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SHOULD MEXICO JOIN ICSID?[a]

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Executive Summary

As of 8 June 2012, 158 countries are parties to the ICSID Convention. ICSID represents a "quintessential framework for investor-state arbitration"[2] and its role in resolving investment disputes is continuously increasing. In 2011, the ICSID Secretariat received the highest number of requests for registration of investment claims under its rules.

This project addresses the question of whether Mexico should join ICSID. It does so by way of a comparative analysis between the ICSID system and the arbitration rules mostly referred to in Mexico's IIAs to resolve investor-state disputes.

Our premise in support of Mexico's adherence to the ICSID Convention is based on the following considerations: 1) Mexico has an extensive practice of investment arbitration 2) Mexico is familiar with investor-State arbitration under UNCITRAL, ICSID/AFR and other arbitration rules, and 3) Mexico has a well-developed legal regime on foreign investment, composed of BITs and FTAs which already contain ICSID as an option for dispute resolution.

The project is divided in three main parts. Part I deals with the *status quo* of Mexico's International Investment Agreements (IIAs) and gives an overview of the investment protection discipline adopted by Mexico. Each BIT and FTA signed by Mexico has been scrutinized in order to confirm that there are no formal impediments to Mexico's ICSID membership and to evaluate the possible impact of the ratification of the Convention on the current framework.

Part II analyses several procedural issues by comparing the discipline contained in the ICSID Convention with other arbitration rules, mainly ICSID/AFR, UNCITRAL, ICC and PCA. The conclusions of this part demonstrate that ICSID offers several procedural advantages when compared to other Dispute Settlement Mechanisms. The

[2] L. Yves Fortier, "Interim measures: An Arbitrator's provisional views", Third Annual Conference on International Arbitration and Mediation, (2008), Paper presented at the Fordham Law School, 16th June, p. 3.

main areas where a substantive difference exists are those related to the role of the secretariat, the annulment and enforcement of awards, transparency, costs, appointment and challenge of arbitrators. Other issues, which do not present disadvantages and would not give rise to concerns, are those related to applicable law, definition of investment and predictability of the awards. Some issues, to the contrary, may cause concern, for instance provisional measures.

Part III considers the reasons for and the impact of ICSID membership. It confirms a) the relevance of ICSID as an additional dispute settlement mechanism to protect Mexican investors abroad, and b) the non-direct link between the ICSID membership and the increase of investment claims against a member state. In addition, part III addresses the recent denunciations of the ICSID Convention and Mexico's experience as a respondent State in investment arbitration to date.

Balancing the advantages with the disadvantages of the ICSID Convention and taking into consideration that ICSID membership sends a positive signal of effective protection to foreign investors, Mexico should consider becoming a party to the Convention. Joining ICSID would expand the range of options in investor-State dispute settlement, both for Mexico acting as a respondent State and, more importantly, for Mexican investors acting as claimants. This choice would contribute to Mexico's emerging economy and would increase its regional and global competitiveness.

Part I: Mexico's Status Quo in International Investment Agreements and Investment Arbitration

This part is dedicated to the International Investment Agreements (IIAs) signed by Mexico. Its goal is to capture the status quo of Mexican IIAs, with a particular focus on the discipline of the settlement of disputes between investors and contracting States. The findings of this part will be fundamental to assess the eventual impact of the access to the ICSID Convention on existing investment treaties.

1. Current Situation in International Investment Agreements Signed by Mexico

More than 25 years ago Mexico embarked on a major modernization of its international economic relations. The new trend officially began in 1986, when Mexico acceded to the General Agreement on Tariffs and Trade (GATT), and at its outset it was mainly oriented towards a liberalization of trade in goods. Very soon Mexico's strategy showed also an interest in the promotion and protection of investments. In 1994 the country signed the North American Free Trade Agreement (NAFTA) together with Canada and the United States, which contains a section (Chapter 11) specifically devoted to investment.

Mexico concluded its first Bilateral Investment Treaty (BIT) with Spain, in 1995. In the following years it entered into 28 BITs[3] of which 18 were concluded with European countries and 10 with non-European countries. Among the most recent treaties are the ones concluded with two major emerging economies, India and China. Alongside BITs, Mexico has signed several Free Trade Agreements (FTAs), mostly with its Latin American partners. These agreements are much broader in scope and more extensive than BITs and may also include a chapter devoted to investment.

[3]Source: <http://www.sre.gob.mx/tratados/> ; <http://www.sice.oas.org/> ; <http://www.unctadxi.org/templates/DocSearch____779.aspx>, (last visited May 2012)..

Currently, Mexico counts with 13 FTAs.[4] The large majority of Mexico's FTAs contain a chapter devoted to investment.[5]

Table 1: BITs Signed by Mexico[6]

CONTRACTING STATES	DATE OF SIGNATURE	DATE OF ENTRY INTO FORCE	NOTES
Argentina	13 November 1996	22 July 1998	
Australia	23 August 2005	21 July 2007	
Austria	29 June 1998	26 March 2001	
Belarus	04 September 2008	27 August 2009	
Belgium and Luxemburg	27 August 1998	18 March 2003	
China	11 July 2008	06 June 2009	
Cuba	30 May 2001	05 April 2002	
Czech Republic	04 April 2002	13 March 2004	
Denmark	13 April 2000	24 September 2000	
Finland	22 February 1999	20 August 2000	
France	12 November 1998	11 October 2000	
Germany	28 August 1998	23 February 2001	
Greece	30 November 2000	03 October 2002	
Iceland	24 June 2005	28 April 2006	
India	21 May 2007	23 February 2008	
Italy	24 November 1999	05 December 2002	
Korea, Republic of	14 November 2000	28 June 2002	
Netherlands	13 May 1998	01 October 1999	
Panama	11 October 2005	14 December 2006	
Portugal	11 November 1999	04 September 2000	
Singapore	12 November 2009	03 April 2011	
Slovakia	26 October 2007	08 April 2009	
Spain	10 October 2006	03 April 2008	Superseded the BIT signed on 22 June 1995
Sweden	03 October 2000	01 July 2001	
Switzerland	10 July 1995	14 March 1996	
Trinidad and Tobago	03 October 2006	16 September 2007	
United Kingdom	12 May 2006	25 July 2007	
Uruguay	30 June 1999	07 July 2002	

[4] The Free Trade Agreement between Mexico and Bolivia was denounced in 2010 and is not included in this analysis.

[5] The FTA between Mexico and EU, as well as the FTA between Mexico and the EFTA States does not contain a separate chapter on investments, but few provisions in its text. The FTA between Mexico and ISRAEL does not deal with investment.

[6] Sources: <http://www.sre.gob.mx/tratados/> ; <http://www.sice.oas.org/> ; <http://www.unctadxi.org/templates/DocSearch____779.aspx>, (last visited May 2012).

Table 2: Free Trade Agreements Signed by Mexico, Containing an Investment Chapter[7]

CONTRACTING PARTIES	DATE OF SIGNATURE	DATE OF ENTRY INTO FORCE	NOTES
Bolivia	10 September 1994	Mexico: 27 December 1994 Bolivia: 01 January 1994	Denounced: 07 June 2010
Chile	17 April 1998	01 August 1999	
Colombia	13 June 1994	01 January 1995	The FTA was originally concluded between Colombia, Mexico and Venezuela. Venezuela denounced the FTA in 2006.
Costa Rica	05 April 1994	01 January 1995	
Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua	22 November 2011	Not yet in force	
El Salvador, Guatemala, Honduras	29 June 2000	Mexico - Guatemala: 15 March 2001 Mexico - El Salvador: 15 March 2001 Mexico - Honduras: 01 June 2001	
Japan	17 September 2004	01 April 2005	
NAFTA (North American Free Trade Agreement)	17 December 1992	01 January 1994	
Nicaragua	18 December 1997	01 July 1998	
Peru	06 April 2011	01 February 2012	
Uruguay	15 November 2003	15 July 2004	

[7] Source: <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> ; <http://www.sre.gob.mx/tratados/> ; <http://www.sice.oas.org/> , (last visited May 2012).

2. Dispute Settlement Provisions in Mexico's International Investment Agreements

Several common features emerge from the analysis of the dispute settlement provisions in Mexico's IIAs:[8]

- Dispute settlement provisions in IIAs signed by Mexico are very detailed and largely inspired by the analogous section of the NAFTA Agreement.

- The scope of the sections concerning the settlement of disputes between investors and contracting States is narrow in all Mexican IIAs. It encompasses only disputes arising out of an alleged breach of an obligation contained in the agreement, entailing loss or damage.[9]

- Time limits: all IIAs state that negotiation and conciliation are the preferred mechanisms to resolve any dispute, or at least are the mechanisms which have to be addressed in a preliminary phase. The possibility for an investor to submit claims to other mechanisms is generally framed within three time limits.[10]

    - A "cooling-off" period: a dispute can be submitted for resolution to methods other than negotiation and conciliation, provided that six months[11] have elapsed since the events giving rise to the claim occurred. Few are the agreements which do not contain such time limitation.[12]

    - Notice of the intention to submit a claim to arbitration: such notice has to be delivered in written form at least six months[13] (or 120 days,[14] 90 days[15]

[8] The reference to dispute settlement in this work shall be intended as to disputes between private investors and States. Usually IIAs contain two sets of provisions, one dealing with disputes between contracting States on the interpretation and application of the treaty and another one addressing disputes between private investors and States. The former is outside the scope of this memorandum.
[9] See for example article 11 of the Slovakia-Mexico BIT. For a comparison with a broader formulation, see article 24 of the 2004 US Model BIT and of the revised 2012 US Model BIT.
[10] An example of time limits may be found in the France-Mexico BIT, at article 9(3): "A dispute (...) may be submitted to arbitration, provided that six months have elapsed since the events giving rise to the claim occurred and provided that the investor has delivered to the Contracting Party, party to the dispute, written notice of its intention to submit a claim to arbitration at least 60 days in advance, but no latter [sic] than 4 years from the date the investor first acquired or should have acquired knowledge of the events which gave rise to the dispute".
[11] See for example article 9(3) of the France-Mexico BIT.
[12] See the Iceland-Mexico BIT.
[13] See for example article 12(2) of the Slovakia-Mexico BIT.

or 60 days,[16] depending on the agreement) before the actual claim is submitted for resolution.

- Time limitation: an investor cannot make a claim if more than three years[17] (in certain cases four years)[18] have elapsed from the date in which it first acquired, or should have first acquired, knowledge of the alleged breach or knowledge that it has incurred loss or damage.

- Submission of claims: If the dispute has not been solved through negotiations or conciliation, the investor has the choice to submit its claim before an international arbitral tribunal or the competent courts or tribunals of the host State. Some treaties provide for both opportunities explicitly.[19] Others refer in their text only to the submission of claims to arbitration but include other provisions, such as waivers and fork in the road clauses (see *infra*) to regulate and avoid possible parallel proceedings before national courts. The provisions designating the different *fora* to which an investor may submit its claims may be considered under the types as presented in Table 3.

  Two important conclusions can be drawn from the following tables: fist, that the most frequently used formulation in IIAs concluded by Mexico is the one under type 4, thus referring exclusively to arbitration and giving to the investor the choice to submit the claim under the ICSID Convention, the ICSID Additional Facility Rules and the UNCITRAL Rules. Second, that all BITs and FTAs signed by Mexico already contain the possibility to arbitrate disputes under the ICSID Convention, although provided that both the disputing Party and the Party of the investor are parties to the Convention. As a consequence, on the one hand, an eventual ratification of the Washington Convention by Mexico will not entail any need of modification of current IIAs. On the other hand, such ratification will create automatically the right to submit a claim under the Convention after 30 days from the deposit of the instrument of ratification.[20]

[14] See for example article 10(7) of the Czech Republic-Mexico BIT.
[15] See for example article 10(3) of the Greece-Mexico BIT.
[16] See for example article 13(10) of the Australia-Mexico BIT.
[17] See for example 12(3)(c) of the India-Mexico BIT.
[18] See for example article 9(3) of the Denmark-Mexico BIT.
[19] See infra table 3.
[20] Article 68(2) ICSID Convention.

Table 3: Types of Dispute Resolution Clauses Contained in Mexico's IIAs

TYPE	CLAUSE	CHARACTERISTICS
1	A dispute may be submitted to: 1) Competent courts or administrative tribunals of the contracting party, party to the dispute 2) Any applicable previously agreed dispute settlement procedure, or 3) Arbitration under: a. The ICSID Convention, provided that both the disputing party and the party of the investor are parties to the ICSID Convention b. The ICSID Additional Facility, provided that either the disputing party or the party of the investor, but not both, is a party to the ICSID Convention c. UNCITRAL Rules d. The International Chamber of Commerce, by an ad hoc tribunal under its rules of arbitration	• Clause giving the broadest range of choices of eligible fora in Mexican IIAs. • An investor may choose between three mechanisms of settlement of disputes: national courts and tribunals, arbitration, and any applicable dispute settlement procedure previously agreed. • For Arbitration: choice is given among four sets of rules. • This clause gives a large spectrum of choices and allows investors to opt for the mechanism they deem more convenient for the specific dispute.
2	A dispute may be submitted to: a. Competent courts or administrative tribunals of the contracting party, party to the dispute b. Any applicable previously agreed dispute settlement procedure, or c. Arbitration under: i. The ICSID Convention, provided that both the disputing party and the party of the investor are parties to the ICSID Convention ii. The ICSID Additional Facility, provided that either the disputing party or the party of the investor, but not both, is a party to the ICSID Convention iii. UNCITRAL Rules	• Clause giving the broadest range of choices as to the mechanism for the settlement of disputes. • For Arbitration: choice is given among three sets of rules. • Under such clause an investor has only one option for institutional arbitration. (ICSID and ICSID Additional facility rules count as one option, since they are mutually exclusive; the availability of one or the other depends on the Contracting States' membership to the ICSID convention)
3	A dispute may be submitted to a. Competent courts or administrative tribunals of the contracting party, party to the dispute b. Arbitration under: a. The ICSID Convention, provided that both the disputing party and the party of the investor are parties to the ICSID Convention b. The ICSID Additional Facility, provided that either the disputing	• Clause giving the choice between national courts and tribunals and arbitration (exclusion of any other mechanism previously agreed). • For Arbitration: choice is given among three sets of rules. • Only one option available for institutional arbitration.

