government followed this recommendation, an award would have become enforceable if unchallenged within a statutory time limit. However, the government rejected this, arguing that it would unduly subject essential public policy concerns to a procedural deadline.[901] Similarly, the government declined the SCC's proposal to empower arbitral tribunals to issue enforceable protective or precautionary measures. The government maintained that such measures could be intrusive and should continue to be overseen by state courts, in accordance with the Swedish Code of Judicial Procedure.[902]

The SCC was able to shape the discussion around the revision of the Swedish Arbitration Act through participation of key personnel in the expert group and by directly commenting on the draft revision. In several respects, the organization was able to influence the outcome of the revision, especially provisions related to the grounds for setting aside arbitral awards and determining the law applicable to the merits of a case. In these instances, the suggestions made through the expert groups and through subsequent comments generally advocated for a broad discretion of arbitral tribunals

899 Swedish government, Wallström and Johansson (n 888) 44.
900 ibid.
901 ibid 44-46.
902 ibid 41-43.

and a restrictive approach to challenging awards in state courts. While the Swedish government did not incorporate all recommendations made by the SCC, its Arbitration Institute, or affiliated individuals, it did implement several provisions that were aligned with their suggestions.

Lobbying and advocacy of the SCC is not limited to revisions of the Swedish Arbitration Act. The organization has also tried to influence other types of domestic legislation impacting its arbitration activity. For instance, the SCC provided comments on a legislative proposal concerning the regulation of secondary sources of income and side jobs of public servants, including judges of Swedish courts, in 2000.[903] Implicitly echoing former Minister Freivald's statement, the SCC argued that Swedish judges should be allowed to concurrently serve as arbitrators and receive remuneration for this role.[904] Despite potential legitimacy concerns arising from such forms of double hatting, the government chose not to restrict or prohibit the practice.[905] While former Swedish judges have acted as arbitrators in mixed arbitrations pursuant to the SCC-AI Arbitration Rules, the extent of the practice of concurrent double hatting could be examined through further research.[906]

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903 Göran Persson and Britta Lejon, 'Regeringens proposition: Offentliganställdas bisysslor (Government Proposal: Public Employees' Secondary Occupations)' (2001) Prop 2000/01:147 <https://www.regeringen.se/contentassets/977758b5cea149d0b1e2f175e35aba1e/offentliganstalldas-bisysslor/> accessed 31 July 2023.

904 ibid 12.

905 ibid 11.

906 Hans Danelius, for instance, was Swedish Supreme Court Justice from 1988 to 2001 and subsequently appointed arbitrator by the SCC-AI, in the SCC cases *Delizia v Eritrea*, *Rupert Joseph Binder v Czech Republic*, *Petrobart v Kyrgyzstan (2)*, *William Nagel v Czech Republic*, *Itera v Georgia (1)*, *Impreglio v Argentina (1)*, and *Impreglio v Argentina (2)*.

The SCC-AI has been able to leverage the pro-arbitration stance of Swedish law to experiment with procedural innovations providing it with a competitive edge. These innovations include emergency arbitration, fast-track arbitration, and summary procedure.[907] Like the ICC-ICA, the SCC-AI does not require governmental approval to introduce new rules pioneering such procedures. Changes by non-governmental arbitral institutions, including those administering mixed arbitrations, largely escape government oversight despite the fact that they may bind states or their entities. For instance a treaty may provide consent to an institution's rules as in force at the time the treaty is concluded or at the time a request for arbitration is filed.[908] Or it may simply be silent on the version of an institution's rules that is to apply, granting the arbitral tribunal and institution discretion to determine the matter.[909]

Notably, the SCC-AI extended its rule-making authority significantly when it introduced emergency arbitration rules in 2010, making them retroactively applicable to investment treaties signed before that year.[910] There have been at least eight emergency arbitrations pursuant to the new rules so far.[911] Several emergency arbitrators have subsequently endorsed the view that the new rules are retroactively applicable to state consent given before the rules were introduced. For instance, in the

[907] '2023 SCC Arbitration Rules' (n 645) app II and art 39; '2023 SCC Expedited Arbitration Rules'.

[908] An example of the former is art IX of the 2001 OPEC Fund Model BIT. The latter approach was included in art 28.9 of the 2012 SADC Model BIT.

[909] This appears to be the case in most BITs in force today.

[910] According to the 2023 SCC Arbitration Rules, 'Under any arbitration agreement referring to the Arbitration Rules of the SCC Arbitration Institute or the Arbitration Institute of the Stockholm Chamber of Commerce the parties shall be deemed to have agreed that the following rules, or such amended rules, in force on the date of the commencement of the arbitration, or the filing of an application for the appointment of an emergency arbitrator, shall be applied unless otherwise agreed by the parties'. In practice, few BITs specify which version of the SCC rules shall be applicable to arbitral proceedings, see '2023 SCC Arbitration Rules' (n 645).

[911] Wu (n 94).

case of *Evrobalt v. The Republic of Moldova*, the emergency arbitrator held that the reference to the SCC-AI Arbitration Rules in the 1998 Moldova – Russian Federation BIT 'should be construed as a dynamic reference to the version of the SCC Rules in effect at the time of the commencement of the arbitration'.[912] Similarly, in *Kompozit v. Republic of Moldova,* the emergency arbitrator held that 'the contracting parties to the Treaty are deemed to have agreed' to the emergency arbitrator rules, 'in the absence of an opt out agreement'.[913] Both emergency arbitrators thus found that the emergency arbitration rules introduced 12 years after the signature of the BIT were available to the investor-claimants. Similar reasoning has also been found to apply to the reference to the SCC-AI Arbitration Rules in the Energy Charter Treaty.[914] While there are doubts whether emergency arbitrator decisions are enforceable, they may nevertheless lead to voluntary compliance or, alternatively, the drawing of adverse inferences in subsequent arbitral proceedings. They may also be used as evidence in parallel court proceedings

Domestic legislation applicable to various aspects of arbitral procedure and its interpretation by state courts is directly relevant to the operation and strategic development of arbitral institutions other than ICSID. This also applies to the role of these institutions in mixed arbitration. Aware of this relevance of domestic courts, the SCC and SCC-AI have leveraged their role as the most prominent international arbitral institution in Sweden to influence the development of national legislation governing

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912 *Evrobalt LLC v The Republic of Moldova, Award on Emergency Measures dated 30 May 2016* [2016] SCC EA 2016, para 26.

913 *Kompozit LLC v Republic of Moldova, Emergency Award on Interim Measures dated 14 June 2016* [2016] SCC EA 2016/095, para 44.

914 *Mohammed Munshi v The State of Mongolia, Award on Emergency Measures dated 5 February 2018* [2018] SCC Emergency Arbitration 2018/007.

arbitration. Moreover, the organization has been able to exploit the liberal stance of Swedish procedural law to innovate new procedures that bind states. This is the case, notably, with the introduction of emergency arbitration rules and determining their retroactive application to advance state consent.

4.2.7. Connections with the ICC-ICA

The SCC and SCC-AI maintain staff and organizational connections with the International Chamber of Commerce. One notable link is the movement of high-level staff between the two organizations. For instance, Andrea Carlevaris, a member of the ICC International Court of Arbitration until 2017, subsequently joined the Board of the SCC-AI in January 2018.[915] Similarly, Robin Oldenstam, a member of the ICC International Court of Arbitration from 2015 to 2021, was appointed to the Board of the SCC-AI in 2022. He also continues to be a member of the Swedish National Committee of the ICC.[916]

Additionally, the Stockholm Chamber of Commerce is a part of the International Chamber of Commerce's World Chambers Federation.[917] As a federation member, the SCC participates in the election of the ICC Executive Board, which in turn nominates candidates for the presidency of the International Court of Arbitration.[918] The ICC's

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[915] Naomi Jeffreys, 'SCC Appoints New Board Members' (*Commercial Dispute Resolution*, 26 October 2017) <https://www.cdr-news.com/categories/people-and-firms/7693-scc-appoints-new-board-members> accessed 31 July 2023.

[916] Mannheimer Swartling, 'Robin Oldenstam' <www.mannheimerswartling.se/en/our-people/robin-oldenstam/> accessed 6 August 2023; ICC Sweden, 'Skiljedom' <https://bok.mobile.icc.se/kommitteer/skiljedom> accessed 31 July 2023.

[917] ICC, 'List of the World Chambers Federation Members' <https://iccwbo.org/wp-content/uploads/sites/3/2023/03/Final-list-of-Chambers-2.pdf> accessed 31 July 2023.

[918] ICC (n 438) art 6(1)(a).

Commission on Arbitration and Alternative Dispute Resolution has also invited the SCC-AI to 'submit analyses of awards showing how arbitrators have dealt with the allocation of costs under their respective rules'.[919] This submission was later included in an 'ICC Report on Decisions on Costs in International Arbitration'.[920]

Strong links also exist between the SCC, SCC-AI, and the ICC's Swedish National Committee of the ICC. This committee may also nominate candidates for arbitrators to the ICC-ICA.[921] It is unclear, to what extent information related to mixed arbitration cases flows freely between the two organizations. Such information could include the identity of arbitrator candidates or their parallel roles as counsel or expert in proceedings at the two institutions, perceived or actual conflicts of interest, or knowledge about the subject-matter and amounts in dispute of filed cases. Such information may be particularly relevant for those individuals affiliated with the two institutions that concurrently practice as lawyers. For example, both the CEO and President of the SCC's Board are also members of the Board of Directors of ICC Sweden.[922] Likewise, the current Secretary General of the SCC-AI is a member of ICC

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919 ICC Commission on Arbitration and ADR, 'ICC Commission Report: Decisions on Costs in International Arbitration, Offprint from ICC Dispute Resolution Bulleting 2015, Issue 2' (ICC 2015) 4 <https://iccwbo.org/wp-content/uploads/sites/3/2015/12/Decisions-on-Costs-in-International-Arbitration.pdf> accessed 31 July 2023.

920 ICC Commission on Arbitration and ADR (n 920) 4.

921 ICC Sweden, 'Möte, ICC Sveriges Kommitté Skiljedom, Torsdagen den 7 oktober, kl 16.30-18.30 Brunnsgatan 2, Stockholm (Meeting, ICC Sweden Arbitration Committee, Thursday, October 7, 16.30-18.30 Brunnsgatan 2, Stockholm)' <https://www.icc.se/wp-content/uploads/2021/10/Deltagare_Skiljedom_7-oktober-2021.pdf> accessed 31 July 2023; ICC Sweden, 'ICC Sweden 2015. Internationella Handelskammarens (ICC): Svenska Nationalkommitté', on file with the author, 21.

922 ICC Sweden, 'Överstyrelse' <www.icc.se/om-icc/styrelse-2/> accessed 31 July 2023.

Sweden's Committee on Arbitration and continues to participate in its meetings.[923] This inter-institutional dimension and its impact on institutional practices related to mixed arbitration provides a promising field for further research.

923 ICC Sweden, 'Möte, ICC Sveriges Kommitté Skiljedom, Torsdagen den 7 oktober, kl 16.30-18.30 Brunnsgatan 2, Stockholm (Meeting, ICC Sweden Arbitration Committee, Thursday, October 7, 16.30-18.30 Brunnsgatan 2, Stockholm)' (n 922).

4.3. Mixed arbitration at the SCC-AI today

Although smaller than its competitors considered in this thesis, the SCC-AI remains a significant player in the global market for mixed arbitration today. While it made its entry into the realm of treaty-based state consent in legal instruments spanning the Cold War divide, consent to SCC-AI is today present in many investment treaties. Particularly the multilateral ECT provides a powerful basis for SCC-AI arbitration in practice. The following provides an overview of the SCC-AI's institutional framework as relevant for mixed arbitration today, the diffusion of state consent, and the Institute's mixed arbitration caseload. The importance of Swedish law for arbitration at the SCC-AI is also briefly considered.

4.3.1. The institutional framework of the SCC-AI

The SCC-AI's institutional framework consists of a Board and a Secretariat, each with specific functions as outlined in the SCC-AI Arbitration Rules. According to the most recent version of these rules, the Board is appointed by the Board of Directors of the Stockholm Chamber of Commerce, and organization consisting of private-sector representatives.[924] The Board's role is broadly defined as taking 'decisions required of the SCC in administering disputes under the SCC Rules and any other rules or procedures agreed upon by the parties', including 'decisions on the jurisdiction of the SCC, determination of advance on costs, appointment of arbitrators, decisions upon

[924] '2023 SCC Arbitration Rules' (n 645) app I, art 3; SCC, 'Styrelse och fullmäktige, Stockholms handelskammare' <https://stockholmshandelskammare.se/om-oss/styrelse-och-fullmaktige> accessed 31 July 2023.

challenges to arbitrators, removal of arbitrators and the fixing of arbitration costs'.[925] This list is non-exhaustive and the Board can take other decisions as may be needed for administrative purposes or as agreed upon by the disputing parties.

The Secretariat of the SCC-AI handles most procedural aspects of mixed arbitral proceedings, especially before an arbitral tribunal has been constituted. Its responsibilities include appointing arbitrators, document management and correspondence, financial oversight of the proceedings, the setting of time limits for the submission of procedural documents, and interaction with arbitrators and arbitrator-nominees.[926] Although official statistics are not available, the SCC-AI is likely to have fewer staff than the other institutions considered in this thesis.[927] Several chairpersons of the SCC-AI have been senior Swedish lawyers and judges from Sweden's Supreme Court, indicating a close relationship with the country's judicial system. Compared to other private-sector institutions like the ICC-ICA, the SCC-AI appears to be less complex in its organizational structure, lacking subsidiary bodies or commissions. Public information does not clarify whether a standing committee exists for the revision of the SCC-AI Arbitration Rules. Some institutional officials suggest, however, that such revisions are usually carried out by *ad hoc* groups of experts and staff.[928]

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925 '2023 SCC Arbitration Rules' (n 645) app I, art 6.

926 See for instance ibid arts 4, 5, 7, 8, 9, 20.

927 The SCC-AI website mentions 14 officials working for the Secretariat, see SCC-AI, 'Contact Us' <https://sccarbitrationinstitute.se/en/about-scc/contact-us> accessed 31 July 2023.

928 Blom (n 872) 4.

4.3.2. The diffusion of consents

To intervene in mixed arbitration, whether as appointing authority or administering institution, the SCC-AI relies primarily on the diffusion of state consent to SCC-AI and UNCITRAL Rules in legal instruments, including treaties and public-private contracts. At least 107 BITs mention the SCC, including 'BITs concluded by the Russian Federation, other former Soviet Republics as well as Chinese first-generation BITs'.[929] This also includes treaties concluded by China with former Soviet republics, 'including Armenia, Belarus, Kazakhstan, Kyrgyzstan, Tajikistan and Ukraine'.[930] Of all BITs referring to the SCC, at least 70 remain in force as of the time of writing.[931] The diffusion of consent to SCC-AI arbitration in BITs is therefore lower than that of the ICC-ICA or the UNCITRAL Arbitration Rules.

At least 30 BITs referencing the Institute appear to have been negotiated based on a model treaty that refers to the SCC-AI (Table 2).[932] This includes BITs signed by BLEU, Mauritius, and Germany. Italy has also mentioned the SCC-AI in its model BITs of 2003, 2020, and 2021.[933] Starting from 1985, consent to arbitration pursuant to SCC-AI Rules was also frequently included in investment treaties of the Belgo-Luxemburg Economic Union (BLEU).

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929 Oldenstam (n 893) 121; some additional BITs only refer to the 'Stockholm Chamber' and were not counted here, see Alschner, Elsig and Polanco (n 455).

930 Oldenstam (n 893) 122.

931 This is the result of a keyword search on EDIT, see Alschner, Elsig and Polanco (n 455).

932 This number is based on information available on EDIT and assumes that all BITs concluded in or after the year a country has published a model treaty are based on that model treaty, see ibid.

933 This is the result of a keyword search on EDIT, see ibid.

State or country grouping with model BIT mentioning SCC-AI	Number of BITs mentioning SCC-AI, signed after publication of model BIT
Belgo-Luxembourg Economic Union	26
Mauritius	3
Germany	1

Table 2 - State or country grouping with model BIT mentioning SCC-AI

Other states with at least 10 BITs mentioning the SCC-AI are China (23), Russia (14), Poland (12), and Kuwait (10). Notably, neither the United States, the United Kingdom, nor the SCC-AI's home state Sweden, appear to have signed BITs referring to the institution, although other Scandinavian countries have.[934] Most BITs referring to the SCC-AI were signed between 1985 and 2000, with the earliest treaties concluded by China with France, Germany, Finland, and Norway in 1983 (Figure 6). The proliferation of treaties referring to the Institute appears to have peaked slightly earlier than in the case of the ICC-ICA. This might be linked to the Institute's prominent role in East-West disputes and geopolitical changes in 1989.

Moreover, as indicated above, arbitration pursuant to SCC-AI Rules is one available option in the plurilateral ECT. Sweden was among the original signatories of the ECT and remains a party at the time of writing. Today, the ECT is the investment treaty that has provided the legal basis for the highest number of treaty-based mixed

[934] Examples of Scandinavian BITs referring to the SCC-AI are China – Norway BIT (1984), China – Finland BIT (1984), China – Denmark BIT (1985), Finland – Russian Federation BIT (1989), and Denmark – Kuwait BIT (2001). This does not distinguish between mentions of the SCC-AI or its officials as appointing authorities and consent to the Institute's rules.

arbitrations (157 cases).[935] Article 26 of the treaty references the rules of the SCC-AI besides the ICSID, ICSID Additional Facility, and UNCITRAL Arbitration Rules. No other plurilateral investment treaty and no national investment law or code appear to refer to the Institute or its rules.

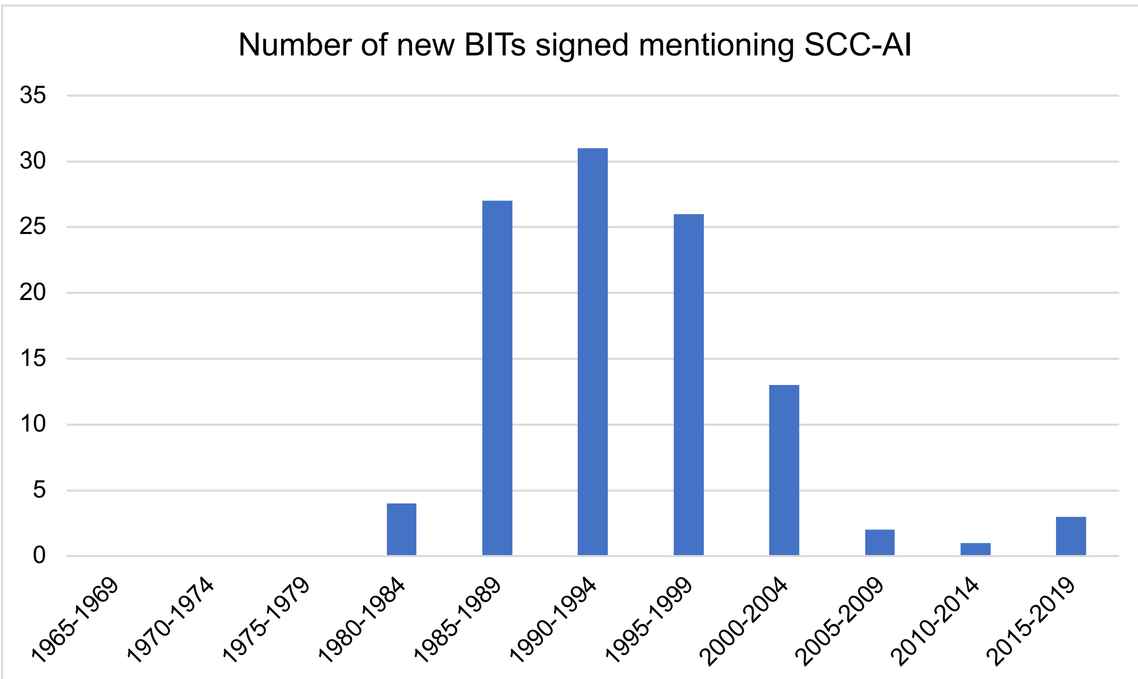

Figure 6 - Number of new BITs signed mentioning the SCC-AI in 5-year intervals

4.3.3. The mixed arbitration caseload of the SCC-AI

The SCC-AI does not publish detailed case statistics, but some insights can be gleaned from presentations, reports by its staff, and Swedish court documents. A notable segment of the SCC-AI's cases involves arbitration between private entities and states (or state entities). The Institute claims to be 'the second largest institute for

935 This is the result of a search conducted on 27 September 2023 on the UNCTAD (n 17).

investment disputes' trailing only ICSID, although the PCA likely administers more investment disputes under UNCITRAL Rules.[936] The SCC-AI may be involved in mixed arbitration under its own rules, UNCITRAL Rules, or other *ad hoc* rules. Such arbitrations may have the SCC-AI acting in roles ranging from a fall-back appointing authority to full case administration.

Based on publicly available information, the SCC-AI ranks third in administering treaty-based mixed arbitrations, following ICSID and the PCA.[937] It registered its first treaty-based arbitration in 1993. This case was filed 21 years after ICSID's first treaty-based case but three years before the first case at ICC-ICA and five years before the first case at the PCA.[938] In 1994, the SCC-AI was also the first institution to serve as an appointing authority in a treaty-based investment dispute pursuant to the UNCITRAL Arbitration Rules.[939]

As of 2021, the SCC-AI administered 90 mixed arbitrations under its own rules, 24 under UNCITRAL Rules, and five under other *ad hoc* rules.[940] Although these numbers are significantly lower than those of intergovernmental institutions like ICSID and the PCA, they are more than twice the number of treaty-based cases in which the ICC-ICA has been involved. Notably, 32 cases at the Institute were based on the ECT (Figure

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[936] SCC-AI, 'Investment Disputes' <https://sccarbitrationinstitute.se/en/our-services/investment-disputes> accessed 31 July 2023.

[937] See SCC-AI (n 730); ICSID, 'ICSID Statistics 2023-1' (n 674); PCA, 'Cases' <https://pca-cpa.org/cases/> accessed 31 July 2023.

[938] This excludes the Iran-US Claims Tribunal, where the PCA served as registry since 19 January 1981, and which also involved claims by private individuals against a state or state entities.

[939] *Saar Papier Vertriebs GmbH v Poland (I)* UNCITRAL; this excludes the Iran-US Claims Tribunal.

[940] Coello Herzberg (n 885) 25.

7).[941] There are no separate statistics for contract- and law-based arbitrations involving states (or state entities) at the SCC-AI, but the Institute has made significant efforts to promote its arbitration services for the use in public-private contracts.

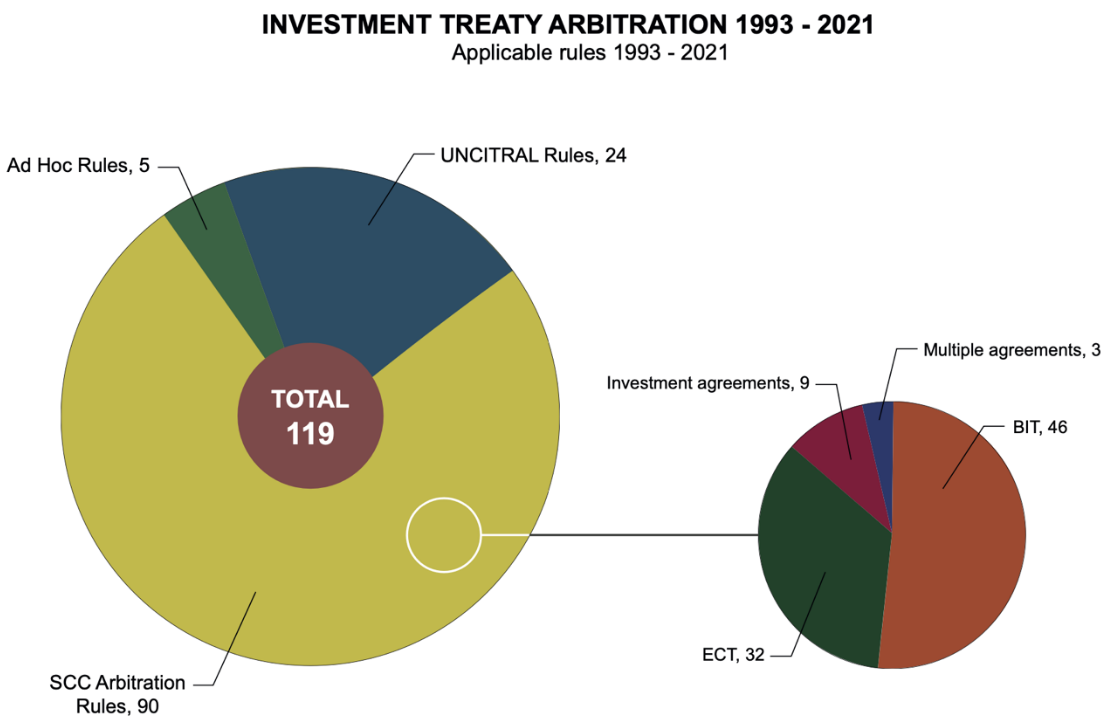

Figure 7 - Investment treaty arbitration at the SCC-AI

The role of Swedish law in mixed arbitration at the SCC-AI

In non-ICSID mixed arbitration, a seat of the arbitration is usually designated. The courts of the seat will have supervisory jurisdiction over the arbitration and typically consider requests for interim measures.[942] Stockholm appears to be the most frequently

941 ibid.
942 Dahlquist (n 99) 84.

chosen seat in SCC-AI arbitration, making Swedish law the governing law for the arbitration agreement and procedural aspects (*lex loci arbitri*) in most cases (Figure 8).

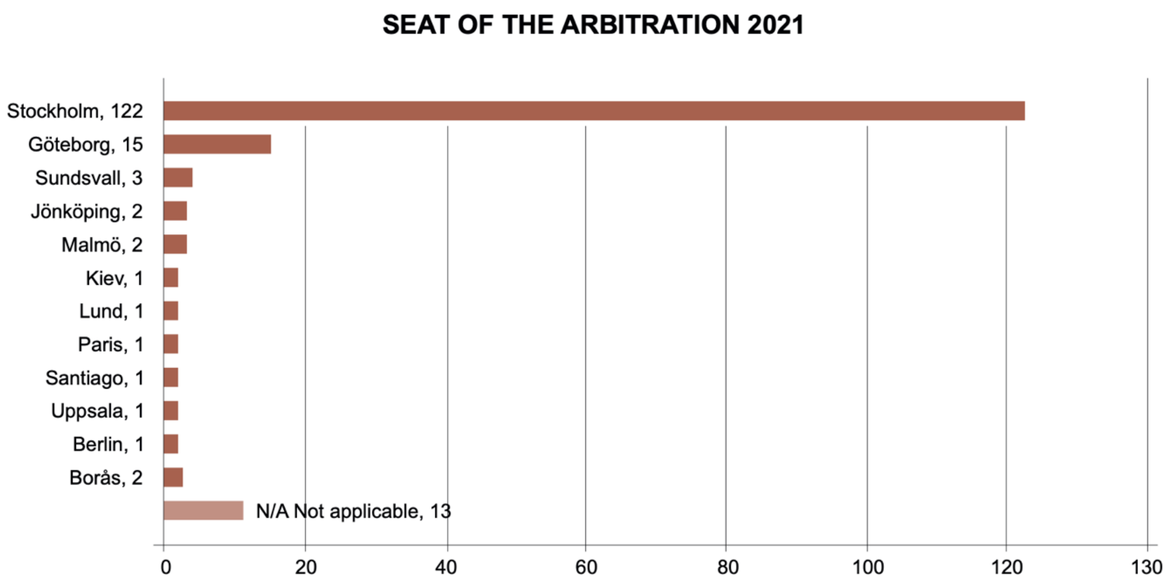

Figure 8 - Choice of the seat in arbitrations administered by the SCC-AI

The 2019 revised version of the Swedish Arbitration Act underscores Sweden's hands-off approach to international arbitration. It places a strong emphasis on party autonomy, even in cases involving states. Rather than adopting the UNCITRAL Model Law, the Swedish Act furthers the disputing parties' freedom to set their own the procedural rules. It has minimal requirements for a valid arbitration agreement,[943] and fully embraces the principle of *Kompetenz-Kompetenz.*[944] The Act even allows parties to waive their right to challenge an arbitral award, a feature that is rare in national arbitration laws.[945]

943 Swedish Arbitration Act 2019 (SFS 1999:116, updated as per SFS 2018:1954), ss 1-6.

944 ibid s 2.

945 ibid s 34.

Although of secondary importance for the SCC-AI, Swedish law may also govern enforcement proceedings.[946] Awards of tribunals at the SCC-AI are typically internationally enforceable on the basis of the 1958 New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards. However, if such awards are rendered in Sweden, as is the case in the majority of SCC-AI proceedings, and if enforcement is sought in Sweden, they are considered to be domestic awards for the purpose of the 1981 Swedish Enforcement Code.[947] This applies to all such arbitral awards, whether rendered in mixed or private arbitrations. Enforcement pursuant to the 1981 Code, does not usually require prior *exequatur* proceedings.[948] Swedish awards rendered in SCC-AI arbitration are thus immediately enforceable.

Enforcement in Sweden is further streamlined by a specialized authority, the *Kronofogdemyndigheten* ('enforcement authority'), which handles cases like debt collection, evictions, and repossessions.[949] Sweden has also signed and ratified the UN Convention on Jurisdictional Immunities of States and Their Properties.[950] Although not yet in force, this Convention allows for the enforcement of arbitral awards against a broad range of state assets. This includes foreign state property that is used, or intended to be used, for any purposes except governmental, non-commercial

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946 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (n 274) art III; For the application of the New York Convention in Sweden, see Swedish Arbitration Act 2019 (SFS 1999:116, updated as per SFS 2018:1954) s 54.

947 Swedish Enforcement Code 1981 (SFS 1981:774) s 3; Oldenstam (n 893) 114.

948 Swedish Enforcement Code 1981 (SFS 1981:774) s 18.

949 Oldenstam (n 893) 129; Krister Azelius, Lotta Knapp Lönroth and Mathilda Kronqvist, *Enforcement of Judgments 2022* (Chambers Global Practice Guides 2022) 3 <www.vinge.se/media/jyljdkkh/enforcement-of-judgments-2022-chapter-036_sweden.pdf> accessed 31 July 2023.

950 'UN Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004)' UNGA Res A/59/38.

purposes.[951] Swedish courts have upheld this approach, enforcing awards against not just commercial state assets but also non-commercial governmental property, even where the state in question had not waived its immunity in respect of this property.[952] As a result, the enforceability of SCC-AI awards in Sweden is robust, comparable to the self-contained enforcement mechanism in the ICSID Convention.

951 ibid art 19.

952 *NJA 2011 s 475, Högsta domstolen, mål nr Ö 170-10, 1 juli, 2011 (The Russian Federation v Franz J Sedelmayer, Swedish Supreme Court)*.

4.4. Chapter conclusion

Founded in 1917, the SCC-AI has become a key player in the market for mixed arbitration. More than the other institutions considered in this thesis, it appears to have benefitted from the foreign policy neutrality of its host state Sweden. It is possible that this has also prevented the Institute from engaging in geographic expansion comparable to that of the PCA or ICC-ICA. Although one of the oldest international arbitral institutions, the SCC-AI did not enter the mixed arbitration market until the 1970s. Despite this late entry, it successfully navigated barriers to entry by specializing in East-West disputes, which were largely untapped by competitors. These disputes were necessarily mixed, due to the collectivist nature of trade participants in socialist countries. While Western institutions like the ICC-ICA and ICSID were often politically unacceptable to these countries, the SCC-AI, supported by Sweden’s foreign policy neutrality as well as the diplomatic efforts of its leadership and affiliated experts, became a go-to forum for such disputes over time.

Other institutions and intergovernmental fora had attempted to enter the East-West arbitration market. Yet, the SCC-AI was a particularly successful pioneer of institutionalised mixed arbitration across the East-West divide. Throughout the 1970s and 80s, it quickly gained prominence and references to its rules or services were increasingly diffused through public-private contracts. This emerging contract-based practice likely gained salience in state administrations, particularly among treaty negotiators considering alternative fora in negotiations with non-ICSID countries. This information transfer paved the way for a greater role of the Institute in the growing investment treaty regime. Today, the SCC-AI enjoys a robust presence throughout the

BIT network that is no longer limited to the East-West context. It has also significantly benefitted from the reference to its rules in the ECT, leading to some instances of collaboration with the Energy Charter Secretariat.

Leveraging its strong market position and robust diffusion through treaties and public-private contracts, the SCC-AI has introduced innovative procedural rules, such as emergency arbitration, that retroactively bind states. Similar to the ICC-ICA, it has generated substantial revenue for the arbitration industry, though benefits seem to be more regionally focused on Sweden. The SCC-AI has also used its market clout to lobby the Swedish government, successfully influencing certain aspects of Swedish arbitration law.

However, the SCC-AI's future in mixed arbitration is not without challenges. The uncertain fate of the ECT, several contracting parties of which have recently announced withdrawals from the treaty, as well as shifting geopolitical landscapes since the end of the Cold War, could threaten the Institute's long-term prospect.[953] With several states joining ICSID after 1989, incentives to refer to alternative *fora* such as the SCC-AI may have been weakened. Yet, some recent national model treaties continue to refer to the Institute. Such considerations notwithstanding, the entrenched nature of existing investment treaties likely implies that these treaties will continue to provide claimants with a consent basis for mixed arbitration at the SCC-AI for the foreseeable future.

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953 France, Germany and Poland have formally notified a withdrawal to the depositary of the ECT, see Energy Charter, 'Written Notifications of Withdrawal from the Energy Charter Treaty' <www.energycharter.org/media/news/article/written-notifications-of-withdrawal-from-the-energy-charter-treaty/> accessed 30 September 2023.

Chapter Five

The Permanent Court of Arbitration

[I]t must be realized that in most cases it will not be a matter of simple private individuals wishing to initiate an arbitration procedure with a foreign State, but of large companies having obtained concessions or having concluded contracts with States (...). For these large enterprises and companies, the institution of arbitration proceedings against a foreign State does not offer insurmountable difficulties.[954]

J. P. A. François, Secretary General of the PCA (1955)

5.1. Introduction

The Permanent Court of Arbitration ('PCA') is an intergovernmental organization established in 1899 by the Convention for the Pacific Settlement of International Disputes ('1899 Convention') signed in The Hague. This Convention was later amended by a second convention in 1907 ('1907 Convention'). Initially designed to facilitate inter-state arbitration, the PCA has evolved into a significant player in the oligopoly of mixed

[954] Jean François, 'La Cour permanente d'arbitrage, son origine, sa jurisprudence, son avenir' (1955) 87 Recueil des Cours de l'Académie de Droit International 457, 544, translated by the author, original: '*Toutefois il faut réaliser qu'il ne s'agira pas dans la plupart des cas de simples personnes privées, désirant entamer une procédure arbitrale avec un État étranger, mais de grandes entreprises ayant obtenu des concessions, ou ayant conclu des contrats avec les États, dont l'exécution donne lieu à des divergences de vues. Pour ces grandes entreprises et compagnies l'institution d'une procédure arbitrale contre un État étranger n'offre point des difficultés insurmontables*'.

arbitration.[955] It is the oldest institution examined in this project and administered its first mixed arbitration in 1934. However, the institution saw minimal activity between 1940 and 1988, primarily due to the emergence of the intergovernmental competitors, the Permanent Court of International Justice ('PCIJ') and the International Court of Justice ('ICJ').[956]

Today, the PCA ranks second only to ICSID in administering treaty-based mixed arbitrations.[957] Once a 'youthful dinosaur that came back from near extinction',[958] its resurgence is largely due to its role in arbitration opposing states and private entities.[959] The institution's history can be divided into three phases, an initial period focused on inter-state disputes, a decade-long hiatus, and a revival starting in the 1990s, spurred in part by developments in the 1970s and 1980s.[960] Today, the PCA is firmly established in the institutional oligopoly of mixed arbitration. Tjaco van den Hout, then the PCA Secretary General, noted in 2007 that the PCA is 'uniquely poised at the intersection of

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955 Shabtai Rosenne, *The Hague Peace Conferences of 1899 and 1907 and International Arbitration: Reports and Documents* (TMC Asser Press 2011), viii.

956 PCA, *Annual Report 1992*, 49; Manuel Indlekofer, *International Arbitration and the Permanent Court of Arbitration* (Kluwer Law International 2013), 4, 5, and 233.

957 Considering the number of mixed arbitrations administered by ICSID and the PCA as indicated in ICSID, 'ICSID Statistics 2023-1' (n 674); PCA, 'Cases' (n 938).

958 Philippe Sands, 'The Permanent Court of Arbitration: Remarks of Professor Philippe Sands QC, University College London and Matrix Chambers' (2007) 6 <https://docs.pca-cpa.org/2016/01/Reflections-on-the-Current-Relevance-of-the-PCA-Presentation-by-Professor-Philippe-Sands-QC.pdf> accessed 31 July 2023.

959 Considering the number of mixed arbitrations as opposed to state-state and other proceedings conducted at the PCA, see PCA, 'Cases' (n 938).

960 Some observers also speak of two eras (see Tjaco Van den Hout, 'Resolution of International Disputes: The Role of the Permanent Court of Arbitration - Reflections on the Centenary of the 1907 Convention for the Pacific Settlement of International Disputes' [2008] 21 Leiden Journal of International Law 643, 660). In the context of mixed arbitration, the period of hibernation was, however, not devoid of developments that had a profound impact on the institution at a later stage. It is therefore submitted that a more useful categorisation is threefold.

public international law at its most traditional, and private international law at its most progressive'.[961]

Compared to other institutions like ICSID, the ICC-ICA, and the SCC-AI, the PCA's unique feature is its flexibility. It may act as a designating or appointing authority in mixed arbitrations and offer additional administrative and registry services under either its own rules or, far more often, under the UNCITRAL Arbitration Rules.[962] The *ad hoc* character of the UNCITRAL Rules creates a certain remoteness of the institution from the legal instrument containing state consent. This is related to the fact that the PCA is often designated as the administering institution in UNCITRAL proceedings only after a dispute has arisen. Unlike other institutions, the PCA does not heavily rely on explicit references to it in legal instruments, such as BITs, public-private contracts, or national investment laws. Instead, it simply benefits from its privileged link to the UNCITRAL Arbitration Rules. The following will examine the PCA's trajectory from an institution primarily focussed on inter-state disputes to one of the leading players in mixed arbitration.

961 Rosenne (n 956) viii.

962 PCA, 'Cases' (n 938).

5.2. The PCA: a dinosaur on steroids

The PCA was established in a particular historical context shaped by a range of factors. These factors included the growing importance of international arbitration, particularly in the 19th century, the rise of the intellectual peace movement in the years prior to the negotiation of the Hague Conventions, and the establishment of several 'learned societies' advocating for the use of international arbitration and a greater codification of international law.[963] In this particular context, establishing a permanent organization to facilitate inter-state arbitration was considered a procedural necessity and a diplomatically viable compromise.[964] On the one hand, the PCA was conceived as an institution to address the limitations of *ad hoc* forms of inter-state arbitration, prevalent in the 19th century. On the other hand, its creation indirectly benefitted from the fact that, at the time the PCA's founding Conventions were negotiated, states remained reluctant to subject to the binding jurisdiction of an international court. The PCA was thus vested with a mandate offering 'the right mixture between permanence and flexibility'.[965]

The Conventions also sought to create a multilateral framework for the *peaceful* resolution of international disputes, offering an alternative to gunboat diplomacy or outright war. Linked to this objective, the Conventions clearly focussed on inter-state disputes, stating that 'international arbitration has for its object the settlement of

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963 Indlekofer (n 957) 35-42.

964 ibid 56-57.

965 Rosenne (n 956) vii.

differences between States'.[966] The contracting parties of the Conventions placed high hopes in arbitration, describing it as 'the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle'.[967]

The 1899 Convention was also one of the first instances of a multilateral codification of the practice of states to submit future disputes to arbitration, while carefully emphasizing its voluntary character.[968] Instead of creating a binding enforcement mechanism, states undertook to voluntarily comply with arbitral awards.[969] Article 20 of the same Convention went on to formally establish the PCA:

> With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Signatory Powers undertake to organize a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the Rules of Procedure inserted in the present Convention.[970]

The PCA was vested with a broad mandate that states could use flexibly. It was stated to be 'competent for all arbitration cases',[971] and its International Bureau was 'authorized to place its premises and its staff at the proposal of the Signatory Powers for the operations of any special Board of Arbitration'.[972]

According to Article 26 of the Convention, the 'jurisdiction of the Permanent Court may, within the conditions laid down in the Regulations, *be extended to disputes*

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[966] Convention for the Pacific Settlement of International Disputes (adopted 29 July 1899, entered into force 5 September 1900) (1907) 1 American Journal of International Law 103, art 15.

[967] ibid art 16.

[968] ibid arts 17 and 19.

[969] ibid art 18.

[970] ibid art 20.

[971] ibid art 21.

[972] ibid art 26.

between non-Signatory Powers, or between Signatory Powers and non-Signatory Powers, if the parties are agreed on recourse to this Tribunal'.[973] Decades later, this provision was to become the basis for the broad interpretation of the PCA's mandate required for the administration of mixed arbitrations. Referring to the article, Howard Holtzmann later observed that with 'admirable foresight, the drafters of the 1899 Convention included an article that makes it clear that the International Bureau is not limited to assisting in treaty disputes between States conducted under the PCA rules but is also authorized to facilitate the administration of other arbitral proceedings'.[974] Although the 1899 Convention included optional procedural rules, these apparently never applied to mixed arbitrations.[975]

States required a neutral case administrator but remained unwilling to 'submit to the jurisdiction of a court outside their territorial limits'.[976] In response to this, the PCA was created as a flexible and 'moderate, sovereignty-preserving forum for dispute settlement'.[977] The voluntary character of the new mechanism did not represent a failure of the Conventions. On the contrary, the creation of the PCA was a significant accomplishment for those seeking a formalized forum and an opportunity to lock-in general state support for international arbitration. Despite its flexible mandate born from diplomatic compromise, the PCA marked 'the beginning of the institutionalization of

973 ibid (emphasis added).

974 'ICCA-Permanent Court of Arbitration Mutual Cooperation Agreement Between Permanent Court of Arbitration at the Hague and International Council for Commercial Arbitration, 1989 [2011] (with Introduction by HM Holtzmann)' Holtzmann Archive Box 5 Folder 10, 1-2.

975 This is the result of a search on the PCA case database, see PCA, 'Cases' (n 938).

976 Rosenne (n 956) vii.

977 Indlekofer (n 957) 31.

arbitration',[978] which would profoundly impact the landscape of mixed arbitration emerging decades later.

States' unwillingness to submit to compulsory jurisdiction persisted and attempts to endow the PCA with such jurisdiction in the second Hague Convention of 1907 were unsuccessful. Instead, the focus of the two Conventions remained on establishing a permanent organization.[979] Importantly, however, the second Convention retained the PCA's flexible mandate and introduced a new provision that the Court's 'jurisdiction' could be extended to disputes between 'Signatory and non-Signatory Powers'.[980]

Between 1899 and 1922, the PCA served as the administrator of most inter-state arbitrations, standing as the sole multilateral body with such a function. During these early years, 'the PCA thrived while it had no rivals'.[981] No international court with compulsory jurisdiction had been created. Many of these early inter-state cases involved allegations of state interference with private property. Despite the fact that they were formally conducted between sovereign states, they were sometimes initiated by private parties seeking diplomatic protection.[982] The 19 inter-state cases the PCA administered in its first three decades of operation were thus already a testing ground,

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978 ibid 33.

979 Van den Hout (n 961) 645-46.

980 1907 Convention for the Pacific Settlement of International Disputes (adopted 18 October 1907, entered into force 26 January 1910) (1908) 2 American Journal of International Law 43, art 47.

981 Cesare Romano, Karen Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2013), 120.

982 See for instance 'Award in the Matter of the "French Claims Against Peru" by the Arbitral Tribunal at the Hague' (1922) 16 The American journal of international law 480; *Norwegian Shipowner's Claims (Norway v USA)* (1922) I UN Reports of International Arbitral Awards 307; *The Pious Fund of the Californias (The United States of America v The United Mexican States)* (1902) IX UN Reports of International Arbitral Awards 1; *The Orinoco Steamship Company Case (United States, Venezuela)* XI UN Reports of International Arbitral Awards 227; *Affaire du Carthage (France, Italie)* (1913) XI UN Reports of International Arbitral Awards 449; *Affaire du Manouba (France, Italie)* (1913) XI UN Reports of International Arbitral Awards 463.

familiarising the organization's staff and other individuals involved in the proceedings with the resolution of international disputes related to private property.[983]

However, this growing role of the PCA came to an abrupt halt after states shifted their policy concerning the adjudication of international disputes in the wake of the First World War. By 1922, states had become willing to submit their disputes to a standing international jurisdiction. This led to the creation of the Permanent Court of International Justice ('PCIJ'), which was to become a significant competitor for the PCA, contributing to the decline of the PCA's caseload.[984] Unlike the PCA, the PCIJ, and its successor, the International Court of Justice, were mandated to directly adjudicate disputes.[985] In addition, instead of relying on voluntary state compliance, the PCIJ had the support of the League of Nations for the enforcement of its judgments.[986] This approach offered several advantages, such as more efficient proceedings, more consistent outcomes, greater impartiality and appearance of impartiality by relying on tenured judges, binding decisions that did not require separate enforcement, and better resource allocation.

The arrival of this formidable competitor had a profound impact on the PCA. As Romano observes, like 'Sleeping Beauty sidelined by the arrival of the step-mother, the International Bureau, the PCA secretariat, was rapidly confined to a few rooms of the [Peace] palace and staffed with skeleton personnel to oversee a few minor cases'.[987] Over subsequent decades, the institution's leadership faced pressure to justify

983 PCA, 'Cases' (n 938).

984 Gleider Hernández, *The International Court of Justice and the Judicial Function* (OUP 2014), 20-22.

985 Indlekofer (n 957) 4-5.

986 Cesare Romano, 'Trial and Error in International Judicialization' in Cesare Romano, Karen Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2013), 112.

987 ibid.

continued operations due to this lack of activity. Comparable to ICSID's brief period of inactivity, which prompted Aron Broches to promote the Additional Facility, the PCA's dormant years were a key factor in its efforts to construe its mandate broadly to include arbitration between private entities and states.[988]

5.2.1. Radio Corporation of America v. China

In this context of dwindling activity, the institution received its first request in 1934 to administer an arbitration initiated by a private sector entity – the Radio Corporation of America against the government of the Republic of China.[989] The dispute centred on a direct contract between the private claimant and China concerning the operation of radio telegraphic equipment. The claimant argued that China had breached the contract by engaging with a different operator and initiated arbitration based on a clause contained in the contract.[990] For 12 years since 1922, the PCA had only received three requests for arbitration and its leadership was likely desperate to attract new cases. Yet, due to the fact that the claimant was a private company, accepting the request was not straightforward for the PCA's International Bureau.

The arbitral tribunal in the case had already been constituted independently from the PCA and prior to the request for case administration. The tribunal's president, J. A. van Hamel, subsequently inquired whether the PCA's International Bureau would be willing to lend the tribunal its premises and administer the proceedings. When

[988] Indlekofer (n 957) 103.

[989] PCA, *Rapport du Conseil administratif de la Cour permanente d'arbitrage sur les travaux de la Cour, sur le fonctionnement des services administratifs et sur les dépenses pendant l'exercice 1934*, 7-8.

[990] *Radio Corporation of America v China, Award* [1935] PCA Case No 1934-01 3.

contacting the International Bureau, van Hamel may have been aware of the ICC-ICA's existing practice of administering mixed arbitrations, since he had represented the League of Nations at the ICA's inauguration in 1923. As indicated above, ICC founding President Étienne Clémentel reassured him at the inaugural event that the ICA was not intended to compete with institutions like the PCA.[991] However, van Hamel, who had been working for the League since 1919, had doubts about a business-driven facilitation of mixed arbitration.[992] It is therefore reasonable to assume that he preferred mixed arbitration to be administered by an intergovernmental organization instead, and that this may have motivated his decision to request registry support from the PCA.

In his request, van Hamel argued that the PCA's mandate covered the administration of mixed arbitrations, basing this view on Article 47 of the 1907 Convention.[993] In reply, the PCA's Secretary General expressed a general willingness to provide the requested services. Yet, to ascertain state support for such a broad construction of the mandate, he sought a formal clarification of the correct interpretation of the Conventions from the Administrative Council, the PCA's governing body.[994] Ultimately, the Council decided that the PCA's original mandate covered arbitration between a state and a private entity. In its 1934 annual report, it explained this interpretation in relation to van Hamel's request:

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991 Schinazi (n 99) 118.

992 Cornelis Roelofsen, 'Hamel, Joost Adriaan van (1880-1964)' (*Huygens Institut, Biografisch Woordenboek van Nederland*) <https://resources.huygens.knaw.nl/bwn1880-2000/lemmata/bwn1/hamelja> accessed 31 July 2023; Letter from Joost van Hamel to the Secretary-General (n 160).

993 PCA, *Rapport du Conseil administratif de la Cour permanente d'arbitrage sur les travaux de la Cour, sur le fonctionnement des services administratifs et sur les dépenses pendant l'exercice 1934* (n 990) 7-8.

994 François (n 955) 542.

> Although only one of the parties to the case is a State, the Bureau concluded that it could accept their request, considering that if it is true that, generally speaking, international arbitration should be understood as a jurisdiction between two or more States, the drafting of [Article 47] does not imply that special boards of arbitration, as to which a broader interpretation tends to appear, are so conditioned.[995]

This decision had far-reaching implications for the PCA, formally legitimizing the organization's ability to administer mixed arbitrations. It is possible that the Council saw the advent of such cases as a way to reinvigorate the institution's activity. The Council decision marked the first time a private claimant had gained access to a multilateral, intergovernmental arbitral institution for the purpose of case administration. Following the Council decision, the International Bureau of the PCA indeed served as the registry in the *Radio Corporation* case, which concluded with an award rejecting the claimant's requests. In a 1935 letter, van Hamel 'sincerely thanked and cordially appreciated' the International Bureau's services.[996]

The expanded mandate of the PCA also caught the attention of commercial arbitration players, and the institution's International Bureau likely welcomed the case as a break from its prolonged period of inactivity. In 1939, the American Arbitration Association sought permission from the PCA Secretary General to inform the public that

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[995] PCA, *Rapport du Conseil administratif de la Cour permanente d'arbitrage sur les travaux de la Cour, sur le fonctionnement des services administratifs et sur les dépenses pendant l'exercice 1934* (n 990) 7, translated by the author, original: '*Bien qu'une des parties seulement dans ce litige soit un État, le Bureau a cru pouvoir acceuillir leur demande, considérant que s'il est vrai que, d'une manière générale, l'arbitrage international doive s'entendre comme juridiction entre deux ou plusieurs États, le libellé de l'article précité n'implique n'implique pas que les juridictions spéciales d'arbitrage, ou une interpretation plus extensive tend à se faire jour, soient ainsi conditionnées*'.

[996] Judith Levine, 'Investor-State and Other "Mixed Disputes" at the PCA' 3 <https://docs.pca-cpa.org/2016/01/Investor-State-and-other-Mixed-Arbitrations-at-the-PCA-by-Judith-Levine.pdf> accessed 31 July 2023.

the PCA was now willing to administering mixed arbitrations.[997] The subsequent confirmation by the Secretary General of a broad mandate led to an early example of inter-institutional collaboration. The Secretary General not only granted the AAA's request but also suggested that the AAA recommend to its constituents a model clause, approved by the PCA International Bureau, for inclusion in contracts with foreign states.[998] Three years after introducing the ICA-AAA optional clause, the AAA had thus gained the support of another institution – this time one with intergovernmental backing. From the perspective of the AAA, this optional clause offered businesses with an alternative forum to file arbitration cases at an intergovernmental organization, an option that may have appeared to be more acceptable to states. However, while *Radio Corporation* established the PCA's mandate to administer mixed arbitrations, it did not extend this mandate to include commercial arbitration between private parties. In practice, the case thus served as a filter for disputes admitted to the PCA, accommodating high-value mixed arbitrations but excluding private commercial cases.

Despite these developments, the PCA-AAA optional clause met with limited success and *Radio Corporation* remained an isolated incident for several decades. Between 1934 and 1988, the PCA intervened in just one other mixed arbitration – the 1969 contract-based case of *Sudan v. Turriff Construction (Sudan) Limited.*[999] According to Paulsson, 'the PCA's Member States simply forgot about the institution

[997] François (n 955) 542.

[998] Jean François, 'Note sur le fonctionnement de la Cour permanente d'arbitrage présentée en mars 1960 par le Secrétaire général de la Cour, M. François' (1959) T XVI Annuaire Suisse de Droit international, 289-90.

[999] This excludes the role of the International Bureau as a registry and secretariat for the Iran-US Claims Tribunal.

they had created and its potential'.[1000] The effect of this decade-long lack of cases on the PCA will be more closely examined in the following section.

5.2.2. The long hibernation and premeditating mixed arbitration at the PCA

The absence of cases had a profound impact on the organization. Yet, this long period of hibernation was not devoid of events relevant for the development of mixed arbitration at the PCA, even if some of these events were only indirectly linked to the organization or its leading staff. Similar to the experience of other arbitral institutions, the advent of the Second World War likely impeded a further dissemination of information about the PCA's willingness to administer mixed arbitrations. The Hague was under German occupation between 1940 and 1945, and unlike the ICC's International Court of Arbitration, the organization did not move its offices abroad.

However, interest in mixed arbitration at the PCA resurfaced swiftly after 1945, even if some arbitration experts did not yet fully grasp the potential of the Administrative Council decision in the *Radio Corporation* case. This interest is illustrated well by the discussion at the 1946 Paris conference hosted by the ICC. The Swedish Supreme Court Judge, Algot Bagge, President of the ICA since 1939, was aware of the PCA-AAA optional clause at the conference. Yet, he considered the PCA's mandate to be limited to inter-state disputes.[1001] Bearing in mind the increasing number of public-private contracts requiring international dispute resolution, Bagge submitted that it would be

[1000] Jan Paulsson, 'Confronting Global Challenges: From Gunboat Diplomacy to Investor-State Arbitration' (2013) 2 <https://docs.pca-cpa.org/2016/01/Confronting-Global-Challenges_-From-Gunboat-Diplomacy-to-Investor-State-Arbitration-by-Jan-Paulsson.pdf> accessed 31 July 2023.

[1001] ICC, 'Conférence sur l'arbitrage commercial international : Compte rendu des séances destiné aux membres de la conférence' (n 150) 6-7.

‘extremely useful to have an arbitration court, such as the PCA, created by the states themselves by the provisions of an international convention’.[1002]

Similarly, Frances Kellor, co-founder of the AAA, and Martin Domke, a leading international arbitration expert, called for a revision of the Hague Conventions at the 1946 conference.[1003] Like Bagge, they believed that such a revision was necessary to enable the PCA to administer mixed arbitrations arising from commercial contracts.[1004] When Kellor inquired of the Soviet delegate, Ramsaizev, as to why he opposed consolidating mixed arbitration within a single international institution, Ramsaizev responded that the PCA’s mandate was limited to inter-state disputes.[1005] He posited that any modification of this mandate would require a new international treaty.[1006] Several arbitration experts present at the conference thus appeared to mistakenly consider an amendment of the Hague Conventions a necessary precondition for the PCA to administer mixed arbitrations.

However this view was not unanimous. Pieter Sanders, for instance, knew about the PCA’s expanded mandate and by 1948, he had developed a preference for mixed arbitration to be hosted at the Hague Court. In a speech at the 2nd international conference of the International Bar Association in July 1948, he noted that many of the

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1002 ibid 7, translated by the author, original: ‘[*I*]*l serait extrêmement utile d’avoir une Cour d’Arbitrage créée par les États eux-mêmes aux termes d’une convention internationale, comme la Cour Permanent d’Arbitrage de La Haye*’; Bagge later became the Swedish appointee to the PCA list of members, see International Bureau of the PCA, ‘Communication of the International Bureau of the PCA, The Hague 18 May 1953, MC No 8515’ GFA B 141/42398.

1003 ICC, ‘Conférence sur l’arbitrage commercial international : Compte rendu des séances destiné aux membres de la conférence’ (n 150) 7.

1004 ibid 6-7.

1005 ibid 29.

1006 ibid.

PCA's inter-state cases already involved claims from private entities.[1007] For Sanders, *Radio Corporation* could not 'be taken as a usual case for the Court', but there was 'a possibility for further developments'.[1008] He went on to 'suggest that the activities of the Permanent Court of Arbitration should be extended to claims of individuals against a foreign State, if both the State and the State of the individual agree'.[1009]

Sanders, who co-founded the Netherlands Arbitration Institute in 1949 and was interested in promoting the country's role in international arbitration, continued to advocate in favour of making the PCA's services more widely available in mixed arbitrations.[1010] He recognized, however, that the procedural rules in the existing Hague Conventions were ill-suited for such cases. In a 1952 article he observed that

> it would not be sufficient simply to refer to the rules of arbitration laid down in the Convention, since the latter is too much permeated with the original intention of providing for arbitration between two states. If the Administrative Council were to decide to make the facilities of the Permanent Court of Arbitration available also for arbitration between a State and a private enterprise, special rules would at the same time have to be drafted which would be applicable in such cases. These rules would have to make provision for the appointment of the arbitrators and the further procedure in a manner suitable for arbitration proceedings of this kind.[1011]

1007 Pieter Sanders, 'Speech Entitled, "The Future of the Permanent Court of Arbitration" Delivered at the 2nd International Conference of the International Bar Association, July 1948' 2 <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/025.pdf> accessed 31 July 2023.

1008 ibid 2.

1009 ibid. This quote also suggests that in addition to the scope of the PCA's mandate, Sanders also anticipated the possibility that consent to mixed arbitration could be granted in a treaty.

1010 Netherlands Arbitration Institute, 'Netherlands Arbitration Institute' <www.nai-nl.org/en/> accessed 31 July 2023; Sanders, 'De toekomst van het Permanente Hof van Arbitrage (The future of the PCA)' (n 321).

1011 Pieter Sanders, 'Het Permanente Hof van Arbitrage (The Permanent Court of Arbitration, English translation by ICCA)' (1962) 497 Arbitrale Rechtspraak 129, 1.

In 1953, the ICC-ICA followed Sanders' suggestion, recommending in its resolutions that the PCA adapt its facilities to accommodate mixed arbitrations.[1012]

In the same year, J. P. A. François was unanimously elected as the Secretary General of the PCA by the Administrative Council, following his nomination by the Dutch government.[1013] The number of delegates involved in the election is not known. François, a Dutch jurist and seasoned diplomat, had served as a legal counsel in the Dutch Foreign Ministry since 1928 and had represented the Netherlands at the Assembly of the League of Nations.[1014] Upon assuming his new role, he entered an organization that had been largely inactive for more than a decade. The last case to be concluded at the PCA was an inter-state dispute that ended with a final award 12 years earlier, in 1940.[1015]

Interest and support by states for the PCA also appeared to be waning, and it is likely that the institution lacked salience in the administrations of its state members. In 1955, the President of the PCA Administrative Council lamented that several states were not honouring their financial commitments to the budget of the organization. He even decried an uncertainty regarding which states still considered themselves bound by the Conventions, in light of progressing decolonization and independence.[1016] Facing

1012 ICC, *Resolutions Adopted by the XIVth Congress of the ICC, Vienna, 18th - 23rd May 1953* (n 296) 91.

1013 Letter to the Federal Minister of Justice: Ständiger Schiedshof im Haag (Permanent Court of Arbitration in the Hague), Bonn (22 December 1953) GFA B 141/42398.

1014 Cornelis Roelofsen, 'François, Jean Pierre Adrien (1889-1978)' (*Huygens Institut, Biografisch Woordenboek van Nederland*) <https://resources.huygens.knaw.nl/bwn1880-2000/lemmata/bwn2/francois> accessed 31 July 2023.

1015 PCA, *Annual Report 1957*, 36.

1016 International Bureau of the PCA, 'Note explicative du Sécretaire général, The Hague, 6 November 1959, CA No 9728A' GFA B 141/42398.

a scarcity of cases, François revived the idea of formalizing the process for mixed arbitration at the PCA, which had previously been suggested by Sanders and the ICC-ICA.[1017]

In a 1955 lecture at the Hague Academy, François argued that promoting PCA-administered arbitration between states and private entities, especially large corporations, could help revitalize the institution.[1018] He saw mixed arbitration as a way to distinguish the PCA from its competitor, the ICJ, which only accepted cases brought by states. In his Hague lecture, François observed:

> It is well known that the International Court of Justice cannot be seized of disputes of this order, because its jurisdiction is limited to disputes between States. For it to be able to rule on a dispute between a State and a foreign private individual, the State would have to take up the cause of its national. For the Arbitration Court, this indirect route is not mandatory.[1019]

He then reiterated the broad interpretation of the PCA's mandate, referring to the decision in *Radio Corporation*, and noted that any request for arbitration would have to come from a national of a member state of the Conventions.[1020] François believed that such arbitration would be particularly relevant when a state was accused of violating Private International Law. In his lecture, he elaborated this thought:

> The question arises as to whether there is a need for an international body competent to adjudicate legal disputes between States and private individuals. If

[1017] François (n 955).

[1018] ibid 541.

[1019] François (n 955), translated by the author, original: '*Il est bien connu que la Cour internationale de Justice ne saurait être saisie de différends de cet ordre, parce que sa juridiction est limitée aux différends entre États. Pour qu'elle puisse statuer sur un différend entre un État et une personne privée étrangère il faudrait que l'État fasse sienne la cause de son ressortissant. Pour la Cour d'Arbitrage cette voie indirecte n'est pas de rigueur*'.

[1020] ibid 542.

> a private individual has suffered unjust treatment from a foreign State in the field of public law, their State will generally be ready to grant them diplomatic protection, thus transforming the dispute into a dispute between States. The difficulties arise mainly when it concerns interests of private individuals in the field of private law. If a private individual has a dispute with a foreign State in the field of private international law, the foreign State cannot be sued in the courts of this private individual: state immunity opposes it. Sometimes it will be possible to sue the foreign State in the courts of that State. But the legislation of States does not always admit recourse to the courts when it comes to claims against the State. And even if it is possible to sue the foreign State in its own courts, an impartial decision is not always guaranteed.[1021]

This passage is noteworthy for several reasons. It presumes that the private entity will initiate the claim and that the state will be the respondent. This presumption was later confirmed in by the proliferation of investor-state arbitrations based on advance consent and the fact that all contract-based mixed arbitrations at the PCA were initiated by a private claimant.[1022] François also pointed out the role of state immunity as an obstacle to suing a foreign state in the domestic courts of the claimant and considers that host state courts may lack neutrality and impartiality. This would later become one of the main arguments of proponents of investor-state arbitration.

In the subsequent part of his lecture, François went on to examine alternative remedies for mixed disputes. He considered diplomatic protection or inter-state claims

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[1021] ibid 542-43, translated by the author, original: '*La question se pose de savoir si le besoin se fait sentir d'une instance internationale compétente pour juger des différends juridiques entre les États et des personnes privées. Si une personne privée a subi un traitement injustifié de la part d'un État étranger dans le domaine du droit public, son État sera généralement prêt à lui accorder la protection diplomatique, et à transformer ainsi le différend en un différend entre États. Les difficultés surgissent surtout quand il s'agit d'intérêts de personnes privées appartenant au domaine du droit privé. Si une personne privée a un différend avec un État étranger dans le domaine du droit international privé, l'État étranger ne saurait être cité devant les tribunaux de cette personne privée : l'immunité de l'État s'y oppose. Parfois il sera possible de citer l'État étranger devant les tribunaux de cet État. Mais la législation des États n'admet pas toujours le recours aux tribunaux quand il s'agit de réclamations contre l'État. Et même s'il est possible de citer l'État étranger devant ses propres tribunaux, une décision impartiale n'est pas toujours assurée*'.

[1022] PCA, 'Cases' (n 938).

to be of limited use for private claimants.[1023] For instance, he considered that home states may be reluctant to endorse a claim for political reasons. Moreover, if the claimant were an international corporation, 'it would often be difficult to determine the state most suited to present the claim'.[1024] For François, these challenges were exacerbated by the increasingly global nature of private corporations. At the same time, he noted, that private standing before the ICJ had been sensibly rejected in the past.[1025] He concluded that existing alternative remedies were generally unsatisfactory for resolving international mixed disputes.[1026]

Responding to institutional inactivity, François seemed to take cues from private-sector suggestions, like those from the ICC-ICA. For instance, he stressed that arbitration remained the best method to solve mixed disputes, citing the 1953 ICC resolution recommending mixed arbitration at the PCA.[1027] François was well-aware of the ICC's strategies and saw its primary constituents – multinational enterprises operating in multiple jurisdictions – as the most likely users of mixed arbitration at the PCA. He emphasised that

> in most cases, it will not be just private individuals seeking to initiate an arbitration procedure with a foreign state, but rather large companies that have obtained concessions or have entered into contracts with states, where the execution of such contracts has led to diverging views. For these large companies and corporations, initiating an arbitration procedure against a foreign state does not pose insurmountable difficulties. Therefore, it can be observed

1023 François (n 955) 544.
1024 ibid 543.
1025 ibid 544.
1026 ibid.
1027 ibid.

that more and more arbitration clauses are being introduced into contracts concluded between these companies and foreign states.[1028]

However, François' vision for the institution did not materialize in the following years. Instead, the lack of cases persisted and the PCA's annual reports largely focused on repetitive details about the organization's budget and new Court nominees. One notable exception was the contested appointment of John C. H. Wu by Taiwan, which was challenged by several countries, including the USSR, Poland, Czechoslovakia, Romania, Hungary, Yugoslavia, and later India.[1029] These countries insisted that only the People's Republic of China could legitimately represent China in the organization.[1030] The dispute as to the legitimacy of the Taiwanese appointment appears to have deterred the PRC from joining the PCA. It resurfaced in 1972 when a vote to remove Taiwanese Court members failed due to US opposition,[1031] while others, including the French ambassador, expressed hope that the PRC would nevertheless join the PCA.[1032]

The 1958 New York Convention, which later became crucial for enforcing mixed arbitration awards involving the PCA, was negotiated without the PCA's direct

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1028 François (n 955).

1029 'Memo: Ständiger Schiedshof, hier: Ernennung des Herrn Wu als ständiges Mitglied durch die Regierung der Republik China (Permanent Court of Arbitration, here: Appointment of Mr. Wu as a Permanent Member by the Government of the Republic of China)' (8 January 1958) GFA B 141/42398.

1030 Letter from Dr Blomeyer to the Federal Minister of Justice: Ständiger Schiedshof in Den Haag (PCA in The Hague), Bonn (6 March 1958) GFA B 141/42398.

1031 'Diplomatic Cable from the Dept of State to the US Embassy in Taipei, the US Consulate in Hong Kong, and the US Liaison Office in Beijing: International Organizations, Permanent Court of Arbitration' <https://search.wikileaks.org/plusd/cables/1975STATE101447_b.html> accessed 31 July 2023.