TYPE	CLAUSE	CHARACTERISTICS
	party or the party of the investor, but not both, is a party to the ICSID Convention c. UNCITRAL Rules	
4	A dispute may be submitted to: 1) Arbitration under: a. The ICSID Convention, provided that both the disputing party and the party of the investor are parties to the ICSID Convention b. The ICSID Additional Facility, provided that either the disputing party or the party of the investor, but not both, is a party to the ICSID Convention c. UNCITRAL Rules	• Clause limiting the mechanisms of dispute settlement only to arbitration (no mention of national courts and tribunals nor of any other mechanism previously agreed) • For Arbitration: choice is given among three sets of rules. • Only one option available for institutional arbitration. • This is the most common type of clauses in Mexico's IIAs.
5	A dispute may be submitted to: 1) Arbitration under: a. The ICSID Convention, provided that both the disputing party and the party of the investor are parties to the ICSID Convention b. The ICSID Additional Facility, provided that either the disputing party or the party of the investor, but not both, is a party to the ICSID Convention c. UNCITRAL Rules d. The International Chamber of Commerce, by an ad hoc tribunal under its rules of arbitration	• Clause limiting the mechanism of dispute settlement only to arbitration (no mention of national courts and tribunals nor of any other mechanism previously agreed), • For Arbitration: choice is given among four sets of rules. • Two options available for institutional arbitration (ICSID; ICC)
6	A dispute may be submitted to: 1) Arbitration under: a. The ICSID Convention, provided that both the disputing party and the party of the investor are parties to the ICSID Convention b. The ICSID Additional Facility, provided that either the disputing party or the party of the investor, but not both, is a party to the ICSID Convention c. UNCITRAL Rules d. Any other arbitration rules, if the disputing parties so agree	• Clause limiting the mechanism of dispute settlement only to arbitration (no mention of national courts and tribunals nor of any other mechanism previously agreed). • The choice of the rules governing arbitration is broad, since the parties have the possibility to agree to any other arbitration rules they deem appropriate. • High degree of flexibility in the choice of arbitral rules other than ICSID, AFR and UNCITRAL, but it requires the consent of the disputing parties
7	A dispute may be submitted to: 1) Arbitration under: a. The ICSID Convention, provided that both the disputing party and the party of the investor are parties to the ICSID Convention	• Clause present only in the BIT between Mexico and the UK. • It refers exclusively to arbitration (no mention of national courts and tribunals nor of any other mechanism previously agreed) • It includes the PCA Rules of arbitration among the possible arbitration

TYPE	CLAUSE	CHARACTERISTICS
	b. The ICSID Additional Facility, provided that either the disputing party or the party of the investor, but not both, is a party to the ICSID Convention c. PCA Rules of Arbitration d. Any other arbitration rules, if the disputing parties so agree	rules. • This is the only clause non mentioning explicitly the UNCITRAL Rules. • Parties may agree on other rules they deem more appropriate, but the consent of both disputing parties will be necessary.

Table 4: Distribution of Different Types of Dispute Settlement Clauses in Mexico's BITs

CONTRACTING PARTY	TYPE 1	TYPE 2	TYPE 3	TYPE 4	TYPE 5	TYPE 6	TYPE 7	ICSID MEMBER
Argentina	-	-	-	X	-	-	-	X
Australia	-	-	-	X	-	-	-	X
Austria	X	-	-	X	-	-	-	X
Belarus	-	-	-	-	-	X	-	X
Belgium and Luxemburg	X	-	-	-	-	-	-	X
China	-	-	-	-	-	X	-	X
Cuba	-	-	-	-	X	-	-	-
Czech Republic	-	-	-	X	-	-	-	X
Denmark	-	X	-	-	-	-	-	X
Finland	-	X	-	-	-	-	-	X
France	-	-	-	-	X	-	-	X
Germany	X	-	-	-	-	-	-	X
Greece	-	X	-	-	-	-	-	X
Iceland	-	X	-	-	-	-	-	X
India	-	-	X	-	-	-	-	-
Italy	X	-	-	-	-	-	-	X
Korea, Republic of	-	-	-	X	-	-	-	X
Netherlands	-	-	-	X	-	-	-	X
Panama	-	-	-	X	-	-	-	X
Portugal	-	X	-	-	-	-	-	X
Singapore	-	-	-	-	-	X	-	X
Slovakia	-	-	-	-	-	X	-	X
Spain	-	-	-	-	-	X	-	X

CONTRACTING PARTY	TYPE 1	TYPE 2	TYPE 3	TYPE 4	TYPE 5	TYPE 6	TYPE 7	ICSID MEMBER
Sweden	-	-	-	-	X	-	-	X
Switzerland	-	-	-	X	-	-	-	X
Trinidad and Tobago	-	-	-	-	-	X	-	X
United Kingdom	-	-	-	-	-	-	X	X
Uruguay	X	-	-	-	-	-	-	X

Table 5: Distribution of Different Types of Dispute Settlement Clauses in Mexico's FTAs Containing an Investment Chapter

CONTRACTING PARTY	TYPE 1	TYPE 2	TYPE 3	TYPE 4	TYPE 5	TYPE 6	TYPE 7	ICSID MEMBER
Chile				X				X
Colombia				X				X
Costa Rica				X				X
El Salvador - Guatemala – Honduras				X				X
EFTA (European Free Trade Association)	No investor-State dispute settlement provision							
Israel	No investor-State dispute settlement provision							X
Japan						X		X
NAFTA (North American Free Trade Agreement)				X				USA only; Canada has signed but not ratified the Convention
Nicaragua				X				X
Peru						X		X
Uruguay				X				X

- Waivers, fork in the road and consolidation of claims: these provisions aim to avoid the occurrence of parallel proceedings which may lead to conflicting decisions or double remedies.
    - Waivers: most IIAs[21] provide, as a necessary requirement for the submission of a claim to arbitration, that a disputing investor and the enterprise waive in writing their right to initiate or continue any proceedings before any administrative tribunal or court, or any other dispute settlement procedure.[22]
    - Fork in the road: when more than one *forum* is available for the investor, often[23] the treaty will contain a "fork in the road clause", according to which once the investor has chosen a dispute settlement mechanism, it has to pursue its claims under this mechanism and automatically renounces to resort to other *fora*.[24]
    - Consolidation: in some circumstances, for example when two or more claims submitted to arbitration arise from common legal and factual issues, the proceedings may be consolidated before a consolidation tribunal established under the UNCITRAL Arbitration Rules. The possibility for

[21] There is no waiver provision in the following BITs: Finland-Mexico BIT; Italy-Mexico BIT; Uruguay-Mexico BIT; Portugal-Mexico BIT; Switzerland-Mexico BIT; Cuba-Mexico BIT; Austria-Mexico BIT; Belgium-Luxembourg-Mexico BIT; Argentina-Mexico BIT; Denmark-Mexico BIT; France-Mexico BIT; Greece-Mexico BIT. All FTAs contain a waiver provision.

[22] Exceptions are made for proceedings before an administrative tribunal or court under the laws of the disputing State for injunctive, declaratory or other extraordinary relief, not involving the payment of damages. See for example article 12(5)(d)(e)(f) of the India-Mexico BIT.

[23] There is no fork in the road in the following BITs: China-Mexico BIT; Germany-Mexico BIT; Panama-Mexico BIT; UK-Mexico BIT. There is no fork in the road in the following FTA: Costa Rica-Mexico FTA.

[24] See for example article 11(2) of the India-Mexico BIT: " if the investor, or an enterprise that an investor owns or controls, submit the dispute (…) to any court or administrative tribunal of the disputing Contracting Party, the same dispute may not be submitted to international arbitration (…)." Some IIAs include a time limitation in their fork in the road: they provide that the dispute can be submitted to arbitration if the investor has initiated a proceeding before a national tribunal and the latter has not rendered a judgment in the first instance on the merits of the case. See article 9(2) of the Finland-Mexico BIT; article 1(2) of the Italy-Mexico BIT; article 2(5) of the Cuba-Mexico Bit; article 10(2) of the Austria-Mexico BIT; article 10(2) of the Belgium-Luxembourg-Mexico BIT; article 8(2) of the Denmark-Mexico BIT. Article 2(6) of the Netherlands-Mexico BIT and article 12(4) of the Germany-Mexico BIT contain a similar provision, but in a surprisingly unilateral formulation: it addresses disputes initiated by citizens of the Kingdom of the Netherlands (or Germany) before a tribunal of the United Mexican States and not also vice-versa. This provision is used in combination with another, according to which if a dispute has been submitted to arbitration, the investor cannot initiate or continue proceedings before a national tribunal. See for example article 12(5) of the Germany-Mexico BIT and article 2(6) of the Netherlands-Mexico BIT.

consolidation is contained in most IIAs, while the circumstances vary from treaty to treaty.[25]

- Formation of the arbitral tribunal: Mexico's IIAs provide that unless otherwise agreed by the parties to the dispute, the tribunal shall comprise three members. If the tribunal has not been constituted within 90 days from the submission of the claim to arbitration, either because one of the parties failed to appoint a member, or because no agreement was reached on the chair, the Secretary General of ICSID is usually elected as the appointing authority.[26] Few IIAs indicate other appointing authorities, depending upon the applicable rules.[27]

- Governing law: All IIAs limit the applicable law to the merits of the dispute to the agreement itself and the applicable rules and principles of international law. The only exception is the FTA between Mexico and Costa Rica where the national legislation of the disputing party applies with suppletory character.[28]

- Enforcement of the award: Several IIAs contain an obligation of the contracting States to adopt all necessary measures for the effective enforcement of awards and to facilitate the enforcement of any award rendered within a proceeding in which a contracting State is a party.[29] The breach of this obligation may lead to a dispute between contracting States.[30]

  Investors may seek enforcement under the ICSID or the New York Convention (or the Panama Convention, see Argentina-Mexico BIT, the Uruguay-Mexico FTA and Mexico-Costa Rica-El Salvador-Guatemala-Honduras-Nicaragua FTA), if both contracting States are parties to such instruments.

[25] See for example article 12 of the Denmark-Mexico BIT and article 15 of the Australia-Mexico BIT.
[26] See for example article 10 of the Korea-Mexico BIT. For a more detailed provision, creating a roaster of 20 presiding arbitrators, see article 82(5) of the Japan-Mexico FTA.
[27] See for example article 5(3) (a)(b)(c)(d) of the Cuba-Mexico BIT, article 13(3) of the Sweden-Mexico BIT and article 4(c) of the Uruguay-Mexico BIT.
[28] See article 13(33) of the Costa Rica-Mexico FTA.
[29] See for example article 21(6) of the China-Mexico BIT and 19(6) of the India-Mexico BIT.
[30] Several IIAs contain the following or a similar provision: "if a disputing Contracting Party fails to abide by or comply with a final award, on delivery of a request by a Contracting Party whose investor was a party to the arbitration, an arbitral tribunal [resolving disputes between contracting States] may be established". See for example article 17(9) of the Iceland-Mexico BIT and article 18(8) of the Singapore-Mexico BIT

12 BITs[31] impose time limitations upon the party seeking the enforcement of an award. The latter may not seek enforcement until:[32]

1) In the case of a final award made under the ICSID Convention:
    a. 120 days have elapsed from the date when the award was rendered and no disputing party has requested revision or annulment of the award, or
    b. Revision or annulment proceedings have been completed
2) In the case of a final award under the UNCITRAL Rules or the ICSID Additional Facility:
    a. Three months have elapsed from the date when the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or
    b. A court has dismissed or allowed an application to revise, set aside or annul the award at the proceeding had been completed and there is no further appeal.

While similar provisions are not contained in the majority of BITs (12 against 16 BITs), they are a common feature in FTAs, where they are present in all agreements, with the only exception of the Japan-Mexico FTA.

- Transparency and publication of the award: the majority of BITs (16)[33] contain an opt-in provision on the publication of the final award. They state that the final award will only be published if there is a written agreement by both parties to the dispute.[34] 8 BITs[35] instead preferred an opt-out formulation, according to which the final award shall public, unless the disputing parties agree otherwise.[36] 3 BITs differ from the others: the BIT between Germany and Mexico, which does not

[31] Korea-Mexico BIT; China-Mexico BIT; Netherlands-Mexico BIT; Belarus-Mexico BIT; Panama-Mexico BIT; Trinidad and Tobago-Mexico BIT; Greece-Mexico BIT; India-Mexico BIT; Czech Republic-Mexico BIT; Iceland-Mexico BIT; Singapore-Mexico BIT; Slovakia-Mexico BIT.
[32] See for example article 17(7) of the Greece-Mexico BIT, article 17(7) of the Czech Republic-Mexico BIT, article 15(7) of the Korea-Mexico BIT.
[33] Finland-Mexico BIT; Uruguay-Mexico BIT; Portugal-Mexico BIT; Switzerland-Mexico BIT; Cuba-Mexico BIT; Austria-Mexico BIT; Belgium-Luxembourg-Mexico BIT; Argentina-Mexico BIT; Denmark-Mexico BIT; Australia-Mexico BIT; France-Mexico BIT; Korea-Mexico BIT; Netherlands-Mexico BIT; Greece-Mexico BIT; Czech Republic-Mexico BIT; Iceland-Mexico BIT;
[34] See for example article 16(3) of the Portugal-Mexico BIT, article 17(3) of the Greece-Mexico Bit and article 17(4) of the Iceland-Mexico BIT.
[35] Trinidad and Tobago-Mexico BIT; Panama-Mexico BIT; Belarus-Mexico BIT; China-Mexico BIT; Singapore-Mexico BIT; UK-Mexico BIT; Slovakia-Mexico BIT; India-Mexico BIT.
[36] See for example article 18(4) of the UK-Mexico BIT, article 13(4) of the Slovakia-Mexico BIT and article 20(4) of the Belarus-Mexico BIT.

contain a provision on the publication of the award; the BIT between Sweden and Mexico, which relies on the discipline on the publication of the awards to the applicable arbitration rules;[37] and the BIT between Spain and Mexico, which makes the awards public without any condition or possibility of opt-out.[38]

Most FTAs provide that the applicable arbitration rules apply to the publication of the award, either always, or when Mexico is the disputing party.[39] 3 FTAs follow the opt-in scheme adopted in the majority of BITs.[40] 3 FTAs stand out for their broader and more detailed provisions on transparency, which cover the award as well as all documents submitted to, or issued by the tribunal, subject to the redaction of privileged and confidential information.[41] Particularly detailed are the provisions on transparency in the FTA between Mexico, Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua.

Conclusions

- IIAs signed by Mexico contain detailed dispute settlement provisions which modify in many aspects the applicable arbitration rules.

- The dispute settlement section is narrow in scope, since it deals only with disputes concerning the breach of the specific IIA. The governing law is also limited to the specific IIA and to the applicable principles of international law.

- All IIAs provide for arbitration as mechanism for resolving investor-States disputes and all contain a reference to the ICSID Convention. Thus, the ratification of the ICSID Convention would not entail any need of modification of existing IIAs and will automatically give right to investors to submit a claim under its provisions 30 days after the deposit of the instruments of ratification.

[37] See article 17(3) of the Sweden-Mexico BIT.
[38] See article XVI(4) of the Spain-Mexico BIT.
[39] See annex 1137.4 NAFTA, article 14-40(4) of the El Salvador, Guatemala, Honduras-Mexico FTA, annex 13-37.4 of the Uruguay-Mexico FTA.
[40] See article 14(3) of the Colombia-Mexico FTA, article 16-38(4) of the Nicaragua-Mexico FTA and article 13-38(4) of the Costa Rica-Mexico FTA.
[41] See article 11.34 of the Peru-Mexico FTA and article 94(4) of the Japan-Mexico FTA.

- The Secretary General of ICSID is already vested as appointing authority in Mexico's IIAs (with few exceptions).

Part II: Analysis of Specific Procedural and Substantive Issues: ICSID, ICSID/AFR and UNCITRAL Considered

The second part of this work is devoted to an in-depth analysis and comparison between the ICSID Convention, the ICSID Additional Facility rules and the UNCITRAL Rules. The choice of these rules for the present analysis is motivated by the fact that all Mexico's IIAs[42] indicate them as possible rules governing the arbitral proceedings between an investor and the host State. Some references will also be made to the ICC Rules, which are mentioned with less frequency in Mexico's IIAs. The goal of this part is to individuate and highlight the main differences, advantages and disadvantages of each system. It will delve into the details of specific procedural and substantive issues. Other aspects, which cannot be subsumed under the categories of "procedural" and "substantial" will be analysed in the final section of this part II.

1. Procedural distinctions between the ICSID Convention and other Arbitration Rules – Selected Aspects

a. The Role of the Secretariat

The role of a secretariat in investment arbitration can offer substantive advantages for a State. This is particularly the case with ICSID whose arbitration rules specialise in investor-State arbitration, and whose Convention makes certain accommodations for States to participate in the operations of the arbitration facility.