1032 'Diplomatic Cable from the US Embassy in The Hague to the Dept of State: International Organizations: Permanent Court of Arbitration' <https://wikileaks.org/plusd/cables/1975THEHA02046_b.html> accessed 31 July 2023.

involvement. Instead, the Netherlands Arbitration Institute provided the Convention's negotiators with information about the PCA's role in facilitating mixed arbitration.[1033] There is no indication that these negotiations were a topic of major concern within the PCA Administrative Council. Instead, the President of the Council and some of its members expressed frustration over the lack of institutional activity at the time of the negotiations and the underutilization of the PCA's services.[1034]

To respond to this continued lack of activity, a 1959 Council resolution, urged member states to make more frequent use of 'the services of the Court' and tasked state representatives with conveying this desire to their respective governments.[1035] The resolution also directed the International Bureau of the PCA 'to examine, in consultation with the President, how the Permanent Court of Arbitration could play a more active role in the peaceful settlement of international disputes'.[1036] Considerations related to the PCA's budget, while relatively minor in comparison to other contemporary intergovernmental organizations, may have played a role in the dissatisfaction expressed.

[1033] UN ECOSOC, 'UN Conference on International Commercial Arbitration: Activities of Inter-Governmental and Non-Governmental Organizations in the Field of International Commercial Arbitration, Consolidated Report by the Secretary-General' (1958) UN Doc No E/CONF26/4, 23.

[1034] International Bureau of the PCA, 'Note explicative du Sécretaire général, The Hague, 6 November 1959, CA No 9728A' (n 1017); International Bureau of the PCA, 'Conseil administratif de la Cour permanente d'arbitrage: Procès-verbal de la séance du mercredi 2 décembre 1959 à 10 heures 30 au Palais de la Paix' GFA B 141/42398, 3.

[1035] ibid.

[1036] ibid 3, translated by the author, original: '*Le Conseil charge le Bureau à mettre à l'étude, d'entente avec le Président, la question de savoir de quelle manière la Cour Permanente d'Arbitrage pourrait jouer un rôle plus actif dans le règlement pacifique des conflits internationaux'*.

Following this, the International Bureau examined potential changes to procedural rules to increase the PCA's activity.[1037] French law professor Guyomar observed at the time, that the Bureau understood full well that to attract more cases, it would need to highlight the distinctive offer of the PCA as opposed to its competitor, the ICJ.[1038] François believed that states often failed to appreciate the differences between these two organizations.[1039] The differences he noted as relevant for the promotion of the PCA's services were the party-appointment of arbitrators, a perceived greater procedural efficiency, lower public profile of PCA cases, and rules that allowed for a 'semi-legal and semi-political' resolution of disputes.[1040]

[1037] François (n 999) 292.

[1038] Geneviève Guyomar, 'Le règlement de la Cour permanente d'arbitrage relatif aux conflits internationaux entre deux parties dont une seulement est un État' (1962) 8 Annuaire Français de Droit International 377, 378.

[1039] ibid.

[1040] ibid.

Prompted in part by a statement made by the Argentinian ambassador at a 1960 Administrative Council meeting lamenting the PCA's continued inactivity, the International Bureau decided to develop new Optional Rules of Arbitration and Conciliation.[1041] Other states seemingly supported this effort and at times even preferred the PCA over the idea of a newly created institution. In 1961, for instance, British officials, considering the ICSID Convention at the time, noted that there was no need for such a new institution, as the PCA was already in place but underutilized.[1042] Pieter Sanders was tasked with drafting the new rules, which were formally adopted in 1962 as the *Optional Rules of Arbitration and Conciliation for Settlement of International Disputes Between Two Parties of Which Only One is a State* ('1962 Optional Rules').[1043] These rules included many modernised features, such as provisions on secretarial support to arbitrators,[1044] setting the default seat of arbitration at The Hague,[1045] and requiring arbitral awards to state reasons and be based on law, unless the disputing parties agreed to vest the tribunal with the power to decide *ex aequo et bono.*[1046]

However, with regard to default arbitrator appointments, the 1962 Optional Rules did not go as far as the ICSID and UNCITRAL Arbitration Rules would go. They allowed

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1041 International Bureau of the PCA, 'Conseil administratif de la Cour permanente d'arbitrage: Procès-verbal de la séance du mercredi 2 décembre 1959 à 10 heures 30 au Palais de la Paix' (n 1035) 3; Arbitration and Court (n 541) 11.

1042 Letter from Hester Boothroyd to Mrs Hedley-Miller, on the International Bank and Arbitration (7 November 1961) (n 522) 2.

1043 Sanders, 'Private Parties and the Permanent Court of Arbitration' (n 322) 289; 'The Permanent Court of Arbitration. Rules of Arbitration and Conciliation for Settlement of International Disputes Between Two Parties of Which Only One Is a State. The Hague, February, 1962' (1963) 57 The American Journal of International Law 500.

1044 'The Permanent Court of Arbitration. Rules of Arbitration and Conciliation for Settlement of International Disputes Between Two Parties of Which Only One Is a State. The Hague, February, 1962' (n 1044) s I, art 23.

1045 ibid s I, art 7.

1046 ibid s I, art 30.

for the International Bureau to propose arbitrator candidates in cases of disagreement, but the Secretary General's power to make default appointments was conditional upon the agreement of both disputing parties, including the state.[1047] These safeguards were likely added in anticipation of state concerns and suggest that the PCA still faced challenges in entering the mixed arbitration market.

When Sanders was asked to comment on the new 1962 Optional Rules by the editors of the Dutch arbitration journal *Arbitrale Rechtspraak*, he made several observations. First, he acknowledged the growing frequency of contractual arrangements between private entities and governments.[1048] These contracts, often linked to foreign investment, construction projects, or public utilities, necessitated a specialized arbitration mechanism.[1049] Sanders noted that litigating such cases in the courts of the host states was 'not a very attractive solution to the private enterprise' for reasons that 'need scarcely be further elucidated'.[1050]

Second, Sanders compared the limitations of arbitration at the ICC-ICA with those of the PCA. He believed that states were reluctant to accept facilitation from an organization 'created by international business interests themselves' and possibly considered the ICC Arbitration Rules insufficiently adapted to mixed arbitration.[1051] According to Sanders '[v]ery occasionally it is indeed possible to get a reference to the

1047 ibid s I, art 6.

1048 Sanders, 'Het Permanente Hof van Arbitrage (The Permanent Court of Arbitration, English translation by ICCA)' (n 1012) 1.

1049 ibid 1-2.

1050 ibid 2.

1051 ibid.

I.C.C.'s rules for (...) [a]rbitration inserted in the contracts, but more often than not the attempt to do so is unsuccessful'.[1052]

Third, Sanders emphasized procedural differences between arbitration pursuant to the ICC Arbitration Rules and the PCA's 1962 Optional Rules, particularly regarding the power to appoint arbitrators. Unlike the ICC rules, which automatically designated the institution itself as the default appointing authority, the new rules of the PCA allowed states to adopt a 'wait-and-see attitude', requiring mutual consent for the International Bureau to make default appointments.[1053] Sanders viewed this as a pragmatic concession aimed at encouraging state support. He noted: 'Some people may find this a serious drawback. Personally, I regard it rather as a wise move which may help States to get over a certain hesitance to take the plunge into arbitration'.[1054]

However, the Optional Rules, like the earlier PCA-AAA optional clause, never gained traction. To date, no claim appears to have been filed under these rules. One limiting factor that may have prevented more widespread use in mixed arbitration, was the fact that the rules could only be applied in cases where the state party was a signatory of at least one of the PCA's founding Conventions. This significantly restricted the scope of potential disputes, particularly those involving former colonies. As of March 1963, only 63 states were members of the PCA, including only three African states.[1055] Another possible disincentive was the absence of predetermined default appointing authority powers, which may have made private companies hesitant to opt for these

1052 ibid.

1053 ibid.

1054 ibid 4.

1055 PCA, *Annual Report 1962*, 5. Those three countries were the Republic of Cameroon, the Republic of the Congo, and the Republic of Upper Volta.

rules over arbitration at the ICC-ICA, especially before ICSID was created. Despite their lack of success, the formal adoption of the 1962 Optional Rules did affirm the PCA's mandate for mixed arbitrations, a move that would set the stage for the growth in mixed arbitrations in later decades.[1056] Had arbitration experts still expressed doubts at the 1946 ICC conference about the scope of the PCA's mandate, there could now no longer be any question that the organization was willing to administer mixed proceedings. The publication of the 1962 Optional Rules thus reaffirmed and formalized the Administrative Council decision in *Radio Corporation.* Moreover, despite their lack of direct success in PCA cases, these rules also served as an inspiration for the ICSID Arbitration Rules.[1057]

5.2.3. The impact of the arrival of ICSID on the PCA

The lack of success of the Optional Rules may also be linked to the arrival of ICSID. As mentioned in Chapter Three, several state officials alluded to the PCA during the regional consultative meetings organized by the World Bank in view of finalizing the ICSID Convention. These comments shed light on how state officials envisioned the new institution working alongside, or in competition with the PCA. According to Broches, the Dutch government had initially suggested that ICSID use the facilities of the PCA in The Hague.[1058] The Dutch, aware of the PCA's struggles to attract cases, were likely

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[1056] Indlekofer (n 957) 269.

[1057] Moragodage Pinto, 'Introductory Statement by the Secretary-General of the Iran-United States Claims Tribunal, May 18, 1999' in PCA (ed), *International Alternative Dispute Resolution: Past, Present, and Future; the Permanent Court of Arbitration Centennial Papers* (Kluwer Law International 2000), 183.

[1058] 'Réunion consultative d'experts juridiques sur le règlement des différends relatifs aux investissements, Genève, 17-22 février 1964, compte rendu sommaire des travaux, CCDEC 2016 30 WPR, 18.891 XII (Folder: 'Dossier 80, Ref 4: Convention pour le règlement des différends relatifs aux investissements entre États et nationaux d'autres États')' (n 557) 16.

cautious about the emergence of a strong intergovernmental competitor. Although there were no official contacts between the PCA and the drafters of the ICSID Convention, some informal discussions had occurred.[1059]

By the time of the Geneva consultative meeting in February 1964, Dutch delegate van Santen's earlier concerns about the redundancy of ICSID had been alleviated. He acknowledged that 'while at the stage of the preliminary discussions there had been some reluctance to encourage the multiplication of possibilities for international proceedings', he was now 'convinced that there may be some value in the proposal to establish a new and workable institution which will be enhanced by the prestige of the International Bank, especially if it collaborates as far as possible with the Permanent Court of Arbitration'.[1060] At the same time, van Santen clarified that his delegation would regret any removal of references to the PCA in the draft ICSID Convention.[1061]

Other delegates were less sanguine. During the Bangkok consultative meeting in April and May 1964, Japanese expert-designate Nemoto expressed the concern that 'the functions of the proposed Centre appear to impinge in some areas on the functions of the Permanent Court of Arbitration and (...) it would be desirable to review the relationship between the two organizations'.[1062] Moreover, the Australian expert-designate O'Donovan suggested that both the PCA and the World Bank should allow

1059 ibid.

1060 ibid 8.

1061 ibid 17.

1062 'Réunion consultative d'experts juridiques sur le règlement des différends relatifs aux investissements, Bangkok, Thaïlande, 27 avril-1er mai 1964, compte rendu sommaire des travaux, Archives of the FPS Foreign Affairs, Belgium, 18.891 XII (Folder: 'Dossier 80, Ref 4: Convention pour le règlement des différends relatifs aux investissements entre États et nationaux d'autres États')' (n 548) 19.

the use of their facilities for ICSID arbitration.[1063] For Broches, however, the Bank was in a different position from the PCA, as it could make its approval of ICSID publicly known.[1064] The debate even extended to whether a single individual could serve as Secretary General for both ICSID and the PCA. Again, Broches subtly resisted this idea.[1065]

Ultimately, the ICSID Convention as signed in 1965, mentioned the PCA merely as an optional forum for proceedings. The Memorandum of General Agreements between the ICSID and the PCA, negotiated by Broches and François and signed in 1968 provided for such optional and reciprocal use of the facilities in Washington and The Hague.[1066] The ICSID Convention and the Memorandum, which remains in force today, were a strategic setback for François.[1067] He was forced to acknowledge that states had vested a different intergovernmental organization with the power to facilitate investment arbitration. The Memorandum also removed an incentive to refer disputes to the PCA instead of ICSID for geographic reasons, as ICSID proceedings could now be administered in The Hague. The PCA's officials had not promoted the Optional Rules as intensely as Broches and other World Bank officials promoted ICSID.

Other factors seemed to contribute to the PCA missing out on the emerging market of mixed arbitration. A key limitation of the 1962 Optional Rules was, for instance, the absence of a self-contained enforcement mechanism. Instead, the rules

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[1063] ibid 22.
[1064] ibid.
[1065] ibid 16.
[1066] Parra (n 471) 117.
[1067] It was in force as of 2012, see ibid. No announcement of its termination has been made since.

relied on the 1958 New York Convention, which only 29 states had ratified at the time ICSID was signed.[1068] In contrast, the enforcement of ICSID awards would be quasi-automatic and grounds for refusal to enforce far more limited. Moreover, among arbitral institutions relying on the 1958 New York Convention for enforcement, it was the ICC-ICA that gained greater traction, especially in public-private contracts.[1069] It is reasonable to assume that this is related to the greater vicinity of the ICC with private-sector arbitration users, many of which were among the organization's members. While some of these users were already familiar with the arbitration procedure at the ICA, whether in mixed or private international arbitration, none of them had gathered experience at the PCA. At the same time, compared to ICSID, the PCA lacked a parent organization like the World Bank, which had established strong and diversified links with state administrations. The limited prior experience of the PCA in administering mixed arbitrations and the prolonged period of inactivity turned out to be a vicious circle. Accordingly, a 1972 OECD briefing underscored the PCA's limitations in administering mixed arbitrations, pointing out its lack of experience of such cases.[1070] The time for a greater role of the PCA in mixed arbitrations simply had not yet come.

5.2.4. <u>The PCA's special relationship with the UNCITRAL Arbitration Rules</u>

A significant milestone in the development of mixed arbitration at the PCA was the inclusion of the PCA Secretary General as the designating authority in the 1976

[1068] 'Contracting States' (*New York Convention*) <www.newyorkconvention.org/countries> accessed 31 July 2023.

[1069] By 1962, the ICC-ICA had administered 12 mixed arbitrations and in 1966 and 1967, 13% of cases registered were mixed arbitrations and 10% of cases registered were East-West arbitrations; see Lemercier and Sgard (n 147) 94.

[1070] OECD Development Assistance Directorate (n 371) 10.

UNCITRAL Arbitration Rules. The drafting records of the UNCITRAL Rules do not point to any involvement of the PCA Secretary General or other leading staff in the elaboration of the rules. Unlike PCA officials, Broches, by then ICSID Secretary General, attended the meetings of the UNCITRAL working group preparing the rules in New York.[1071] During the drafting process, this group decided to grant the PCA Secretary General the role of a designating authority. Specifically, Articles 6 and 7 of the 1976 Rules conferred this authority upon the PCA Secretary General in three instances: (1) appointment of a sole arbitrator where the disputing parties fail to do so; (2) appointment of a co-arbitrator on behalf of the respondent, where it fails to do so; and (3) appointment of the presiding arbitrator of a three-member tribunal, where the party-appointed arbitrators fail to do so.

The formal development of the UNCITRAL Arbitration Rules began in 1973 with a request from the UNCITRAL Commission to its Secretary, Willem C. Vis to prepare rules for the arbitration of commercial disputes *inter alia* in consultation with 'centres of international commercial arbitration'.[1072] Pieter Sanders was later appointed as a consultant to the UNCITRAL Secretariat and helped draft the initial rules.[1073] Before the UNCITRAL Commission voted on the draft, the text was reviewed by a 'Consultative Group' constituted by the International Council for Commercial Arbitration.[1074] Both

[1071] UNCITRAL (n 623) 4.

[1072] UNCITRAL, 'Report of the UN Commission on International Trade Law on the Work of Its Sixth Session, 2-13 April 1973', 23.

[1073] UNCITRAL, 'Report of the Secretary-General: Preliminary Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating to International Trade (UNCITRAL Arbitration Rules), 4 November 1974' (1975) VI Yearbook of the United Nations Commission on International Trade Law 163.

[1074] UNCITRAL, 'Report of the UN Commission on International Trade Law on the Work of Its Eighth Session, 1-17 April 1975', 24.

Howard Holtzmann and Donald Straus, who would negotiate East-West arbitration arrangements referring to the SCC-AI and based on the new rules in subsequent years, commented on the draft.[1075] This preliminary review of the draft gave private arbitral institutions and their affiliated experts the opportunity to set the agenda before the vote.

Early drafts of the rules contained a provision expressly including 'legal persons of public law' as potential disputing parties.[1076] Several delegates and experts, including Holtzmann, welcomed this reference.[1077] Broches, however, expressed reservations. He commented that the rules could not recognize the rights of statal parties to conclude arbitration agreements, as such a step would require an intergovernmental convention.[1078] Considering these reservations, and especially his remark highlighting the advantages of a convention, it is reasonable to assume that Broches considered the new UNCITRAL Rules to be competition for ICSID.

The provision referring to 'legal persons of public law' was eventually deleted due to a lack of consensus among states.[1079] Some delegates considered the matter of state participation should be 'left to the applicable municipal law'.[1080] Others thought the provision 'served a desirable purpose in clarifying that a Government, State agency, or

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[1075] Letter from Donald Straus to Pieter Sanders with Comments on the Draft UNCITRAL Arbitration Rules (16 August 1976) <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/016.pdf> accessed 30 September 2023; Letter from Howard Holtzmann to Pieter Sanders (23 November 1976) <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/018.pdf> accessed 30 September 2023.

[1076] UNCITRAL, 'Report of the UN Commission on International Trade Law on the Work of Its Eighth Session, 1-17 April 1975' (n 1075) 43.

[1077] UNCITRAL (n 623) 5.

[1078] ICCA (n 616) 2.

[1079] UNCITRAL, 'Report of the UN Commission on International Trade Law on the Work of Its Ninth Session, 12 April-7 May 1976', 163.

[1080] UNCITRAL, 'Annex I, Preliminary Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating to International Trade: Summary of Discussion by the UNCITRAL' (1975) VI Yearbook of the United Nations Commission on International Trade Law 24, 26.

State organization could be a party to an agreement for arbitration under the Rules'.[1081] Despite the deletion, the earlier drafts indicate an expectation by both states and arbitral institutions that states might more frequently be disputing parties in commercial arbitrations in the future.

Addressing the problem of deadlock in arbitrator appointments, states initially considered creating a specialized UN body to make direct appointments.[1082] However, concerned that dissatisfied disputing parties could blame UNCITRAL or the United Nations for their appointment decisions, they opted for the more 'remote' mechanism of a designating authority.[1083] This authority should designate, on a case-by-case basis, an appointing authority, most likely 'an arbitral institution or a chamber of commerce experienced in the appointment of arbitrators'.[1084] Yet, selecting a suitable designating authority initially led to an impasse as states were unable to agree, which organization to reference in the rules for the new role.[1085]

To overcome this impasse, states ultimately decided to name the PCA Secretary General as the designating authority in the UNCITRAL Arbitration Rules. This largely rested on the diplomatic efforts of Pieter Sanders, Howard Holtzmann, and Willem

[1081] UNCITRAL, 'Report of the UN Commission on International Trade Law on the Work of Its Eighth Session, 1-17 April 1975' (n 1075) 44.

[1082] ibid 47. See also Pieter Sanders' intervention in his role as a consultant to the UNCITRAL Secretariat, UNCITRAL, 'Ninth Session, Committee of the Whole (II), Summary Record of the 3rd Meeting' (1976) UN Doc No A/CN9/9/C2/SR3, 4.

[1083] UNCITRAL, (n 623) Pieter Sanders' intervention, 3; UNCITRAL, 'Ninth Session, Committee of the Whole (II), Summary Record of the 3rd Meeting' (n 1083) Werner Melis' intervention, 9; UNCITRAL, 'Ninth Session, Committee of the Whole (II), Summary Record of the 4th Meeting' (1976) UN Doc No A/CN9/9/C2/SR4, Sergei Lebedev's intervention, 6.

[1084] UNCITRAL (n 623) 3.

[1085] Like other delegates, Sergei Lebedev, who represented the USSR at UNCITRAL, feared that the creation of a new UN body as a designating authority could undermine the role of the organization as a neutral forum and lead to 'obvious difficulties and complications'; see UNCITRAL, 'Ninth Session, Committee of the Whole (II), Summary Record of the 4th Meeting' (n 1084) 6.

Vis.[1086] Sanders was certainly remembering the failure of the 1962 Optional Rules to set a default appointing mechanism and knew that a functioning appointment system would be crucial for the success of the rules. In a late night call to PCA Secretary General, Eric van Boetzelaer, Holtzmann asked if he would agree to act as default appointing authority in the rules. Apparently, the Secretary General first declined to appoint arbitrators directly.[1087] He was also concerned about any additional costs, for the resource-constrained PCA. 'What will it cost us', he asked, and Holtzmann replied 'Nothing'.[1088] In the end, van Boetzelaer accepted the more remote role of a designating authority, a concept that had been Sanders' idea.[1089] Holtzmann, Sanders, Vis, and van Boetzelaer, who was facing a continued lack of cases at the PCA, may have seen this role as another opportunity to enhance the PCA's visibility an revive the institution. However, the reasons for van Boetzelaer's preference for the designating as opposed to the appointing authority role remain unclear.

During subsequent discussions at UNCITRAL, several delegations 'vigorously attacked' the reference to the PCA Secretary General, but without success.[1090] The UNCITRAL Arbitration Rules were adopted in 1976, retaining the reference.[1091] Pursuant to Article 6(2) of the rules, where a sole arbitrator is to be appointed, a

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[1086] van den Berg (n 312).

[1087] Hugo Siblesz, 'The Role of Institutions in the Arbitral Process: The Permanent Court of Arbitration' (2013) 2 <https://docs.pca-cpa.org/2013/04/20130425-SG-Lima-LatAm-Congress8c61-1.pdf> accessed 31 July 2023.

[1088] van den Berg (n 312).

[1089] Siblesz (n 1088) 2.

[1090] 'Diplomatic Cable from the US Mission to Geneva to the Dept of State and the US Mission to the UN in New York: Eighth Session of UNCITRAL' (n 375).

[1091] UNCITRAL, 'Report of the UN Commission on International Trade Law on the Work of Its Ninth Session, 12 April-7 May 1976' (n 1080) 34.

disputing party may request the Secretary General of the PCA to designate an appointing authority, 'if no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within sixty days of the receipt of a party's request therefor'. The same provision applied *mutatis mutandis* to arbitrations with a three-member tribunal, where a disputing party failed to appoint the second arbitrator, or the two co-arbitrators failed to appoint the presiding arbitrator.[1092]

Parties were also free to designate the PCA as an appointing authority, in which case the institution was to additionally decide on contested challenges to the arbitrators.[1093] In subsequent revisions of the rules, the PCA's role was further strengthened. The 2010 revision, for instance, retained the PCA as a default designating authority, but also expressly mentioned it as an optional appointing authority.[1094] Moreover, since 2010, the PCA, if designated by the parties as an appointing authority, has additional roles in relation to arbitrators' fees and expenses.[1095]

The 1976 Rules did not specifically define the term 'parties' but merely required consent to be established through a written contract.[1096] The scope was thus broad enough to encompass mixed arbitration. Later in 1976, the UN General Assembly and the Asian-African Legal Consultative Committee recommended using the rules,

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1092 '1976 UNCITRAL Arbitration Rules', art 7.

1093 Article 12 of the 1976 UNCITRAL Arbitration Rules, later retained in art 13 of the 2010 and 2013 UNCITRAL Arbitration Rules.

1094 '2010 UNCITRAL Arbitration Rules', art 6(1).

1095 ibid art 41(4)(b) and (c).

1096 '1976 UNCITRAL Arbitration Rules' (n 1093) art 1(1).

highlighting widespread state support.[1097] Holtzmann later stated that the 'principal development that brought the PCA into the field of international commercial arbitration was the adoption in 1976 of the Arbitration Rules of the United Nations Commission on International Trade Law'.[1098] This view is shared by others, who view the Rules as central to the evolution of the PCA, some even suggesting that they were designed with the intention to apply specifically to mixed arbitrations.[1099]

The specific mention of the PCA Secretary General in the 1976 UNCITRAL Arbitration Rules implies that the reasons for the PCA's more substantial role in mixed arbitration are not exclusively linked to the end of the Cold War. Although the PCA experienced a growth of mixed arbitrations in the early 1990s, partially fuelled by the willingness of former Soviet states to consent to arbitration at the PCA, the explicit reference to the Secretary General was the key factor linking the PCA to the UNCITRAL Arbitration Rules. Philippe Sands later observed that the *ad hoc* nature of the Rules meant there was a 'need for some of those proceedings to locate a home'.[1100] Over time, the PCA has become the 'home' for the majority of mixed arbitrations pursuant to these Rules. Brooks W. Daly, then-Deputy Secretary General of the PCA, noted in 2019

1097 UNGA (n 626) 108; AALCC, *Report of the Seventeenth, Eighteenth and Nineteenth Sessions held in Kuala Lumpur (1976), Baghdad (1977) and Doha (1978)* (n 626) 144.

1098 'ICCA-Permanent Court of Arbitration Mutual Cooperation Agreement Between Permanent Court of Arbitration at the Hague and International Council for Commercial Arbitration, 1989 [2011] (with Introduction by HM Holtzmann)' (n 975) 2. See also James Crawford, 'The Permanent Court of Arbitration and Mixed Arbitration' (2007) 5 <https://docs.pca-cpa.org/2016/01/Reflections-on-the-Current-Relevance-of-the-PCA-Presentation-by-Professor-James-Crawford-SC.pdf> accessed 31 July 2023.

1099 Gilbert Guillaume, 'The Contribution of the Permanent Court of Arbitration and Its International Bureau to Arbitration Between States' (2007) 2 <https://docs.pca-cpa.org/2016/01/Reflections-on-the-Current-Relevance-of-the-PCA-Presentation-by-Professor-James-Crawford-SC.pdf> accessed 31 July 2023.

1100 Sands (n 959) 2.

that the PCA had 'become the leading institution in the administration of investor-state arbitration proceedings under the UNCITRAL Rules'.[1101]

The PCA was also the first arbitral institution to administer a treaty-based investor-state arbitration under the UNCITRAL Rules.[1102] The decision to choose the Hague institution as administrating authority in this case was apparently motivated by the fact that the respondent state, the Czech Republic, had gathered prior experience in arbitration at the PCA.[1103] The PCA's intergovernmental nature and states' participation in the work of the Administrative Council might explain why the institution was increasingly frequently chosen as the administering body for mixed arbitrations in subsequent years. As time passed, several public-private contracts and BITs started to directly designate the PCA Secretary General as an appointing rather than a designating authority under the 1976 Rules.[1104] In the eyes of states, this direct designation may have been advantageous, as it removed uncertainties associated with the Secretary General's potential choices of an appointing authority. Indeed, the Rules granted the Secretary General discretion to choose any appointing authority, including ICSID or private-sector arbitral institutions. Several states agreeing to UNCITRAL arbitration may have apprehended such choices, considered unacceptable for political reasons.

[1101] Brooks Daly, 'Balancing Private Rights and Public Order' (2019) 30 American Review of International Arbitration 35, 36.

[1102] *Saluka Investments BV v The Czech Republic, Partial Award* [2006].

[1103] Brooks W Daly, Presentation to LLM Students at Georgetown University Law Center, given on 28 October 2015, cited in Dahlquist (n 99).

[1104] See for example Panama – Switzerland BIT (1983), art 9; Bulgaria – Switzerland BIT (1991), art 11(3).

Moreover, the PCA has certain competitive advantages over ICSID in certain mixed disputes, due to its connection with the UNCITRAL Rules. The ICSID Convention requires claimants to demonstrate the existence of an investment, which is usually assessed based on the test developed in *Salini v. Morocco*.[1105] The UNCITRAL Rules do not impose such a requirement and tribunals will apply the definitions of investment in the underlying legal instrument, such as an investment treaty. Where a transaction would not meet the *Salini* criteria, the UNCITRAL Rules may thus be a strategic choice for investor-claimants.

The UNCITRAL Arbitration Rules also offer greater flexibility for claimants that are natural persons with dual nationality, including the host state nationality, who are barred from bringing ICSID claims.[1106] UNCITRAL arbitration allows these individuals to bypass domestic courts because it does not prohibit claims by dual nationals. Several claimants have attempted to use this advantage in practice, including in arbitrations administered by the PCA.[1107] Tribunals in PCA-administered UNCITRAL arbitrations have ruled that a claimant's host state nationality did not bar them from hearing the case.[1108] Similar attempts in ICSID arbitration have failed at the jurisdictional stage.[1109]

1105 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (n 470) art 25(1); Alex Grabowski, 'The Definition of Investment under the ICSID Convention: A Defense of Salini' (2014) 15 Chicago Journal of International Law 281.

1106 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (n 470) art 25(2)(a).

1107 See for example *Serafín García Armas and Karina García Gruber v Bolivarian Republic of Venezuela* PCA Case No 2013-3.

1108 *Alberto Carrizosa Gelzis, Enrique Carrizosa Gelzis, Felipe Carrizosa Gelzis v Republic of Colombia, Award* PCA Case No 2018-56, 7 May 2021, para 181; *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v Bolivarian Republic of Venezuela, Award on Jurisdiction* PCA Case No 2016-08, 13 December 2019, para 707; *Mohamed Abdel Raouf Bahgat v Arab Republic of Egypt (I), Decision on Jurisdiction* PCA Case No 2012-07, 30 November 2017, para 230.

5.2.5. Pioneering the use of the UNCITRAL Arbitration Rules in treaties

In the decades following their adoption, the UNCITRAL Rules were increasingly referenced in the investor-state dispute settlement provisions of investment treaties. Yet, today's widespread incorporation of the Rules in treaties is surprising, given their initial design for the use in contracts.[1110] After the adoption of the Rules, however, states quickly began construing Article 1 broadly, to allow for a use of the Rules in treaties. One reason for this expansive interpretation could be the precedent created by the application of the UNCITRAL Rules by the Iran-United States Claims Tribunal.[1111]

Established in 1981, this special Tribunal interrupted the PCA's long period of inactivity, even though it was not an arbitral tribunal in the strict sense and relied on a *sui generis* enforcement mechanism. A detailed examination of the Tribunal's origins is beyond the scope of this thesis. Details of the negotiations leading to its creation also largely remain confidential. The following will therefore focus only on aspects of the Tribunal as relevant to the subsequent use of UNCITRAL Rules in intergovernmental treaties.

On 19 January 1981, the United States and Iran concluded the Algiers Accords, mediated by the Algerian government, to resolve the Iran hostage crisis.[1112] The

See also Javier Olmedo, 'Claims by Dual Nationals under Investment Treaties: Are Investors Entitled to Sue Their Own States?' (2017) 8 Journal of International Dispute Settlement 695.

1109 *Hussein Nauman Soufraki v United Arab Emirates, Award* ICSID Case No ARB/02/7, 7 July 2004; *Saba Fakes v Republic of Turkey, Award* ICSID Case No ARB/07/20, 14 July 2010.

1110 '1976 UNCITRAL Arbitration Rules' (n 1093) art 1(1) specifically refers to a 'contract in writing'.

1111 This explanation was suggested by Joel Dahlquist, see Dahlquist (n 99) 22.

1112 US Embassy in Algiers, Algeria, 'Press Release: The United States Extends Condolences to Algeria on the Passing of Ambassador Redha Malek' 1 <https://dz.usembassy.gov/wp-content/uploads/sites/236/2017/08/8-3-17-Press-Release-Condolences-on-the-Passing-of-Ambassador-Malek-English.pdf> accessed 31 July 2023.

Accords provided for a Tribunal to hear claims by American parties related to Iranian assets frozen by the Carter administration. According to the Accords, the US government transferred these frozen assets to a specialized fund, to be used to pay awards to successful American claimants. This feature distinguished the Tribunal from the need to enforce conventional arbitral awards under the ICSID or New York Conventions.

The Claims Settlement Declaration, which formed part of the Algiers Accords, stipulated that the Tribunal would operate under a modified version of the UNCITRAL Rules.[1113] The rationale behind this choice remains unclear due to the lack of archival records and the continued classification of relevant US State Department files. However, the negotiations were fraught with mutual distrust between the state parties, motivated more by political than procedural considerations, and driven by the need for a swift resolution of outstanding claims.[1114] These factors may have influenced the design and rationality of the dispute settlement mechanism.[1115] At the time, the UNCITRAL Rules were relatively new, and it remains uncertain whether the US and Iran fully understood that referring to these rules would empower the PCA Secretary General to designate appointing authorities for the Tribunal.

While not technically an investment treaty, the Algiers Accords shared several features with such treaties. The Claims Settlement Declaration included provisions for 'binding third party arbitration', excluded the use of domestic courts, and even granted

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1113 'Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by Iran and the United States ('Claims Settlement Declaration')' 20 ILM 230, art III(2).

1114 Dahlquist (n 99) 65-67.

1115 ibid.

advance consent to arbitration for a potentially indefinite group of private claimants.[1116] It has been argued that the Tribunal's practice paved the way for the use of UNCITRAL Rules in investment treaties.[1117] Indeed, following the establishment of the Tribunal, references to UNCITRAL Rules in investment treaties surged, with the 1982 UK-Belize and China-Sweden BITs being among the first examples. At that time, neither Belize, Sweden, nor China had ratified the ICSID Convention.[1118]

In addition to the Algiers Accords, the work of the Asian-African Legal Consultative Committee may also have played a role in the adoption of the UNCITRAL Rules in treaties. The AALCC Secretariat prepared a model investment protection agreement in May 1981, just a few months after the Algiers Accords were finalized. This model was subsequently discussed by the AALCC Trade Law Sub-Committee and *inter alia* provided for investor-state arbitration pursuant to the UNCITRAL Arbitration Rules.[1119] Notably, observers at the Sub-Committee meeting included UNCITRAL and ICSID representatives.[1120] The AALCC's archival records do not provide a definitive answer as to whether the UNCITRAL Rules were added to the AALCC draft before or after the Algiers Accords were concluded. It cannot be ruled out that the AALCC Committee members knew about the Accords and were inspired by their use of the Rules. However, the AALCC's strong engagement with UNCITRAL in previous years suggests

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[1116] 'Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by Iran and the United States ('Claims Settlement Declaration')' (n 1114) art II; Dahlquist (n 99) 61-62.

[1117] Dahlquist (n 99) 72-75.

[1118] ICSID (n 374).

[1119] AALCC (ed), *Report of Twentieth, Twenty-First and Twenty-Second Sessions Held in Seoul (1979), Jakarta (1980) and Colombo (1981)* (AALCC Secretariat), 182.

[1120] ibid 174.

the possibility that the Committee considered the treaty-use of the Rules independently from the Algiers Accords. The AALCC model may thus have provided a second reference point and precedent for the use of the UNCITRAL Arbitration Rules in investment treaties.

Aside from its influence on treaty-based arbitration, the creation of the Iran-US Claims Tribunal had implications for the PCA's role in administering mixed arbitrations. The Claims Settlement Declaration specified that the Tribunal would be seated in The Hague, which emerged as a compromise location.[1121] During the negotiations of the Accords, 'the United States was inclined to favour London as the site of the proposed international tribunal, the Algerians urged to suggest The Hague on the theory that it would be somewhat more palatable to the Iranians'.[1122] Similar to Holtzmann's earlier call to van Boetzelaer, the negotiating states approached then-PCA Secretary General Jacob Varekamp to inquire if the PCA would be willing to provide secretarial support to the Tribunal.[1123] Varekamp agreed, and the PCA subsequently offered 'physical facilities and diplomatically sensitive administrative assistance' to the Tribunal.[1124] The reasons for choosing the PCA as an administering authority remain opaque, but in 1981, the PCA Secretary General was asked to designate an appointing authority for

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1121 US negotiator Robert B Owen, 'The Final Negotiation and Release in Algiers', in P Kreisberg (ed), American Hostages in Iran 297, 161, cited in David Caron, 'The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution' (1990) 84 American Journal of International Law 104.

1122 US negotiator Robert B Owen, 'The Final Negotiation and Release in Algiers', in P Kreisberg (ed), American Hostages in Iran 297, 312, cited in ibid 141-42.

1123 2000_PCA_International ADR Past, Present and Future, page 59.

1124 Howard Holtzmann and Bette Shifman, 'General Topics, 1.3 Permanent Court of Arbitration' in UNCTAD (ed), *Course on Dispute Settlement in International Trade, Investment and Intellectual Property* (UNCTAD 2003) 7 <https://unctad.org/es/system/files/official-document/edmmisc232add26_en.pdf> accessed 31 July 2023.

the Claims Tribunal for the first time.[1125] In subsequent years, he responded to over 100 such requests.[1126]

5.2.6. Revived interest in the PCA

In the years after the creation of the Iran-US Claims Tribunal and the publication of the AALCC model treaty, the UNCITRAL Arbitration Rules increasingly found mention in investment treaties and sparked cases at the PCA.[1127] Similar to the rules of other arbitral institutions, the Rules became a convenient alternative for BIT negotiators, if one or both negotiating states had not ratified the ICSID Convention. They were also attractive for capital-exporting states who wanted to offer multiple options for arbitration, believing that more forum choices equalled stronger protection.[1128] In 1988, the PCA Secretary General received its first request to act as a designating authority in the mixed arbitration *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana,* to which the UNCITRAL Rules applied. In this contract-based case, Varekamp designated then-

[1125] Holtzmann and Shifman (n 1125) 7.

[1126] ibid.

[1127] Early examples are United Kingdom – Belize BIT (1982), United Kingdom – Saint Lucia BIT (1983), and Switzerland – Panama BIT (1983).

[1128] In Franco-German consultations in 1984, France indicated a preference for offering a choice between the ICC-ICA and ICSID; see Burkhardt, 'Vermerk: Deutsch-französische Konsultationen über Investitionsschutz am 17.2.1984 in Bonn (Memo: Franco-German Consultations on Investment Protection in Bonn on 17 February 1984), Bonn, VC5 - 904 346/1' (n 408) 4; A 1990 negotiating brief accompanying the UK model Investment Promotion and Protection Agreement notes that 'ICSID should be our first preference. An alternative is the à la carte provision of ICSID/ICC/UNCITRAL', see 'Confidential: Model Investment Promotion and Protection Agreement, Jan 1990 Version, General Negotiating Brief' (n 417) para 28 (document obtained upon FOI request; on file with the author).

ICSID Secretary General, Shihata, as authority to appoint an arbitrator on behalf of the respondent Ghana, which had failed to respond to the request for arbitration.[1129]

The end of the Cold War also marked the end of the PCA's long hibernation. In the early 1990s, the institution commenced a process to modernize its practice while receiving a growing number of requests for mixed arbitration. For this modernization, the PCA collaborated with various commercial arbitration experts, most notably the International Council for Commercial Arbitration. In 1989, it signed a Memorandum of Understanding with ICCA, which recognized ICCA's emerging role in commercial arbitration as greatly benefitting both organizations.[1130]The Memorandum allowed the PCA to rely on ICCA's broad membership and network of commercial arbitration users in order to increase its visibility. In-house counsel and private lawyers participating in ICCA, it was hoped, would then be more likely to refer mixed claims to the PCA.

The Memorandum also benefitted the PCA in relation to information sharing. In the words of former PCA Secretary General van den Hout, ICCA was to provide 'the PCA with information concerning arbitration institutions, experts, procedures and activities in various parts of the world'.[1131] This information then helped the intergovernmental PCA identify suitable appointing authorities and arbitrator candidates for mixed arbitrations.

[1129] Jarrod Hepburn, 'Looking Back: UNCITRAL Tribunal in Biloune v Ghana Found Creeping Expropriation of Resort Complex, but Declined Jurisdiction over Denial of Justice and Human Rights Claims' (*Investment Arbitration Reporter*, 6 November 2020) <www.iareporter.com/articles/looking-back-uncitral-tribunal-in-biloune-v-ghana-found-creeping-expropriation-of-resort-complex-but-declined-jurisdiction-over-denial-of-justice-and-human-rights-claims/> accessed 28 November 2022.

[1130] 'ICCA-Permanent Court of Arbitration Mutual Cooperation Agreement Between Permanent Court of Arbitration at the Hague and International Council for Commercial Arbitration, 1989 [2011] (with Introduction by HM Holtzmann)' (n 975) preamble, 6-7.

[1131] Tjaco T Van den Hout, 'Luncheon Address: The Influence of International Commercial Arbitration on the Permanent Court of Arbitration' in Albert Jan van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions* (Kluwer Law International 2003) 13.

For ICCA, on the other hand, the Memorandum was a prestigious recognition of its influence and an opportunity to formally cooperate with an intergovernmental organization. This was especially required to influence the growing involvement of states or state entities in commercial arbitration. The agreement also increased the visibility of ICCA's leader- and membership, which included numerous arbitrator candidates seeking institutional appointments.

In the Memorandum, the PCA also generally committed to maintaining the confidentiality of commercial arbitration.[1132] Although the Memorandum is not a binding agreement and does not specify, which specific proceedings are concerned, this commitment may have been a condition for ICCA to share case-related information with the PCA. Furthermore, the Memorandum also provided the basis for the PCA to assist ICCA with its publishing activity. Today, 'all ICCA publications are prepared at the PCA, where the staff gathers and edits relevant information under the supervision of renowned international arbitration practitioners'.[1133] These publications include *ICCA's Guide to the Interpretation of the 1958 New York Convention*, a book targeted at national judges responsible for enforcing foreign arbitral awards.[1134]

1132 Article 4 of the Memorandum stipulates that all 'activities pursuant to this Mutual Cooperation Agreement shall be conducted with due regard to protecting the confidentiality of commercial arbitration and conciliation proceedings, unless the parties to such proceedings otherwise agree.' In his introduction to the Memorandum, Holtzmann observed that '[p]rivacy of parties, which is one of the most valuable characteristics of arbitration, is carefully preserved by a specific provision of the Agreement', see 'ICCA-Permanent Court of Arbitration Mutual Cooperation Agreement Between Permanent Court of Arbitration at the Hague and International Council for Commercial Arbitration, 1989 [2011] (with Introduction by HM Holtzmann)' (n 975) 4 and 8.

1133 PCA 'PCA Publications, Section on ICCA Publications, Introduction' <https://pca-cpa.org/en/documents/publications/icca-publications/> accessed 28 November 2022.

1134 Neil Kaplan and others, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (2011).

The Memorandum has also facilitated the PCA's involvement in ICCA's outreach to state officials. One notable example is ICCA's 'New York Convention Roadshow', a 'series of workshops for judges on the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards'.[1135] In organizing the roadshow, ICCA specifically recognized 'the dependence of international arbitration practice on the critical role of national court judges in applying the New York Convention'.[1136] The roadshow events have taken place in the PCA's overseas offices and involved PCA officials, ICCA members, and state officials.[1137] The efficient enforcement of arbitral awards in national courts and the judicial interpretation of the New York Convention that it requires are directly relevant to the PCA's involvement in mixed arbitration. The majority of awards in mixed arbitrations at the PCA are enforced on the basis of this Convention.

The Memorandum has led to a significant degree of institutional integration of the ICCA and the PCA International Bureau. For instance, it provided for the creation of a special committee within ICCA that would be in charge of relations with the PCA.[1138] The first president of this committee, inaugurated in 1989, was Howard Holtzmann.[1139] In previous years, Holtzmann had already gathered in-depth knowledge of the

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1135 ICCA, 'Flyer March 2023: New York Convention Roadshow' <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/NYC-Roadshow-Information-Flyer-March-2023.pdf> accessed 31 July 2023.

1136 ibid.

1137 ICCA, 'New York Convention Roadshow in Buenos Aires, Argentina' <https://www.arbitration-icca.org/new-york-convention-roadshow-buenos-aires-argentina> accessed 30 August 2023.

1138 'ICCA-Permanent Court of Arbitration Mutual Cooperation Agreement Between Permanent Court of Arbitration at the Hague and International Council for Commercial Arbitration, 1989 [2011] (with Introduction by HM Holtzmann)' (n 975) para II.

1139 ibid 4.

functioning of the International Bureau and likely knew several of its staff, in his role as a judge of the Iran-US Claims Tribunals.[1140]

In the broader context, 1989 saw the UN General Assembly proclaim the 1990s as the 'United Nations Decade of International Law' aimed *inter alia* at promoting the peaceful settlement of disputes.[1141] This set the stage for the mostly dormant PCA to make strategic changes and 'diversify' its offer.[1142] In 1990, the PCA's International Bureau enlisted a group of consultants to analyse the reasons for the lack of cases and make policy recommendations.[1143] The expert group included judges of the International Court of Justice and the Iran-US Claims Tribunal, diplomats, and legal academics.[1144]

In its report, the group identified several reasons for the lack of cases. They included a lack of awareness of the availability of the PCA for international arbitration, a lack of confidence in the PCA's capacity to provide dispute resolution services, outdated procedural rules, and organizational inefficiencies.[1145] To overcome these challenges, the expert group recommended a multipronged strategy. They advised the PCA to promote its services through publications, contact states willing to join the Hague

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1140 The White House Office of the Press Secretary, 'Appointment to Tribunal: Press Release, 17 April 1981' Holtzmann Archive Box 54 Folder 5.

1141 UNGA, 'United Nations Decade of International Law' (17 November 1989), UNGA Res A/44/23; Hans Jonkman and Bette Shifman, 'The Role of the Permanent Court of Arbitration in the United Nations Decade of International Law and the Peaceful Settlement of International Disputes: 1990-1999 and Beyond' in Najeeb Al-Nauimi and Richard Meese (eds), *International Legal Issues Arising under the United Nations Decade of International Law* (Martinus Nijhof 1995).

1142 Pierre Pescatore, 'Die Stille Renovierung Des Ständigen Schiedshofs. Eine Alt-Neue Perspektive Der Internationalen Streitschlichtung' *Neue Zürcher Zeitung* (4 September 1996) 17.

1143 Jeffrey Bleich, 'A New Direction for the PCA: The Work of the Expert Group' (1993) 6 Leiden Journal of International Law 215, 217.

1144 ibid.

1145 ibid 217-22.

Conventions, participate in UN processes, and increase educational outreach.[1146] Additionally, they suggested elaborating new procedural rules to allow for the appointment of arbitrators that are not on the PCA's list of members, and recommended pursuing a general policy of geographic expansion.[1147]

Following the report of the expert group, the PCA replaced its 1962 Optional Rules with new rules, the 1993 *Optional Rules for Arbitration between Two Parties of Which Only One is a State* ('1993 Optional Rules'). These Rules were inspired by the 1976 UNCITRAL Arbitration Rules, but made several key changes aimed at making the PCA's services more attractive to private-sector claimants. One of the objectives of the new Rules was to 'secure the weaker position of individuals in the arbitral proceedings vice versa a state'.[1148] At the same time, it was hoped that these new Rules would also make the PCA more appealing to states, compared to the rules of private-sector institutions.[1149]

Unlike the PCA's 1962 Optional Rules, the new Rules explicitly allowed for use in disputes where neither the home state nor the host state signed the Hague Conventions.[1150] This provision finally answered the longstanding questions of the PCA's authority to administer mixed disputes among non-signatories of the Conventions. Moreover, unlike the 1976 UNCITRAL Rules, the new Rules contained a waiver of sovereign immunity from jurisdiction and even mentioned an optional waiver of

1146 PCA, '1999 Steering Committee: Interim Report and Recommendations to the Administrative Council', 1-7, on file with the author.

1147 Bleich (n 1144) 218-27.

1148 Indlekofer (n 957) 243.

1149 Sanders, 'Private Parties and the Permanent Court of Arbitration' (n 322) 295.

1150 'Text of Rules Other Documents: Permanent Court of Arbitration: Optional Rules for Arbitrating Disputes between Two States' (1993) 32 ILM 575, 575.

sovereign immunity from execution.[1151] The new Rules also explicitly addressed the scenario of truncated tribunals. If one arbitrator failed to participate in the proceedings, the other arbitrators were given discretion to continue the arbitration in this arbitrators absence and nevertheless render a valid award.[1152] The new Rules were again updated and consolidated in 2012, introducing new features, including multiparty disputes 'involving a combination of States, State-controlled entities, intergovernmental organizations, and private parties'.[1153]

Despite these updates, the 1993 Optional Rules and the 2012 consolidated rules met with no success.[1154] The PCA struggled to establish its own institutional rules on the market of mixed arbitrations. One reason for this lack of success was the lack of advance state consent to these rules in investment treaties and investment laws. The new Rules failed to benefit from the contemporary proliferation of investment treaties, as states had already developed preferences for other rules, especially those of ICSID and UNCITRAL. States may also have been concerned about the new Rules' additional features that were strengthening the position of private-sector claimants.

Regardless, the attempt to introduce new rules signalled a growing institutional willingness to attract a greater number of mixed arbitrations. Judge Guillaume later commented these efforts by stating that the PCA Secretaries General Jonkman and van

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[1151] PCA, 'Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State, 1993', art 1(2).

[1152] ibid art 13(3).

[1153] PCA, 'Overview of PCA Arbitration Rules' <https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/> accessed 28 November 2022; PCA, 'Arbitration Rules 2012' 4 <https://docs.pca-cpa.org/2015/11/PCA-Arbitration-Rules-2012.pdf> accessed 30 July 2023.

[1154] None of the cases listed in the PCA case database appear to have been conducted on the basis of these rules, see PCA, 'Cases' (n 938).

den Hout 'did their utmost to see to it that the [International] Bureau could benefit from [the] multiplication of arbitrations between States and Businesses'.[1155] Romano notes that 'by diversifying, the PCA entered into competition with other adjudicative regimes, such as the ICSID (...) but by the beginning of the 2000s, the number of international commercial investment disputes being litigated had expanded so much that there was still plenty to go around for multiple players'.[1156] The demand for mixed arbitration was higher than institutional 'supply'.

Instead of relying on new procedural rules, the PCA was able to enter the mixed arbitration market due to earlier path-dependent developments, such as the growing diffusion of the UNCITRAL Rules in public-private contracts and investment treaties. This market entry was also supported by the flexibility of the PCA's mandate. Unlike ICSID, which actively promoted first and second-stage consent to ICSID arbitration, the PCA did not have to. In many cases, it simply served as an intergovernmental alternative to ICSID. For instance, in the 1990 MIGA standard contract of guarantee, the PCA was chosen to administer arbitrations between the agency and its beneficiaries according to the ICSID Arbitration Rules.[1157] This avoided a conflict of interest involving the Chairman of ICSID's Administrative Council, who also served as Chairman of MIGA's Board of Directors.[1158]

Rather than developing a successful strategy to secure state consent, the PCA benefitted from external circumstances that it did not directly influence. Although some

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1155 Guillaume (n 1100) 2.

1156 Romano (n 987) 121.

1157 Ibrahim Shihata, 'The Multilateral Investment Guarantee Agency (MIGA) and the Legal Treatment of Foreign Investment' (1987) 203 Recueil des Cours de l'Académie de Droit International 95, 304.

1158 ibid.

PCA officials like François envisioned a greater role of the PCA in mixed arbitration as far back as the 1950s, archival records do not point to PCA officials engaging in active lobbying of states between 1960 and 1989. Similarly, there is no evidence to suggest that van Boetzelaer actively sought to have a reference to the PCA Secretary General included as the designating authority in the UNCITRAL Arbitration Rules. When contacted by Holtzmann, he first inquired whether the role would come with additional financial expenses for the organization.[1159] Only when Holtzmann reassured him that the PCA would not incur any additional costs, he agreed to assume the designating authority role.[1160] Instead of active lobbying by the PCA, it seems that the PCA's inclusion largely came from the relentless efforts of Sanders, who had been advocating a revival of the PCA through mixed arbitration since the late 1940s, and his American counterpart Holtzmann.

5.2.7. <u>The PCA's evolving role in mixed arbitration</u>

The 1990s saw a rapid increase in the number of investment treaties referencing the UNCITRAL Arbitration Rules. By 2000, mixed arbitrations involving the PCA also begun to flourish, attracting greater attention from arbitration beneficiaries. However, the organization's long-term survival remained uncertain. While various actors involved in mixed arbitration were increasingly captivated by business opportunities linked to the PCA, it still seemed to lack adequate support from its state principals. Echoing previous requests made throughout the organization's history, PCA Secretary General van den

[1159] van den Berg (n 312).
[1160] ibid.

Hout, called for a budget increase in 2003. He stressed that the Court 'has seen its workload outgrow its budget over the past decade' and hoped 'to prevent the likely attrition his small organization faced'.[1161] Reporting on the PCA's activities to the Department of State, US diplomats spoke of a 'chronic nonpayment of contributions' to the Court.[1162] Van den Hout apparently shared this concern.[1163]

Whereas van Boetzelaer and Varekamp had led the International Bureau of the PCA during periods of inactivity (see Table 3), Jonkman and van den Hout actively sought to promote recourse to the PCA in mixed arbitration.[1164] Around this time, PCA officials and those associated with the organization also began framing the PCA's role in more competitive terms. In 2008, van den Hout noted, for instance, that 'the international community will be drawn to those mechanisms that can operate with a high degree of flexibility and are administered by experienced and highly responsive institutions'.[1165]

Similarly, Jan Paulsson, a member of the PCA since 2008, remarked in 2013 that due to its 'its flexible mandate, and the capacity created by many separate tribunals, the

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1161 'Diplomatic Cable from the US Embassy in The Hague to the Dept of State: PCA, Administrative Council Adopts Budget Proposal' <https://search.wikileaks.org/plusd/cables/03THEHAGUE2328_a.html> accessed 31 July 2023.

1162 'Diplomatic Cable from the US Embassy in The Hague to the Dept of State: PCA, Request for Guidance for Administrative Council Meeting' <https://www.scoop.co.nz/stories/WL0404/S00514/cablegate-pca-request-for-guidance-for-administrative.htm> accessed 31 July 2023.

1163 ibid; In 1976, 13 member states were in arrears with their financial contributions for 1974 and 7 with their contributions for 1972, see 'Diplomatic Cable from the US Embassy in The Hague to the Dept of State: International Organizations: International Bureau of the Permanent Court of Arbitration' <https://wikileaks.org/plusd/cables/1976THEHA02070_b.html> accessed 31 July 2023.

1164 Guillaume (n 1100) 2.

1165 Van den Hout (n 961) 661.

PCA's potential for expansion seems unlimited'.[1166] Criticizing limited state support, Paulsson added that intergovernmental arbitral institutions required active backing from their member states. Such support was particularly important for 'institutions engaged in types of arbitration for which private sector dispute resolution alternatives also exist'.[1167] Paulsson recommended that states 'ensure at least the level of attention and support that the private sector makes available to private arbitral institutions'.[1168] Speaking at the same event, frequent arbitrator and then-ICJ nominee, James Crawford, observed that the 'ICSID Secretariat – excellent as it is – is over-stretched' and that the 'PCA is an obvious alternative venue, both in terms of expertise and available facilities'.[1169]

PCA Secretary General	**Tenure**
Claude Crommelin	1929-1947
Aarnout Snouck Hurgronje	1948-1951
Alexander Loudon	1951-1953
Jean François	1954-1968
Eric van Boetzelaer	1968-1980
Jacob Varekamp	1981-1990
Hans Jonkman	1990-1999
Tjaco van den Hout	1999-2008
Christiaan Kröner	2008-2011
Hugo Siblesz	2012-2022

Table 3 - The tenure of PCA Secretaries General between 1929 and 2022

1166 'CV of Jan Paulsson (January 2021)' <https://www.tas-cas.org/uploads/tx_tascas/CV_Jan_Paulsson_Jan2021_01.pdf> accessed 31 July 2023; Paulsson (n 1001) 2.

1167 Paulsson (n 1001) 2.

1168 ibid.

1169 Crawford (n 1099) 5.

Today, the PCA appears more deeply integrated into the mixed arbitration industry than ever. Staff has moved from the institution to third-party funders, and PCA officials often occupy multiple roles in the arbitration sector.[1170] In 2019, the PCA signed a Memorandum of Understanding with the intergovernmental Secretariat created by the Energy Charter Treaty.[1171] This treaty has served as a basis in a number of cases implicating the PCA.[1172] Given the widespread adoption of the UNCITRAL Arbitration Rules in investment treaties and the PCA's extensive geographic reach, the organization is poised to remain a leading institution in mixed arbitration in the foreseeable future.

1170 Bentham IMF Capital, 'Bentham IMF Hires Recognized International Arbitration Expert In Canada' (*Mondaq*, 7 June 2019) <www.mondaq.com/canada/litigation-mediation-arbitration/813346/bentham-imf-hires-recognized-international-arbitration-expert-in-canada> accessed 31 July 2023.

1171 Energy Charter, 'Cooperation Activities with Other Organisations, Memoranda of Understanding' <www.energycharter.org/partners/overview/> accessed 31 July 2023.

1172 According to the UNCTAD database, 20 investor-state arbitrations based on the ECT were administered by the PCA. This does not take into account additional cases in which the PCA may have acted as a designating or appointing authority. See UNCTAD (n 17).

5.3. Mixed arbitration at the PCA today

The PCA is the ‘other’ major intergovernmental institution facilitating mixed arbitration besides ICSID. A broad interpretation by states of its mandate allowed it to administer a first mixed arbitration in 1934. However, this case remained an outlier and, despite the institution’s openness to a greater role in mixed disputes, it subsequently faced a decade-long period of inactivity. External developments during that period, notably the adoption of the 1976 UNCITRAL Arbitration Rules and their growing use in treaties, laid the groundwork for a rapid growth in caseload in the 1990s and 2000s. Today, the PCA is a sophisticated and global organization, that has facilitated well over 100 mixed arbitrations and opened several regional offices. The following provides an overview of the PCA’s institutional framework, its global cooperation and expansion, the diffusion of state consent, and its mixed arbitration caseload.

5.3.1. The institutional framework of the PCA

Today, the PCA comprises 122 contracting states, including the USA, Canada, all EU Member States, Russia, China, Australia, India, and Brazil.[1173] Its organizational structure consists of an Administrative Council, an International Bureau, and the Court itself. The Court is essentially a roster with 252 state-appointed ‘members’.[1174] Over

[1173] PCA, ‘Contracting Parties’ <https://pca-cpa.org/en/about/introduction/contracting-parties/> accessed 30 September 2023.

[1174] PCA, ‘Members of the Permanent Court of Arbitration’ <https://docs.pca-cpa.org/2023/07/a0d67d2f-pca-400282-v17g-current_list_annex_1_members_of_the_court.pdf> accessed 31 July 2023.

time, members included key figures in the development of international law, such as Swedish Supreme Court judge Algot Bagge and Hartley Shawcross.[1175]

Like other institutions examined in this thesis, the PCA does not directly adjudicate disputes. Its role in mixed arbitration is varied, more flexible, and often more indirectly connected to individual cases than that of other institutions. The PCA may serve in multiple capacities, such as those of a designating or appointing authority, or perform secretarial functions. In practice, these capacities depend on several factors like the language of investment treaties, the provisions of its founding Conventions, or the law governing specific arbitral procedure. In some cases, it also provides its premises for mixed arbitrations facilitated by other arbitral institutions.

The Administrative Council is the PCA's decision-making body, overseeing the budget, supervising the International Bureau, and setting strategic policies.[1176] It consists of diplomats from the contracting states and is chaired by the Dutch Minister of Foreign Affairs.[1177] Unlike the governing bodies of other institutions, its members are exclusively public-sector representatives.[1178] The Council's meetings are confidential, and neither its decisions nor detailed records of its meetings are made public. It 'decides all questions of administration which may arise with regard to the operations of

1175 International Bureau of the PCA, 'Communication of the International Bureau of the PCA, The Hague 18 May 1953, MC No 8515' (n 1003); Charles Mosley (ed), *Burke's Peerage and Baronetage*, vol 2 (106th edn, Burke's Peerage (Genealogical Books) Ltd 1999) 2594.

1176 '1907 Convention for the Pacific Settlement of International Disputes' (n 981) art 49.

1177 '1899 Convention for the Pacific Settlement of International Disputes' (n 967) art 28; David Gaukrodger has suggested the possibility that members of diplomatic corps based in The Hague might in practice be represented by other 'persons with dispute settlement or ISDS expertise', see Gaukrodger (n 23) 28.

1178 Nothing suggests the presence of private-sector observer organizations.

the Court'[1179] and exerts 'control over the appointment, suspension, or dismissal of the officials and employees of the [International] Bureau'.[1180] In practice, participation at Council meetings has sometimes been relatively low, raising concerns about potential partisan control.[1181]

The Administrative Council determines its own rules of procedure.[1182] According to its procedural rules, which were last amended in 2021,[1183] the president can convene Administrative Council meetings on 48 hours' notice and Council members may also request meetings. The body appears to usually meets twice a year.[1184] The rules also provide for a rotating acting presidency determined by geographic distribution replacing the president in his absence.[1185] Decisions are made by 'a majority of votes actually cast (...) [with] abstentions not to be counted'.[1186] As the rules do not mention a quorum, this leads to the possibility that a small share of the 122 contracting states could disproportionately influence outcomes.

1179 '1907 Convention for the Pacific Settlement of International Disputes' (n 981) art 49.

1180 '1899 Convention for the Pacific Settlement of International Disputes' (n 967) art 28.

1181 In 1959, for instance, only 32 out of 53 contracting parties participated in an Administrative Council meeting. This can be inferred from the list of states participating in the PCA at the time, see PCA, *Annual Report 1958*, 6; and the number of states participating in the Administrative Council meeting on 2 December 1959, see International Bureau of the PCA, 'Conseil administratif de la Cour permanente d'arbitrage: Procès-verbal de la séance du mercredi 2 décembre 1959 à 10 heures 30 au Palais de la Paix' (n 1035) 1.

1182 '1907 Convention for the Pacific Settlement of International Disputes' (n 981) art 49.

1183 PCA, 'Rules of Procedure of the Administrative Council of the Permanent Court of Arbitration' <https://docs.pca-cpa.org/2022/06/2704a3ed-ca_rules_of_procedure_of_the_administrative_council_-_as_modified_on_12_july_2021_en.pdf> accessed 31 July 2023.

1184 Gaukrodger (n 23) 28-29.

1185 This rule was apparently introduced in 2019, see PCA, 'Rules of Procedure of the Administrative Council of the Permanent Court of Arbitration' (n 1184) art III*.

1186 ibid art VI†.

The procedural rules also regulate the International Bureau of the PCA. This Bureau is headquartered at the Peace Palace in The Hague, acts as a permanent registry, and currently consists of 56 staff members and seven ICCA officials.[1187] It serves as a 'channel for communications' in arbitral proceedings, including mixed arbitrations.[1188] Despite its formal mandate, the Bureau's role in most mixed arbitrations today is more remote from the Court members and less tied to the Hague Conventions than in its early inter-state cases. This is linked to the fact that in mixed arbitrations at the PCA, the rules of procedure of these Conventions do not apply.[1189]

The International Bureau is chaired by a Secretary General elected for a five-year term. The current Secretary General, Polish ambassador to The Hague, Martin Czepelak, is the first non-Dutch national to hold the position. His election was only the second contested election in PCA history.[1190] All 13 predecessors of Czepelak were Dutch, indicating the strong ties of the organization with the Dutch state. As the organization's most powerful principal, the Netherlands have used the informal or customary preference given to Dutch nationals to retain institutional control. The Secretary General is assisted by a Deputy Secretary General, a role that is shared by two Co-Deputy Secretary Generals today.[1191]

[1187] '1907 Convention for the Pacific Settlement of International Disputes' (n 981) art 15; PCA, 'Staff' <https://pca-cpa.org/en/about/introduction/staff/> accessed 31 July 2023.

[1188] '1907 Convention for the Pacific Settlement of International Disputes' (n 981) art 43.

[1189] The only mixed arbitration in which the procedural rules of a Convention, the 1907 Convention, applied was the 1934 case of Radio Corporation of America v China; see PCA, 'Cases' (n 938).

[1190] PCA, 'HE Ambassador Marcin Czepelak Elected as PCA Secretary-General' (15 February 2022) <https://pca-cpa.org/en/news/h-e-ambassador-marcin-czepelak-elected-as-pca-secretary-general/> accessed 31 July 2023.

[1191] PCA, 'Appointment of New PCA Deputy Secretaries-General' (2 January 2023) <https://pca-cpa.org/en/news/appointment-of-new-dsg/> accessed 31 July 2023.

5.3.2. Inter-institutional cooperation and geographic expansion

Since 1913, the PCA has been headquartered at the Peace Palace in The Hague, next to the International Court of Justice. A leading arbitrator once described the Peace Palace as the venue where 'the responsibility of states is examined, tested, articulated, debated, refined – and indeed established'.[1192] In recent years, the PCA has aggressively expanded its global footprint by opening international offices in Mauritius (2010), Singapore (2018), Buenos Aires (2019), Vienna (2022), and Ha Noi (2022).[1193] The Singapore office, notably, is located at the Maxwell Chambers hearing centre, which also hosts offices of the ICC-ICA and other private-sector arbitral institutions.[1194]

Several factors have motivated this expansion. The establishment of regional offices has increased the PCA's global presence and made its services more convenient to arbitration users. These offices also benefit from local legal environments conducive to international arbitration, such as those in Singapore[1195] and Vienna.[1196] This is especially relevant given the importance of UNCITRAL Arbitration Rules, which usually require the disputing parties to choose a seat. The PCA's leadership specifically recognized the role of geographic expansion for case attraction. According to a 2004 US diplomatic cable, former Secretary General van den Hout 'made a spirited case for

1192 Paulsson (n 1001) 1.

1193 PCA, 'International Offices' <https://pca-cpa.org/en/about/international-offices/> accessed 31 July 2023.

1194 Maxwell Chambers, 'Directory: Dispute Resolution Tenants' <www.maxwellchambers.com/dispute-resolution-tenants/> accessed 31 July 2023.

1195 Alastair Henderson, Tomas Furlong and Gerald Leong, 'Arbitration Procedures and Practice in Singapore: Overview' (*Thomson Reuters Practical Law*, 1 April 2021) <http://uk.practicallaw.thomsonreuters.com/3-381-2028?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 31 July 2023.