Contracting Member States are able to participate in the modification or development of the institution's rules of procedure, its administrative and financial regulations, and the general operations of the Secretariat through representation on the Administrative Council (Articles 2 and 6 of the ICSID Convention). One nominated individual

[42] With the exception of the BIT between UK and Mexico, see supra part I.

represents each Contracting Member State and most decisions are made by simple majority, save for the institution's rules of procedure and the administrative and financial regulations which require two-thirds majority.

In general, the role of a secretariat in institutional arbitration centres is to facilitate the arbitral process. An important component of a Secretariat's work is to screen complaints to ensure that only legitimate claims continue to the arbitration phase. This ensures that a State is not burdened with unnecessary costs that arise out of illegitimate claims. Moreover, the quality of this screening process is heightened by an innate quality control mechanism - the fact that the Secretariat act as a guardian of the institution's reputation. In the case of the ICSID Secretariat, its direct interference with the proceedings is limited to this screening phase to ensure that a claim deposited to the Secretary General is not manifestly outside the jurisdiction of the Centre, as well as to the appointment of secretaries to assist with administrative functions of proceedings.

In contrast to the ICC, ICSID's Secretariat does not interfere in the substance of the proceedings, for instance determining the outcome of an arbitrator's challenge or in the scrutiny, rendering, review, or annulment of an award (see Section on Challenge of Arbitrators). This process ensures impartiality and transparency, and leaves the most substantive decisions of law to the Tribunal who are either chosen by the parties or, in limited circumstances, appointed by the Secretary-General.

Secretariats also increase the productivity and cost efficiently of the arbitration process, the speed of arbitration, and the likelihood to arrive at a final award. The secretariat thus limits the possibility that arbitration proceedings are unnecessarily extended thereby increasing the cost to the parties.[43] It also ensures that the money spent on arbitrations lead to an award so that any initial investment is not wasted. This facility is already accessible under the AFR.

Governed by the rules of the institution, the ICSID Secretariat prioritises transparency between the parties and allows public access to general information in its Register.

[43] The average length of an ICSID case is 3.4 years, however the duration of a cases can range from 1 to 10 years.

The right to publicize all documentation of the proceedings requires a consensus by the parties. Regardless of the consent of the parties, however, the Centre will publish excerpts of a Tribunal's legal reasoning for each case. This ensures that a State's arbitration proceedings are made readily accessible not only to a State's general public, but also to current and future investors. This can help raise both public and investor confidence in the State's investment regime, as well as promote developments in international investment law allowing States to better respond to and engage with the international investment legal framework.

In contrast, ad hoc arbitration requires that both parties agree on the administrative aspects of the arbitration if they are not already established in the applicable investment contract. Although this can offer greater flexibility to the parties at the onset of arbitration proceedings and allow the parties to influence the proceedings in their favour, it reduces predictability and in exceptional cases it can result in delays and added expenses if there is no consensus between the parties.

The role of the Secretariat is thus helpful in effectively screening claims and facilitating the proceedings to reach a conclusion as quickly as possible, and in promoting transparency and confidence in the process of investment arbitration. Although Mexico is able to access the services of the ICSID Secretariat through the AFR, the added benefits of becoming a contracting state include influence on the operations and governance of the Centre by membership on the Administrative Council, and the ability to appoint arbitrators and councillors to the ICSID Panels. For these reasons, Mexico would benefit from ratifying the ICSID convention.

Table 6: The Role of the Secretariat – Comparison of ICSID Convention, ICC and UNCITRAL Rules

	ICSID SECRETARIAT	ICC SECRETARIAT	UNCITRAL	GENERAL COMMENTS
Structure, Management and Staff	- Branch of the World Bank Group - ICSID Chairman (WB President) heads the Administrative Council (representatives from each contracting state) who equally vote on rules and regulations governing the arbitration facility - Contracting States have one representative on the Administrative Council (Art 4 Convention) - Administrative Council elects 1 Secretary-General and 1 or more Deputy-Secretary/ies - Contracting States can elect 4 qualified persons to the Panel of Conciliators and the Panel of Arbitrators for a6-year renewable term (Article 13 Convention)	- Separate court under the International Chamber of Commerce as a private NGO est. under French Law - World Council comprised of national committee members which in turn represent national trade organisations, industry companies and associations from 120 countries. Governmental representatives not included.[44] - Chairman and Vice-Chairman of the ICC can make decisions (pursuant to Art 1(3)) but usually made at Plenary Sessions of the ICC Court with the Secretariat of the ICC Court. - ICC Court Secretariat consists of about 90 staff with a Secretary General, Deputy Secretary General, General Counsel and 8 Counsels with support staff	- Commission Mandated by the UN GA to prepare legislative and contractual provisions and rules relating to international commercial arbitration and conciliation with the support of the UNCITRAL Secretariat - Commission composed of sixty member States elected for 6-year terms by UN GA to represent geographic regions and its principal economic and legal systems; Mexico a member from 1968-1980 and 1983-2013[46] - Secretariat comprises of 20 staff and does not offer legal advice in specific disputes, nominate arbitrators, administer arbitrations, certify arbitral authorities	- ICSID and UNCITRAL offer contracting states more influence on arbitration rules, regulations. - ICC is influenced by industry

[44] Michael Buhler et al. *Handbook of ICC Arbitration. Commentary, Precedents, Materials* (2nd Edition, Sweet & Maxwell London 2008) lv

	ICSID SECRETARIAT	ICC SECRETARIAT	UNCITRAL	GENERAL COMMENTS
	- Secretariat consists of about 14 lawyers as well as paralegal and support staff	- Usually 12 Plenary and 50 Committee sessions of the ICC Court each year[45]		
Funding of the Secretariat	Mainly from the World Bank, but also from fees, publications and reports[47]	Membership fees, sale of publications, organisation of seminars, admin fees for ICC Arbitrators, and interest on the cash deposits of parties	Secretariat officials are UN civil servants	ICISD has a strong financial link with the World Bank
Secretariat Seat and Facilities	Washington D.C. and access to network of international offices with support staff via the World Bank Offices and arrangements with international institutions like the PCA	Paris, with a branch Secretariat office in Hong Kong, a second branch office to be opened in New York, and a representative office in Singapore; access to support staff, and arbitration seat arrangements made by the secretariat	Vienna; no facilities offered and parties arrange the seat of arbitration	ICSID facilitates procedural ease with largest network of facilities
Language	Spanish, English, and French, are the official languages of the Secretariat, however arbitration can take place in any language chosen by the parties (Regulation 34 of the Administrative and Financial Regulations)	English and French as the official languages of the Secretariat, however arbitration can take place in any language chosen by the parties	Arbitration can take place in any language chosen by the parties	Spanish is an official language of the ICSID Secretariat
Role in Proceedings	- Initial screening upon application to the Secretary General to ensure that claim is not manifestly outside the jurisdiction of the Centre. (Articles 28(3) and	- Secretariat follows all aspects of the arbitration, including scrutiny of the award (which article)[48] to insulate the arbitration from national court procedures	Parties can defer to the PCA or another arbitration institution for Secretariat facilities; sometimes outlines in IA or contract	- Secretariats prevents illegitimate claims - Institutional knowledge of a Secretariat can facilitate

[46] See: http://www.uncitral.org/uncitral/about/origin_history.html
[45] Michael Buhler et al. *Handbook of ICC Arbitration. Commentary, Precedents, Materials* (2nd Edition, Sweet & Maxwell London 2008) lv.
[47] Christoph Schreuer, L Malintoppi, A Reinisch, A Sinclair, *The ICSID Convention: a Commentary*, (2nd ed., Cambridge University Press 2010) 57
[48] Michael Buhler et al. *Handbook of ICC Arbitration. Commentary, Precedents, Materials* (2nd Edition, Sweet & Maxwell London 2008) liv.

	ICSID SECRETARIAT	ICC SECRETARIAT	UNCITRAL	GENERAL COMMENTS
	36(3) of the Convention) - Secretariat administers cases and provides general assistance to proceedings	- Administer cases, provide general assistance to proceedings - Secretariat Members attend court sessions; can and do express past practice of the ICC Court.[49]		proceedings, especially on procedural matters
Public Record	- Maintains a register and depository with some information open to the public, however publications limited to consent of the parties - Requirement to publish excerpts for the legal award	Documentation of the arbitration not published	- Documentation and awards remain between the parties, unless otherwise desired - No organised system to publish awards, however this is being reviewed by Working Group II[50] - Subject to IAs between States	- Consent by both parties is always required to fully publish documentation and awards - ICSID maintains a publically available database and will always publish extracts of the award
Secretaries	Appointed by the Secretary-General to facilitate administrative functions of the arbitration process; no guidelines for secretaries separately appointed by the arbitrators to assist the Tribunal	Appointed by the arbitrators with no involvement of the Secretariat	Secretariat has written a Note on secretaries with guidelines, highlighting informed consent of the parties	Work of the secretaries *can* influence the outcome of awards. ICSID's guidelines most developed, but need specific guidelines of Tribunal-appointed secretaries
Other Factors				ICSID is the preferred arbitration facility under NAFTA

[49] Michael Buhler et al. *Handbook of ICC Arbitration. Commentary, Precedents, Materials* (2nd Edition, Sweet & Maxwell London 2008) 3
[50] Thomas Webster, *Handbook of UNCITRAL Arbitration: Commentary, Precedents and Models for UNCITRAL Based Arbitration Rules*, (Sweet & Maxwell Ltd, London 2010) 16

Conclusions

- As a contracting State to the ICSID Convention, Mexico would be able to influence ICSID's administrative and financial regulations, and the general operations of the Secretariat through representation to the Administrative Council. Such a position can be used to generally affect and direct how investment arbitration is conducted under the ICSID rules.

- ICSID's Secretariat has a strong commitment to transparency in investment arbitration, and publishes information on each case, including excerpts of the legal reasoning of the Tribunal regardless of the consent of the parties.

- The ICSID Secretariat is closely linked to and dependant on the Wold Bank, especially in terms of financing and infrastructure. As a result, a vast array of international resources is available to parties at a lower cost than other investment arbitration facilities.

- The ICSID Secretariat has limited powers to interfere in the proceedings, as most substantive decisions are made by Tribunals or ad-hoc Tribunals, save for the initial screening process and the appointment of secretaries.

b. Constitution of the Tribunal and Challenge of Arbitrators

Compared to the other arbitration facilities, ICSID arbitration provides parties with a more transparent means to appoint arbitrators to a Tribunal and it provides greater scope for the State to influence the choice of arbitrators in proceedings.

Contracting States have the right to appoint up to four individuals to the Panel of Conciliators and to the Panel of Arbitrators, respectively. This gives States an opportunity to select qualified individuals who may have experience or insight into their specific country, government or political system, and/or selected industries and sectors that are of key importance to the State.[51]

[51] It is also important that the selected individuals meet the requirements set out by the ICSID Convention.

Some critics of investment arbitration, including that of ICSID, argue that the majority of arbitrators come from an investment background and harbour biases favouring investors. This becomes extremely relevant when parties cannot agree on the appointment of arbitrators, as it then falls to the Secretariat to choose from the Panel of Arbitrators (Article 40 ICSID Convention).

Under the ICSID Convention, the Panel of Arbitrators is only selected by Contracting States, save for 10 who are nominated by the Secretary-General. As a result, the roster will generally consist of individuals who are preselected and considerate of State interests and perspectives. Under the ICSID Additional Facility Rules, parties are not obligated to choose arbitrators from this pre-selected roster.

As a contracting State to ICSID, Mexico would thus be able to choose from a roster of pre-selected arbitrators that are sensitive to the State's specific concerns. This scenario offers Mexico an even greater advantage, given that most NAFTA disputes operate through ICSID and the pre-selected arbitrators would become available to Mexico in NAFTA disputes with American Companies as investors.

In addition, unlike the process for selecting arbitrators in ICC proceedings, under ICSID arbitration parties have the ability to appoint arbitrators to the Arbitration Panel without requiring the approval or involvement of the Secretariat. This allows States an opportunity to appoint arbitrators without any influence from a third party which can increase the perception of public confidence in the in the arbitration facility, and subsequently the arbitration procedure. This is particularly important for States when dealing with politically sensitive or highly publicised issues.

The emphasis on transparency and avoiding the perception of bias in ICSID arbitration, however, creates a very high public standard to which arbitrators are held. This can have negative impacts on arbitration proceedings namely that cases can be easily annulled if there is a slight perception of bias. Under the ICSID arbitration, the question of arbitrator competence or disqualification can be manipulated for tactical purposes to delay proceedings. The rules regulating the procedure to challenge arbitrations and the standard to which an arbitrator is held are the same under the AFR.

However, the fact that under the ICSID Convention arbitrators come from a pre-selected roster chosen by other States offers much recourse when challenging an arbitrator. The remaining Tribunal members (and not the secretariat) make a decision on the disqualification of an arbitrator,[52] or a separate ad-hoc Tribunal drawn up from the roster in the case of review or annulment of an award.

Under the AFR, the parties to a claim are not limited to choosing arbitrators appointed to the ICSID Panel of Arbitrators, nor are they *directly* held to the same stringent standard as under the ICSID Convention.[53] Ratifying the ICSID Convention would allow Mexico to effectively limit the pool from which arbitrators are selected and ensure that they are held to the high standard outlined in the ICSID Convention.

[52] The Secretary General is involved as a tie-breaker if necessary.
[53] The Rules under the Additional Facility Rules are not as detailed. In practice, however, it is difficult to make a difference.

Table 7: Constitution of the Tribunal and Challenge of Arbitrators – Comparison of ICSID Convention, ICC and UNCITRAL Rules

	ICSID	ICC	UNCITRAL	GENERAL COMMENTS
Constitution				
Number of Arbitrators	One or any uneven number of arbitrators, as per agreement of the parties; if no agreement, each party chooses one and the President is chosen via joint consent	If parties cannot agree on the number of arbitrators Secretariat will decide which is preferable, 1 or 3	If parties cannot agree on the number of arbitrators, after 15 days, 3 are automatically selected (Art. 5)	Parties can choose; but the default is usually 3
Appointment	- Consensus by the parties on individuals from the Panel of Arbitrators, otherwise from non-panel arbitrators - In default, Secretariat decides arbitrators	- Requires consensus by the parties - Each party nominates one arbitrator with a chairman nominated by the Secretariat, unless otherwise agreed - If one party does not nominate, ICC court nominates - ICC may refuse to confirm an arbitrator if they do not meet their quality assurance[54] (Rules 7-9)	- Parties agree via consensus on arbitrators; if no agreement, the appointing authority has the final say. If no appointing authority mentioned, either party can request the Secretary-General of the PCA to decide on an appointing authority (results in delays) (Art. 6) - If 3 arbitrators, each party chooses one each; the 2 arbitrators then choose the 3rd and presiding arbitrator (Art. 7) (Rules 6-10)	- General criticism that in institutional arbitration, recommended arbitrators come from a small pool of applicants with similar backgrounds - In ICSID parties have the final say provided that there is a consensus between the parties - Generally all arbitration facilities use the IBA Guidelines
Qualification of Arbitrators	*Qualities:* - High moral character; - Recognized competence in the fields of law, commerce, industry or finance; - Reliability to exercise independent judgment (Art. 14 Convention)	*Qualities:* - lack of independence or impartiality (Art. 7) - remain independent of the parties involved (Independence and Impartiality Art. 7-9)	*Qualities:* Independence, Impartiality and Nationality (Art. 6-13) Appointment of a co-arbitrator by institution Art 9(1)	- More specific criteria used in ICSID with the issue of Nationality being prominent - To Note: NAFTA Art

[54] Thomas Webster, *Handbook of UNCITRAL Arbitration: Commentary, Precedents and Models for UNCITRAL Based Arbitration Rules*, (Sweet & Maxwell Ltd, London 2010)12

	ICSID	ICC	UNCITRAL	GENERAL COMMENTS
	· Rule 6(2) requires a declaration re reliability for independent judgment and imposes a continuing obligation to notify the Secretary-General of the Centre of issues concerning independence [55] (Independence and Impartiality – Art. 14, 56, 57, 58) - Nationality · Arbitrators of the same nationality of the parties are strongly discouraged. Only allowed if the arbitrator is in the minority (art 39), or if both parties agree. In the latter case, the Chairman cannot appoint the third arbitrator as it must be done by the parties[56] · For arbitrators with dual or multiple nationalities, generally uses the dominant nationality [57] · Can become an issue in the context of treating a national of the host State as a national of another Contracting State because of foreign control of finances (Art. 25) *To note:* - Designations of arbitrators to the Panel	- all arbitrators must be confirmed or appointed by the ICC Court (Art 9(1)(2)) *Other:* - Subjective standard to disclosure; IBA Guideline not always applicable - Arbitrators must give a declaration of independence and disclose all in a form reviewed by the ICC Court Secretariat - Secretariat generally follows IBA Guidelines, but often decides independently based on specifics of each case[59]		1115 keeps the possibility open to appoint national arbitrators under ICSID and ICSID AFR

[55] Christoph Schreuer, L Malintoppi, A Reinisch, A Sinclair, *The ICSID Convention: a Commentary*, (2nd ed., Cambridge University Press 2010) 513
[56] Christoph Schreuer, L Malintoppi, A Reinisch, A Sinclair, *The ICSID Convention: a Commentary*, (2nd ed., Cambridge University Press 2010) 504
[57] Christoph Schreuer, L Malintoppi, A Reinisch, A Sinclair, *The ICSID Convention: a Commentary*, (2nd ed., Cambridge University Press 2010) 507

	ICSID	ICC	UNCITRAL	GENERAL COMMENTS
	is up to the discretion of ratified States to the convention[58] - Chairman may designate 10 persons to the Panel (Art. 13)			
Challenge				
Disqualify	- Must be made before the close of proceedings (Rule 9) - Not applicable to ad hoc tribunals, as replacement would be made by the Chairman	- Challenge must be made within 30 days of the appointment of arbitrator or when made privy to info justifying challenge, and be made according to outlined procedures – other party must defend to the secretariat if knew of grounds	- Duty to disclose pre- and post-appointment stage (Art. 9) - Justifiable doubts are held to an objective standard and failure to disclose is not an automatic disqualification (Art. 10)[60] - IBA Rules often used as guidelines.	- ICC and UNICITRAL subject to the applicable law in the seat of arbitration - 2004 IBA Guidelines on the Conflict of Interest
Procedure to Disqualify and Method of Disqualification	- Other members of the Tribunal make the decision to disqualify the Arbitrator in question, however in the case of a sole arbitrator, the decision to disqualify is made by the Chairman of the Administration Council. (Art 58 and Rule 9); results in a suspension of the proceedings until a replacement is found (Rule 10). - Must be made before the end of	- ICC Court decides on the challenge during Committee Sessions; does not provide reasons for disqualification under (Art 11)[61] - Decisions are final, however if a parties' challenge to an arbitrator is unsuccessful, can go to local court subject to the applicable law and jurisdiction of the seat of arbitration[62]	Art 6, 11-13 - challenge must be made within 15 days of the appointment of arbitrator or when made privy to info justifying challenge, and be made according to outlined procedures (Art. 11) - if other party does not agree to the challenge, appointing authority decides on the challenge (Art. 12)	In ICSID, challenge of arbitrators may arise as a procedural tactic whereas the ICC enforces zero tolerance

[59] Michael Buhler et al. *Handbook of ICC Arbitration. Commentary, Precedents, Materials* (2nd Edition Sweet & Maxwell, 2008) 132
[58] Christoph Schreuer, L Malintoppi, A Reinisch, A Sinclair, *The ICSID Convention: a Commentary*, (2nd ed., Cambridge University Press 2010) 50
[60] David D. Caron, Lee Caplan, and Matti Pellonpää, *The UNCITRAL Arbitration rules: a commentary* (OUP, Oxford 2006) 225.
[61] Michael Buhler et al. *Handbook of ICC Arbitration. Commentary, Precedents, Materials* (2nd Edition, Sweet & Maxwell London 2008) lviii.
[62] Michael Buhler et al. *Handbook of ICC Arbitration. Commentary, Precedents, Materials* (2nd Edition, Sweet & Maxwell London 2008)135

	ICSID	ICC	UNCITRAL	GENERAL COMMENTS
	proceedings		- Decision-making process is unclear; - IBA Rules often used as guidelines[63]	
Replacement	- Offers specific rules in instances of inability to continue, resignation, or death which require consent of both parties (Art 56) - Not applicable to ad hoc tribunals, as replacement would be made by the Chairman	- Court has discretion to decide whether or not to follow the original nominating process (Art 15)	- Same procedural measures in the event of inability to continue due to mental or physical incapacity, resignation, or death (Art. 13) - Absence should not result in a challenge[64]	
Implications	- If there is an improper constitution of the tribunal based on an absence of the qualities required by Art. 14, can result in an annulment of the award (Art. 52); however failure to propose the disqualification of an arbitrator in a timely manner leads to the loss of the right to request annulment on this ground (Art. 57)[65]	N\A	- Replacement of a sole or presiding arbitrator results in a repetition of hearings (Art. 14)	Disqualification of an ICSID arbitrator can be very costly

[63] David D. Caron, Lee Caplan, and Matti Pellonpää, *The UNCITRAL Arbitration rules: a commentary* (OUP, Oxford 2006) 270
[64] David D. Caron, Lee Caplan, and Matti Pellonpää, The UNCITRAL Arbitration rules: a commentary, (OUP, Oxford 2006) 292
[65] Christoph Schreuer, L Malintoppi, A Reinisch, A Sinclair, *The ICSID Convention: a Commentary*, (2nd ed., Cambridge University Press 2010) 50

Conclusions

- Contracting States have the ability to independently appoint arbitrators and councillors to a roster (Panel), from which parties are strongly encouraged to choose in ICSID proceedings. States thus have the ability to appoint arbitrators that have a greater sensitivity to and awareness of a government's perspective in investment arbitration.

- Arbitrators are held to a very high standard with the most elaborated set of criteria compared to other dispute settlement mechanisms. This set of criteria applies to both the ICSID Convention and the AFR.

- Opportunities to disqualify an arbitrator under ICSID are wider in scope and can be manipulated for tactical purposes.

- Tribunals have the responsibility to assess whether an arbitrator should be disqualified. This can become costly if a new ad-hoc Tribunal needs to be created to deliberate on the question.

- The same rules apply for the disqualification of an arbitrator under the ICSID Convention and the AFR.

c. Applicable Law

i. General Overview on Applicable Law under ICSID, ICSID/AF, UNCITRAL, ICC and PCA Rules

Choice of law to decide the merits of investment disputes, also referred to as *lex causae,*[66] is an important element of investment arbitration and parties are always facing the difficulty of its choice.[67] The outcome of a dispute may depend considerably from applicable rules of law that the parties choose which means that IIAs' contracting states should carefully negotiate the provisions on applicable law

[66] David D. Caron, Lee Caplan, and Matti Pellonpää, *The UNCITRAL Arbitration rules: a commentary*, (Oxford Commentaries on International Law, OUP, Oxford 2006), p. 121.
[67] D. A. Gantz, "Investor-State Arbitration under ICSID, the ICSID Additional Facility and the UNCTAD Arbitral Rules", (US-Vietnam Trade Council Education Forum 2004), available at: www.usvtc.org accessed 30 March 2012.

contained in those agreements. Normally parties agree on the law to govern the disputes and insert express choice of law clauses in their IIAs. However, different Arbitration Rules offer solutions in cases where parties do not choose specifically the applicable law in their agreements. It is in this case that ICSID and ICSID/AFR differ considerably from UNCITRAL, ICC and PCA rules. However, these differences are irrelevant for Mexico given that arbitration rules covering the situation of non-agreement between parties have limited scope of application.

We will start our analyses by considering arbitration rules of different investment dispute settlement mechanism and observing the content of applicable law rules therein. We will first consider the applicable law rules in the ICSID system.
Article 42(1) constitutes an "obligatory choice of law clause."[68] Under Article 42(1) first sentence, the applicable law is the law agreed by the parties to the dispute, meaning that "parties are *free to agree* on the applicable rules of law."[69] As a result, parties may agree on domestic, international,[70] both domestic and international, selected rules of a legal system[71] or different rules of law to apply to different parts of the dispute.[72] Article 42(1) second sentence refers to the situation where there is no agreement between the parties as to the applicable law. If there is no agreement, the Tribunal applies the *law of the Contracting State* ("including rules on the conflict of laws") and such rules of international law as may be applicable. It is clearly stated that also the host State laws will be applied to the dispute but before doing so, the tribunal will have to analyze also the conflict of law rules of that state. Article 42(2) excludes the possibility of a finding of *non liquet* for an arbitral tribunal. Article 42(3) provides for equity rules to be applied by an arbitral tribunal with the agreement of the parties.

We will now consider the applicable law issue with reference to the ICSID/AFR. Article 54(1) regulates the issue in the following terms: reference is made to the law

[68] M. Reisman, "The regime for Lacunae in the ICSID choice of law provision and the question of its Threshold", (2000) 15 ICSID Review- Foreign Investment Law Journal 362.
[69] T. Begic, *Applicable law in International Investment Disputes*, (Eleven International Publishing, The Hague 2005), p. 5.
[70] C. Schreuer, *The ICSID Convention: A commentary*, (2nd edition, Cambridge University Press, Cambridge 2009), p. 557 et seq.
[71] Y. Banifatemi, "The law applicable in investment treaty arbitration", in K. Yannaca-Small (ed), *Arbitration under International Investment agreements: A guide to the key issues*, (OUP, Oxford 2010), p. 196.
[72] T. Begic, *Applicable law in International Investment Disputes*, (Eleven International Publishing, The Hague 2005), p. 5.

designated by the parties in the first place. Second, the absence of agreed rules by the parties calls the tribunals to identify the applicable law. Only in their absence will the tribunal consider applicable the law resulting from conflict of law issues and international rules that it considers applicable. Consequently, a first difference with ICSID can be noticed in this regard. There is no compulsory reference to the laws of the host state. Lastly, *ex aequo et bono* decisions by the tribunals are subject to double conditions: 1) the agreement of the parties and 2) the applicable procedural law's permission to do so.[73]

The (OLD 1976) UNCITRAL applicable law issue is regulated by Article 33. Once more, the podium is occupied by party's autonomy.[74] The parties decide which law to apply to the substance of the arbitral dispute and the Tribunal may intervene when designation by the parties is missing, using the conflict of laws rules and determining the applicable law consequently. Nonetheless, the Tribunal is not bound by national conflict of laws rules.[75] In addition, there is no express reference to international law, signing a relevant departure from both ICSID and ICSID/AFR rules. Another novelty of the UNCITRAL rules as compared with the 2 previous ones consists in the reference made to the "terms of the contract" and the "usages of trade", which is understandable given the private commercial nature of UNCITRAL and their primary designation for commercial dispute resolution. This observation constitutes another departure from ICSID and ICSID/AF which do not refer to any "treaty/contract term" or "investment usage" consideration for arbitral tribunals to take into account.

The (NEW 2010) UNCITRAL applicable law issue is regulated by (revised Article 33) Article 35. There are relevant differences introduced by Article 35. Article 35(1) first sentence adds the notion of "rules" to the previously used term "laws", which makes the NEW UNCITRAL rules similar to ICSID and ICSID/AF. One immediate consequence of the above is the possibility for arbitral tribunals to use *lex*

[73] T. Begic, *Applicable law in International Investment Disputes*, (Eleven International Publishing, The Hague 2005) p. 6.
[74] David D. Caron, Lee Caplan, and Matti Pellonpää, *The UNCITRAL Arbitration rules: a commentary*, (Oxford Commentaries on International Law, OUP, Oxford 2006), p. 121.
[75] T. Begic, *Applicable law in International Investment Disputes*, (Eleven International Publishing, The Hague 2005), p. 8.

mercatoria,[76] if so requested by the parties. The second sentence of the 35(1) also introduces new criteria for establishing applicable law when there is no designation of the parties. There is no reference to the conflicts of law rule and the tribunal will apply the law "which it determines to be appropriate". It seems that the tribunal's discretion is broadened i.e., its decision is not subject to any requirement for the determination of the applicable law, in the absence of parties' choice. Article 35(2) eliminates the subjection of *ex aequo et bono* decisions to the law governing the arbitral procedure, making this norm similar to ICSID equivalent and departing only from the ICSID/AF correspondent rule. Article 35(3) remains substantively the same.

Arbitration rules of the International Chamber of Commerce (ICC Rules) were the latest arbitration rules undergoing revision and a new set of rules entered into force as of 1 January 2012. The (OLD 1998) ICC rules dealt with applicable rules of law in Article 17. The content of this article looked very much alike the actual version in UNCITRAL. It refers in the first place to the rules of law agreed by the parties. It than gives the tribunal the power to decide on the appropriate rules to be applicable, if agreement between parties is missing.

The (NEW 2012) ICC rules deal with applicable law in Article 21. The only difference to the old version can be found in Article 21(2). It is a very slight difference which does not refer to "all cases" when considering "provisions of the contract" or "trade usages". Nonetheless, as a whole, Article 21 resembles greatly Article 35 of NEW UNCITRAL rules.

PCA Rules dedicate Article 33 to the applicable law issue. Compared to the previously analyzed set of rules, PCA text on applicable law refers to "conflict of laws" rules and subjects the *ex aequo et bono* decisions to the "applicable law of procedure". This element renders PCA rules similar to ICSID/AF with respect to the later issue and similar to ICSID and ICSID/AF with respect to the former. Another

[76] S. Finizio, S. Wheeler and H. Preidt, "Revised UNCITRAL Arbitration rules", July 2010, available at: < http://www.wilmerhale.com> accessed 14 April 2012. The authors refer to UNIDROIT Principles of International Commercial Contracts and the Convention of International Sale of Goods. See also, E. Gaillard, "Thirty years of *lex mercatoria*: towards the selective application of transnational rules", (1995) 10 ICSID Review 208, para. 215.

distinctive feature of PCA is its reference to the "Law" designated by the parties and not to "rules of law", implying a choice for a specific legal system.

For an easier reference, readers can refer to the following table which summarizes the above information and highlights the differences in applicable law rules contained in those arbitration rules which are mostly used in investment disputes.