1196 Christian Konrad and Philipp Peters, 'Arbitration Procedures and Practice in Austria: Overview' (*Thomson Reuters Practical Law*, 1 September 2021) <http://uk.practicallaw.thomsonreuters.com/w-025-9041?transitionType=Default&contextData=(sc.Default)> accessed 31 July 2023.

the PCA's global efforts to attract cases and raise its profile' during an Administrative Council meeting.[1197]

The PCA has also gone further than other institutions in pursuing a strategy of inter-institutional collaboration. It has signed at least 41 inter-institutional cooperation agreements with various regional arbitral institutions, intergovernmental organizations, and arbitration interest groups worldwide.[1198] These agreements aim to 'make PCA dispute resolution services more widely accessible' and 'enable the PCA to hold hearings and meetings in the facilities of the other institution, as well as to receive assistance with the arrangement of local support services' for such hearings.[1199] Among the PCA's cooperation partners are ICSID, the Singapore and Hong Kong International Arbitration Centres, and over 20 other regional institutions that play a lesser role in mixed arbitration.[1200] Notably absent from this list are the ICC-ICA and the SCC-AI, although the PCA has occasionally lent its premises for ICC-ICA arbitration hearings.[1201]

Few of these cooperation agreements have been made public. The cooperation agreement with the Florence Chamber of Commerce provides for the mutual use of institutional premises for arbitration hearings and the reciprocal promotion of arbitration

1197 'Diplomatic Cable from the US Embassy in The Hague to the Dept of State: PCA, Secretary General Reappointed After French-Dominated Administrative Council Meeting' <https://wikileaks.jcvignoli.com/cable_04THEHAGUE1235> accessed 31 July 2023.

1198 'ICCA-Permanent Court of Arbitration Mutual Cooperation Agreement Between Permanent Court of Arbitration at the Hague and International Council for Commercial Arbitration, 1989 [2011] (with Introduction by HM Holtzmann)' (n 975) 5.

1199 PCA, 'Overview of PCA Cooperation Agreements' <https://pca-cpa.org/en/relations/cooperation-agreements/> accessed 28 November 2022.

1200 ibid.

1201 'ICCA-Permanent Court of Arbitration Mutual Cooperation Agreement Between Permanent Court of Arbitration at the Hague and International Council for Commercial Arbitration, 1989 [2011] (with Introduction by HM Holtzmann)' (n 975) 5.

services.[1202] These agreements are not just practical, offering greater convenience and reduced costs to mixed arbitration 'users', but may also have a strategic dimension. By enabling local proceedings, they potentially discourage the formation of competing institutions and counter the view, that the PCA is a eurocentric institution.

The PCA also cooperates with other institutions on the basis of memoranda of understanding. One example is the 2019 memorandum with the Energy Charter Secretariat, with which the PCA regularly co-hosts capacity-building events, conferences, and training sessions.[1203] One such event was the 2019 Energy Charter Treaty Forum held at Maxwell Chambers in Singapore.[1204] Another joint effort is the co-organization of investment arbitration 'Masterclasses' together with the Energy Charter Secretariat. These Masterclasses have covered topics such as the 'determination of damages' and 'when to invite economic experts, whom from the company should be involved, setting realistic compensation targets in the context of international investment arbitration'.[1205] Less binding than cooperation agreements, memoranda of understanding mainly serve promotional purposes, enhancing the visibility of the PCA's

1202 'Cooperation Agreement Between the Permanent Court of Arbitration and the Florence Chamber of Commerce, 29 March 2018' <https://www.fimcmediation.com/wp-content/uploads/2018/10/Cooperation_Agreement_PCA-FCC.pdf> accessed 31 July 2023.

1203 'Memorandum of Understanding between the Permanent Court of Arbitration and the Energy Charter Secretariat, Dated 20 December 2019' <https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/2019.10.20_Permanent_Court_of_Arbitration.pdf> accessed 31 July 2023.

1204 PCA, 'Overview of PCA Conferences and Seminars' <https://pca-cpa.org/en/relations/conferences/> accessed 28 November 2022.

1205 Energy Charter, 'Leaflet: Investment Arbitration Masterclass, 3rd Edition' (n 886); For ECT-related events, the PCA also appears to have collaborated with the Arbitration Institute of the Stockholm Chamber of Commerce, although no MoU with this institution has been made public, see Energy Charter, 'Legal Training on Investment Dispute Resolution' (21-23 September 2021) <www.energycharter.org/media/news/article/legal-training-on-investment-dispute-resolution-21-23-september-2021/> accessed 31 July 2023.

services, particularly within strategic industrial sectors like energy or among students of international arbitration.[1206]

In addition to these inter-institutional arrangements, the PCA has secured several agreements with signatory states of its founding Conventions. Perhaps the most important of these agreements is the 1999 Headquarters Agreement with the Netherlands, granting the PCA diplomatic privileges, inviolability, immunity from legal process, and exemption from direct taxes.[1207] The transit and residence rights guaranteed in the agreement extend not only to PCA officials, but also to arbitrators, participants in proceedings, and persons attending PCA meetings.[1208] Arbitrators also 'enjoy such immunities as are accorded to diplomatic agents pursuant to the Vienna Convention'.[1209]

These privileges are not limited to the Netherlands; the PCA has entered into 14 Host Country Agreements with other states, including Hong Kong and Singapore.[1210] These agreements aim to establish a legal framework, 'under which future PCA-administered proceedings can be conducted in the territory of the host country on an *ad hoc* basis, without the need for a permanent physical PCA presence in that territory'.[1211]

[1206] The PCA has also concluded cooperation agreements with academic institutions. See for instance PCA (n 1200).

[1207] Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, 'Verdrag inzake de zetel van het Permanente Hof van Arbitrage, 's-Gravenhage (Convention on the seat of the Permanent Court of Arbitration, The Hague) 30 March 1999' arts 3 and 7 <https://wetten.overheid.nl/BWBV0001409/2000-08-09> accessed 31 July 2023. It is uncertain whether these tax privileges extend to PCA staff and arbitrators appointed in PCA proceedings.

[1208] Koninkrijksrelaties (n 1208) art 8.

[1209] ibid art 9.

[1210] PCA, 'Overview of PCA Host Country Agreements' <https://pca-cpa.org/en/relations/host-country-agreements/> accessed 28 November 2022.

[1211] ibid.

They also ‘ensure that adjudicators, PCA staff, and participants in proceedings (such as counsel, agents, and witnesses) are able to perform their functions under similar conditions to those guaranteed under the PCA’s Headquarters Agreement with the Kingdom of The Netherlands’.[1212] For instance, India recently signed such an agreement while simultaneously allowing foreign lawyers to practice within its borders – an essential step for hosting international arbitrations.[1213]

Host Country Agreements have broad implications for both the PCA and the host country. The PCA promotes these agreements in sales terms. It highlights benefits for host countries, such as an increased attractiveness for international arbitrations, an elevated international status, and the promotion of a state’s jurisdiction as neutral grounds for dispute resolution.[1214] States possibly expect economic returns and heightened prestige. From the PCA’s perspective, such agreements bring the institution closer to its local ‘users’ and deter the creation of competitor institutions. Unlike at ICSID, mixed arbitrations at the PCA often depend on the support of the courts at the seat of the arbitration. Diplomatic privileges and a wide geographic presence can potentially lessen the risk of adverse interference by local courts. This, in turn, may help remedy the competitive disadvantages that most mixed arbitrations at the PCA have when compared to ICSID.

[1212] ibid.

[1213] ‘India Asks 68 Countries to Renegotiate Bilateral Investment Pacts, Rajya Sabha Told’ *Times of India* (16 March 2023) <https://timesofindia.indiatimes.com/business/india-business/india-asks-68-countries-to-renegotiate-bilateral-investment-pacts-rajya-sabha-told/articleshow/98708530.cms?from=mdr> accessed 31 July 2023. This apparently coincides with the decision of India to terminate 68 investment treaties, although it is uncertain whether these decisions are linked.

[1214] PCA (n 1210).

5.3.3. <u>The diffusion of consents</u>

The PCA's involvement in mixed arbitration relies almost exclusively on the UNCITRAL Arbitration Rules, which apply to the majority of the PCA's mixed arbitrations. Despite their *ad hoc* character, these Rules privilege the PCA and grant it a unique level of flexibility. Since they allow for a designation of the appointing authority when the dispute arises, the PCA often becomes involved in cases where the underlying instrument containing consent – be it a treaty, contract, or law – does not explicitly mention the PCA. This procedural remoteness sets the PCA apart from other institutions like ICSID, ICC-ICA, and SCC-AI, which are more often explicitly designated in the legal instrument containing state consent and tend to rely on their own institutional rules.

A comprehensive analysis of the reasons for which states started to incorporate the UNCITRAL Arbitration Rules in their legal frameworks is beyond the scope of the present. Some broad trends can nevertheless be observed. Of the investment treaties currently in force, 1,128 refer to the UNCITRAL Arbitration Rules, making them the second most common set of mixed arbitration rules after those of ICSID (Figure 9).[1215] Additionally, a number of treaties also explicitly mention the PCA as the appointing authority or registry for investment arbitration. For instance, the PCA is specifically mentioned in 25 BITs of Qatar, 21 BITs of Austria, 20 BITs of Iran, and 17 BITs of Israel.[1216] The high occurrence of Iranian BITs referring to the PCA, may be attributed to

[1215] UNCTAD (n 456); this combines ICSID and ICSID Additional Facility Rules.

[1216] These numbers were retrieved from EDIT, using the keywords 'PCA' and 'Permanent Court of Arbitration' and verifying in the text of the treaty, whether the mention relates to mixed arbitration (to distinguish inter-state use of the PCA), see Alschner, Elsig and Polanco (n 455).

the PCA's historical role in providing registry and secretarial services to the Iran-United States Claims Tribunal.

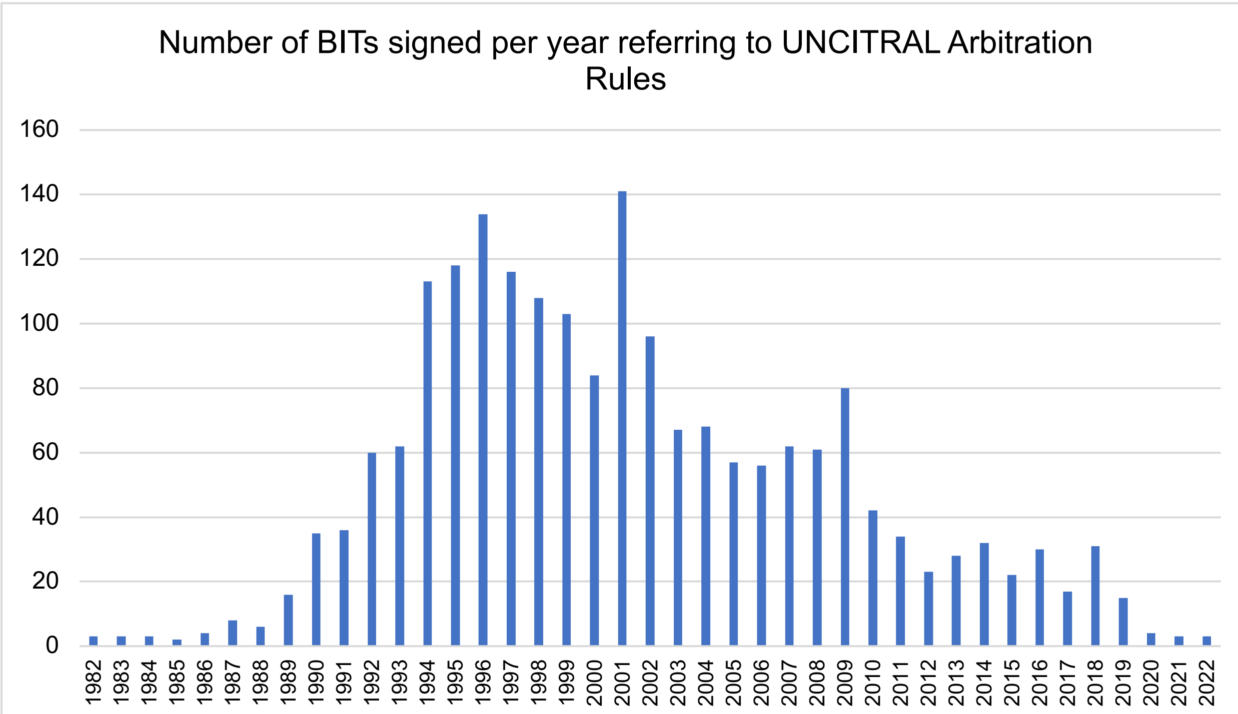

Figure 9 - Number of BITs signed per year referring to UNCITRAL Arbitration Rules

5.3.4. The mixed arbitration caseload of the PCA

The PCA may intervene in mixed arbitration as a designating, appointing, and administering authority. In theory, it could do so under different sets of rules, including the UNCITRAL Arbitration Rules, the PCA's 1962 or 1993 Optional Rules, or any other *ad hoc* rules that disputing parties may agree upon with reference to the PCA. In practice, the UNCITRAL rules dominate the caseload and, disputing parties appear to frequently request the PCA to act as a registry for UNCITRAL proceedings.[1217] While

[1217] According to the UNCTAD database, of 387 cases in which UNCITRAL Rules applied, 217 were administered by the PCA, see UNCTAD (n 17).

the PCA has been highly successful in attracting mixed arbitrations under the UNCITRAL Rules, it has not gained traction using its own rules.[1218]

The PCA website lists investor-state arbitrations and contract-based mixed arbitrations separately, but it does not define these terms. Available information suggests that the 'investor-state arbitration' category is limited to treaty-based cases.[1219] The website, however, does not include cases in which the PCA has acted solely as designating authority. As of 2018, the Secretary General 'received 787 requests to act as appointing authority or to designate an appointing authority' across all types of cases.[1220] It is reasonable to assume a significant number of cases of the PCA serving as designating authority in mixed arbitrations pursuant to UNCITRAL Rules that are not reflected on the website.

Besides this extensive designating authority activity, the PCA has intervened as an appointing authority or administering institution in 123 investor-state arbitrations and 18 contract-based mixed arbitrations.[1221] Among the investor-state arbitrations, 84 have been concluded while 39 are still pending.[1222] The PCA also provided registry services

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1218 According to the PCA case database, none of the mixed arbitrations administered by the PCA were based on the organization's Optional Rules, see PCA, 'Cases' (n 938).

1219 This relies on the categorization available in the advance search function of the 'cases' section of the PCA website, see ibid. Contract-based mixed arbitrations can be filtered to only include cases opposing private entities and states or state entities and information on applicable procedural rules is also provided.

1220 PCA, *Spotlight on the PCA's Appointing Authority Activities* (2019) 1 <https://docs.pca-cpa.org/2019/04/EN-Spotlight-on-the-PCAs-Appointing-Authority-Activities-1.pdf>.

1221 PCA, 'Cases' (n 938).

1222 ibid.

in at least 115 of these cases.[1223] All contract-based mixed arbitrations involved private claimants and states, their entities, or a combination of both as respondents.[1224]

UNCITRAL Arbitration Rules dominate the mixed proceedings in which the PCA has intervened. Out of 123 investor-state arbitrations, 110 were based on a version of these Rules.[1225] Moreover, 15 out of 18 contract-based mixed arbitrations were based on the UNCITRAL Rules.[1226] Some observers suggest that the PCA is the institution that is most frequently designated as an appointing authority in UNCITRAL investor-state arbitrations.[1227] The first mixed arbitration in which the PCA acted as a registry and administering institution was the 1934 case of *Radio Corporation of America v. China*. From 1934 to 1988, the PCA intervened in only one other contract-based mixed arbitration, not counting the registry services it provided to the Iran-United States Claims Tribunal.[1228] As indicated above, the 1988 case of *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana* involved the first designating authority role under the 1976 UNCITRAL Rules.[1229] Figure 10 provides an overview of the relatively low number of contract-based mixed arbitrations filed with the PCA per year.

1223 PCA, *Annual Report 2021* (n 727) 10.

1224 PCA, 'Cases' (n 938).

1225 ibid.

1226 ibid.

1227 Dahlquist (n 99) 67.

1228 This was the 1969 case of Sudan v Turriff Construction, see Jarrod Hepburn, 'The International Extension of Denial of Justice' (2022) 85 The Modern Law Review 1357.

1229 *Antoine Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana, Award on Jurisdiction and Liability* [1989], paras 1 and 17.

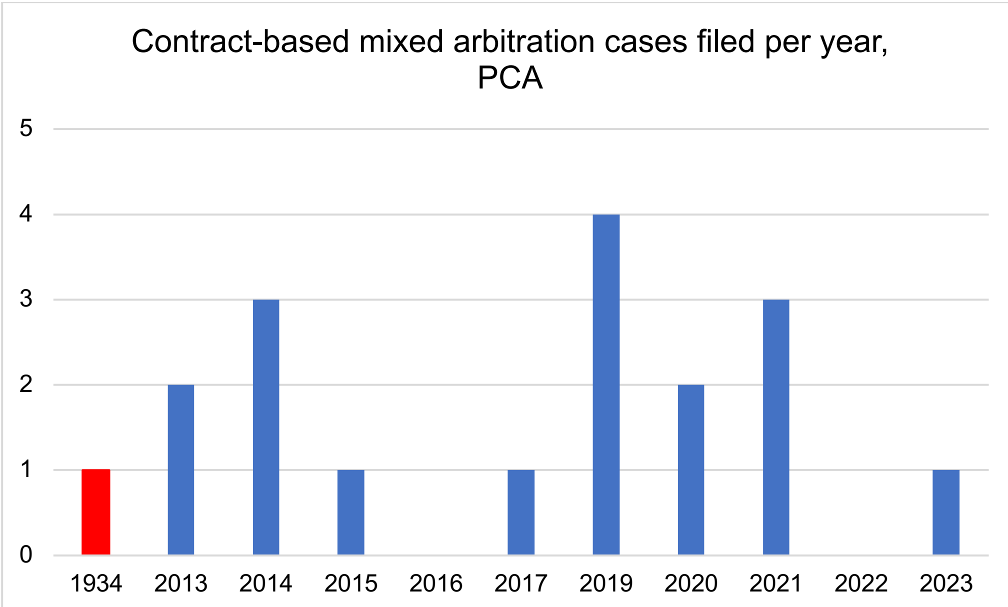

Figure 10 - Contract-based mixed arbitrations filed per year, PCA

The PCA's first treaty-based mixed dispute was the UNCITRAL arbitration *Saluka Investments B.V. v. Czech Republic*, filed in 2001. Since then, the number of treaty-based mixed arbitrations has generally been on the rise, reaching a peak in 2018 with 14 new cases. In recent years, this number has decreased slightly. Today, the PCA is the second most active institution by number of investor-state arbitrations administered, trailing only ICSID.[1230]

[1230] PCA, 'Cases' (n 938); ICSID, 'ICSID Statistics 2023-1' (n 674); ICSID, 'ICSID Statistics 2022-2' <https://icsid.worldbank.org/sites/default/files/publications/The_ICSID_Caseload_Statistics_2022-2_ENG.pdf> accessed 31 July 2023.

5.4. Chapter conclusion

The PCA is the most flexible of the institutions considered in this thesis. This flexibility is by design. In combination with the UNCITRAL Arbitration Rules, it is this flexibility that allowed the PCA to develop a strong market position within the advance consent oligopoly at a late stage when the other institutions had already secured a stronger footing. Despite its inter-state mandate, the PCA could easily be converted into an organization specializing in mixed arbitration, after a decade-long period of drift. During this period of drift, it had struggled to garner financial and political support from its principals and had been subject to a voting mechanism that was vulnerable to partisan decision-making. The PCA was repurposed to fulfil a multitude of roles, including designating and appointing authority services, registry and administrative services, or simply lending its premises and diplomatic appeal to proceedings conducted under external rules. While institutional officials and experts associated with it had hoped to see mixed arbitration emerge at the PCA decades earlier, such efforts remained without success, in part due to inter-institutional competition from the ICC-ICA and ICSID.

In contrast to other institutions, the PCA and its own officials had little to no success in brokering mixed arbitration based on the organization's own rules. Rather its success depended on the privileged role it was to be granted in the 1976 UNCITRAL Arbitration Rules, which itself depended on the favourable view and diplomatic efforts of Pieter Sanders and Howard Holtzmann. The UNCITRAL Rules created a gap in an otherwise increasingly closed oligopoly of pre-existing arbitral institutions, in that they allowed disputing parties to defer the choice of appointing or administering authority to the moment a dispute was arising. More than the other institutions considered, the PCA thus depended on the favourable view of disputing parties at the time of filing a claim rather than at the stage of diffusion of consent. The PCA thus piggybacked on the success of the UNCITRAL Arbitration Rules, which themselves offered certain competitive advantages over existing institutional rules, including the freedom to choose an institution that was politically acceptable to the disputing parties. The normalization of the use of UNCITRAL Rules in investment treaties further reinforced their relevance as a source of cases for the PCA.

To complement its flexibility, the PCA has more recently pursued one of the strongest geographic expansion policies of all institutions considered in this thesis, opening several regional offices and entering numerous formal agreements for cooperation with states, interest groups, intergovernmental organizations, and regional arbitral institutions. This geographic expansion may be means for the PCA to keep regional competition based on UNCITRAL Arbitration Rules at bay. Indeed, due to the absence of a strong institutional link, mixed arbitrations based on UNCITRAL Rules can be more easily administered at smaller institutions across the world, opening up an otherwise closed market. Today, the PCA maintains strong links with the commercial arbitration constituency, and due to the UNCITRAL Rules, mixed arbitration at the PCA is not limited to investment matters.

Conclusion

The Institutional Oligopoly of Mixed Arbitration

The core argument of this research project is that the institutional market for treaty-based mixed arbitration constitutes an oligopoly of four institutions – the International Court of Arbitration of the International Chamber of Commerce, the International Centre for Settlement of Investment Disputes, the Arbitration Institute of the Stockholm Chamber of Commerce, and the Permanent Court of Arbitration. The institutional oligopoly of treaty-based mixed arbitration was preceded and is today accompanied by a second market for contract-based mixed arbitration. This more opaque market is also characterized by imperfect competition, but with an apparently lower concentration of market share by the four institutions.

Archival material reviewed for this thesis indicates that institutional practices in contract-based and treaty-based mixed arbitration cross-fertilized over time. This cross-fertilization informs and complements existing findings on the rise of investor-state arbitration. In addition to Broches' diplomatic brokering and interaction with state officials as analysed by St John, ICSID emerged in response and relation to pre-existing institutional practices of mixed arbitration primarily at the ICC-ICA.[1231] After ICSID's initial period of inactivity, inter-institutional competition likely influenced Broches' reasoning behind the creation ICSID Additional Facility more than 10 years after the

[1231] St John (n 52) 110-45. In contrast to ibid 41 and 46, this also suggests that a constituency of beneficiaries of mixed arbitration, albeit small, may have existed prior to the creation of ICSID and may have overlapped the other institutions to differing degrees as they entered the oligopoly.

Convention was signed. The co-existence between institutional markets for advance-consent and contract-based mixed arbitration also suggests that further insights could be gained from bringing distinct bodies of scholarship on institutional arbitration[1232] and the political economy of the investment treaty regime[1233] into conversation.

Rather than a result of free market competition, the treaty-based oligopoly emerged driven by various factors. These factors include lobbying and advocacy of institutional officials and affiliated experts during critical junctures and subsequent, path-dependent developments. Over time, states developed a preference for the four institutions, and the growing number of consents in investment treaties entrenched and perpetuated this preference. When the number of cases started to increase, institutional mixed arbitration gave rise to a constituency of beneficiaries incurring increasing returns. This constituency developed a vested interest in maintaining access and a steady influx of cases to the dominant institutions. In support of these objectives, beneficiaries have formed strategic partnerships with the institutions, engaged in formal and informal forms of information-sharing and promotional activities, and benefitted from a quasi-ubiquitous 'revolving door'. The constituency of beneficiaries of the institutional oligopoly of mixed arbitration spans all four institutions and also overlaps with contract-based mixed arbitration. However, particularly in non-ICSID mixed arbitration that requires the designation of a seat, beneficiaries tend to be regionally concentrated, especially where the headquarters or regional offices of arbitral institutions are situated.

1232 For instance, Dezalay and Garth (n 79); Lemercier and Sgard (n 147); Schinazi (n 99).

1233 Bonnitcha et al (n 145); Lauge Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (CUP 2015); Perrone (n 99). Some recent scholarship has started to bridge this gap. See for instance, St John (n 52); Carlevaris and Dahlquist (n 418).

These non-judicial aspects of arbitral institutions operating outside of the ICSID regime complement recent doctrinal scholarship on the role of commercial arbitration rules in investment treaty arbitration.[1234]

Despite similarities with private enterprises, the institutions also have unique features due to their interaction with states and the presence of non-financial incentives. The considered institutions have influenced the international investment regime and other actors involved in mixed arbitration. The competition between the institutions considered in this thesis, and the way it emerged and evolved, is unique, leading to various forms of strategic interaction. Rather than competing on prices[1235] or quantity,[1236] arbitral institutions rely on strategies such as product differentiation, procedural innovation, and the deliberate dissemination or retention of information in order to distinguish and promote themselves as suppliers of institutional services. The four institutions have also used professional and diplomatic networks as well as significant expert knowledge across the domains of arbitration procedure, inter-state deliberations, and investment law.

At the same time, competition is impeded by factors described in historical institutionalist scholarship. Particularly for treaty-based mixed arbitration, developments are path-dependent and earlier decisions may shape later outcomes in ways that were

[1234] Dahlquist (n 99). This also confirms that Dezalay and Garth's findings on the regional specialisation and concentration of commercial arbitration beneficiaries around the seats of arbitral institutions also extend to mixed arbitration, see Dezalay and Garth (n 79) ch 9.

[1235] Cournot (n 31).

[1236] Bertrand (n 33). At least for treaty-based mixed arbitration, it is also unlikely that arbitral institutions compete on administrative fees in a way suggested for commercial arbitration by Dezalay and Garth, see Dezalay and Garth (n 79) 44.

not fully anticipated.[1237] Long periods of institutional hibernation of the PCA and ICSID, and unexpected sources of new cases, such as a mention in the UNCITRAL Arbitration Rules demonstrate this path-dependence. Institutional outcomes are sometimes unintended consequences.[1238] For instance, while efforts to promote mixed arbitration at the PCA were unsuccessful, even with the publication of specific procedural rules in 1962 and 1993, it was the reference to the PCA Secretary General in the UNCITRAL Rules that led to the organization's revitalization.

In some moments, however, individual agency is considerable.[1239] At critical junctures, arbitral institutions, and their associated experts, assumed the role of value-driven actors where institutional profit-maximization appears to have played a secondary role. In these instances, a remarkably mobile transnational group of select experts with significant procedural and diplomatic knowledge and privileged access to information followed a common goal. This goal was to create and expand institutionalized forms of mixed arbitration. It was pursued at every stage of the emergence of the oligopoly and for every aspect of arbitral procedure. The activities in pursuit of the goal ranged from advocacy for the capacity of states to consent to binding arbitration, to the fostering of mixed arbitration agreements and their recognition by state courts, to the promotion of international obligations for the enforcement of foreign mixed arbitral awards. The promoters of institutionalized mixed arbitration brokered the ICSID Convention and openly supported the diffusion of concrete state consents to

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[1237] Capoccia and Kelemen (n 71) 343.

[1238] Farrell and Newman (n 57) 621.

[1239] Despite diverging views as to its homogeneity, the influence of a relatively small group of individuals is therefore a common denominator of scholarship on the emergence of commercial (for instance, Dezalay and Garth (n 79) 3, 15, 123, and ch 3 more generally) and investor-state arbitration (St John (n 52) 12-13; Perrone (n 99) 4, 14-15; Batselé (n 65) 7).

arbitrate in investment treaties. More opaquely, they also facilitated state consents in public-private contracts.[1240] Similar to lawyers, institutional arbitration experts have been 'professionals of a double game, serving clients and the construction of a particular legal order.'[1241]

Throughout this process, the institutions and their individual promoters were limited by institutional neutrality. They had to carefully navigate what could and what could not be said. Lobbying generates tension with the expectation of institutional neutrality that is intrinsically linked to any dispute settlement function. It creates a need to present a distance between the activities of case administration and those of consent promotion. This factor has led to internal and external specialisation and division of labour. Internally, arbitral institutions create separate institutional organs with such tensions in mind, as in the case of the ICC's Arbitration Commission. Externally, the institutions rely on groups of allied arbitration experts wearing distinct hats or their professional associations, illustrated by the International Council for Commercial Arbitration in the case of the PCA or the American Arbitration Association in the case of the SCC-AI.

The demands of diplomatic finesse and strategic manoeuvring contrast, to some extent, with the priorities of norm entrepreneurs and investor representatives examined by Perrone and Batselé.[1242] The latter have been organized in interest groups such as

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1240 Differing degrees of rationality can be observed in the market for mixed arbitration. While state officials have often acted bounded rational (Poulsen (n 1233) 109), institutional arbitration experts often acted with remarkable foresight and a high degree of rationality, similar to that of multinational companies (see Dezalay and Garth (n 79) 93).

1241 Dezalay and Garth (n 79) 70, also see 93 on lawyers as rule-makers.

1242 Perrone (n 99); Batselé (n 65).

the Cologne Society, the APPI, and multilateral corporations such as Shell.[1243] Arbitral institutions and their individual promoters may not have been the primary actors to shape the overarching field of international investment law. Likewise, experts have had significantly divergent views on how to broker state consent by one or another organizational setting or set of procedural rules.[1244] Other extrinsic factors have been projected into this institutional interaction, including major geopolitical processes.

For treaty-based arbitration, the institutions other than ICSID benefitted from the initial reluctance of many states to ratify the ICSID Convention. Where a capital-exporting state negotiated an investment treaty with a developing country that had not ratified ICSID, it often looked for alternative institutional rules. Other institutions had to be visible to be viable alternatives to ICSID. Visibility was particularly relevant to appeal to state decision makers, especially in ministries charged with negotiating the legal instruments. Also, a reference in a treaty was not immediately identified as a strategic win for institutions. While some individuals anticipated the importance of advance consent, only over time did the institutions fully recognize that this form of consent was a potent source of caseload, and they did not all translate this insight equally into (successful) advocacy.

Arbitral institutions also participated in the development of the procedural rules that apply to mixed arbitration. This phenomenon remains understudied. They participate to varying degrees, both for internal (procedural rules) and external instruments (international conventions, treaties etc.). Again, arbitral institutions are not always the

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[1243] Batselé (n 65) 7, 8, 10.
[1244] St John (n 503).

dominant actors influencing or dictating these rules. Likewise, they may not always or not exclusively have had mixed arbitration in mind when participating in norm-making processes. At times, considerations regarding institutional practices in commercial arbitration between private disputing parties may have been equally or more important. Institutions also did not always succeed but launched numerous initiatives, with varying levels of success. Moreover, their influence oscillated between hard and soft power. And finally, other groups of actors, such as investor interest groups, have also had considerable agency in the development of mixed arbitration.[1245]

Yet, in some clear instances, arbitral institutions and their affiliated experts have had nearly full control over procedural innovation, with states retaining minimal or no oversight. In these instances, the institutions are extraordinarily powerful actors, tying states to new procedural constraints and commitments as a result of their advance consents to the institutions' authority. Indeed, the power to alter retroactively the procedural rules may offer a competitive advantage to non-governmental over intergovernmental institutions, which must seek some degree of public mandate. Regulatory oversight of the institutional oligopoly of mixed arbitration is lopsided. This advantage may be a means to attract additional cases, particularly in light of the high rationality of multinational companies[1246] and the cross-institutional mobility of arbitrator candidates, legal counsel, and third-party funders. In other instances, the institutions participate as observers in intergovernmental deliberations, relying on soft power and co-optation to influence outcomes.

[1245] See for instance Batselé (n 65); Perrone (n 99).
[1246] Dezalay and Garth (n 79) 93.

Arbitral institutions gain significant advantages from beneficial relationships with the state in which their offices are located. This is especially true for institutions other than ICSID. Where the ICSID system is self-contained – in that it does not foresee a seat of arbitration subject to supervisory jurisdiction of the courts at this seat – other institutions depend on a favourable, pro-arbitration stance of such courts.[1247] In this regard, mixed arbitration outside the ICSID system has several common features with general commercial arbitration. Even though the seat is not necessarily the home state of the institution, the default choice for non-governmental arbitral institutions, in the absence of an agreement of the disputing parties, is usually the institution's home state. This tendency has fundamental consequences for the legal and judicial system of the relevant state. Its courts will *inter alia* have the power to decide upon requests to order anti-suit or anti-arbitration injunctions, to determine the validity of arbitration agreements, to set aside arbitral awards, and to interpret international and foreign state law.

The presence of arbitral institutions also has economic consequences for the home state. The institutions give rise to local arbitration industries. Law firms, arbitrators, expert witnesses, and other participants contribute to the creation of local subsidiaries and generate local revenue. States and their officials have gone to considerable lengths to maintain this lucrative presence of an institution in their territory, or to attract subsidiaries of the dominant institutions.

Arbitral institutions also pursue strategic goals in their relationship with the home state. They have negotiated tax exemptions, financial benefits, and diplomatic immunity.

[1247] Dahlquist (n 99) 82-197.

Sometimes they request immunity for arbitrators and counsel taking part in their proceedings. They may also lobby the state for more favourable domestic legislation on arbitration procedures. States can help an institution influence decision-making and ‘gain a seat at the table’ in the wider context of mixed arbitration. For instance, France appears to have been instrumental in promoting the ICC’s application for observer status at the United Nations.

Another striking feature of mixed arbitration is that all of the dominant institutions, except the PCA, appear to exist within a wider structure or parent institution. ICSID is part of the World Bank Group[1248]; the International Court of Arbitration is a subsidiary of the International Chamber of Commerce; and the Arbitration Institute is a subsidiary of the Stockholm Chamber of Commerce. To varying degrees, the institutions have used the status and influence of their parent organizations to promote and foster mixed arbitration. ICSID appears to have benefitted most from its parent organization in the promotion of state consent to mixed arbitration, aided by the relationships with state officials the World Bank had fostered prior to the Centre’s creation.