Table 8: Differences in Applicable Law Provisions under ICSID, ICSID/AF, UNCITRAL 2010, ICC 2012 and PCA Rules

APPLICABLE LAW ISSUES	ICSID	ICSID/AF	UNCITRAL	ICC	PCA
When there is **AGREEMENT** between parties	Rules of law agreed by the parties	Rules of law designated by the parties	Rules of law designated by the parties	Parties are free to agree the rules of law	The Law designated by the parties
When there is **NO AGREEMENT**	Law of the contracting State party + Including Rules on conflicts of law + Rules of international Law	Law determined by the conflict of law rules + Rules of international law	Law that tribunal determines to be appropriate + In accordance with terms of contract + Take account of usage of trade	Rules of Law it determines to be appropriate + Take account of provisions of contracts and trade usage	Law determined by conflict of law rules + In accordance with terms of contract + Take account of usage of trade
Ex aequo et bono Decision	If the parties so agree	If the parties have expressly authorized + If the applicable law of procedure permits	If the parties have expressly authorized	Only if the parties have agreed	If the parties have expressly authorized + If the applicable law of procedure permits

ii. The Special Role of International Law

One major concern of investment dispute settlement under ICSID and ICSID/AFR is the role played by "rules of international law" as applicable law to investment disputes. The concerns are twofold and the questions that arise are: 1) what is meant by "rules of international law" and 2) what's the extension of this role. In order to

answer to the first question, reference should be made to Article 38 of the Statute of the International Court of Justice:[77]

> *"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*
> *a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
> *b. international custom, as evidence of a general practice accepted as law;*
> *c. the general principles of law recognized by civilized nations;*
> *d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".*

This reference gives ICSID arbitral tribunals the same tools as the ICJ in deciding which rules of international law to apply to the case. This is very important especially considering that failure to apply the correct applicable law results in excess of power and consequently constitutes a ground for annulment of the award.[78]

The second question on the extent of the role that international law plays, can be answered considering the following: international law can apply directly, or indirectly. When international law is incorporated in the domestic law[79] as in the Mexican case, international law is indirectly applicable. International law is already inside the Mexican reality according to the Mexican Constitution itself. Mexico is a "Monist" country. This concept refers to the quality of certain countries having international treaties recognized as part of the supreme law of that country. The text of Article 133 of the Mexican Constitution states the following:

[77] International Bank for Reconstruction and Development, "Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between states and Nationals of other states" (18 March 1965), 1 ICSID Reports 25, para. 40.
[78] Examples can be found in *Sempra v Argentina* and *Enron v Argentina* cases, respectively Case No ARB/02/16 and Case No ARB/01/3 as recalled by D. Di Pietro, "Applicable law under Article 42 of the ICSID Convention", (19.10.2011) available at: <http://blogs.law.nyu.edu/transnational/2011/10/applicable-law-under-article-42-of-the-icsid-convention/> accessed 20 May 2012.
[79] Y. Banifatemi, "The law applicable in investment treaty arbitration", in K. Yannaca-Small (ed), *Arbitration under International Investment agreements: A guide to the key issues*, (OUP, Oxford 2010), p. 196.

> "*This Constitution, the laws of the Congress of the Union that emanate therefore, and all treaties that have been made and shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the supreme law of the whole Union. The judges of each State shall conform to the said Constitution, the laws, and treaties, in spite of any contradictory provisions that may appear in the constitutions or laws of the States*.

Second, when applied directly, international law can play a "supplemental role"[80] to the national law of the host state which governs the dispute. It is also said that it "corrects" domestic law in certain cases, especially in cases of incompatibility[81] between the two. Nonetheless, in the Case *Siemens v Argentina*, the tribunal rejected a purely corrective role for international law.[82] Moreover, international law "complements" the law of the host state in cases of *lacunae.*[83]

The role of international law is further discussed with reference to "customary international law" which content cannot be well-defined for reasons inherent in its own nature. Customary international law varies in time and changes in content. In the NAFTA context, which is primarily relevant to Mexico, there have been some clear indications as to what constitutes "customary international law". NAFTA tribunals have included in the concept of customary international law all relevant sources like BITs and international arbitral decisions.[84] A few cases to mention in this regard are *ADF v USA*[85] and *Mondev v USA.*[86] Sometimes, the parties themselves refer in their pleadings to international law, customary international law and the law of the host

[80] See *AGIP S.P.A v Government of the Peoples Republic of Congo*, ICSID Case No ARB/77/1, Award of 30/11/1979, 64 *Rivista di diritto internazionale* 863 (1981). The tribunal affirmed that Congo law, the applicable law in that case, was "supplemented if need be, by any principles of international law" (emphasis added), para 43 et seq.
[81] See *Wena v Egypt*, ICSID Case No ARB/98/4, Decision of the ad hoc committee, 05/02/2002, 6 ICSID Reports 129, at 138, para. 42. The tribunal stated the following: "the rules of international law … prevail over domestic law that might be incompatible with them" (emphasis added).
[82] A. Parra, "Applicable law in investor-state arbitration", Second Annual Conference on International Arbitration and Mediation, (2007) Paper presented at the Fordham Law School, June 18-19, p. 8.
[83] See *Klöckner v Cameroon*, ICSID Case No ARB/81/2, Annulment decision of 03/05/1985, 2 ICSID Reports 122.
[84] D. A. Gantz, "Investor-State Arbitration under ICSID, the ICSID Additional Facility and the UNCTAD Arbitral Rules", (US-Vietnam Trade Council Education Forum 2004), available at: www.usvtc.org accessed 30 March 2012, p. 22.
[85] See, *ADF Group Inc v United States of America*, ICSID Case No ARB(AF)/00/1.
[86] See, *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2.

state and in this latter case the tribunals have relied on the above as well.[87] This could be interpreted as a kind of indirect legitimacy for the tribunal to rely on customary international law, if the parties rely on them in their arguments. Another concern related to the application of international law is the possibility of using only that law as the applicable law in an investment dispute. In this regard, *Wena v Egypt* case affirmed that "*international law too can be applied by itself*"[88] under ICSID Article 42(1).

Considering the above Mexico loses nothing by joining the ICSID Convention. Mexico has experienced the role of international law under ICSID/AF claims and ICSID gives the same importance to international law as ICSID/AF does.

iii. Applicable Law Rules Governing Mexico's Disputes under BITs/FTAs Signed by Mexico

Let us now concentrate on the case of Mexico and continue our discussion by analyzing Applicable Law articles existing in BITs/FTAs signed by Mexico. It is relevant to see whether parties to these agreements have chosen the law applicable to their disputes in the first place in that, only in its absence, will the arbitral tribunals intervene and determine the law[89] that applies in respective disputes.

All Mexican BITs/FTAs contain articles on applicable law. There are two main tendencies in BITs/FTAs signed by Mexico with reference to the applicable law clauses. The first is to declare in one sentence the same "agreement" at stake as the applicable law of their disputes, supplemented by "applicable rules and principles of international law". The second tendency is to add a second sentence and refer to the situation where the parties have agreed and interpreted a certain provision of the agreement in a certain way. In this eventuality, that interpretation is binding on the Arbitral Tribunal and consequently becomes applicable law only with reference to

[87] See, *Enron v Argentina*, ICSID Case No ARB/01/3, Award of 22/05/2007, para 206-209.
[88] See, *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No ARB/98/4 as recalled by A. Parra, "Applicable law in investor-state arbitration", Second Annual conference on International Arbitration and Mediation, (2007) Paper presented at the Fordham University Law, June 18-19, p. 13.
[89] Y. Banifatemi, "The law applicable in investment treaty arbitration", in K. Yannaca-Small (ed), *Arbitration under International Investment agreements: A guide to the key issues*, (OUP, Oxford 2010), p. 191.

that provision. The majority of BITs[90] and FTAs[91] adopt the second option of applicable law provision which generally looks in the following way:

> *"Applicable Law"*
> *1) …the tribunal shall decide the dispute in accordance with this agreement and applicable rules and principles of international law*
> *2) … a joined interpretation agreed by the parties on a provision of this agreement… will be binding on the tribunal".*

A minority number of BITs[92] contain a single sentence and refer only to the terms of the agreement in itself and applicable rules and principles of international law. Only in one case, the Netherlands- Mexico BIT, there is no reference to rules and principles of international law.

Table 9: Applicable Law Provisions Contained in Mexican BITs/FTAs[93]

APPLICABLE LAW	This agreement (the BIT or FTA)	Rules and principles of international law	A joined interpretation agreed by the parties (on a specific provision) binding on the tribunal
Argentina (BIT)	✓	✓	×
Australia (BIT)	✓	✓	✓
Austria (BIT)	✓	✓	×
Belarus (BIT)	✓	✓	✓
Belgium & Luxembourg (BIT)	✓	✓	×
Chile (FTA)	✓	✓	✓
China (BIT)	✓	✓	✓
Colombia (FTA)	✓	✓	✓
Costa Rica (FTA)[94]	✓	✓	✓
Cuba (BIT)	✓	✓	✓
Czech Republic (BIT)	✓	✓	✓
Denmark (BIT)	✓	✓	×
EFTA	N/A	N/A	N/A
El Salvador- Guatemala-	✓	✓	✓

[90] See Article 16 of Greece-Mexico BIT; Article Septimo Adendice Cuba-Mexico BIT; Article 14 Korea-Mexico BIT; Article Eight Schedule Netherlands-Mexico BIT; Articulo XV Spain-Mexico BIT; Article 18 Australia- Mexico BIT; Article 16 Iceland-Mexico BIT etc.
[91] See Article 11.29 Peru-Mexico FTA; Article 13-31 Uruguay-Mexico FTA; Article 84 Japan-Mexico FTA; Article 1131 NAFTA.
[92] Out of 39, only 10 BITs/FTAs contain only one sentence in the articles dedicated to applicable law rules. For reference see: Article 18 Germany-Mexico BIT; Article 8/7 Uruguay-Mexico BIT; Article 16 Sweden-Mexico BIT; Articulo Decimo Primero (5)Argentina-Mexico BIT etc.
[93] For reference to the BITs/FTAs texts and relative articles on applicable law, see: www.sice.oas.org
[94] Costa Rica- Mexico FTA, in addition to the above mentioned rules, also refers to the "law of the contracting party" as a supplementary law applicable to the disputes.

APPLICABLE LAW	This agreement (the BIT or FTA)	Rules and principles of international law	A joined interpretation agreed by the parties (on a specific provision) binding on the tribunal
Honduras- Nicaragua- Costa Rica (FTA)			
El Salvador- Honduras- Guatemala (FTA)	✓	✓	✓
Finland (BIT)	✓	✓	×
France (BIT)	✓	✓	×
Germany (BIT)	✓	✓	×
Greece (BIT)	✓	✓	✓
Iceland (BIT)	✓	✓	✓
India (BIT)	✓	✓	✓
Israel (FTA)	N/A	N/A	N/A
Italy (BIT)	✓	✓	×
Japan (FTA)	✓	✓	✓
Korea (BIT)	✓	✓	✓
NAFTA	✓	✓	✓
Netherlands (BIT)[95]	✓	×	✓
Nicaragua (FTA)	✓	✓	✓
Panama (BIT)	✓	✓	✓
Peru (FTA)	✓	✓	✓
Portugal (BIT)	✓	✓	✓
Singapore (BIT)	✓	✓	✓
Slovakia (BIT)	✓	✓	✓
Spain (BIT)	✓	✓	✓
Sweden (BIT)	✓	✓	×
Switzerland (BIT)	✓	✓	✓
Trinidad & Tobago (BIT)	✓	✓	✓
UK (BIT)	✓	✓	✓
Uruguay (BIT)	✓	✓	×
Uruguay (FTA)	✓	✓	✓

As can be observed from the above, in none of the BITs has Mexico agreed on the "host's state law" as the one applicable in disputes between contracting parties. The only exception is represented by Costa Rica-Mexico FTA, which refers to the "law of the contracting party" as a supplement to the other laws applicable to the dispute.[96]

But the most relevant conclusion to be drawn from the above is that in all BITs/FTAs, Mexico has agreed on the law applicable to possible disputes arising from those IIAs. This is particularly relevant because it means that in practical terms, the second sentence of applicable law articles of different arbitration rules (*e.g.*, … *when there is*

[95] Mexico- Netherland BIT refers also to applicable rules of law, but does not mention rules and principles of international law as the law applicable to the dispute.
[96] See Article 13-33(1) Costa Rica- Mexico FTA.

no agreement, the tribunal will decide the case based on….), will be automatically excluded and will not play any role. Because of the agreement of the parties as to the applicable law rules, arbitration rules play only a limited role. Consequently, the reference to "law of the contracting state party" which represents the main point of departure of ICSID from other arbitration rules loses the relevance in practical terms. The possibility of arbitral tribunals deciding the case on basis of that law is merely hypothetical.

iv. Conclusions

- From the perspectives of both, Mexican government and Mexican investors, ICSID alternative is not different from other arbitration rules in relation to applicable law concerns.

- Mexico's BITs/FTAs contain express choice of law clauses. The role of arbitration rules (ICSID included) is limited.

- Finally, all the above discussion has to be seen in the light of the following consideration. A general principle on the best law applicable to investment disputes is not possible to be *a priori* envisaged. It is a question to be treated on a case by case scrutiny. The best choice depends on which provisions are deemed to have been violated e.g., expropriation, national treatment etc. It is only upon that previous knowledge that one can compare different applicable laws and observe which ones favour which part. It may be that expropriation is treated better under BITs provisions than under international or national laws. But a deep analysis on these topics on individual basis falls outside the scope of this project.

d. Provisional Measures

Provisional measures' purpose in arbitration proceedings is "to preserve the rights of the parties or the subject matter in dispute" when the substantive matter is still to be decided.[97] Interim measures can be ordered by national courts or by arbitral tribunals.

[97] B. Osadare, "Interim measures of protection in international investment arbitration: wither sovereign rights?" available at www.dundee.ac.uk accessed 25 May 2012, p. 5, recalling M. Reisman et al., *International commercial arbitration: Cases, materials and Notes on the Resolution of International Business Disputes*, (University Casebook Series, New York 1997), p. 753.

The powers of arbitral tribunals to decide on interim measures are usually contained in the arbitration rules and we will start our considerations by analyzing ICSID in the first place.

i. Arbitral Tribunals Powers to Grant Provisional Measures

The ICSID Convention itself deals with provisional measures in Article 47. It states the following: "*…the Tribunal may, recommend any provisional measures which should be taken to preserve the respective rights of either party*". This provision of the convention, read in conjunction with Article 26 ("*consent …under this Convention… shall be deemed consent to such arbitration to the exclusion of any other remedy*"), has been considered as awarding exclusive jurisdiction to an ICSID tribunal in matters of provisional measures.[98] This "exclusivity power", is a unique feature of the ICSID system.[99]

The power of ICSID arbitral tribunals to grant interim measures is limited to "recommendations". Evidence is deduced from the language of both Article 47 and ICSID Arbitration Rule 39. Nonetheless, the jurisdiction of ICSID tribunals, as compared to other arbitration tribunals, allows for measures "to be granted on its own initiative" or "other than those requested by the parties."[100] Lastly, the power of the tribunal encompasses the possibility of accepting requests for provisional measures even before the tribunal is formally constituted and consequently, before it has decided on its own jurisdiction.[101]

To sum up, the powers of ICSID tribunals in granting provisional measures are quite extensive and the main concern for a contacting state would be seeing its sovereign rights limited by the exercise of this power. Nonetheless, this power is attenuated considerably because it only applies to "recommendations" and not "orders", as in the case of other arbitration rules.[102] Notwithstanding the above observation, the case law

[98] L. Yves Fortier, "Interim measures: An Arbitrator's provisional views", Third Annual Conference on International Arbitration and Mediation, (2008), Paper presented at the Fordham Law School, 16th June, p. 3.
[99] Ibid., p. 4.
[100] See Arbitration Rule 39(3) of the ICSID Convention.
[101] See the 2006 revised Arbitration Rule 39(5) of the ICSID Convention.
[102] A. Redfern and M. Hunter, *Law and practice of international commercial arbitration*, (4th edition, Sweet & Maxwell, London 2004), paras. 7-12.

of ICSID tribunals suggests that in practical terms, even ICSID provisional measures are "binding as final awards", though reducing the difference of language found under ICSID and other Arbitration Rules.[103] The practical equivalence of the terms "recommend" and "order" has already been confirmed in *Maffezini v Kingdom of Spain*[104] and *Tokios Tokeles v Ukraine.*[105]

Last, ICSID arbitration rules do not specify the types of provisional measures and do not include specific criteria to be respected when granting them.

UNCITRAL rules deal with provisional measures in Rule 26. Revised Article 26 of the NEW UNCITRAL Rules defines better the "types of interim measures" and imposes a "twofold test" to be satisfied in order for the parties to submit an application for interim measures.
Article 26(3) imposes on the party requesting an interim measure the duty to satisfy the tribunal that: a) a not reparable harm is likely to result if the measure is not ordered and b) there is a reasonable possibility that the party will succeed on the merits of the claim.

Article 26(2) extends the powers of the arbitral tribunal beyond preservation of the status quo and includes the power to "order injunctions and order preservation of evidence."[106] Article 26(8) introduces damage liabilities for the party obtaining a provisional measure which should have not been awarded. This is definitively in favor of host states which can be subject of provisional measures request by the investor for the acts they take on their territory. It can play a deterrent role and eliminate request for frivolous requests.

[103] One example is represented by UNCITRAL provisions which refer to the power to "order" provisional measures.
[104] Decision on request for provisional measures, 28/10/1999, para. 9 as cited by L. Yves Fortier, "Interim measures: An Arbitrator's provisional views", Third Annual Conference on International Arbitration and Mediation, (2008), Paper presented at the Fordham Law School, 16th June, p.6.
[105] See, *Tokios Tokeles v Ukraine*, ICSID Case No ARB/02/18, Procedural Order No 1, 01/07/2003, para. 4: "recommended provisional measures… are in effect ordered by the tribunal" (emphases added).
[106] S. Finizio, S. Wheeler and H. Preidt, "Revised UNCITRAL Arbitration rules", July 2010, available at: http://www.wilmerhale.com accessed 14 April 2012.

It is believed that the introduction of such criteria under UNCITRAL Rules will render the outcome of application for provisional measures more certain for the parties and will contribute to greater consistency in UNCITRAL arbitration[107] cases. Considering the above and the list of provisional measures contained in the revised Article 26, UNCITRAL rules would provide more certainty to both Mexico and Mexican investors.

Table 10: Differences on Provisional Measures under ICSID, UNCITRAL and other Arbitration Rules

Procedural Issue/Provisional Measures	ICSID Article 47 + Rule 39	UNCITRAL Article 26
Power **Exception to the power**	By the party's request or on tribunal's own initiative Can only be granted by the arbitral tribunal except in cases where the relevant BIT provides for other court's jurisdiction in granting them. This option depends on single BITs and some do not include such an option[108]	Only by either parties request National law may preclude tribunals from the power to order provisional measures
Time	At any time after the institution of the proceeding; Even before the constitution of the Tribunal	Anytime prior to the issuance of the award
Content	Tribunal can only Recommend[109] For the preservation of its rights= a) existing rights, not hypothetical, b) reasonably related to the "rights in dispute"[110]	The tribunal Orders Preserve or restore status quo Preserving assets Preserving evidence Prevent harm May be in the form of an

[107] G. Hanessian, D.J. Hayden and J.T. de Paiva Muniz, "The New ICC and UNCITRAL rules: focus on cost-effectiveness and multiparty disputes", *Global Arbitration Review*, available at: www.globalarbitrationreview.com accessed 20 May 2012.
[108] See BIT France- Croacia in B. Leurent and D.A. Pawlak, "Arbitration under the UNCITRAL & ICSID rules: A Comparison", Presentation in Zagreb of 23.09.2011.
[109] As analysed above, this is a purely linguistic difference which does not lead to practical differences.
[110] See, *Plama Consortium v Republic of Bulgaria*, ICSID Case No ARB/03/24, Order of 06/09/2005, para. 40.

Procedural Issue/Provisional Measures	ICSID Article 47 + Rule 39	UNCITRAL Article 26
	It is binding in practice No security for cost provision under ICSID[111] but in some cases it has been the subject of provisional measures applications e.g. *Atlantic Triton*[112]	award= binding for the parties and enforced in the courts Security for costs can be part of the provisional measure award
Recourse to national courts	Allowed: Arbitration Rule 39(5)	Allowed: Article 26(9)- does not constitute a waiver of the arbitration agreement
Conditions	No criteria and no list	A test to be satisfied and a list of provisional measures
Revocation	Modify or revoke: the tribunal, after the parties present their observation	Modify, suspend, terminate: upon application of either party + on tribunal's own initiative
Liability	No liability	The requesting party can be liable for damages and costs deriving from the measure

ii. Conclusions

- UNCITRAL Rules, as revised in 2010 are more detailed and specific on requirements and types of interim measures and thus, serve better the purpose of legal certainty.
- Mexico's choice for UNCITRAL rules in relation to provisional measures seems more suitable in terms of legal certainty.

e. Annulment and Setting-aside of Awards

The ICSID Convention establishes an autonomous and self-contained system of arbitration. This has a fundamental impact on the means of recourse against the award. The first consequence is that recourse against ICSID awards is regulated

[111] S. Jagusch, "Comparison of ICSID and UNCITRAL Arbitration: Areas of divergence and concern" in M. Waibel (ed) *The backlash against investment arbitration*, (Kluwer Law International, Netherlands 2010), p. 91.
[112] Ibid., p. 91.

exclusively by the ICSID Convention, while non-ICSID awards[113] may be challenged at the seat of arbitration, in accordance with the applicable national law.

The main differences between the annulment proceedings of ICSID awards and the set-aside proceedings of non-ICSID awards[114] regard the following issues: (1) Applicable rules; (2) Competent authorities; (3) Object of annulment/set aside; (4) Grounds for annulment/set aside; (5) Effects of annulment/set aside; (6) Possibility to waive the right of recourse against the award; (7) Possibility to stay enforcement while pending a decision on annulment/set aside; (8) Predictability of decision on annulment/set aside; and (9) Stability of awards. Each issue will be examined in detail and summarized in a table of comparison at the end of this section.[115]

i. Applicable Rules

Article 53 (1) of the ICSID Convention states clearly that "the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention." This article precludes parties to resort to any mechanism to challenge final awards other than those provided by the Convention; its regime is mandatory and exclusive.[116] The relevant articles are thus; article 52 and articles 41-45, 48, 49, 53, 54, chapter VI and VII applied *mutiatis mutandis.*

In case of non-ICSID awards, including awards rendered under the Additional Facility Rules or in proceedings administered by the Centre, the Convention does not apply, thus, the discipline on setting-aside of arbitral awards has to be found in the national legislation in force at the seat of arbitration.[117] The *lex arbitri* for proceedings seated

[113] Rendered under ICSID AFR, UNCITRAL Rules, ICC Rules, etc.
[114] The terms "annulment" and "set-aside" are equivalent. For purposes of clarity, in this section annulment will be used with reference to ICSID awards and set aside with reference to non-ICSID awards.
[115] See infra.
[116] Lucy Reed, Jan Paulsson, et al, *Guide to ICSID Arbitration,* (second edition, Kluwer Law International, 2010) pp. 159-177, N. Blackaby, C. Partasides, et al., *Redfern and Hunter on International Arbitration,* (Oxford University Press 2009), pp. 588-598.
[117] This rule is widely recognized. See D. Girsberger, N. Voser, *International Arbitration in Switzerland*, (Schulthness 2008), p.311, "(…) all national arbitration law statutes provide for the competence of the state court at the seat of arbitration". However, as underlined by N. Blackaby, C. Partasides, et al., *Redfern and Hunter on International Arbitration,* (Oxford University Press 2009), pp. 591-592, there is one exception to this general rule, albeit more theoretical than real. Parties may, in the exercise of their autonomy, choose to submit the arbitration to a procedural law of a country other than

in Mexico, is the *Titulo IV, Libro V, Codigo de Comercio (1993).* However, in practice this law has scarce relevance for investment disputes involving Mexico, since in most of the cases in which Mexico acted as a respondent the proceedings had their seat in Washington or in Canada.

One major difference is evident at first glance: the ICSID Convention creates a uniform regime for the annulment of awards, while the disciple for setting aside of non-ICSID awards has to be found on a case-by-case basis, depending on the seat of arbitration. Although there is a certain degree of uniformity in the grounds and proceedings for setting aside, especially in those countries that chose to adopt the UNCITRAL Model Law, substantive differences may exist.

ii. Competent Authority

The application[118] for annulment of an ICSID award shall be made within 120 days after the date on which the award was rendered.[119] On receipt of the request, the Chairman of the Administrative Council appoints an *ad hoc* Committee of three persons from the Panel of Arbitrators. The idea behind *ad hoc* Committees is to entrust decisions on annulment to a newly constituted panel, with a high level of expertise in investment arbitration, independent from the parties and from national courts. The original tribunal has no role in the annulment proceedings. The Committee cannot remand the award to it for reconsideration or for correction and, should it annul the decision, all a party can do is to submit the dispute to a newly formed tribunal.

that of the seat of arbitration. The New York Convention acknowledges such possibility, as it is evident from article V(1)(e): recognition and enforcement may be refused if the award has been "set aside or suspended by a competent authority of the country in which, *or under the law of which*, that award was made" (emphasis added). Some jurisdictions (ex. India), however, have interpreted the reference to such law as meaning the substantive law governing the merits of the dispute, thus allowed the setting aside of awards rendered in third country but governed by their substantive law. This practice has been highly criticized, but has not been completely abandoned. See recent *White Industries Australia Limited v the Republic of India*, UNCITRAL, final award 30 November 2011.

[118] See also Arbitration Rule 50.

[119] When the annulment is requested on the ground of corruption, the application shall be made within 120 days after the discovery of the corruption, and in any even within 3 years after the date on which the award was rendered (article 52(2)). So far, there no application for annulment has been brought under this ground.

Set aside of non-ICSID awards is instead competence of national courts at the seat of arbitration. The applicable *lex arbitri* indicates the competent court or tribunal. Some jurisdictions provide for the possibility to appeal the decision before several instances, while other jurisdictions opt for only one instance of review.[120]

An advantage the ICSID system consists in the neutrality and expertise of the members of the *ad hoc* Committee. However, some criticism has been moved towards the practice of repeated appointments of arbitrators to act in *ad hoc* Committees.[121] Judges at national courts may lack sufficient expertise in dealing with investment law issues. However, the competence of national courts meets the interest of sovereign States to preserve a certain degree of control over international arbitration. Having only one instance of review, challenges before *ad hoc* Committees are arguably faster than before national courts.

iii. Object of the Annulment/Set Aside: Decisions Upholding Jurisdiction

Another difference between ICSID and non-ICSID arbitrations consists in the possibility to seek the setting aside of an award upholding jurisdiction.

The ICSID Convention does not admit such possibility. Annulment may be sought only of awards declining jurisdiction, while decisions of tribunals upholding jurisdiction may be challenged only in the context of a recourse against the award on the merits.[122] In a non-ICSID Context, whether a party is entitled to challenge

[120] For example under Swiss law, the only competent authority to set aside is the Swiss Federal Supreme Court (article 191 PILA). Under French law, the competent court is the Court of Appeal of the place where the award was made. Its decision may be appealed before the Cour de Cassation (French Supreme Court) (article 1516, Decree No. 2011-48 of 13 January 2011).

[121] As of September 2010, out of a total of 60 *ad hoc* Committee member positions, 15 arbitrators have held over three-quarter of the appointments. Lucy Reed, Jan Paulsson, et al, *Guide to ICSID Arbitration,* (second edition, Kluwer Law International, 2010) pp. 159-177.

[122] In the SPP v Egypt case, the Secretary General of ICSID refused to register the application to annul tribunal's decision upholding jurisdiction on the grounds that it was not an award under the Convention. Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt (ICSID Case No. ARB/84/3) available at <www.icsid.wordbank.org.>. Piero Bernardini, 'ICSID versus Non-ICSID Investment Treaty Arbitration' in Fernandez-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades*, (La Ley 2010) pp. 159-188, Lucy Reed, Jan Paulsson, et al, *Guide to ICSID Arbitration,* (second edition, Kluwer Law International, 2010) pp. 159-177.

decisions of the tribunal upholding jurisdiction is provided by the applicable national law.[123]

iv. Grounds for Annulment/Set Aside

The ICSID Convention provides limited and exclusive grounds for annulment contained in article 52 (1) of the Convention.[124] The grounds for annulment of non-ICSID awards are contained in the *lex arbitri* of the seat of arbitration. Although there is a certain degree of uniformity in the grounds and proceedings for set aside, substantial differences may exist, especially in the practice and in the interpretation given to such grounds by local courts.

A major difference between the ICSID and a non-ICSID system is that ICSID *ad hoc* Committees do not pay any deference or apply any principle of domestic systems, such as non-arbitrability of the dispute or violation of public policy. Thus, States have no opportunity to address their non-procedural public policy concerns through annulment proceedings under the ICSID Convention.[125]

v. Effects of the Annulment/Set Aside

The annulment proceeding is not an appeal. The fundamental difference is that the former concerns only the legitimacy of the process of decision and not the substantive correctness of the award.[126]

Under the ICSID Convention, the *ad hoc* Committee has only the power to annul, in whole or in part the award, or to reject the application for annulment. It has no power

[123] This possibility is granted, for example, by the Model Law (article 16(3)) and by Swiss law (PILA article 190(2) (b)).
[124] Article 52(1) ICSID Convention:"Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) That the Tribunal was not properly constituted; (b) That the Tribunal has manifestly exceeded its powers; (c) That there was corruption on the part of a member of the Tribunal; (d) That there has been a serious departure from a fundamental rule of procedure; or (e) That the award has failed to state the reasons on which it is based." The grounds more frequently invoked, often in combination, are 'manifest excess of powers', 'serious departure form a fundamental rule of proceedings' and 'failure to state reasons'. Corruption on the part of a member of the tribunal has never been invoked.
[125] Ibid.
[126] Christoph Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope' (2011) 10 The Law and Practice of International Courts and Tribunals 211, 225.

to vary or modify the award, to remit it to the original tribunal for reconsideration, or for allowing the elimination of grounds for annulment. Following an annulment, the dispute shall, at the request of either party, be submitted to a new tribunal.[127] Annulled awards lose their binding effect and cannot be enforced in the territory of other contracting States.