Even before ICSID was established, the World Bank was mediating international disputes about private property rights. At the time the ICSID Convention was signed, the World Bank had a broad state membership and unequalled access to statal decision-making in economic and investment policy. Similarly, the ICC Commission on Arbitration benefitted from the ICC’s participation in UN bodies, including the Economic Commission for Europe, where state officials discussed the future of arbitration. The

[1248] St John describes the advantage of brokering the ICSID Convention under the institutional umbrella of the World Bank, see St John (n 52) 110-45.

SCC-AI appears to have used its parent organization to a lesser degree, benefiting instead from Sweden's Cold War status as a neutral country. Both, the SCC-AI and the ICC-ICA may also have benefitted from their visibility among corporates and businesspeople.

6.1. The pioneering role of the ICC-ICA

Among the four institutions considered in this thesis, the ICC pioneered administered mixed arbitration of disputes based on contracts between states (or state entities) and private entities. Inter-institutional competition, particularly with the PCA, was part of the mindset of ICC institution builders at the time of the ICA's inception. Long before ICSID, the ICC-ICA administered contract-based disputes involving states. It is unclear how strongly the ICC promoted mixed arbitration in these early years, but it clearly hoped to see cases submitted to the ICA and did not reject requests when they were made. Thus, before the critical juncture in the late 1950s and early 1960s, which allowed for the creation of ICSID, there was an earlier, more minor juncture in the interwar period that allowed for mixed arbitration to be institutionalized at the ICC (and, technically, the PCA).

As observed by Lemercier and Sgard,[1249] this updates the account of Dezalay and Garth, who situated the arrival of mixed arbitration at the ICC-ICA in the 1970s in relation to the nationalisation of oil investments in newly independent states, particularly Libya.[1250] Moreover, the ICC-ICA's first-mover advantage in administering contract-

[1249] Lemercier and Sgard (n 147).
[1250] Dezalay and Garth (n 79) ch 4, particularly 74-85.

based mixed arbitrations, combined with the arrival of ICSID, may also explain the absence of a major British institutional competitor in mixed arbitration. This absence replicates the delay of market entry in commercial arbitration of the LCIA and the reluctance of the ICC-ICA to designate London as a seat prior to the 1980s, as observed by Dezalay and Garth.[1251]

When the ICSID Convention was signed, it had, for years, been usual practice for some governments and major corporations to refer to the ICC in public-private contracts. The ICA's case numbers were increasing significantly. As a private-sector institution, the ICC-ICA did not require a mandate granted by states through the complex and onerous diplomatic exercise of brokering an intergovernmental convention. It hit the ground running. While further analysis of mixed cases at other arbitral institutions not considered for this project is required, it is possible that, before the inception of ICSID, the market for contract-based mixed arbitration constituted an oligopoly dominated by the ICC-ICA.[1252] Until today, the ICC has likely administered far more contract-based mixed arbitrations than its intergovernmental competitors ICSID and the PCA.

At the same time, there were limitations to mixed arbitration at the ICC-ICA before 1965. Until the 1958 New York Convention, the prevailing party had to rely on alternative means of enforcing arbitral awards, such as the 1927 Geneva Convention, which placed a far greater burden on the party seeking enforcement. It is possible that the lack of a credible threat of sanctions against disputing parties limited the efficiency

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[1251] ibid ch 7, particularly 135-141.

[1252] The ICC-ICA has also been identified to be the dominant institution in private commercial arbitration by Green (n 81) and Dezalay and Garth (n 79) 9 and ch 3.

of mixed arbitration up to 1958. Moreover, the ICC was a private-sector organization and a chamber of commerce; some states appeared apprehensive about arbitration at the ICC-ICA for this reason. Some members of the ICC Commission on Arbitration – a primary forum for arbitration experts to discuss mixed arbitration in the post-war years – pointed to this type of state distrust in the institution, particularly with regard to East-West disputes. Some powerful experts, such as van Hamel in the 1920s, and Sanders after 1945, believed that governments would be more willing to submit disputes to the intergovernmental PCA, and may therefore have advocated for mixed arbitration there. Others, like Haight, placed their bet on ICSID after formal state support for mixed arbitration at the ICC-ICA was not forthcoming. The ICC was also located in Europe, in the territory of colonial France, which some newly independent states likely rejected as a neutral venue.[1253]

With the emergence of the investment protection narrative in the 1950s and 1960s, the ICC generally endorsed means that were alternative to arbitration, such as insurance and a multilateral investment guarantee scheme. Even so, arbitration experts at the ICC kept the hope alive that mixed arbitration could be more formally recognised by states. The majority of ICC experts viewed the choice of organization flexibly, so long as mixed arbitration was formally administered. While institutional officials and affiliated experts lobbied for state consent to mixed arbitration, they did not always have a preference for the institution they represented or communicate such a preference publicly. In these instances, they acted as value-driven actors prioritizing state consent

[1253] This also creates avenues for more detailed research on the politics of hosting the headquarters or regional offices of arbitral institutions and their specific link to mixed arbitration, especially relevant due to the observed expansionist tendencies of some institutions.

over the choice of institution. In Sanders' words, the goal was to 'help States to get over a certain hesitance to take the plunge into arbitration'.[1254]

Flexibility as to organizational choice also followed from exchanges between ICC and World Bank officials, where the latter cautioned that the ICC might not be acceptable to states. This may also explain the relatively rapid endorsement by the ICC of the ICSID Convention as a viable means for the protection of foreign investment. Some existing accounts that portray the ICC as a unitary actor, pushing in a different direction from the ICSID Convention, may be nuanced by this finding. Despite the endorsement of ICSID, the ICC-ICA remained a primary forum for the settlement of mixed disputes, particularly based on public-private contracts.

6.2. ICSID's sparking of the advance consent

The advent of ICSID introduced what the ICC had been unable to deliver: government buy-in for a legally binding international convention that created a new formalized institutional structure for investor-state arbitration with a self-contained enforcement system. In the following years, ICSID officials, particularly Broches, used the wide network of government contacts stemming from ICSID and the World Bank, which private-sector institutions lacked. It was a competitive advantage that gave Broches and other ICSID officials significant agency to promote second-stage consent in investment treaties. Broches' diplomatic skill, ICSID's revolutionary two-consent structure, and the strong promotion of second-stage consent created a potent setting for

[1254] Sanders, 'Het Permanente Hof van Arbitrage (The Permanent Court of Arbitration, English translation by ICCA)' (n 1012) 4.

treaty-based mixed arbitration. By the early 2000s, ICSID had established itself as the institution with, by far, the most advance consents and treaty-based disputes under its authority.

Similar to the PCA's long drift, however, ICSID's standing was fragile in the early years. Delays in ratifications of the ICSID Convention, the uneven geographic distribution of ratifying countries, and the long lag in the filing of cases created a lot of space for other institutions. The reasons for the delay in ratifications were diverse. They included the predominance of the Calvo Doctrine in Latin America, the Cold-War divide, and China's concerns about Taiwanese membership. It is possible that the lack of cases, pending a flood of investment treaties from the late 1980s, was linked to the ICC-ICA absorbing a majority of mixed arbitrations at the time. To highlight the continued usefulness of the Centre to its state principals, ICSID used the number of first- and second-stage consents by states as a primary indicator of success in its first decade, prioritising it over the number of cases actually filed. Despite this early lack of cases, ICSID is today the dominant institution in the institutional oligopoly of treaty-based mixed arbitration and also has a significant contract-based caseload.

6.3. The SCC-AI and the East-West puzzle

The SCC-AI benefitted significantly from the general distrust of states in the Eastern bloc in arbitral institutions in the West and the related delay of accessions of the Soviet republics and China to ICSID. For years, Western companies tried in vain to obtain concessions from Eastern trading partners, usually state agencies, to arbitrate in third countries in their contract negotiations. For its part, the USSR firmly maintained a preference for bilateral appointment mechanisms and for arbitration in the defendant state's territory in the post-war years. With the thawing of US-USSR relations in the early 1970s, and the rapprochement of the PRC, the tide turned for East-West mixed arbitration. This new juncture set the scene for an emerging compromise that required the soft diplomacy of leading experts, including Sergei Lebedev, Howard Holtzmann, Ulf Franke, and Ren Jianxin, as well as the willingness and support of the SCC-AI.[1255]

Despite their private-sector profile, Holtzmann and Franke acted in ways comparable to state diplomats in promoting institutional arbitration. Both regularly exchanged correspondence and participated in official visits to state agencies in charge of commercial and trade policy, as well as mixed dispute settlement in the East. More than other institutions, the SCC-AI appeared to benefit from its host state neutrality. Official recommendations by Soviet state representatives to reference the *1977 Optional Clause for Use in US-USSR Trade* in legal instruments established a quasi-binding rule and disseminated knowledge about the SCC-AI in government circles. In a similar way, although not formalised by an optional clause, Holtzmann's visit to China and his exchange with the CCPIT significantly contributed to China's eventual acceptance of the SCC-AI.

The development of institutional forms of East-West arbitration was also enabled by the adoption of the UNCITRAL Arbitration Rules, which, in contrast to ICSID or the PCA's own rules, were drafted with broader involvement from developing and socialist countries. These Rules provided the advantage of flexibility. Deferring the choice of seat

[1255] The archival sources examined for this project thus complement and expand the accounts of Dahlquist (n 99, 40-43), Dezalay and Garth (n 79, ch 9), and Moser (n 745, 345-347).

and of administering institution to a stage later than initial consent, they allowed disputing parties and states to circumvent contentious issues in negotiations. The Rules were also agnostic on government participation, permitting states or their entities to consent to arbitration according to domestic law. Moreover, the Rules were adopted without creating or attaching an institutional superstructure, which would have been contentious.

At the same time, the Rules remedied key weaknesses of earlier institutional arbitration rules. Most importantly, they introduced solid fallback mechanisms to ensure efficient procedures even without participation of or collaboration by the respondent. Thus, the Rules were well-adapted to East-West disputes and chosen as a basis for the *Optional Clause*, supporting the SCC-AI's entry into mixed arbitration. Despite its original base in East-West mixed arbitration, the Institute was able to subsequently broaden its scope and benefit from the position of a useful alternative. The robust diffusion of references to the SCC-AI in investment treaties is likely to continue supplying the SCC-AI with cases in the near future. Yet, the growing number of state withdrawals from the Energy Charter Treaty may weaken this prospect to some extent.

These findings complement and update Dezalay and Garth's 1996 case study on arbitration in Stockholm in some respects. The authors' broad focus on commercial arbitration and dominance of Swedish law firms on the local market lead them to conclude that the orientation of arbitration in Stockholm was 'mainly domestic'[1256] and that Stockholm did 'not really compete for business'.[1257] Focusing specifically on mixed

[1256] Dezalay and Garth (n 79) 182.
[1257] ibid 191.

arbitration, a slightly different picture emerges. While the SCC-AI may not compete with the ICC for purely commercial cases, it retains a significant standing in mixed arbitration, relying primarily on the diffusion of state consent to SCC-AI arbitration in BITs and the ECT. Rather than through the work of law firms, mixed arbitration at the SCC-AI was internationalised through the quasi-diplomatic work of Franke, Holtzmann, Lebedev, and Jianxin as well as the subsequent path-dependent emergence of state practice.

6.4. The PCA's filling of a market gap

Contrary to other institutions, the PCA's market share in mixed arbitration did not rely on the diffusion of direct references to it in investment treaties. Instead, its success was facilitated by the adoption of the UNCITRAL Arbitration Rules and their subsequent use in investment treaties. In the 1970s, the negotiations toward the UNCITRAL Arbitration Rules risked deadlock over the question of the default appointing authority. This challenge recalled earlier state disagreements to determine an organizational setting for mixed arbitration. In response, Holtzmann successfully pitched the PCA Secretary General, thus crafting an ongoing link between the PCA and the Rules. The PCA's limited role as a designating authority was more acceptable to Eastern state officials than an institution with closer links to and greater degree of control over the proceedings.

Besides the SCC-AI, the PCA thus came to benefit greatly from the inception of the Rules in mixed arbitration. Indeed, the threat of an emergent UNCITRAL competitor was so palpable that it prompted Broches and ICSID to advocate for a broad and arguably dubious reinterpretation of ICSID's mandate in order to launch its Additional Facility. This reaction is well-explained by Von Stackelberg's leader-follower model, describing a dialectic of reciprocal reactions to decisions of oligopolistic competitors able to destabilise temporarily emerging equilibria.[1258] Similar to product differentiation[1259] or sequential innovation,[1260] the development of competitor rules that remained strategically open as to institutional choice may also represent another type of reaction to oligopolistic competition from institutions expressly mentioned in investment treaties.

The UNCITRAL Rules were apparently negotiated with a view to a use in contracts, including those concluded between states and private entities. Yet, the Rules became a frequent forum of choice in subsequent investment treaty negotiations. The precise reasons for this adaptation require further research, but it is reasonable to assume that the use of the Rules in the 1977 Optional Clause of the SCC-AI, their use in the Claims Settlement Declaration of the Algiers Accords, and pro-UNCITRAL recommendations from the Asian-African Legal Consultative Committee all played a role in normalizing the rules for treaty use. Through a process of differential growth[1261], starting from the early 1980s, the UNCITRAL Rules became an increasingly viable alternative in investment treaty negotiations for states that had not ratified ICSID or for those seeking the inclusion of multiple fora.

1258 von Stackelberg (n 28) 190-204.
1259 Chamberlin (n 35); Tirole (n 41), para 10.7.
1260 Schumpeter (n 40); Arrow (40).
1261 Streeck and Thelen (n 73) 20.

By deferring the choice of an administering institution to a later stage of negotiation and consent, the UNCITRAL Rules opened a gap in the increasingly closed institutional oligopoly of mixed arbitration. Particularly in treaty-based arbitration, the diffusion of consent through bilateral investment treaties entrenched institutional choices, creating high barriers to entry for institutions not already established in the mixed arbitration market. This gap appears to have benefitted the PCA, which retained visibility and a privileged connection to the UNCITRAL Rules by its role as the default designating authority. The PCA rapidly came to administer the second-highest number of treaty-based mixed arbitrations after ICSID, despite its relatively minor role in promoting state consents under investment treaties.

6.5. Today's oligopoly

The oligopoly of mixed arbitration solidified with the emergence of the global investment treaty regime. The vast majority of investment treaties and national investment laws that authorize mixed arbitration refer to ICSID, UNCITRAL, or, to a lesser degree, the SCC-AI or the ICC-ICA. Other mentions of arbitral institutions are an outlier, although new treaties may invite new entrants. This near-saturation of the treaty regime, and the time distance between the conclusion of a treaty and the filing of a claim, prevent significant change in the advance-consent oligopoly. The resulting stability of the institutional oligopoly of mixed arbitration and its constituency of beneficiaries may have been an additional reason for the interpretative 'lag' of arbitral tribunals construing more recent treaty language, as observed by Alschner.[1262] Benefitting from an expansive interpretation of treaty provisions, the oligopolists and their beneficiaries have provided the institutional background for the 'zombie precedent'[1263] that continues to determine case outcomes in treaty-based mixed arbitration today.

The institutional market for contract-based mixed arbitration, in contrast, is apparently less concentrated and has lower barriers to entry. The number of public-private contracts and related negotiations is far greater than that of the treaties. For instance, one database lists 2649 company-state contracts in the mining sector alone, including production and profit sharing agreements, concession agreements, exploitation and production permits, or licenses.[1264] Many new contracts are concluded annually, with each negotiation representing a new opportunity. Similar to the treaty regime, there is a vast global network of international public-private contracts containing state consent to arbitration. The boundaries of this network are less visible and well-defined due to the significant number of contacts and the fact that states enter into such contracts at all governance levels and in different capacities.[1265] While a comprehensive

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1262 Examining decisions of arbitral tribunals interpreting the provisions of new-generation investment treaties, Alschner finds that the purportedly more balanced, reform-oriented provisions of these treaties have not had the intended effect. He explains this lag with the continued reliance by tribunals on precedent cases based on old-generation treaties, see Wolfgang Alschner*, Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (OUP 2022) 6-8.

1263 ibid 8.

1264 See Resource Contracts, <https://resourcecontracts.org/search/group?q=&document_type%5B0%5D=Company-State+Contract&page=2> accessed 26 November 2023. To be sure, not all of these contracts contain arbitration clauses. Yet it is reasonable to assume a great number of contracts exist in other industrial sectors.

1265 Examples may range from high-value international mining contracts entered into by the state to contracts for the provisions of administrative services to state entities at the municipal level. Contracts may also be entered into by wholly-state-owned enterprises or private enterprises with differing degrees of state ownership.

statistical analysis is impossible for lack of data, the ICC-ICA likely remains dominant in contract-based mixed arbitration today.[1266]

An effect of the oligopoly of mixed arbitration is that beneficiaries tend to seek out and rally around dominant institutions. They enjoy increasing returns[1267] from these institutions by relying on the prior diffusion of consent and established caseloads. Arbitrators jockey for institutional appointments, law firms strive for access to informal and insider knowledge about institutional procedures, and third-party funders scout for potential clients in the institutional milieu. The constituency of mixed arbitration beneficiaries is not closed but tends to overlap with the neighbouring field of commercial arbitration between private disputing parties. The practices of private-sector institutions appear especially inspired and influenced by commercial arbitration, such as by their emphasis on party autonomy, on the relevance of a local seat, and on enforcement using the New York Convention.

6.6. Further research opportunities: new entrants

The dominant institutions always face a threat of new entrants.[1268] In treaty-based arbitration, they are heavily shielded in this respect by the *longue durée* of the treaty

[1266] Similar to a recent interest in the future role of national investment laws and codes (see Bonnitcha et al (n 145)), further research could elucidate the relevance of public-private contracts for investment law and their implications for ongoing efforts to reform investor-state dispute settlement and the investment treaty regime. This has also recently been suggested by Anthea Roberts and Taylor St John in the context of the UNCITRAL Working Group III process on investor-state dispute settlement reform (see Anthea Roberts and Taylor St John, ‘UNCITRAL and ISDS Reform: Lifelong Learning’ (EJIL:Talk! 2023) <https://www.ejiltalk.org/uncitral-and-isds-reform-lifelong-learning/> accessed 26 November 2023).

[1267] Pierson (n 74) 312.

[1268] Gaukrodger (n 23) 15.

regime, itself a result of path-dependency.[1269] Even outside of the treaties, other institutions face barriers to entry as a result of longstanding state practices in public-private contracts or geographic expansion of dominant institutions at the expense of local arbitration centres.[1270] Why would a party refer a mixed arbitration to the Florence Chamber of Commerce if this institution cooperates anyway with the PCA by lending the PCA its premises and by allowing the PCA to administer proceedings locally?

New institutions can rely on UNCITRAL Rules as a tool for attracting cases, even under existing investment treaties. But the institution would have to show a competitive advantage over the PCA, an intergovernmental organization, or the SCC-AI, which is sometimes also mentioned as an appointing authority in the treaties. Alternatively, the new institution could develop and promote its own procedural rules. Chinese arbitral institutions, for instance, recently published dedicated rules for mixed arbitration, as has the Vienna International Arbitration Centre.[1271] Such steps reveal a clear intent to attract more arbitrations and they call for more research on the prospects for new entrants. Outside the realm of contracts, however, it may take years and great staying power for new rules to make their way into the existing cement of state consents. The barriers to

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[1269] The stability of the treaty regime may have allowed the oligopoly to withstand pressures to introduce competition. In the context of commercial arbitration, Dezalay and Garth observe that Anglo American law firms tried to introduce inter-institutional 'competition in a market that was strongly cartelized' (see Dezalay and Garth (n 79) 49).

[1270] These barriers to entry are similar to other barriers to entry faced by participants in international arbitration, including young practitioners seeking appointment as arbitrators (Dezalay and Garth (n 79) 23, 28).

[1271] Manjiao Chi, 'The ISDS Adventure of Chinese Arbitration Institutions: Towards a Dead End or a Bright Future?' (2020) 28 Asia Pacific Law Review 279, 281; VIAC, *Rules of Investment Arbitration and Mediation* (2nd edn, Austrian Federal Economic Chamber 2021) <https://www.viac.eu/images/documents/vienna_rules/VIAC_schieds_mediationsordnung_investitionsverfahren_2021_e_20211110.pdf> accessed 31 July 2023.

entry are exacerbated by the lapse of time between mandate-granting and mandate-exercising events in the investment regime.

If a new entrant's rules are successfully included in an advance consent clause, it may lead to a stream of cases, a major achievement for the institution. For this reason, some new entrants turn to their own host state for support. Chinese arbitral institutions such as CIETAC and the Beijing Arbitration Commission, the former a quasi-statal organization and the latter closely aligned with the state, have participated directly in the negotiation of investment treaties involving the PRC, and in processes for multilateral reform of investor-state arbitration at UNCITRAL Working Group III.[1272] They have also advised the Chinese government on how to promote international arbitration.[1273]

Yet, even support from the host state will be limited. The required neutrality of arbitral institutions is an impediment. Chinese institutions may also be unsuitable for arbitrations under treaties to which China is a party or in contracts involving Chinese investors. Indeed, there appears to have been backlash against a contract between a Chinese investor and Kenya for the construction of a railway project, which referred to CIETAC arbitration.[1274] Further research could explore situations in which states have successfully negotiated other states' consents to arbitration at an institution located in

[1272] ibid 280.

[1273] ibid 281.

[1274] In support, he cites public backlash against an investor-State contract between a Chinese investor and the Republic of Kenya for the construction of a railway project which referred to CIETAC arbitration; see ibid 286.

their own territory.[1275] Are such outcomes a result of asymmetric bargaining power or simply an oversight or bounded rationality of the accepting state?

In practice, all new entrants must rely on existing enforcement mechanisms, most notably the 1958 New York Convention.[1276] As a result, in contrast to ICSID, mixed arbitrations at new institutions would rely on the choice of seat by the disputing parties. The SCC-AI and ICC-ICA have brought to bear their economic clout to influence the arbitration-friendliness in their home states, which are frequently chosen as seats. In this same respect, Chinese procedural law for mixed arbitration, for instance, may be less supportive for Chinese arbitral institutions. These institutions may, for example, face relatively restrictive rules on case admission, on the arbitrability of investment disputes, or on the legal capacity and immunity of states in Chinese law.[1277]

The entry of new institutions presents a multi-faceted challenge. While they have potential, such institutions are confronted with various impediments, including the established oligopoly of pre-existing institutions, countervailing state practices, the inertia of the investment treaty regime, and domestic legal constraints. These hurdles are not insurmountable, especially if the treaty regime itself changes. To overcome them will require time, persistence, planning, and robust host state support. The

[1275] Examples are the French BITs with the Syrian Arab Republic (1977), El Salvador (1978), or Equatorial Guinea (1982) which refer to the ICC-ICA for mixed arbitration. Similarly, Egypt has successfully negotiated references to the Cairo Regional Centre for International Commercial Arbitrations in several BITs, including those with Oman (1998), South Africa (1998), or Denmark (1999).

[1276] While, technically, a new convention with a self-contained enforcement mechanism comparable to ICSID could be concluded, it appears highly unlikely in the present context.

[1277] Chi (n 1271).

promotion of procedural rules tailored to mixed arbitration showcases a definitive intent of new institutions to challenge the oligopoly.

The role of new entrants in mixed arbitration represents a promising area for further research. Such research could elucidate the strategies of these institutions in attempting to break the oligopoly and enter the market for mixed arbitration. How are they trying to outcompete established institutions? To what extent do they rely on promotion by a powerful principal state? Can they use existing enforcement mechanisms like the New York Convention to their advantage and will they rely on their own rules or other *ad hoc* rules, like those of UNCITRAL? These questions should motivate further research on how the institutional structure of mixed arbitration can change over the next decades.

6.7. Normative recommendations

The objective of this research project is primarily exploratory. Yet it may yield some normative recommendations for the policy debate around a possible regulation or reform of mixed arbitration and its institutions, as it is currently considered in several fora.[1278] A key finding of this project is the long-standing policy-making and -influencing role of arbitral institutions, which have both enabled and, at times, constrained the

[1278] At multilateral level, significant reform efforts include the UNCITRAL Working Group III process on investor-state dispute settlement reform (UNCITRAL, 'Working Group III: Investor-State Dispute Settlement Reform' (UNCITRAL) <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 26 November 2023), UNCTAD's recommendations of best practices for the reform of international investment agreements (see, for instance, UNCTAD, 'International Investment Agreements Reform Accelerator' (UNCTAD 2020) <https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf> accessed 26 November 2023) and, more recently, the OECD's work programme on investment treaties and climate change (OECD, 'The Future of Investment Treaties' (OECD) <https://www.oecd.org/investment/investment-policy/investment-treaties.htm> accessed 26 November 2023).

agency of influential individuals with a vested interest in maintaining access to mixed arbitration. This has significant implications for the participation of these institutions in normative processes at all governance levels. For instance, their active role in the UNCITRAL Working Group III process for investor-state dispute settlement reform may be influenced by competitive pressures and the increasing returns they have gained from mixed arbitration over time.[1279]

This project also illustrates that arbitration opposing private entities and states (or their entities) exists as a spectrum on a scale that extends beyond the archetypical treaty-based investor-state arbitration. Arbitral institutions often bridge the issue areas of international commercial arbitration and investment law, a connection that regulators may not sufficiently realize or admit. Many of the concerns expressed by states in relation to treaty-based arbitration at UNCITRAL Working Group III equally apply to contract- and law-based proceedings.[1280] However, the policy discussion strongly focuses on treaty-based arbitration, which may, at least in part, be a consequence of a similar focus in state-centred scholarship on investment law.[1281] This focus was recently challenged during the Working Group's deliberations on a draft code of conduct for

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1279 For instance, ICSID co-hosted an informal meeting with state delegates on the implications of a rule in the draft code of conduct for arbitrators that would limit double hatting by investment arbitrators, see UNCITRAL, 'Joint ICSID – UNCITRAL Informal Meeting on Article 4 of the Draft Code of Conduct for Adjudicators in International Investment Disputes' (UNCITRAL 2022) <https://uncitral.un.org/en/content/joint-icsid-—uncitral-informal-meeting-article-4-draft-code-conduct-adjudicators> accessed 26 November 2023.

1280 This is the case notably for many of the cross-cutting issues identified by the Working Group, including the lack of transparency of the proceedings, the use of forward-looking valuation techniques and related awards of high amounts of compensation, the effect of contract-based mixed arbitration on the jurisdiction of domestic courts, and the risk of regulatory chill (see UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-third session (7 October 2022), UN Doc. A/CN.9/1124, 16 and 18-19).

1281 Anthea Roberts and Taylor St John (n 1266).

arbitrators, when several African states advocated for a definition inclusive of contract-based arbitration.[1282]

The findings also highlight the decade-long coexistence of an institutional oligopoly in treaty-based mixed arbitration and a second, more opaque institutional market for contract-based mixed arbitration. Efforts to regulate treaty-based mixed arbitration must therefore consider the potential shift of private-sector claimants to investor-state contracts or private arbitral institutions. The institutional practices in this secondary market, including the selection, appointment, disqualification, and remuneration of arbitrators, or the scrutiny of final awards by arbitral institutions, are significantly less subject to state control. Moreover, the strategic use of parallel proceedings by investor claimants raises questions about states' defensive strategies, costs, transparency, and institutional accountability. The normative implications of such parallel proceedings remain understudied.

The likely lower salience of contract-based arbitration and the practices of private arbitral institutions in state administrations, as compared to treaty-based and IGO-administered cases, could also negatively impact efforts to develop adequate domestic response practices.[1283] This notably concerns the recent tendency of governments to set up dispute prevention and management agencies at the domestic level.[1284] This

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[1282] ibid; see also Lukas Schaugg, 'The UNCITRAL Code of Conduct: Breakthrough or Diversion?' (Investment Treaty News 2021) <https://www.iisd.org/itn/en/2021/11/10/the-uncitral-code-of-conduct-breakthrough-or-diversion/> accessed 26 November 2023.

[1283] Contracts may, for instance, have been concluded by state agencies different from those in charge of defending the state in a subsequent contract-based mixed arbitration; states may also not monitor non-governmental arbitral institutions as closely as intergovernmental arbitral institutions, where they are typically represented in administrative councils and attend meetings in regular intervals.

[1284] For a useful overview of such agencies, see Jonathan Bonnitcha and Zoe Williams, *Investment Dispute Prevention and Management Agencies. Toward a more informed policy discussion* (IISD narrow focus in state administrations also contrasts with the high mobility of arbitrators and law firms, which often have access to greater technical knowledge and professional networks across contract-, law-, and treaty-based arbitration practice. In contrast to the relatively piecemeal efforts of states to reform investment law and craft a coherent response to investor claims,[1285] arbitral institutions and their beneficiaries have been agile, regularly innovating new procedural rules and, at times, moving freely across the demarcation lines separating state consent types.

The findings also have implications for the implementation of possible regulatory reforms. For instance, at UNCITRAL, states have contemplated to implement reform proposals in the procedural rules of ICSID or other intergovernmental arbitral institutions.[1286] Such and implementation could drive the mixed arbitration constituency toward unregulated, private-sector institutions where some of the contemplated reform options, such as a cap on compensation or a regulation of the use of forward-looking valuation techniques,[1287] may not apply. A similar effect could also adversely impact the European Union's ambition to establish a multilateral investment court.[1288] If such a

Report 2022) 16-31, <www.iisd.org/system/files/2021-10/investment-dispute-prevention-management-agencies-policy-discussion.pdf> accessed 26 November 2023.

1285 While a greater number of BITs has been terminated in recent years, 1935 BITs signed prior to 2000 remain in force; see UNCTAD (n 456).

1286 The Working Group has, for instance, contemplated an implementation of the code of conduct for arbitrators in such procedural rules, see UNCTIRAL, 'Investor-State Dispute Settlement Reform. Draft Code of Conduct: Means of Implementation' (2021) UN Doc No A/CN.9/WG.III/WP.208.

1287 Aisbett and Bonnitcha, for instance, have suggested a new rule according to which compensation should be capped at the 'lesser of the investor's loss and the host state's gain from the host state not having had the new legal regime in place when the investment was made', Emma Aisbett and Jonathan Bonnitcha, 'A Pareto-Improving Compensation Rule for Investment Treaties' (2021) 24 Journal of International Economic Law 181, 181.

1288 The EU has advocated the creation of such a court in the context of UNCITRAL Working Group III (see European Union, 'Multilateral Investment Court Project – Relevant Documents' (EU) <https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project/relevant-documents_en> accessed 26 November 2023. The EU has also integrated an Investment Court System in investment agreements concluded with third states, including Chapter 8 court were competent only to hear treaty-based disputes, investor claimants could increasingly use investment contracts for their claims in alternative fora.

The implications also extend beyond the UN to other international processes, such as the reform of the Energy Charter Treaty and the OECD work programme on investment treaties and climate change. The non-binding agreement in principle for the ECT reform, for example, retains a provision in which states consent to an *à la carte* choice of investor claimants between arbitration at ICSID, UNCITRAL, and the SCC-AI.[1289] This could potentially lock in the mandate of these institutions to facilitate investor-state arbitrations in the energy sector, where cases are often geopolitically sensitive or directly relevant for climate change mitigation.[1290]

Moreover, this study underscores the special responsibility of states hosting the headquarters or regional offices of arbitral institutions other than ICSID. This responsibility arises since disputing parties frequently choose these jurisdictions as the seat. The presence of arbitral institutions in a state should therefore imply a special regulatory duty related to the participation of foreign states or their entities in arbitral proceedings. Inter-state competition for the attraction of arbitration business and pressure exerted by institutional officials and other arbitration beneficiaries may,

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of CETA, Chapter 3 of the EU – Vietnam Investment Promotion Agreement, Chapter 3 of the EU – Singapore Investment Promotion Agreement, and Section C of the Chapter on Investment of the EU – Mexico Agreement in Principle.

[1289] Energy Charter, ‘Ad Hoc Meeting of the Energy Charter Conference, 24 June 2022. Agreement in Principle on the Modernisation of the Energy Charter Treaty’, art 26, Energy Charter Doc CC 750 Rev <https://www.bilaterals.org/IMG/pdf/reformed_ect_text.pdf> accessed 26 November 2023.

[1290] Such a role would be particularly concerning given the frequency of ECT-based investor-state arbitrations by claimants in the fossil fuel industry and related concerns for climate mitigation and adaptation among the contracting states of the ECT, see Lea Di Salvatore, ‘Investor-State Disputes in the Fossil Fuel Industry’ (IISD Report 2021) <https://www.iisd.org/system/files/2022-01/investor–state-disputes-fossil-fuel-industry.pdf> accessed 26 November 2023.

however, be opposed to such a greater role of the host state. Moreover, states on the periphery of the mixed arbitration market face high barriers to creating alternative institutions due to the dominance of oligopolists like the PCA. To break this oligopoly, they would need to terminate or withdraw from existing investment treaties that contain consent to arbitration at dominant institutions, or otherwise limit their treaty-based consent.

Finally, the study informs efforts to regulate and limit the problematic practice of 'double hatting'. Current definitions often oversimplify this issue, focusing exclusively on dual roles of individuals as arbitrators and legal counsel. To be effective, a considerably broader definition of double hatting, encompassing all roles in the arbitration market, including that of institutional official, third party funder, and member of an arbitration interest group would be required.[1291] This would also involve adapting definitions to encompass all levels of institutional organization and engagement, such as, for instance, the work of national committees of the International Chamber of Commerce. Moreover, institutional officials may have conflicts of interest even if not implicated in an arbitration as arbitrators or legal counsel. For instance, an individual serving simultaneously on the selection committees of two arbitral institutions could have access to non-public information in related cases and thereby unduly influence arbitrator selection, raising accountability and transparency concerns. By adopting binding rules of conduct, including a comprehensive definition and robust enforcement mechanism, states could address the different forms of double hatting examined in this study.

[1291] This type of double hatting has been described in the context of commercial arbitration, see Dezalay and Garth (n 79) 50-51.

Appendix A

Literature Review

A. Purpose of a literature review and useful heuristics

This section aims to identify typical methodological approaches in existing scholarship on arbitral institutions. Insofar as it has a bearing on the study of arbitral institutions, this review also considers a wider body of scholarship on international investment law. There are at least two reasons, why such an exercise is warranted. Firstly, there is intrinsic value in synthesizing existing scholarship concerning a specific object of research. Synthesis is particularly relevant where, as here, research on a specific object is still at an early stage. Secondly, a literature review serves as a basis to identify gaps in the existing research which, in turn, will offer a justification for this research project.

Claims made in scholarship may be divided into doctrinal, empirical, and normative claims.[1292] Doctrinal claims are claims about the state of the law (what is the law?). For instance, an author may claim that arbitral institutions incur a contractual liability for their actions under French contract law. Considering the topic of arbitral institutions, for the purposes of this section, the law includes the procedural rules of arbitral institutions. Consequently, doctrinal claims also include claims of the type: Pursuant to rule X, an arbitral institution fixes the time limit for the rendering of the final arbitral award.

[1292] Jonathan Bonnitcha, 'How Much Substantive Protection Should Investment Treaties Provide to Foreign Investment?' (DPhil thesis, University of Oxford 2012), 21.

Empirical claims are usually associated with observable facts, or relationships among those facts. An example would be an observed correlation between the amount of compensation awarded in an investor-state arbitration and the type of institutional rules applicable to that arbitration. Normative claims are value judgments that compare a given situation to a predetermined ideal or value. An author may for instance claim that arbitral institutions should be subject to similar standards of judicial accountability as those that apply to the registries of constitutional courts in domestic legal systems.

The reviewed scholarship can also be categorized along at least two additional lines. These lines are nevertheless not to be understood as absolute and impermeable. Firstly, the reviewed scholarship may be distinguished depending on the degree of engagement with the research object. While arbitral institutions are the primary topic of some scholarship, other authors only touch upon the topic incidentally. Some scholarship that does not expressly mention arbitral institutions may be implicitly relevant for this research project. This latter category may, for instance, concern the wider context within which arbitral institutions operate, as this context may influence, enable, or constrain institutional strategies. Or it may provide empirical data on the bargaining dynamics that surround mandate-granting events.

Secondly, the reviewed scholarship may be distinguished depending on whether and to what extent it considers the type of dispute in which an arbitral institution has a procedural role. Some scholars analyse arbitral institutions irrespective of the type of dispute they administer. Other authors distinguish disputes depending on the disputing parties (e.g., commercial, investor-state, inter-state arbitration) or subject-matter (e.g., law of the sea, climate change). And thirdly, the reviewed scholarship can be categorized according to its target audience. Compared to the abovementioned criteria, this category is less definitive and implicit at times. It is nevertheless useful, as it allows for tendencies to be identified.

B. Professional and doctrinal literature on arbitral institutions

One body of literature is primarily targeted at arbitration practitioners – lawyers, arbitrators, or disputing party representatives. As such, it is tailored to be of practical use to its target audience and aimed at fostering a better understanding of the way in which an arbitral institution administers proceedings or acts as appointing or designating authority. This professional literature is often authored by arbitration practitioners, including representatives of arbitral institutions.[1293] Typically, decision-making processes of arbitral institutions are confidential, subject to limited exceptions of disclosure. For instance, reasons motivating a decision to reject a challenge to an arbitrator may not be communicated to the public. Institutional representatives use insider knowledge of informal practices to comment on how procedural rules are usually implemented by an institution.

Particularly where authored by such officials, professional literature often has a promotional undertone – with some authors openly promoting the services of a specific institution.[1294] Professional literature also focusses mainly on the role of arbitral

[1293] Brooks Daly, Evgeniya Goriatcheva and Hugh Meighen, *A Guide to the PCA Arbitration Rules* (OUP 2016); Annette Magnusson, Jakob Ragnwaldh and Martin Wallin, *International Arbitration in Sweden: A Practitioner's Guide* (2nd edn, Kluwer Law International 2021); Jakob Ragnwaldh, Fredrik Andersson and Celeste Salinas Quero, *A Guide to the SCC Arbitration Rules* (Kluwer Law International 2019).

[1294] Anton Asoskov, 'The Advantages of Arbitrating Russia-Related Disputes at HKIAC as a Permanent Arbitral Institution Under Russian Law' (2020) 22 Asian Dispute Review 75; Judith Levine and Garth institutions throughout specific arbitral proceedings – from the filing of the request to the rendering of the final award. As such, it does not usually consider other institutional acts, such as the revision of rules or the participation in intergovernmental reform processes.

1. Commentaries of institutional rules

A particularly abundant stream of professional literature – often framed as 'commentary' or 'practical guide' – provides comprehensive descriptions of the way in which a single arbitral institution administers proceedings.[1295] These authors usually take the procedural rules published by the institution as their primary source (institution-level perspective). Where an institution administers arbitrations involving different types of disputing parties – e.g., commercial, or mixed arbitration – commentaries simply distinguish the *modus operandi* of the institution along the lines of the procedural rules themselves.

Institution-level professional literature does not typically engage with the wider policy debate on investor-state arbitration. The focus being on the administration of a specific proceeding, commentaries do not consider how institutions innovate new procedures, which economic or political incentives apply, to what extent institutions act

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Schofield, *Navigating Uncharted Procedural Waters in a Rising Sea of Cases at the Permanent Court of Arbitration* (Brill Nijhoff 2018); Wendy Miles and Merryl Lawry-White, 'Arbitral Institutions and the Enforcement of Climate Change Obligations for the Benefit of All Stakeholders: The Role of ICSID' (2019) 34 ICSID Review 1; Syed Ahmad Idid, 'Use of the UNCITRAL Arbitration Rules at Arbitral Institutions by Arbitral Institutions – The Case of Malaysia' (2007) 24 Journal of International Arbitration 37.

1295 Selection: Yves Derains, *A Guide to the ICC Rules of Arbitration* (2nd edn, Wolters Kluwer 2005); Lucy Reed, *Guide to ICSID Arbitration* (2nd edn, Wolters Kluwer 2010); Ragnwaldh, Andersson and Salinas Quero (n 1293); Daly, Goriatcheva and Meighen (n 1293).

strategically, or the impact of inter-institutional competition. If at all, institutional geneses are narrated descriptively, and history is not used to explain outcomes. For this research project, commentaries are helpful as secondary sources on the research object itself. But they do not inform the theoretical research framework.

2. Incentives of new entrants and impeding factors

For the purpose of this research project, a specific sub-group of institution-level accounts that relates to 'new entrants' must be distinguished. Chi, for instance, finds that despite a rising number of cases involving Chinese disputing parties, the role of Chinese institutions in mixed arbitration remains limited. While he does not make his method and theoretical framework explicit, Chi makes the normative claim that Chinese institutions should seize this growing number of cases as an opportunity to 'emerge on the world stage for ISDS'.[1296] Chinese institutions appear willing to engage with mixed arbitration on multiple levels. For instance, they publish specialized procedural rules, provide direct advice to the Chinese government on measures promoting arbitration,[1297] participate in the negotiation of international investment treaties to which China is a party,[1298] or attend the process for a multilateral reform of investor-state dispute settlement under the auspices of UNCITRAL Working Group III as observers.[1299]

[1296] Chi (n 1271).

[1297] ibid 281.

[1298] ibid 280.

[1299] CIETAC, 'China International Economic and Trade Arbitration Commission: Delegates Attended UNCITRAL Working Group III' <https://www.marketscreener.com/news/CIETAC-China-International-Economic-and-Trade-Ar-Delegates-Attended-UNCITRAL-Working-Group-I—26525721> accessed 31 July 2023; Liu Yang, 'Investor-State Dispute Settlement Reform: BAC/BIAC Delegation Attended the 34th Session UNCITRAL of Working Group III' <www.bjac.org.cn/english/news/view?id=3132> accessed 31 July 2023.

Despite these attempts, Chinese arbitral institutions face certain impediments. Firstly, as any new entrants, they face competitive pressures exacerbated by the typical lapse of time between mandate-granting and mandate-exercising events – particularly in treaty-based arbitration. While an institution may convince a state to designate it in a treaty, the institution has no control over whether or when a dispute will arise, and decades may pass before a first case is filed. New entrants face an oligopoly of established institutions. References to the rules of these established institutions are already well diffused throughout existing investment treaties. Secondly, the required neutrality of arbitral institutions may act as an impediment. Chinese institutions may be unsuitable to administer disputes based on treaties to which China is a party or on contracts involving Chinese investors.[1300] Thirdly*,* Chinese procedural law applicable to mixed arbitration may also act as an impediment. Examples mentioned by Chi include restrictive rules applicable to case admission, the arbitrability of investment disputes, or the legal capacity and immunity of states under Chinese law.

Chi's observations raise a number of questions that are relevant for this research project. As opposed to other doctrinal approaches, he considers that arbitral institutions act – and should act – strategically. The market of arbitral institutions in mixed arbitration is highly concentrated. But for what historical reasons did this oligopoly emerge? Chi also observes that new entrants develop creative solutions to overcome structural impediments and carefully navigate between promoting their services and the requirement of neutrality. What are typical strategies that different new entrants adopt,

[1300] In support, he cites public backlash against an investor-State contract between a Chinese investor and the Republic of Kenya for the construction of a railway project which referred to CIETAC arbitration; see Chi (n 1271) 286.

including outside China? For instance, do they actively promote contract-based investor-state arbitration assuming that the investment treaty regime is relatively static and the lapse of time between mandate-granting and mandate-exercising events in contractual disputes is shorter? Discussing institutional neutrality, Chi also touches upon the relation between arbitral institutions and the state within which they are located. To what extent is this relation symbiotic? What are the incentives for arbitral institutions and such states to collaborate? While the particular role of new entrants could motivate further research on the institutional structure of mixed arbitration, this research project attempts to address some of these questions.

3. <u>Macro-level comparative and micro-level doctrinal approaches</u>

Another stream of doctrinal or professional literature distinct from institution-level approaches, takes inter-institutional, comparative, or micro-level perspectives. Inter-institutional perspectives are frequently concerned with definitional and typological questions.[1301] Fouchard, for instance, has drawn up a typology of arbitral institutions without distinguishing between the type of dispute administered.[1302] Instead of aiming for an exhaustive synthesis of institutions, he develops criteria for their categorization, including their geographic location, socio-professional context, degree of specialization, and the degree of internationality of the disputes administered. Gerbay suggests the additional categories of legal status, degree of embeddedness in a broader institutional

[1301] Philippe Fouchard, ‘Typologie des institutions d’arbitrage’ [1990] Revue de l’arbitrage 281; Rémy Gerbay, *The Functions of Arbitral Institutions* (Kluwer Law International 2016); Gloria Alvarez, Julien Fouret and Rémy Gerbay, *The ICSID Convention, Regulations and Rules: A Practical Commentary* (Elgar 2019).

[1302] Fouchard (n 1301).

context, (not-)for-profit character, as well as cultural background and historical heritage.[1303]

Typologies have the advantage to ‘address complex phenomena without oversimplifying, clarify similarities and differences among cases to facilitate comparisons, provide a comprehensive inventory of all possible kinds of cases, incorporate interaction effects, and draw attention to “empty cells” or kinds of cases that have not occurred and perhaps cannot occur’.[1304] Insofar as they concern institutions that administer mixed arbitrations, the abovementioned typologies provide a descriptive basis for the comparative approach taken in this research project. At the same time, typologies for complexity reduction are relevant where the number of cases is high. Only a small number of institutions play a role in mixed arbitration, limiting the usefulness of typologies.

As opposed to macro-level and comparative approaches, micro-level doctrinal perspectives typically examine one rule or aspect of case administration – sometimes comparing one type of rule across different institutions. This type of scholarship is often prompted by the revision of institutional rules, procedural innovations, or their reflection in emerging case law. Rather than investigating the motives for innovation, micro-level scholarship is predominantly doctrinal. The main question raised is, how a specific, and at times new, rule will impact arbitral procedure in practice. Micro-level doctrinal scholarship has examined many single institutional rules, including provisions for

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[1303] Gerbay (n 1301) 19-27.

[1304] Alexander George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT 2005), 233.

emergency arbitration,[1305] *prima facie* tests of jurisdiction,[1306] the authority to set time limits,[1307] the authority to join or consolidate separatee proceedings,[1308] or an institutional duty to act in good faith.[1309]

4. Contract law

Arbitral institutions have moreover been analysed through a variety of private law lenses with a focus on contract law. Particularly in civil law jurisdictions, scholars have made the doctrinal argument that the relationships between arbitral institutions, arbitrators, and disputing parties are of a contractual nature.[1310] More recently, this interpretation has been taken up in the United Kingdom.[1311] These doctrinal approaches are interested in the contractual rights and obligations of arbitral institutions vis-à-vis arbitrators and disputing parties. For instance, an arbitral institution may be under a contractual obligation to pay arbitrators or to provide certain administrative services to the disputing parties. As part of this debate, authors have also conducted doctrinal

1305 Patricia Shaughnessy, 'Pre-Arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules' (2010) 27 Journal of International Arbitration 337.

1306 Calvin Chan, 'Of Arbitral Institutions and Provisional Determinations on Jurisdiction: The Global Gold Case' (2009) 25 Arbitration International 403.

1307 Mostafa Abu-Hagras, 'Two ICC Arbitrations Disturbed by Two Court Orders: The Impact of Ignoring the Power of the ICC Court to Extend the Time Limit for the Award' (2017) 31 Arab Law Quarterly 203.

1308 Gordon Smith, 'Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules' (2018) 35 Journal of International Arbitration 173.

1309 Duarte Henriques, 'The Role of Good Faith in Arbitration: Are Arbitrators and Arbitral Institutions Bound to Act in Good Faith?' (2015) 33 ASA Bulletin 514.

1310 Charles Jarrosson, 'Le statut juridique de l'arbitrage administré' (2016) 2016 Revue de l'arbitrage 445; Klaus Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit* (R Boorberg 2001); Jens Gal, *Die Haftung des Schiedsrichters in der internationalen Handelsschiedsgerichtsbarkeit* (Mohr Siebeck 2009); Thomas Clay, *L'Arbitre* (Dalloz 2001); Moufid El Khoury, 'Le contrat d'organisation de l'arbitrage' (Université Aix-Marseille 2014), PhD Thesis submitted under the supervision of G Blanc at University Paris II - Panthéon-Assas.

1311 Van Vechten Veeder, 'Arbitrators and Arbitral Institutions: Legal Risks for Product Liability' (2018) 5 American University Business Law Review 335.

analyses of a growing number of lawsuits against private-sector arbitral institutions for alleged breaches of such contractual obligations.[1312]

Contract law approaches are not directly relevant for the theoretical framework of this research project, as they take a purely doctrinal perspective. However, they may be a secondary source on the research object itself. Is the growing number of lawsuits against institutions an indicator of increased competition between participants in the arbitral process? Is the status of arbitral institutions – to which certain jurisdictions traditionally granted far-reaching immunity – increasingly contested? Legal recourse against arbitral institutions appears limited to private-sector institutions. To what extent does this impact inter-institutional competition in mixed arbitration?

5. Synthesis of professional literature on arbitral institutions

Professional literature on arbitral institutions relies primarily on doctrinal analysis. As such, it is limited to the function of arbitral institutions in relation to specific arbitral proceedings. It does not consider institutional practices that are not limited to such proceedings, such as the development of new rules, the creation of subsidiaries, the expansion of an institution's geographic reach. A focus on doctrine does not allow for a closer examination of the extent to which arbitral institutions strategize and compete, and which economic, political, or other incentives apply to them. Arbitral institutions appear to generate tightly knit constituencies of beneficiaries over time. They include

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1312 See for instance Loretta Malintoppi, 'Don't Shoot the Sheriff: The Threat of Legal Claims Against Arbitrators and Arbitral Institutions' (2021) 37 Arbitration International 487; Barbara Warwas, *The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses* (TMC Asser Press 2017).

appointees, candidates, third-party funders, law firm representatives. Specific relationships appear to also link them to states. Constituency-generation and the development of a network of relationships appears directly influenced by temporality and the sequence of events – elements that a doctrinal approach cannot capture. For this research project, rather than informing the research framework, doctrinal or professional literature acts as a secondary source on the research object, supplementing primary archival and documentary sources.

C. An ethnographic and socio-legal approach

Dezalay and Garth's 1996 study, 'Dealing in Virtue', adopts an ethnographic and socio-legal perspective, drawing on the theoretical tradition of Pierre Bourdieu. This non-doctrinal study provides a technically detailed account based on numerous interviews and Bryant Garth's legal experience. It primarily examines how elite legal professionals in international commercial arbitration have built their careers and influence using various forms of capital, including cultural and social. The authors view institutions as tools that are put to the use of specific social groups.[1313] As a consequence, the study foregrounds the role of individuals that are, or are not, part of such groups.[1314]

This current research project diverges from Dezalay and Garth's theoretical approach. While it also anticipates moments of significant individual agency, it also incorporates insights of historical institutionalist scholarship that recognize how

[1313] Dezalay and Garth (n 79) 17.
[1314] ibid, particularly chs 2 and 3, as well as 3, 15, 17, 98, 99, 123.

institutions can constrain such agency.[1315] This aspect is particularly pertinent in the context of investment treaties, which entrenched state consent to specific institutional rules over extended periods, potentially limiting individual efforts for change or increased inter-institutional competition.

Although Dezalay and Garth's research focus, in line with their Bourdieusian approach, is deliberately open-ended,[1316] it primarily considers international commercial arbitration without expressly in- or excluding mixed arbitration. As their study predates the surge in treaty-based mixed arbitrations post-1996, it does not address the impact of these cases on commercial arbitration or engage with recent scholarship on the emergence of the investment treaty regime and investor-state arbitration.[1317] Where the study focuses on the role of states, it does so primarily by examining the alternatives of arbitration and state court litigation of commercial disputes[1318] and by investigating concessions of states not to interfere with arbitral proceedings seated in their jurisdiction.[1319] Here, the authors carefully trace the influence of leading individuals to broker a greater autonomy of the arbitral process and increased remoteness from state (court) oversight.[1320]

States and their entities as respondents appear as part of the chapter examining the significance of North-South conflicts for the formation of the field of international

1315 For instance, Streeck and Thelen (n 73) 24.
1316 ibid 15.
1317 For instance, Bonnitcha et al (n 110), St John (n 52), Batselé (n 65), Perrone (n 99), Dahlquist (n 99).
1318 For instance, Dezalay and Garth (n 79) 171-173.
1319 For a discussion on legislative competition among state to attract arbitration business, see ibid 7.
1320 For instance, ibid 33; for a consideration of the ICC's role in fostering state-recognition of private commercial arbitration, also see ibid 46.

commercial arbitration.[1321] Here, the authors examine arbitration claims from the 1970s, where foreign oil investors challenged the nationalization of their assets in newly independent states, such as Libya.[1322] However, these cases are not understood as distinct mixed arbitration cases with specific methodological implications. The study does not investigate the unique interactions between institutional arbitration experts and state officials that are specific to mixed arbitration. At the level of individual careers, vicinity of arbitrator candidates to state functions or political power is considered but not in a way specific to mixed arbitration.[1323] While competition as an analytical category, including among arbitral institutions, features prominently in the authors' analysis,[1324] this competition is not brought into context with the relative stability of the investment treaty regime or the possible cross-fertilisation of institutional practices in contract- and treaty-based mixed arbitration. Dezalay and Garth's findings are therefore primarily used as a comparative framework in this project.

The authors' approach also differs methodologically from this project. Methodologically, Dezalay and Garth's study, based on almost 300 interviews with arbitration professionals, is one of the most comprehensive non-doctrinal works on international commercial arbitration.[1325] This research project aims to complement these

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1321 ibid ch 4.
1322 ibid 74-88.
1323 ibid 19 and 21.
1324 The authors generally conceptualise commercial arbitration as a competitive market (ibid 16, 31, 33, 128); competition among arbitral institutions is also considered with a focus on its implications for law firms and arbitrator candidates (ibid 7, 44); also see ibid 168-169, for an analysis of competition among state courts and commercial arbitral tribunals in the US, 171, for competition among litigators and in-house counsel and 7, for regulatory competition among states to attract commercial arbitration business (7). Besides competition, the authors also identify instances of cooperation among senior arbitration candidate akin to collusion (see ibid 83). This offers an interesting parallel to the inter-institutional cooperation observed in this research project.
1325 ibid 7.

findings, primarily using archival records, including state archives, intergovernmental organizations records, leaked diplomatic cables, and personal documents of leading arbitration experts. This project proceeds with the assumption that these sources may accurately reflect interactions between institutional and state officials, especially those that have been declassified.

D. A special case of state-centred literature

A special case of state-centred literature is David Gaukrodger's comparative study of arbitral institutions as appointing authorities in investor-state arbitration.[1326] The study was commissioned by 50 state participants at an intergovernmental forum on investment policy at the OECD. It was published as an OECD Consultation Paper in 2018. The decision to commission the study was motivated by a number of state concerns, including a perceived lack of appointee diversity and transparency of proceedings, the unknown impact of increased inter-institutional competition and related incentives, as well as the gradual extension of institutional mandates through repeated rule revisions and procedural innovations.[1327] The study specifically addresses a state audience, including official investment negotiators, policymakers and governments. It is aimed at informing intergovernmental reform efforts to provide a basis for 'a broader dialogue with appointing authorities'.[1328]

Rather than focusing on all procedural functions, Gaukrodger exclusively considers the appointment practices of five major appointing authorities – ICSID, PCA,

[1326] Gaukrodger (n 23).
[1327] ibid 7-11.
[1328] ibid 7.

ICC, SCC-AI and SIAC. The study is not explicit about its methodology, nor does it expressly set out a theoretical framework. However, in contrast to doctrinal approaches, it appears to be informed by institutional economics. The approach taken is primarily descriptive and comparative, drawing on institutional rules but also a greater number of secondary sources published by arbitral institutions than the abovementioned doctrinal literature. The study also differs from the abovementioned approaches in other ways. It is limited to one type of dispute – mixed arbitration; its focus extends beyond the role of an appointing authority in a single arbitration case to cover institutional strategies, incentives, and competition; it compares dynamics at intergovernmental and private-sector institutions; and, to a limited extend, it also assesses the participation of arbitral institutions in mandate-granting events. Gaukrodger generates several hypotheses that differ from the interpretation of arbitral institutions as mere case managers. Noting the impact of heightened competition on institutional strategy, Gaukrodger observes, for instance, that

> [i]n addition to competition between existing institutions active in ISDS, a number of other competitive forces widely recognised as important appear likely to be at play: the power of customers (investor claimants, lawyers and lawyer/arbitrators, governments); the threat of new entrants (e.g., other commercial arbitration institutions); the threat of substitutes (the ICS, domestic courts, insurance, commercial arbitration); the power of suppliers (potential arbitrators, staff).[1329]

Facing such pressures, arbitral institutions are seen to compete for cases, for instance, by inventing and promoting new procedural rules, or by marketing their services in ways similar to international law firms.[1330]

[1329] ibid 15.

[1330] ibid 14.

Gaukrodger also finds that institutions typically develop their own constituency of a small group of arbitrators and lawyers.[1331] This constituency may be linked to the significant economic benefit that lawyers incur when appointed by an arbitral institution.[1332] While institutions strive to attract cases, potential arbitrator candidates aim at securing appointments.[1333] But how do such constituencies form over time and to what extent do they span different institutions? Despite the central role of appointing authorities in mixed arbitration, Gaukrodger also notes that there appears to be limited accountability – whether public or internal. Despite differences among the examined institutions, disclosure of institutional decisions – and particularly the reasons motivating these decisions – is generally limited. Gaukrodger notes that

> [t]he availability of internal and external recourse against appointing authority decisions appears to be rarely specified. No national or other parliaments have engaged in inquiries about the operation of arbitration institutions in ISDS. Although it now increasingly reports on ISDS issues, the generalist press rarely if ever reports on the detail of how arbitration institutions operate or how ISDS tribunals are constituted. A primary mechanism allowing for a degree of accountability appears to be the market for cases which increases the importance of market analysis and incentives.[1334]

This research project proceeds with the assumption that in addition to market analysis, a historical institutionalist approach could contribute to a better understanding of the operation and incentives of arbitral institutions. Some of the hypotheses that Gaukrodger hints at could be further explored by considering the current inter-institutional competition and the network of relations between institutions and other

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1331 ibid 15.

1332 ibid.

1333 ibid 16.

1334 ibid.

participants in mixed arbitration, such as states, law firms, arbitrators, or third-party funders. This research project also has a broader scope, considering other functions and elements of institutional strategy, besides arbitrator appointment.

E. International political economy

Another emerging body of scholarship examines the political economy of international investment law and, more specifically, the international investment treaty regime. Approaches rooted in international political economy offer an interdisciplinary perspective that may allow to overcome some of the limitations of doctrinal analysis. While most political economy accounts only incidentally consider arbitral institutions, the topic has not entirely gone unnoticed. In their comprehensive study of the political economy of the international investment treaty regime, Bonnitcha and others for instance, examine the consequences of a state's choice to designate an arbitral institution in a treaty provision.[1335] Considering the ICSID Secretariat, the authors observe that it 'plays no formal role in the development of the substantive rules protecting foreign investors, but may play a more prominent role behind the scenes – for instance, through institutional appointments of arbitrators, advice to tribunals on precedents, assisting tribunals with the editing of drafts'.[1336] According to the authors, the 'role of the ICSID Secretariat may thus be underappreciated in current literature and policy debates'.[1337] This research project proceeds on the assumption that insider

[1335] Bonnitcha, Skovgaard Poulsen and Waibel (n 110) 72-73.
[1336] ibid 73.
[1337] ibid.

research may allow for a better appreciation of such informal institutional practices, by taking into account previously unconsidered archival and documentary sources.

Moreover, two streams of political economy scholarship may be implicitly relevant for this research project. One stream empirically tests the assertion that the investment treaty regime has contributed to the attraction of foreign direct investment.[1338] And another stream focusses on a possible link between investment treaties and economic development, with a focus on developing countries.[1339] *Prima facie,* arbitral institutions may appear remote from these research questions, since they are not a party to investment treaties. However, some institutions appear to expressly position themselves in this debate.

Examining why developing countries consented to mixed arbitration despite the high costs resulting from this type of dispute settlement, Poulsen finds that bounded

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[1338] Emma Aisbett, 'Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation' in Karl Sauvant and Lisa Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP 2009); Lauge Skovgaard Poulsen, 'The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence', *Yearbook on International Investment Law and Policy 2009-2010* (OUP 2010); Jason Yackee, 'Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?' (2008) 42 Law and Society Review 805; Clint Peinhardt and Todd Allee, 'Failure to Deliver: The Investment Effects of US Preferential Economic Agreements' (2012) 35 World Economy 757; Andrew Kerner and Jane Lawrence, 'What's the Risk? Bilateral Investment Treaties, Political Risk and Fixed Capital Accumulation' (2014) 44 British Journal of Political Science 107; Srividya Jandhyala and Robert Weiner, 'Institutions Sans Frontières: International Agreements and Foreign Investment' (2014) 45 Journal of International Business Studies 649; Liesbeth Colen, Damiaan Persyn and Andrea Guariso, 'Bilateral Investment Treaties and FDI: Does the Sector Matter?' (2016) 83 World Development 193.

[1339] Mark Manger, 'International Investment Agreements and Services Markets: Locking in Market Failure?' (2008) 36 World Development 2456; Ken Shadlen, 'Globalisation, Power and Integration: The Political Economy of Regional and Bilateral Trade Agreements in the Americas' (2008) 44 Journal of Development Studies 1; Lorenzo Cotula, 'The New Enclosures? Polanyi, International Investment Law and the Global Land Rush' (2013) 34 Third World Quarterly 1605; Kyra Bos and Joyeeta Gupta, 'Climate Change: The Risks of Stranded Fossil Fuel Assets and Resources to the Developing World' (2018) 39 Third World Quarterly 436.

rationality may have been an explanatory factor.[1340] He also consecrates a brief section of his book to the role of ICSID in the promotion of investment treaties. Generally, he notes that 'the development of the International Centre for the Settlement of Investment Disputes (ICSID) was always closely connected to the spread of modern investment treaties'.[1341] More specifically, he finds that ICSID actively promoted investment treaties, both with developed and developing countries.[1342] By the 1980s, treaty provisions referring to ICSID arbitration 'were commonplace in investment treaties' and this proliferation was 'not in small measure due to the policy work by ICSID'.[1343] ICSID actively weighed in on and advocated for the conclusion of such treaties by developing countries, including in official publications.[1344] Considering certain adverse consequences of investment treaties for developing countries, Poulsen explains this openness to such external advice *inter alia* with bounded rationality of developing country officials.

At the same time, he observes that the role ICSID played in the promotion of investment treaties was limited in comparison to other World Bank agencies such as MIGA, due to limited staff and resources. But how can ICSID's brief intervention in the promotion of investment treaties be explained at all? Could the fact that the institution had no other purpose at the time – most arbitral proceedings were only filed years later – explain this activity that appears remote from ICSID's core mandate (an instance of

1340 Poulsen (n 1233).
1341 ibid 72.
1342 ibid 71.
1343 ibid 72.
1344 See for instance Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Brill Nijhoff 1995), 12.

institutional *drift*)? Or was ICSID acting primarily in its own interest, to attract a greater number of cases by promoting diffusion of references to ICSID in treaty provisions on mixed arbitration? ICSID's promotion of investment treaties is striking because it exemplifies a dual role – an arbitral institution expressing a view on mandate-granting events that would serve as a basis for its own administration of mixed arbitrations.

How frequent is such a promotional role among other arbitral institutions? The initial research conducted for this research project appears to suggest that ICSID's promotional activity is not an isolated event. Other arbitral institutions appear to have played a role in mandate-granting events or have weighed in on procedural law reforms in the country where their offices or headquarters are located. This research project will attempt to explore some of these questions in greater detail. Poulsen also demonstrates successful use of qualitative research including archival sources to address questions related to the incentives and reasoning of state actors in investment law and policy. This research project attempts to complement this methodological approach by contributing an institutional perspective and by exploring additional archival and documentary sources.

F. Judicialization and legitimacy

Another stream of interdisciplinary scholarship considers arbitral institutions as they are part of the growing judicialization of international law and compare to other international adjudicatory bodies.[1345] Authors of this current may for instance compare

[1345] Many studies in this category have been published with the support of the University of Oslo PluriCourts Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order and as arbitral institutions to the secretariats of inter-state courts such as the International Court of Justice or the International Tribunal for the Law of the Sea. Normative aspects and the impact of institutional practices on the sociological and normative legitimacy of investor-state arbitration feature prominently in this debate. Insofar as normative legitimacy is concerned, this stream of scholarship appears to be reform-oriented, investigating how international adjudicatory bodies should evolve to increase legitimacy. Other authors of this current appear to focus on sociological legitimacy, trying to provide a better understanding of how international adjudicatory bodies are perceived by the wider public and other, more specific constituencies.

1. <u>Gatekeeper role and mandate-creep</u>

Claussen develops the concept of the gatekeeper as a heuristic to investigate the nature and extent of the mandate of international court secretariats and arbitral institutions. Gatekeepers are powerful actors, implying 'a degree of privilege or authority'.[1346] Far more than just neutral case managers, international court secretariats and arbitral institutions increasingly control case entry and shape dispute resolution practices. As opposed to doctrinal approaches, Claussen captures institutional dynamics by drawing on sociological concepts such as power, authority, or privilege. Activating these concepts in the context of arbitral institutions allows her to grasp instances where institutions act strategically and dominate other actors on the arbitral scene, including disputing parties, lawyers, and arbitrators. At times, this may imply an

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result of the conference on the Legitimacy of Unseen Actors in International Adjudication co-organized by PluriCourts and the Europa Instituut at Leiden University in October 2017.

1346 Claussen (n 93) 139.

institution exceeding the limits of a mandate. Claussen defines this ‘secretariat mandate creep’ as the ‘aggrandizement of the secretariat’s role not sanctioned by parties or States’.[1347] The way in which and from whom gatekeepers receive authority directly impacts their legitimacy. Legitimacy as a concept assumes the existence of certain comparator values, such as trust, independence, impartiality, or accountability. This prompts questions of the relationship between arbitral institutions and the states that have granted a mandate as well as normative questions of the type, how arbitral institutions should act to be – or be perceived as – legitimate.

Similar to Gaukrodger, Claussen’s interdisciplinary approach overcomes the primacy of doctrinal analysis of institutional case administration. This helps detach institutions from the single instance of an arbitral proceeding to focus more generally on their mandate, strategy, and power. Less visible institutional practices that are not limited to case administration – determining outside access to information, shaping procedural elements, or generating a constituency of beneficiaries – gain greater visibility. In Claussen’s account, arbitral institutions are not considered to exist in an institutional void but are embedded in wider institutional structures and comparable to other international court secretariats. A growing gatekeeping role thus appears as a trend that is not specific to arbitral institutions but concerns different secretariats of international adjudicatory bodies.

Claussen’s theoretical approach nevertheless has certain limitations for the present research project. Like any approach based on ‘legitimacy’, it faces conceptual

[1347] ibid 162.

difficulties related to this term that has been described as potentially confusing,[1348] 'slippery, circular, and highly subjective'.[1349] What are the precise comparator values that arbitral institutions should live up to? Such values may be highly subjective – particularly due to the contested nature of investor-state arbitration and investment law. Claussen does not engage in this debate that would require a definition and justification of such comparator values. Moreover, if taken too narrowly, the gatekeeper heuristic might overemphasize the control of access to institutional case administration. According to the preliminary research conducted, arbitral institutions appear to develop powerful positions primarily through means other than controlling access to case administration. Indeed, once a case is filed, arbitral institutions are normally under an obligation to administer it unless they clearly lack a mandate.