The situation might be very different for non-ICSID awards. Once again, the powers of national courts during the setting aside proceedings are determined by the applicable *lex arbitri*.[128]

Once an ICSID award has been annulled, it ceases to exist for all contracting States. The same cannot be affirmed for non-ICSID awards, at least in certain jurisdictions. Article V (1) (e) of the New York Convention considers the fact that an award has been set aside or suspended "by the competent authority of the country in which, or under the law of which, that award was made" a valid ground for refusing enforcement. However, the non mandatory language used by the Convention ("enforcement *may* be refused"), gives discretionary power to the competent courts to refuse or grant enforcement of annulled awards. This article has been read in combination with article VII of the Convention, according to which "an interested party may not be deprived of any right to avail himself of any arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon". From the interplay of the two provisions, in France, where the fact that an award has been set aside does not represent a ground for refusing enforcement, courts have enforced awards notwithstanding the fact that they had ceased to exist at the seat of arbitration.[129]

In the comparison between the two systems, the ICSID Convention gives more certainty as to the status of annulled awards. On the other hand, however, national

[127] Article 52(6) ICSID Convention.
[128] Under the English Arbitration Act, for example, courts have the power to vary the award or to remit it to the tribunal for reconsideration, see English Arbitration Act, Section 67 (3) (b) and Section 68 (3) (a). The Model Law, instead, entitles the court to suspend the set aside proceedings at the request of a party, in order to give to the tribunal the possibility to eliminate the grounds that may lead to the setting aside of the award, see UNCITRAL Model Law, Article 34 (4).
[129] See *PT Putrabali Adyamulia*, Cass. Civ. 1, 29 June 2007.

legislations are more flexible, for example when giving the power to the tribunal, if appropriate, to eliminate from the award the grounds for setting aside.[130]

vi. Waiver of the Right to Recourse Against the Award

It is disputed whether under the ICSID Convention parties are entitled to waive their right for annulment.[131] There is no express provision on the issue in the Convention and one can assume from the fact that the parties cannot modify or exclude certain grounds for annulment, that waiving their rights *tout court* is not possible either.
Some national jurisdictions, such as Switzerland, instead, provide for this possibility. Under article 192 of the PILA, parties may waive fully their right to seek annulment or limit it to one or several grounds.

vii. Stay of the Enforcement Pending a Request for Annulment

Article 52 (5) of the Convention gives the possibility to a party to ask the Committee to stay the enforcement of the award pending the decision on its annulment. If this request is made together with the application for annulment, thus before the constitution of the Committee, the enforcement shall be stayed provisionally, until the Committee may rule on such request. The stay of the enforcement of an award prevents its enforcement in all contracting States.

Suspension of the enforcement of non-ICSID awards pending an application for annulment is regulated by article VI of the New York Convention and is left to the discretion of the competent courts.

The majority of International Investment Agreements signed by Mexico, however, deal with the issue directly when stating that a party cannot seek enforcement of an ICSID award until annulment proceedings have been completed or, in case of non-

[130] See article 34 (4) UNCITRAL Model Law.
[131] Lucy Reed, Jan Paulsson, et al, *Guide to ICSID Arbitration,* (second edition, Kluwer Law International, 2010) pp. 159-177.

ICSID awards, until a court has dismissed or allowed an application to set aside or annul the award and the proceeding had been completed without further appeal.[132]

viii. Predictability

Decisions by *ad hoc* Committees do not have precedential value, that is to say that they do not bind other Committees. This may have the result of decreasing the predictability of the outcome of the decisions and of the interpretation of the grounds for annulment. It is generally considered that there has been already "three generations" of Committees, which interpreted differently their role, as well as the grounds set in article 52.[133] However, although no rule on binding precedents exists in investment arbitration and the same issues or standards have been interpreted sometimes rather differently, to say the least, it is undeniable that often investment tribunals refer to other tribunals' rulings and shape with their interpretation the content and the scope of certain standards of treatment. The same may be said of decisions of annulment Committees.

It may be argued that the decisions on setting aside formulated by national courts enjoy a higher degree of predictability. Even if the value of precedents varies in each jurisdiction, courts' judgments will form part of a national jurisprudence that will have at least an authoritative value for subsequent decisions.

ix. Stability of Awards

One of the recent criticisms towards the annulment system under the ICSID Convention regards the "inflationary nature" of requests for annulment.[134] It has been said that "it has become a routine step for loosing parties in ICSID arbitrations to try to overturn the awards in annulment proceedings".[135] Although the number of

[132] See *supra*, Part I, §2.
[133] See Lucy Reed, Jan Paulsson, et al, *Guide to ICSID Arbitration,* (second edition, Kluwer Law International, 2010) pp. 159-177; Christina Cathey Schuetz, 'Legitimacy and Inconsistency: Is Investment Treaty Arbitration Broken and Can It Be"Fixed"? Is the ICSID Annulment Mechanism and Could It Be Improved?", in Ian Laird and Todd Weiler (eds) *Investment Treaty Arbitration and International Law* (Juris 2010 Volume 3), pp. 270 et seq.
[134] Christoph Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope' (2011) 10 The Law and Practice of International Courts and Tribunals 211, 225.
[135] Ibid.

requests has certainly increased in the last decade, the outcomes have been rather balanced, with rejection of the applications still more frequent than decisions for annulment.[136]

Reported challenges before national courts show instead a certain favour for the finality of arbitral awards. The large majority of recourses for annulment have been rejected.[137] It may thus be argued that the stability of non-ICSID investment awards is higher than that of ICSID awards subject to the annulment proceedings under article 52.

[136] See ICSID Case Load 2012, available at <www.icsid.worldbank.org>, last visited April 2012. Out of 40 applications filed, 18 have been rejected. Annulment has been granted in 11 cases.
[137] See <http://italaw.com/annulment_judicialreview.htm> last visited April 2012.

Table 11: Annulment and Setting-aside Discipline in ICSID and Non-ICSID Systems

	ANNULMENT	SET-ASIDE	NOTES
Applicable rules	The applicable rules on annulment are provided exclusively by the ICSID Convention (article 53 (1)) Relevant articles: article 52 ICSID Convention. Articles 41-45, 48, 49, 53, 54, Chapters VI and VII *mutatis mutandis.*	National law at the seat of arbitration.	The ICSID Convention establishes a delocalized and uniform regime. The discipline of setting-aside of non-ICSID awards is to be assessed case by case.
Competent Authority	Ad hoc committee of three arbitrators constituted under article 52 ICSID Convention.	Competent courts as provided by the applicable national law.	Ad hoc Committees: - Expertise - Avoids the influence of political considerations - Faster proceeding - Risk of repeat appointments National courts: - May lack specific expertise - Risk of political influences
Object of the annulment (awards on jurisdiction)	No possibility of immediate recourse against a decision upholding jurisdiction	Depends upon the *lex arbitri* at the seat of arbitration. Some jurisdictions allow recourse against awards upholding jurisdiction.	
Grounds for annulment	Limited and exclusive list of grounds for annulment contained in article 52. No reference to principles of domestic systems as non-arbitrability and public policy.	The grounds for annulment are contained in the rules of procedure at the seat of arbitration.	Under the ICSID Convention violation of public policy is not a ground for annulment.
Effects of the annulment	The ad hoc committee can only annul the award in whole or in part. It has no power to vary the award nor to remit it to the tribunal to correct or complete the award If the award has been annulled, the dispute may be submitted to a new	The effects of annulment are regulated by the national law at the seat of arbitration. Some jurisdictions may grant enforcement of an award which has been set aside at the seat of arbitration.	The ICSID Convention provides more certainty as to the effects of an annulment but is not flexible in giving to the original tribunal the possibility of eliminating the grounds for annulment.

	ANNULMENT	SET-ASIDE	NOTES
	tribunal Annulled awards lose their binding force and cannot be enforced in the territory of other contracting States.		
Waiver of the right of recourse against the award	The possibility to waive the right for annulment is disputed. No express provision on the matter is contained in the Convention.	Some jurisdictions allow the parties to fully waive their right to seek annulment or to limit it to one or several grounds.	
Stay of the enforcement	The stay of the enforcement is automatically (but provisionally) granted if the request is made by the applicant in its application. The ad hoc Committee will review the request once constituted. The stay of the enforcement of an ICSID award prevents its enforcement in any contracting State.	Article VI New York Convention: stay of enforcement is discretionary. Because of the non mandatory language of the New York Convention the stay of the enforcement of a non-ICSID award in one jurisdiction does not prevent its enforcement in other jurisdictions.	The majority of IIAs signed by Mexico provide that a party cannot seek the enforcement of an award until certain conditions have been fulfilled and time limits have expired.
Predictability	Ad hoc Committee decisions do not constitute binding precedents. Different "generations" of decisions have been discerned by commentators. However, certain uniform interpretations of the grounds for annulment seem to emerge. Although there is no formal rule of binding precedents, investment awards often refer to each other's rulings.	Court decisions on recourse against the award form part of the national jurisprudence. It is arguable that they have a certain precedential value (differing between common law and civil law countries) which can increase predictability.	
Stability of awards	Recent criticisms denounce the increase of requests for annulment and the extensive interpretation given by certain ad hoc Committees. Rejection of applications has been more frequent (18/40 cases) than annulment (11/40 cases)	The large majority of recourses against an investment award in national courts have been rejected.	It is arguable that the stability of non-ICSID investment awards is higher.

x. Conclusions

- The annulment regime is one of the main features that differentiates ICSID and non-ICSID systems. The challenge of ICSID awards is dealt with by an *ad hoc* Committee of three arbitrators and is regulated exclusively by the Convention. The challenge of non-ICSID awards, instead, is regulated by the arbitration law at the seat of arbitration and decided by national courts. As a result, the grounds and the competent authorities vary on a case by case basis, while the ICSID Convention provides a uniform regime. The expertise of *ad hoc* Committees is an also an advantage; national courts may lack familiarity with the specificities of investment disputes and may not be immune from political considerations.

- Investment proceedings are rarely seated in Mexico. It is unlikely that Mexican courts may exercise a control over the awards in deciding applications for annulment. In these circumstances, it is preferable for Mexico as a respondent State and for Mexican investors as claimants to submit their proceedings to an uniform regime that isolates them from the national courts at the seat of arbitration (usually located in Canada and USA). Moreover, respondent States seem to be more likely to succeed in an request for annulment before the *ad hoc* Committees than before the courts at the seat of arbitration.

- The annulment system under the ICSID Convention does not create any uncertainty as to the effects of the annulled award. Once the *ad hoc* Committee has annulled the award, it ceases to exist and to be binding upon the member States. In some national jurisdictions instead, courts may interfere with the award, modify it, and decide to enforce it notwithstanding the fact that it has already been vacated at the seat of arbitration.

- Several national laws provide for several instances of appeal of set-aside decisions. This may result in a lengthy process. Conversely, ICSID provides for a single stage.

- Uniformity, expertise, predictability of the discipline and speed, make the annulment proceedings under the ICSID convention a more favourable regime for Mexico and Mexicans investors.

f. Enforcement of Awards

Another major difference between ICSID and non-ICSID systems regards the enforcement of arbitral awards. Differences might be found in: (1) the applicable rules; (2) the possibility to refuse enforcement. The two systems have also some similarities: notably, in both systems, even if a State has waived its immunity from jurisdiction and consented to arbitration, by the same token it did not waive its immunity from execution (3).

i. Applicable Rules

The ICSID Convention deals with enforcement in articles 53, 54 and 55. Article 53 imposes an obligation on the disputing parties to abide and comply with the terms of the award and not to seek other remedies against it than those provided by the Convention. Article 54, instead, addresses all contracting States. It states that "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and *enforce* the pecuniary obligations imposed by that award within its territories *as if it were a final judgment of a court in that State*" (emphasis added).

The enforcement of the vast majority of non-ICSID awards is disciplined by the New York Convention on recognition and enforcement of foreign awards. Another international instrument dealing with the enforcement of arbitral awards is the Inter-American Convention on International Commercial Arbitration (Panama Convention) of 1975.[138]

ii. Possibility to Refuse Enforcement

The major difference in the enforcement regime between ICSID and non-ICSID awards concerns the possibility to refuse enforcement. Under the ICSID Convention there is no such possibility. ICSID awards are given the same value as final national courts' decisions.

[138] Most of Mexico's BITs and FTAs state that an investor is entitled to seek enforcement under the ICSID Convention or the New York Convention, provided that the disputing State and the home State of the investor are both members of those instruments. Few agreements give the possibility to the investor to rely also on the Panama Convention.

The New York Convention, instead, gives the possibility to the interested party to resist enforcement and to the courts at the place of enforcement to refuse to grant it on several grounds. It is a possibility, since the language of the Convention does not establish an obligation to refuse enforcement, even if one or more circumstances arise that may justify it. These grounds are limited to those provided under article V of the Convention[139]. The ICSID Convention thus, results in a more pro-enforcement regime than the New York Convention.

iii. State's Immunity from Execution

Neither the ICSID, nor the New York Convention regulate the execution of awards. The ICSID Convention expressly states in article 54 (3) that "execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought" and in the following article that "nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution." As a consequence, there is no obligation upon contracting States to execute an ICSID award in circumstances in which an equivalent final national court's judgment would not be executed. The defence of sovereign immunity from execution applies equally to ICSID[140] and non-ICSID awards.[141]

[139] For the Panama Convention, the relevant provision is also article V.

[140] See Lucy Reed, Jan Paulsson, et al, *Guide to ICSID Arbitration,* (second edition, Kluwer Law International, 2010) pp. 186-189, Piero Bernardini, 'ICSID versus Non-ICSID Investment Treaty Arbitration' in Fernandez-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades*, (La Ley 2010) pp. 185-187.

[141] See N. Blackaby, C. Partasides, et al., *Redfern and Hunter on International Arbitration,* (Oxford University Press 2009), pp. 666 et seq.

Table 12: Enforcement Discipline in ICSID and Non-ICSID Systems

	ENFORCEMENT OF ICSID AWARDS	ENFORCEMENT OF NON-ICSID AWARDS	NOTES
Applicable rules	Articles 53, 54, 55 ICSID Convention	New York Convention (when applicable) Panama Convention (when applicable) National legislation (for non-signatories of the abovementioned conventions)	The majority of Mexico's IIAs indicate that investors may seek enforcement under the ICSID Convention or the New York Convention (for non-ICSID awards). In few cases investors may seek enforcement under the Panama Convention.
Refusal of enforcement	No refusal possible.	Grounds contained in article V of the New York Convention and article V of the Panama Convention.	ICSID awards benefit from a more favorable treatment since they are equated to final judgments of courts of any State. Courts cannot refuse the enforcement of an ICSID award on any ground. No possibility to refuse enforcement of an ICSID award for violation of public policy.
Sovereign immunity from execution	Article 55: the ICSID Convention does not waive contracting State's immunity from execution.	Neither the New York Convention nor the Panama Convention waive contracting State's immunity from execution.	The defense of sovereign immunity from execution applies equally to ICSID and non-ICSID awards

iv. Conclusions

- The enforcement regime under the ICSID Convention is more favourable for investors and less favourable for member States. It equals ICSID awards to final national courts decisions and denies the right of States' courts to refuse enforcement on public policy considerations or on any of the grounds provided by the New York Convention.

- By signing the ICSID Convention, member States are relinquishing their right to exercise control over investment awards and can no longer decide not to grant enforcement. On the other hand, a favourable enforcement regime may attract potential investors. This is an important trade-off which deserves careful consideration.

- It is however very important to underline that none of the systems deals with sovereign immunity from execution. Even if Mexico, by ratifying the Convention, relinquishes its right to exercise a control over the enforcement of the award, it will still not waive its immunity from execution.

3. Substantive Aspects

a. The Definition of Investment

The *travaux préparatoires* of the ICSID convention illustrate how its drafters were unable to decide on a clear definition of "investment." This point is clearly illustrated in the Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States:

> "no attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanisms through which Contracting States can make known in advance, if they so desire, the classes of

> disputes which they would or would not consider submitting to the Centre [in Article 25(4)]."[142]

As a result, the concept of "investment" has been a hotly debated substantive legal issue of the ICSID Convention, and the ever-dynamic interpretation, application, and definition of "investment" by ICSID ad hoc tribunals, continues to create legal uncertainty and unpredictability. Under both the ICSID Convention and ICSID AFR, Tribunals are tasked with the mandate to determine whether a claim before the Centre qualifies as an investment as per Article 25 of the ICSID Convention.