In addition, mixed arbitration may also differ significantly from other forms of international dispute settlement – e.g., due to private standing, party appointment, the *ad hoc* character of proceedings, available and typical remedies, typical amounts of compensation, or the deference granted to domestic courts. Concerns related to the normative or sociological legitimacy of arbitral institutions acting as gatekeepers in mixed arbitration may therefore be very different from those related to secretariats of other international adjudicatory bodies. Claussen's account also does not develop a comparative perspective to explore inter-institutional competition or incentives that may exist in relationships between institutions, states, and individuals.

[1348] Bonnitcha, Skovgaard Poulsen and Waibel (n 110) 233.

[1349] Andrea Bjorklund, 'The Legitimacy of the International Centre for Settlement of Investment Disputes' in Grossman Nienke (ed), *Legitimacy and International Courts* (CUP 2018), 235.

Claussen also relies primarily on the analysis of judgments, arbitral awards, and existing literature. She does not consider other institutional or statal sources that may inform how mandates are granted and revised, which, in turn, may impact the gatekeeping role. The analysis is limited to intergovernmental arbitral institutions and does not consider private-sector institutions. Due to the collective, interest-group character of private-sector institutions and the absence of an international treaty establishing them, the limits of a mandate granted by a state to private-sector institutions may be less clear. The concept of mandate creep may therefore be less suited for the analysis of private-sector institutions.

2. Legitimacy as linked to diversity, efficacy, and expedition

Other authors that engage with the judicialization literature study a greater number and variety of sources. In a study focused exclusively on the legitimacy of arbitral institutions, Polonskaya, for instance, examines perceived legitimacy deficits of such institutions and analyses institutional reactions to these concerns.[1350] Polonskaya's study, however, does not distinguish between commercial and mixed arbitration. She considers that the lack of diversity, transparency, and expedition are key factors that adversely impact institutional legitimacy. To assess these legitimacy deficits, the author conducts a comparative case study of major arbitral institutions, including ICSID, LCIA, ICC, SCC-AI, and SIAC. In contrast with Claussen, Polonskaya examines a greater number of sources, including institutional appointment and case statistics, arbitration

[1350] Ksenia Polonskaya, 'Arbitral Institutions' Response to Perceived Legitimacy Deficits: Promoting Diversity, Transparency and Expedition in Investor-State Arbitration' in Freya Baetens (ed), *Legitimacy of Unseen Actors in International Adjudication* (CUP 2019), 371.

rules and their amendments over time, financial regulations and institutional discussion papers, treaties establishing arbitral institutions, as well as arbitral awards. On the basis of these sources, she observes trends towards greater diversity in institutional appointments, efforts to increase transparency by promoting the publication of arbitral awards, and procedural measures to enhance procedural efficacy.

Polonskaya's study is methodologically innovative and demonstrates the successful use of the case study method to explore the practices of arbitral institutions. It is also based on a wealth of documentary and archival sources that exceeds that of other scholarship mentioned above. However, similar to Claussen, Polonskaya does not enter a more detailed discussion of the concept of legitimacy. Transparency, diversity, and expedition are assumed to be the major legitimacy concerns on the basis of extant literature. Polonskaya does not address some of the critiques that are specific to this type of dispute resolution.[1351] In addition, the concept of transparency is operationalized narrowly to mean publication of arbitral awards and therefore does not consider other forms of disclosure, such as the publication of institutional decisions and the reasons for these decisions, institutional correspondence, or the financial statements of arbitral institutions. The study also does not fully exploit the comparative perspective to explore possible differences of the examined legitimacy deficits among public- and private-sector arbitral institutions. This research project proceeds with the assumption that normative debate could benefit from further exploratory and hypothesis-generating research on arbitral institutions acting in mixed arbitration. As such, it also intends to

[1351] See Section F on constitutional and public law analogies below; Bonnitcha, Skovgaard Poulsen and Waibel (n 110) 235.

make greater use of the comparative perspective to capture the differences between intergovernmental and private-sector arbitral institutions.

3. Normative and sociological legitimacy of ICSID

Some scholars develop more detailed considerations of the concept of legitimacy. Bjorklund, for instance conducts a single case study on the normative and sociological legitimacy of ICSID, in which she examines and rebuts typical criticisms levelled at this institution.[1352] She offers a more detailed discussion of the concepts of normative and sociological legitimacy, as well as their evolution over time. While increased efficacy contributes to the normative legitimacy of ICSID, it 'tends to undermine its sociological legitimacy'.[1353] Contrary to Claussen, Bjorklund discusses concerns directly related to state sovereignty and thereby operationalizes legitimacy in a way that exceeds the concepts of transparency, diversity, and expedition. According to Bjorklund, critics highlighting these concerns, view 'the distance between a tribunal and the national polity whose acts are being challenged'[1354] as problematic and focus on the 'underlying normative regime'.[1355] For Bjorklund state consent to ICSID-administered mixed arbitration is a perfect exercise of state sovereignty. But she acknowledges that this will not suffice to address related concerns such as regulatory chill or the impact of mixed arbitration on environmental law and human rights protection. Possible shortfalls of ICSID should be considered a consequence of the limited mandate granted to the

[1352] Bjorklund (n 1349).
[1353] ibid 281.
[1354] ibid.
[1355] ibid.

Centre in the founding Convention rather than an instance of it acting *ultra vires*. Ultimately, Bjorklund considers ICSID to be an institution that 'administers the resolution of disputes but is not a norm-enforcing body with power to affect the interpretation of investment treaties or to change their content'.[1356] She emphasizes that this distinction is often misunderstood by critics of the institution.

Bjorklund's claim that the criticism typically levelled at mixed arbitration cannot simply be transferred to ICSID, and by analogy to other arbitral institutions that administer mixed arbitrations, is convincing. Like other arbitral institutions, ICSID's case administration function does not have a direct impact on the interpretation of investment provisions contained in treaties, investment laws, or investment contracts. By expressly considering critics that highlight the systems remoteness from the challenged national polity, Bjorklund also avoids an overly narrow conceptualization of legitimacy. Several questions nevertheless remain. To what extent do the discussed legitimacy concerns affect arbitral institutions directly? In other words, what may be institution-specific legitimacy concerns? For instance, is the distance of an arbitral tribunal to the challenged national polity more problematic that the distance of an arbitral institution to that polity? Also, the initial research conducted appears to indicate that arbitral institutions may nevertheless sometimes exert a degree of mediated or indirect influence on treaty interpretation, for instance by participating in the promotion of certain investment instruments or by lobbying national governments for procedural reform.

Several questions regarding the impact of institutional practices on state sovereignty remain unanswered. In arbitral practice the distinction between

[1356] ibid 239.

administration and norm-enforcement may be blurred. Institutional decisions, even if labelled as administrative, may have a significant impact on the course and outcome of proceedings. The extent of mandates may be unclear and there may be incentives for institutions to aggrandize their mandate through broad interpretation of treaty- and contract- provisions over time. This research project is aimed at developing a more granular understanding of how arbitral institutions operate in practice.

4. Synthesis of scholarship on judicialization and legitimacy

Within the stream of scholarship on the judicialization of international law and the legitimacy of international adjudicatory bodies, only few accounts focus on arbitral institutions in mixed arbitration. As key actors in international dispute settlement, arbitral institutions are understood to be part of a broader, empirically observable trend towards a greater judicialization of international law and, more generally, international relations. Typical approaches compare arbitral institutions to the secretariats of other international courts and tribunals and discuss implications of the findings for the ongoing debate on the legitimacy of international adjudicatory processes in general and on mixed arbitration in particular.

This stream of scholarship leaves certain gaps that this research project attempts to address. Firstly, a narrow focus on judicialization may not capture situations where arbitral institutions participate in legislative and intergovernmental reform processes rather than extending their mandate through judicial decision-making. Concepts such as gatekeeping may be better suited for secretariats that frequently reject cases and thereby exert power over a certain constituency. In addition, a focus on the judicial aspects of institutional behaviour may fail to render some of the strategic, political, and economic considerations of institutions more visible. Finally, diverging definitions of the concept of legitimacy exist and different comparator values for an assessment of the normative legitimacy of arbitral institutions are suggested. These include transparency, efficacy, accountability, neutrality etc. Legitimacy concerns related to other participants in the arbitral process, such as arbitral tribunals, are sometimes transferred to arbitral institutions. This project proceeds with the assumption that exploratory research on arbitral institutions could inform the debate on the normative legitimacy of mixed arbitration.

G. The analogy of constitutional and public law

Closely related to questions of legitimacy, another strand of scholarship in international investment law draws comparisons between mixed arbitration and dispute settlement procedures under national constitutional or public law. These scholars consider analogical reasoning to be useful when describing international investment law, as it constitutes a relatively recent field of study where 'many issues remain unresolved'.[1357] For Van Harten, drawing on the public law analogy, investor-state arbitration 'is uniquely a form of public law adjudication, constituted at the international level'.[1358] He observes that much like in domestic procedures of public law, individual persons can use mixed arbitration to challenge the regulatory conduct of a state.[1359] By

[1357] Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 American Journal of International Law 45, 50.

[1358] Gus Van Harten, 'A Case for an International Investment Court' (2008), Society of International Economic Law (SIEL) Inaugural Conference Paper, 5.

[1359] ibid 8-9.

consequence he advocates that the norms typically applicable to domestic public law procedures – accountability, openness, coherence, and independence – should equally apply to mixed arbitration. Similarly, Schneidermann, comparing investment law to national constitutional law, considers that investor-state arbitration can be 'likened to the performance of judicial review under national constitutions'.[1360] Contrary to Van Harten, Schneidermann normatively rejects international investment treaties altogether, arguing that they unduly remove decision-making as determined in national constitutions from the remit of state sovereignty.

Following the analogist logic, the work of arbitral institutions could be compared to the public law or constitutional functions of the legislative or executive branches of national governments, as well as administrative agencies, such as court registries. For instance, similar to constitutionally defined methods of judicial selection of high court judges that conduct judicial review, arbitral institutions select and confirm arbitrators that ultimately determine 'the propriety of state action'[1361] in mixed arbitrations. Similar to certain domestic frameworks for the regulation of the judiciary, such selection processes follow a 'dyadic paradigm'[1362] balancing arbitrator independence with accountability. Moreover, similar to constitutional law that may determine the duration of tenure or the remuneration of judges of constitutional courts, arbitral institutions may determine the length of an arbitrator's mandate or fix her fees. Other analogies with domestic

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[1360] David Schneidermann, 'Investment Arbitration as Constitutional Law: Constitutional Analogies, Linkages, and Absences' in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (OUP 2020), 421.

[1361] ibid.

[1362] Richard Devlin and Adam Dodek, 'Regulating Judges: Challenges, Controversies and Choices' in Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Elgar 2016), 2.

administrative or constitutional law can be drawn. These include similarities between the legislative process of passing a national procedural law or code, and the processes by which arbitral institutions elaborate, publish, amend, or replace procedural or financial rules that are applicable to mixed arbitrations.

The comparison of arbitral institutions with domestic constitutional or administrative procedures nevertheless faces certain difficulties. Firstly, a question similar to legitimacy concerns raised in the judicialization literature is, out of the plethora of different constitutional and public laws, which is the right comparator for reform? Even among democratic states, considerable differences in the selection, accountability, remuneration, or tenure of constitutional or supreme court judges exist.[1363] Secondly*,* not all states that mandate arbitral institutions are democratic and a policy comparison with constitutional or public laws of autocratic or dictatorial systems may not be desirable.[1364] Thirdly*,* deference to regulatory decision-making also varies in the domestic context. And fourthly, formally, state consent to mixed arbitration is often democratically legitimized through parliamentary ratification of international investment instruments.[1365] Moreover, as Bonnitcha and others observe, '[t]here are large unresolved questions about the relationship between democracy and the investment treaty regime that future research needs to address'.[1366]

[1363] Bonnitcha, Skovgaard Poulsen and Waibel (n 110) 65.

[1364] Jonathan Bonnitcha, 'Investment Treaties and Transition from Authoritarian Rule' (2014) 15 Journal of World Investment and Trade 965; Gus Van Harten, 'Guatemala's Peace Accords in a Free Trade Area of the Americas' (2000) 3 Yale Human Rights and Development Law Journal 113.

[1365] Bonnitcha, Skovgaard Poulsen and Waibel (n 110) 236.

[1366] ibid 238.

This research project does not directly engage with this debate. Rather, it proceeds on the assumption that a better understanding of the historical emergence of arbitral institutions in mixed arbitration, their strategies and incentives, as well as their relationship with other actors may serve as a basis for normative claims. To provide such an understanding, this research project adopts an interdisciplinary research framework informed by historical institutionalism and oligopoly theory.

Appendix B

Methodology

A. Purpose statement, preliminary definitions, and rationale

This research project adopts a comparative case study method. As is typical for the case study design, the research project will primarily be exploratory and descriptive. An exploratory approach is warranted due to the early stage of interdisciplinary research on arbitral institutions in mixed arbitration. Choosing a comparative and exploratory research design enables the generation of new hypotheses, that are informed by the rich, practical context in which arbitral institutions emerge and operate.

Case studies are a typical research method in scholarship on international organizations.[1367] Arbitral institutions are in many ways similar to such organizations. For instance, they operate on the basis of state mandates, sometimes enjoy diplomatic privileges, and participate in intergovernmental processes. Besides the frequent use of the method in neighbouring research fields, case studies allow for the in-depth analysis of cases that are 'bounded by time and activity' and imply 'using a variety of data collection procedures'.[1368] This offers various advantages. Firstly, to capture the majority of mandate-granting and mandate exercising events, this research project is following a timeframe spanning from the 1920s to the present, during which the majority of treaties

[1367] Tarald Berge and Taylor St John, 'Asymmetric Diffusion: World Bank "Best Practice" and the Spread of Arbitration in National Investment Laws' (2021) 28 Review of International Political Economy 584; Polonskaya (n 1350); Nina Hall, 'Money or Mandate? Why International Organizations Engage with the Climate Change Regime' (2015) 15 Global Environmental Politics 79.

[1368] John Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (5th edn, SAGE 2018), 32.

were signed, and most known mixed arbitrations were commenced.[1369] This does not exclude brief references to earlier historical processes or cases that appear vital for institutional development.[1370]

Secondly, case studies are ideal to produce ‘context-dependent knowledge’[1371] and are also characterized by a high conceptual validity. Case studies also allow ‘for the complexities of social and political relations to be seen’.[1372] The method is therefore well-suited to contribute to normative debate by identifying possible concerns related to the legitimacy of arbitral institutions – particularly where these concerns arise from institutional practices other than their administrative core functions. Arbitral institutions also offer a perfect unit of study, as their boundaries are well-defined. Like other international organizations, they, or their parent organizations, usually have a distinct legal personality and financial structure, a clearly defined body of staff, specific procedural rules, and a visible branding. In addition, the comparative element will highlight the key differences among the different types of arbitral institutions contained in the sample and identify deviant cases.

1369 This does of course not exclude punctual references to historic origins or significant earlier investor-state arbitration proceedings.

1370 For the PCA, the arbitral proceeding in *Radio Corporation of America v China* of 1934 appears to be such a case since it represents the first case where private standing on the basis of the 1899 and 1907 Conventions was confirmed.

1371 Aikaterini Argyrou, ‘Making the Case for Case Studies in Empirical Legal Research’ (2017) 13 Utrecht Law Review 95, 104.

1372 ibid 103-04.

B. Research type

This project will rely on qualitative research methods. There are several reasons for this methodological choice. Firstly, the objective of this project is to build theory and generate hypotheses. The project is based on the understanding that only an in-depth, context-aware description that captures the complexity of the institutions and their work will serve as a viable basis for this objective. Relying predominantly on 'text and image data', qualitative research methods are particularly well-suited for theory-building and hypothesis-generating research.[1373] Due to the confidential, inaccessible, and often opaque nature of the work of arbitral institutions, text and image data may be the only type of data that is publicly available. While some institutions, often bound by confidentiality agreements with disputing parties and arbitrators, have so far been reluctant to publish extensive statistics and numerical data about their work, its administrative nature implies the production of a vast number of documents.

Public institutional documents can be complemented by other documentary sources. These sources include documents published by the executive or legislative branches of government in states in which the examined institutions are located or which have used institutional rules in their legal instruments; the *travaux préparatoires* of the intergovernmental agreements that established an arbitral institution or granted an institutional mandate; leaked documents containing information about the interaction of institutions and state representatives; and personal archives of institutional officials or affiliated experts.

[1373] Creswell (n 1368) 254.

C. Addressing the access problem with 'insider research'

As indicated in the previous section, any research about the practices and functions of arbitral institutions encounters a problem of access.[1374] Various aspects of the work of arbitral institutions are covered by confidentiality, such as, for instance, the subject matter of disputes and the identity of the disputing parties in the proceedings they are administering. This access problem must therefore inform the choice of data collection techniques. To address this, this research project relies on so-called 'insider research', understood as research conducted by a researcher who has acted in a professional role for the institution that is the object of a study.[1375] Besides observational data, such researchers are also in a privileged position to identify documentary evidence in the public domain that is 'hidden in plain sight'.[1376] Insider research has been proposed as a viable research technique in the study of international adjudicatory bodies – a field of study where similar access problems occur frequently.[1377]

Accordingly, this study draws on the author's professional experience as an intern and Deputy Counsel at the International Court of Arbitration of the International Chamber of Commerce from July 2019 to March 2020. The role as a Deputy Counsel implied the administration of over 70 arbitral proceedings, the management of case-related documents, and the interaction with a range of institutional representatives, arbitrators, counsel, experts, third-party funders, and disputing parties. It also involved

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1374 Freya Baetens, 'Unseen Actors in International Courts and Tribunals: Challenging the Legitimacy of International Adjudication' in Freya Baetens (ed), *Legitimacy of Unseen Actors in International Adjudication* (CUP 2019), 13.

1375 ibid.

1376 ibid.

1377 ibid.

participating in meetings of the International Court of Arbitration of the International Chamber of Commerce – the administrative instance taking all relevant decisions on case administration in ICC arbitration – as well as in the process of the revision of the ICC Rules.

For the purpose of this research project, the author's professional experience as an 'insider' will be used to identify publicly available documentary and archival data that has not been considered in prior research. The starting point of the data collection process will be legal documents that are directly related to the administration of mixed arbitrations, including arbitration rules and related commentaries. The abovementioned professional and doctrinal literature on institutional case administration will serve as a secondary source in this regard. These sources will then be complemented by other documentary and archival sources, including documents published by arbitral institutions and their subsidiaries; and agreements that institutions have entered with states, other institutions, organizations, and individuals. Archival sources include institutional archives, state archives, and archives of intergovernmental organizations, where relevant.

D. Research population

As indicated in the thesis introduction, the population of interest for this research project will be all arbitral institutions that have either been mandated by states or state entities to administer mixed arbitrations or to act as an appointing or designating authority in such proceedings. It is understood that mandates can be granted in investment treaties, national investment laws, and public-private contracts. The exact number of institutions that is part of the research population is unknown for at least two reasons. Firstly, the legal instruments granting an institutional mandate may be confidential. Secondly, particularly in contract-based arbitration, whether specific institutional rules will be applicable to mixed arbitrations may only be determined once a case arises. The fact that the number of institutions that form the research population is unknown is no obstacle to this research project. It will nevertheless impact its limitations and generalizability.

E. Unit of analysis and research sample

The unit of analysis in this research project will be one arbitral institution active in mixed arbitration, as defined above. A sample of four institutions (that is, cases) is selected. Case selection is information-based rather than random. In theory-building research it is common practice to use information-based or 'theoretical' rather than random sampling, as this allows for cases to 'be chosen to fill theoretical categories and provide examples of polar types'.[1378] The four selected institutions are ICC-ICA, ICSID, SCC-AI, and the PCA.

The view that case studies can produce generalizable knowledge is now firmly established.[1379] According to Flyvbjerg, generalizability or external validity of case studies can be improved by using information-based sampling. A central criterion increasing external validity is a maximum variation of cases 'that are very different on

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[1378] Eisenhardt (n 143) 537.

[1379] Bent Flyvbjerg, 'Five Misunderstandings About Case-Study Research' (2010) 12 Qualitative Inquiry 219, 307.

one dimension'.[1380] The chosen sample fulfils this criterion. The four chosen institutions vary in staff size, number of proceedings administered so far, corporate structure and specialization (e.g., some only administer mixed arbitrations while others also act as appointing authorities, administer commercial arbitration, mediation, conciliation, or inter-state proceedings). At least two out of the selected institutions, the ICC-ICA and SCC-AI, are linked to private-sector interest groups. This offers an interesting contrast with the public-sector institutions ICSID and PCA.

F. Limitations

The research method of this research project necessarily implies certain limitations. A first set of limitations relate to the abovementioned access problem and the confidentiality of mixed arbitration in general. Some arbitral institutions that administer mixed arbitrations, may not have been considered in the research population. These arbitral institutions may represent deviant or extreme cases and therefore limit the generalizability of the research findings. Furthermore, arbitral institutions within the sample may engage in activities that are unknown to the public, such as the administration of confidential cases or confidential meetings with state representatives. The confidentiality of these activities may be linked to political sensitivity or institutional image, a feature that is not negligeable due to the frequent implication of issues of public interest in mixed arbitrations. Information in the public domain that is used in the study, even if hidden in plain sight and only identifiable to an 'insider', may therefore be biased towards painting a politically 'neutral' picture.

[1380] ibid.

Moreover, there are limitations that are linked to the role of the researcher that is also a professional insider. For instance, Baetens notes that insider research has been viewed to suffer from confirmation bias and may paint an overly positive image of the institution that is examined.[1381] This bias is arguably less relevant where the insider is no longer acting for the institution in a professional capacity at the time of conducting the research. Insider research has also been said to suffer from a lack of verifiability.[1382] This project addresses this concern by focusing on data that is 'hidden in plain sight' rather than observational data and, where possible, by triangulating data using several sources. Lastly, due to the author's professional experience at the ICC, the comparative element of the study may be biased towards finding patterns of practices or functions of the other institutions in the sample that are similar to those of the ICC.

G. A four-quadrant model of mixed arbitration

[1381] Baetens (n 1374) 13.

[1382] ibid.

The terms ‘investment arbitration’ and ‘investor-state arbitration’ are sometimes used generically to include two categories of proceedings: (1) international arbitration between private disputing parties and disputing parties with some degree of state involvement (e.g., the state itself, state agencies, state-owned enterprises, or private enterprises with partial state ownership), and (2) international arbitration involving different types of state consent (e.g., advance consent or simultaneous consent). It is submitted that, for the purpose of this project, mixed arbitration can usefully be situated in a four-quadrant model, where the x-axis represents the *nature of state participation* (from indirect to direct), and the y-axis represents the binary category of *consent type* (advance consent or simultaneous consent). This model is illustrated in Figure 11.[1383]

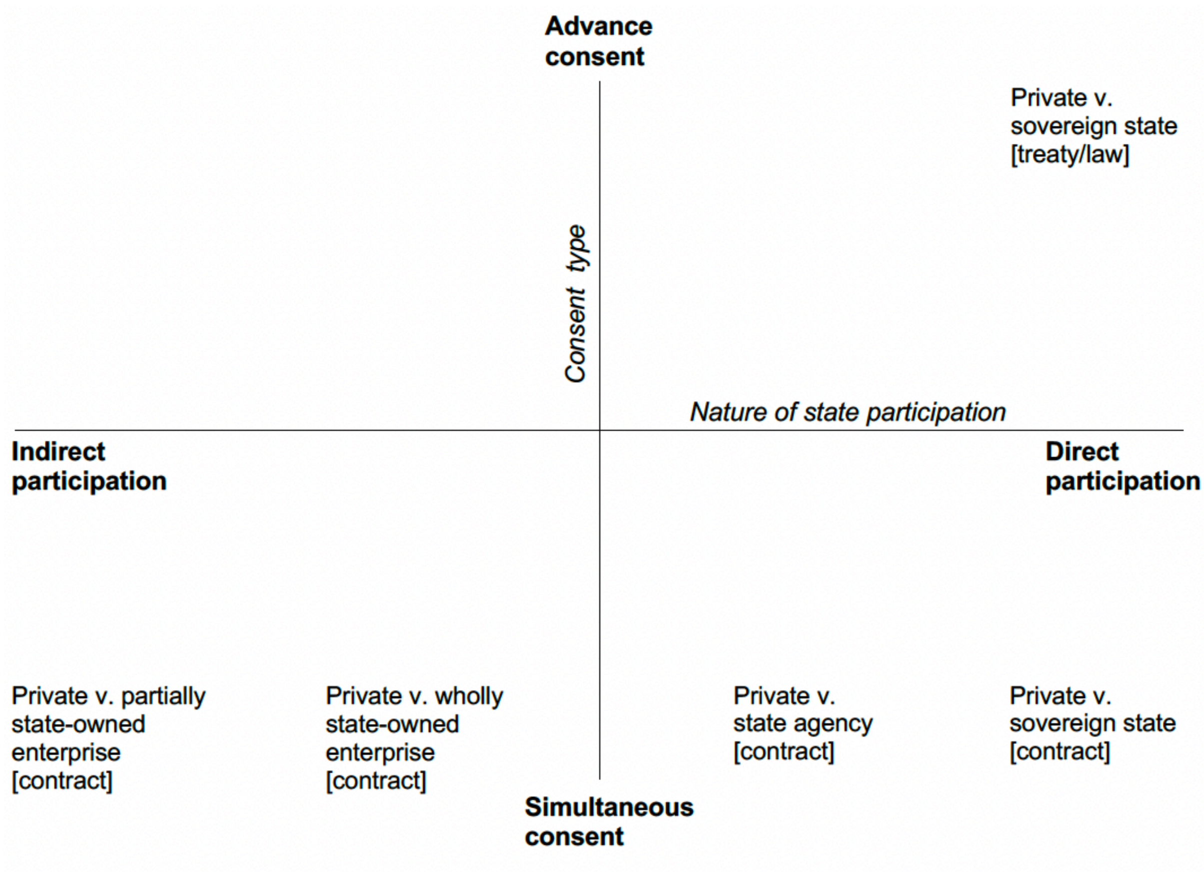

Figure 11 - Four-quadrant model of mixed arbitration

The institutions examined in this project differ according to the types of disputes they administer or otherwise intervene in. This applies to their providing such services both in principle and in practice. In international relations scholarship, a 'set of overlapping [international organizations] that govern a single-issue space' has been described as a 'regime complex'.[1384] The group of arbitral institutions administering

[1383] The model contains examples of cases with the type of legal instrument containing consent mentioned in square brackets.

[1384] Clark (n 82) 1133.

mixed arbitration bears a certain resemblance with regime complexes, particularly regarding the administration of arbitrations involving sovereign states as respondents that have made a standing offer to arbitrate in a treaty or domestic investment law.

Like every heuristic, the model simplifies the reality of mixed arbitration to some extent. Firstly, it assumes a single private entity as claimant and a single disputing party involving the state as respondent. Yet, in practice, mixed arbitration may involve several claimants. For instance, this may be the case following the joinder of additional claimants to an existing proceeding or the consolidation of several proceedings into one. Similarly, mixed arbitration may involve claimants with a degree of state participation. For instance, this may be the case where the claimant is a private enterprise with partial state ownership.[1385] Secondly, the model excludes the possibility of mixed arbitration based on multiple types of state consent or legal instruments. In practice, a mixed arbitration may be based on both a contract and a treaty. This may also play out in time. For instance, in bi- or trifurcated proceedings, an arbitral institution or tribunal may be *prima facie* satisfied that several consents provide a valid basis for the arbitration before an award on jurisdiction is rendered.

These limitations notwithstanding, it is submitted that the four-quadrant model of mixed arbitration provides a useful conceptual basis for the analysis of arbitral institutions in mixed arbitration. The 'archetypal' investment arbitration is situated in the top right quadrant – i.e., arbitration initiated by one private entity as claimant against a sovereign state who has made an advance offer to arbitrate in a treaty. In normative

[1385] The case of arbitration between sovereign states can be distinguished, as it does not represent mixed arbitration.

and policy debate, this form appears to receive particular attention. To understand the emergence and development of arbitral institutions, however, mixed arbitration is more usefully situated on a continuum. ICSID (including its Additional Facility), is the arbitral institution that is most frequently referred to in investment treaties and domestic investment laws. ICSID Arbitration Rules are also the institutional rules that are applicable to the majority of administered treaty-based mixed arbitrations. This is closely followed by the UNCITRAL Arbitration Rules, and treaty-based arbitrations pursuant to those rules appear most frequently administered by the PCA and the SCC-AI. Investment arbitration that is in the top right quadrant therefore most closely resembles a 'single-issue space' and this is also where the market share of intergovernmental arbitral institutions is the highest. In contrast, the picture gets 'blurrier' when the focus moves towards the bottom left quadrant. Market concentration is weaker where consent is given simultaneously and where the state is involved only indirectly.

The four-quadrant model of mixed arbitration also harmonizes the terminology employed by arbitral institutions themselves when designating arbitration involving states or their entities. Before the creation of ICSID, arbitral institutions and their affiliated experts frequently referred to 'commercial arbitration', whether involving a state or not. Even today, each institution maintains its own terminology to refer to arbitration involving states. The ICC refers to arbitration involving 'state entities', the PCA refers to mixed arbitration and to rules of arbitration between parties 'of which only one is a state', and ICSID refers to 'investment' arbitration.[1386]

[1386] See for instance ICC, 'ICC Statistics 2020' (n 419) 11; PCA, *Annual Report 2021* (n 727) 36; 'The Permanent Court of Arbitration. Rules of Arbitration and Conciliation for Settlement of International

There may be strategic advantages for a private-sector arbitral institution to frame arbitration as commercial, or at least not limited to investment, and to downplay the issue of state participation. This framing may be particularly relevant in iterative intergovernmental negotiation processes. During the negotiations of the 1976 UNCITRAL Arbitration Rules, for instance, discussions were deliberately not limited to arbitration of 'commercial' disputes or disputes related to 'investments', to retain greater flexibility. Whether state participation in arbitration is a prominent and visible feature of an international normative process (e.g., negotiation of ICSID Convention) or a transient element (UNCITRAL Arbitration Rules), may also be useful for brokering state consent.

Disputes Between Two Parties of Which Only One Is a State. The Hague, February, 1962' (n 1044); ICSID, 'ICSID Statistics 2023-1' (n 674) 9.

Appendix C

List of Principal Protagonists

Protagonist	Years	Role
Edwin Herbert	1899 – 1973	President of the ICC Commission on Arbitration in the 1950s; ICA President (1970 - ?); ICC delegate to the 1958 UN Conference on International Commercial Arbitration.
George Haight	1905 – 1983	ICC delegate to the 1958 UN Conference on International Commercial Arbitration; manager of the legal department of Royal Dutch Shell in the 1950s.
John Blair	1912 – 1989	Consultant in international relations and international law at Shell (1958 – 1954); associated with the Confederation of British Industry and the ICC; member of the Consultative Committee of the Association for the Promotion and Protection of Private Investment.
Frédéric Eisemann	1908 – 1986	French jurist and long-term Secretary General of the ICA (1947 -1973); ICC delegate to the 1958 UN Conference on International Commercial Arbitration.
Charles Carabiber	1887 – 1969	Arbitration specialist and ICA president from 1953 until his death in 1969; conceptualized mixed arbitration tribunals in a 1952 lecture at the Hague Academy.
Algot Bagge	1875 – 1971	Swedish Supreme Court judge (1930 – 1943); president of the International Court of Arbitration (Swedish section) during the Second World War (1940 to 1943); member of the PCA in the 1940s (at least).
Pieter Sanders	1912 – 2012	Co-founder of the Netherlands Arbitration Institute and the International Council for Commercial Arbitration; Dutch delegate to the 1958 Conference on International

		Commercial Arbitration; member of the ICC Commission on Arbitration in the 1950s and 60s; advisor to the UNCITRAL Secretariat in the 1970s.
Aron Broches	1914 – 1999	General Counsel of the World Bank (1959 - 1979); ICSID Secretary General (1967 - 1980); observer for ICCA at UNCITRAL in the 1980s.
Howard Holtzmann	1922 – 2013	President of the American Arbitration Association; judge of the Iran-US Claims Tribunal; ICCA Council member; US delegate to UNCITRAL; member of the SCC.
Ren Jianxin	Born in 1925	Secretary General of the Foreign Economic and Trade Arbitration Commission of China (1959 – 1966); Director of Legal Affairs at the China Council for the Promotion of International Trade (1971 – 1981); Vice President and then President of the Supreme Court of China (1983 – 1998).
Sergei Lebedev	1934 – 2016	Leading Soviet jurist and arbitration specialist having played a leading role in developing the 1977 Optional Clause for Use in US-USSR Trade; ICCA Council member; President of the Soviet Maritime Arbitration Commission; Soviet delegate to UNCITRAL.
Dimitri Ramsaizev	1902 – 1977	Diplomat in the USSR trade mission to Germany; senior Soviet law professor; chairman of the Foreign Trade Arbitration Commission of the USSR Chamber of Commerce and Industry (1940 – 1959).
Ulf Franke	?	Secretary General of the Arbitration Institute of the Stockholm Chamber of Commerce (1975 – 2010).
Jean François	1889 – 1978	PCA Secretary General (1954 – 1968); conceptualized mixed arbitration in a 1955 lecture at the Hague Academy.

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