Article 25 outlines the limits of ICSID jurisdiction, however does not clearly define the concepts of "nationality" and "investment." As a result, two schools of thought have developed interpreting the term "investment." The first textual interpretation rests on the specific terms of an agreement between the states through a BIT, while the second teleological interpretation attempts to expand ICSID jurisdiction with an independent meaning derived from the *raison d'être* of the ICSID regime and not that of the text.[143]

The teleological approach looks at the wider concept of investment and argues that it should not be limited to one specific definition, but that the term investment is non-justiciable and is ultimately based on the question of a party's consent and recognition of the activity or asset in question.[144] As a result, the scope of investment is wide-ranging and generally tribunals in this framework base their decisions on a definition of investment outlined in the consent document, they assess whether the consent incorporates the asset or enterprise in question, and they establish whether it is determinative of ICSID jurisdiction. [145] Generally, within the framework of BITs tribunals apply the definition of "investment" in the treaty,[146] and in contractual

[142] ICSID. "Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States" *(1965)*, ICSID Doc. *in* ICSID, *History of the ICSID Convention* (ICSID, Washington) Volume IIp.1069, para. 27

[143] Yulia Andreeva, *Is there a limit to the outer limits of ICSID Jurisdiction?* (August 5, 2009) American Society of International Law: Access: http://kluwerarbitrationblog.com/blog/2009/08/05/is-there-a-limit-to-the-outer-limits-of-icsid-jurisdiction/

[144] Julian Davis Mortenson, "The Meaning of "Investment": ICSID's *Travaux* and the Domain of International Investment Law" (2010) *Vol. 51.*1, *Harvard International Law Journal* 269.

[145] Ibid.

[146] Ibid., 270

arbitration clauses tribunals look for an explicit referral to ICSID jurisdiction.[147] In applying the teleological approach, tribunals have applied the term "investment" broadly to include, among others, a liaison customs office for which all core functions took place overseas,[148] a hotel construction and operation contract,[149] a $2.3 million portfolio investment in local securities,[150] and $760,000 in debt instruments issued by a sovereign state.[151]

The textual interpretation (also referred to as the objective interpretation) is the most widely accepted application of the ICSID Convention by international arbitrators.[152] Following a double barrelled test, it is based on the jurisprudence of *Salini v Morocco*,[153] which was later complemented by *Pheonix v The Czech Republic*[154] and *MHS v Malaysia*.[155] The test first interprets the definition of investment as per the party's BIT, and secondly (if such a BIT does not exist) the tribunal will apply the Article 25(1) of the ICSID Convention and the six identified elements that make a distinction between a contribution of value and an investment.[156]

Although widely accepted as the dominant test, there is continued debate on which of the six elements should be applied. The first three are generally accepted however the latter three remain subjective. For instance with respect to the fourth criteria assessing the extent to which the investment amounts to development in the host country, desperate case-law creates a form of legal unpredictability where one of the three different interpretations can be applied. Either the economic contribution to development of the host State *is* a formal prerequisite,[157] or as in the case of *CSOB v.*

[147] Ibid.
[148] Ibid., 269
[149] Ibid.
[150] Ibid., 270
[151] Ibid.
[152] Ibid., 272
[153] *Salini v. Morocco* [2001] ICSID
[154] *Phoenix Action Ltd v. Czech Republic* [2009] ICSID, para 114.
[155] *Malaysian Historical Salvors, SDN, BHD v. Malaysia* [2007] ICSID
[156] See *Pheonix v The Czech Republic* at para 114: "(i) a contribution in money or other assets; (ii) a certain duration; (iii) an element of risk; (iv) an operation made in order to develop an economic activity in the host State; (v) assets invested in accordance with the law of the host State; (vi) assets invested bona fide."
[157] *Salini v. Morocco*, [2001] ICSID para 52.

the Slovak Republic it *is not* a formal prerequisite.[158] A third possibility is that it should not be considered as an independent requirement to determine whether investment exists however it *can* be implicitly included in the first three criteria.[159]

The difficulty to predict an outcome from divergent investment regimes when interpreting the ICSID Convention can be a strong deterrent when selecting an arbitration facility. Notwithstanding, recent case law suggests an emerging consensus among the arbitration community. For instance, since 2006 the majority of cases (seven) have adopted the textual interpretation[160] of investment, and only two — *Biwater Gauff v. Tanzania* and the *Malaysian Historical Salvors* annulment — have rejected it. [161] [162] In cases where the definition of investment is not clearly identifiable, UNCITRAL arbitration may prove to be more attractive for arbitration parties.

Conclusions

- The textual interpretation of Article 25 of the ICSID Convention has gained much support within the international legal community, however there is no legal certainty in the application of the law by ICSID arbitration Tribunals.

- Although the Secretariat acts as a screening process to determine whether the Centre has jurisdiction, when in doubt, it is generally left to Tribunals to determine the full legal interpretation of Article 25 under the ICSID Convention.

- A similar process is provided for under ICSID Additional Facility Rules, with the initial decision made by the Secretary General to accept a claim, and when in doubt, the legal interpretation is left to Tribunals.

[158] Yas Banifatemi, "Unresolved Issues in Investment Arbitration." (Paper presented to the Congress organized by UNCITRAL for its 40th annual session in Vienna, 9-12 July 2007) <http://www.uncitral.org/pdf/english/congress/Banifatemi.pdf> accessed 27 April 2012
[159] *Consorzio Groupement L.E.S.I.-Dipenta v. People's Democratic Republic of Algeria* [2004] ICSID.
[160] *Phoenix Action Ltd v. Czech Republic* [2009] ICSID paras. 81–86, 118–33; *Malaysian Historical Salvors I* [2007] ICSID; *Saipem, S.p.A. v. People's Republic of Bangladesh* [2007] ICSID; *Mitchell v. Congo*, [2006] ICSID;
Helnan International Hotels v. Arab Republic of Egypt [2008] ICSID; *L.E.S.I., S.p.A. v. République algérienne démocratique et populaire* [2006] ICSID; *N.V. v. Arab Republic of Egypt* [2006] ICSID.
[161] *See* Malaysian Historical Salvors II [2008] ICSID; *Biwater Gauff v. Tanzania* [2008] ICSID
[162] Julian Davis Mortenson, "The Meaning of "Investment": ICSID's *Travaux* and the Domain of International Investment Law" (2010) *Vol. 51*.1, *Harvard International Law Journal* 277

b. The Definition of National

A substantive legal issue unique to the ICSID Convention is the interpretation of a "national investor". As a contracting state to the ICSID convention, Mexico may be able to restrict investment arbitration claims made by its own nationals, dual nationals, and in some cases, former Mexican nationals.

With respect to a natural person, Article 25(2) establishes that in order to profit from arbitration, an investor must be a national of a Contracting State *other* than the State party to the dispute. This must be the case on the date when the parties consented to submit to dispute arbitration, as well as on the date when the arbitration was registered. As a result, dual nationals who possess the nationality of a State Party to the dispute do not fall within the scope of "investor" under Article 25(2) of the ICSID convention.

> (2) "National of another Contracting State" means: (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered […],but does not include any person who on either date also had the nationality of the Contracting State party to the dispute;

The case law supports the interpretation that dual nationals holding the nationality of the host State cannot bring a claim under the ICSID Convention, but in order to prevent legal uncertainly it is important to observe the timing and legal effect of a natural person's nationality.[163] In contrast to ICSID and the Additional Facility Rules, the UNCITRAL and the ICC Arbitration Rules do not impose such national

[163] In *Champion Trading v. The Arab Republic of Egypt* [2006] ICSID the Tribunal held that dual nationals who hold the nationality of the host State cannot bring a claim under the ICSID Convention. In *Soufraki v.United Arab Emirates* [2004] ICSID the Tribunal again confirmed the exclusion of dual nationals, an emphasised the importance of claimant's nationality on the specific date when the parties consented to ICSID arbitration and the date of the registration of the request for arbitration. In *Siag and Vecchi v.* In *The Arab Republic of Egypt* [2009] ICSID Professor Orrego Vicuña dissenting option discusses the importance of the timing in the acquisition and loss of a nationality.

restrictions, and thus the latter two may be seen as more advantageous to some investors.[164]

Conclusions

- Dual nationals cannot bring claims before ICSID. This interpretation is the same under the ICSID Convention and ICSID AFR.

4. Other Aspects

a. Costs

The costs of investment arbitration vary from case to case, and are often dependant on several factors making it difficult to determine the exact cost of different arbitration facilities. Nonetheless, ICSID is generally a less expensive arbitration facility and the preferred institution to use by a State.

The factors contributing to costs in ICSID Arbitration include the cost of legal services, fees to the institution which include institutional facilities, cost of witnesses, travel expenses, arbitrator fees, and the accumulation of interest on an award that is contested. Most ICSID cases cost between 3 to 6 Million USD in legal and institutional fees, and last around 3 years. The institutional fees are based on the actual cost of proceedings and the payment scheme is organised in instalments. Due to predictability with respect to length of proceedings and institutional fees of ICSID, it is easier for States to estimate the cost of proceedings and allocate resources according. It also gives the State more information to conduct a more accurate cost-benefit analysis of the merits to proceed with arbitration and compare that with other possible options.

The comparative length of ICSID arbitration, however, can substantially increase costs. With the publications of most previous ICSID awards on similar issues and treaty provisions, this may result in an increased amount of legal analysis by the

[164] Yas Banifatemi, "Unresolved Issues in Investment Arbitration." (Paper presented to the Congress organized by UNCITRAL for its 40th annual session in Vienna, 9-12 July 2007) <http://www.uncitral.org/pdf/english/congress/Banifatemi.pdf> accessed 27 April 2012

parties and arbitrators during pleadings.[165] In addition, as the original award cannot be revised, the process of annulment is lengthy and costly, in particular because it requires the constitution of a new ad hoc tribunal. These rules apply both under the AFR and ICSID Convention.

[165] Simon Greenberg *International Commercial Arbitration: An Asia-Pacific Perspective.* (Cambridge University Press 2011) 486.

Table 13: Costs – Comparison of ICSID Convention, the ICC and UNCITRAL Rules

	ICSID	ICC	UNCITRAL	COMMENTS
Charges payable to the Centre	Based on actual cost that its subsidized staff incurs (Administrative and Financial Regulation 14)	*Ad valorem* or percentage of the total amount in dispute	N\A	ICSID is generally a cheaper dispute settlement mechanism
Fees and expenses of the arbitrators	Schedule of Fees set by the institution	Schedule of Fees set by the institution	Fees set by the individual arbitrators; no limit	Scheduled fees facilitates financial predictability
Responsibility of Costs in a failed claim	N\A	N\A	If the Claimant's complaint fails, unless otherwise stipulated by the Tribunal, the claimant is responsible for costs of arbitration.	
Fee payment method	- Advance payments only to cover expected expenditure for periods of three to six months - Proceedings stayed for non-payment (Regulation14(3)(d))	Advance payment to cover the full administrative charge	Proceedings are administered by the tribunal, generally cheaper if the arbitration is fast, but Arbitrator fees very high are if issues arise may result in court litigation	ICSID's payment scheme in installments is advantageous for States offering predictability
Duration of Proceedings	Average 3.2 to 3.6 years; shortest case 1.2 years and the longest case 10.5 years[166]	Average is 9 months, but can range from 45 days to 4 years[167]	No public information	ICSID proceedings are long, but usually cost less; there are no annulment proceedings

[166] Anthony Sinclair, Louis Fisher, Sarah Macrory *ICSID Arbitration: How long Does it Take?* GAR journal, Volume 4 issue 5, See: http://www.goldreserveinc.com/documents/ICSID%20arbitration%20%20How%20long%20does%20it%20take.pdf

[167] See: http://www.iccspain.org/index.php?option=com_content&view=article&id=65:where-is-the-international-chamber&catid=53:preguntas-sobre-arbitraje&Itemid=41

Conclusions

- The current fee structure for Mexico under ICSID AFR or as a contracting party would not change.

b. Transparency of the Arbitral Proceedings

The issue of transparency involves considerations on the possibility of third parties participation in arbitral proceedings.[168] It needs to be highlighted that international commercial disputes and international investment disputes differ in this respect. The former involve purely private interests (normally), while the later involve public interests because a public body, the host State, is a party. In addition, more public interest issues are raised in investment arbitration proceedings nowadays.[169] In commercial arbitration, the rule is confidentiality and this is a distinctive feature of that system.[170] In investment arbitration there are different scenarios and mostly depended on the arbitration rules chosen by the parties.

i. Transparency under ICSID, UNCITRAL and ICSID/AFR

Participation in arbitral proceedings may cover either the phase of the proceedings or the post-award phase. As a general indication, transparency covers the following:

- Attendance to the hearings

ICSID Arbitration Rule 32(2): The tribunal may allow parties "to attend or observe all or part of the hearings". The only condition to be fulfilled is lack of the party's objections and consultation with Secretary-General. It is important to mention the latest developments in transparency issues of ICSID jurisprudence. In *Case Railroad Development Corporation v. Republic of Guatemala*,

[168] G. Kaufmann-Kohler, "In search of transparency and consistency: ICSID reform proposal", (2005) 2 TDM 5, p. 3.
[169] M. Zachariasiewicz, "Amicus Curia in international investment arbitration: can it enhance the transparency of investment dispute resolution? (2012) 29 Journal of International Arbitration 2, p. 206.
[170] A. K. Bjorklund, "The emerging Civilization of investment arbitration", (2009) 113 Penn State Law Review 4, p. 1287.

the hearing on the merits was transmitted live via internet feed.[171] This was possible due to CAFTA Article 10.21.2. Another interesting example comes from ICSID Case *Mobil Investment Canada inc and Murphy Oil Corporation v Canada*. In this case, the publicity of the hearing was provided by live broadcast from one of the rooms at the World Bank.

- Submissions to the proceedings

ICSID Arbitration Rule 37(2): Third parties may file submission to the Tribunal if the Tribunal allows so. The requirements to be fulfilled relate to: 1) prior consultation with the parties to the dispute, but not their consent and 2) the subject matter falling under the scope of the dispute. The scope of these submissions is to assist the Tribunal and bring a different perspective to its attention.[172] It is also a condition that the third-party has a significant interest in the proceedings.[173]

- Publication of awards

ICISD Arbitration Rule 48(4) regulates the matter. It is still required the consent of the parties for the publication of the award, but the novelty of the Rule lies in the second sentence. The Centre is obliged to publish "excerpts of the legal reasoning of the tribunal."

ICSID rules do provide clear guidance on transparency issues in investment claims registered under ICSID dispute mechanism. It has not been always like this. Previously, ICSID cases would not contain the present level of transparency in arbitral proceedings. In 2005, the OECD released a statement recalling the need for a higher degree of transparency in investor-State disputes especially with regard to publication of awards and third-party participation in the hearings. In 2006 the ICSID rules were amended and included relevant changes to the transparency issue, making the ICSID system the most transparent one among those dealing with investment disputes.

[171] Available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement97 accessed 3 May 2012.
[172] C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles,* (OUP, Oxford 2007), para. 3.43.
[173] See ICSID Arbitration Rule 37(2)(c).

In terms of transparency, UNCITRAL Rules are non-adequate to assist the system of investment claims toward a more transparent one. They are commercial arbitration rules and as such, characterized by privacy and confidentiality.[174] The parties to a dispute are the sole legitimate participants and only with their consent can third parties be involved in commercial arbitration disputes. Notwithstanding the UNCITRAL revised Rules of 2010, no major changes were introduced with regard to Privacy/Transparency issues but the UN Working Groups are dealing with the issue.

The situation at present is the following:

- Attendance to the hearings

UNCITRAL (Rules) Article 28: Hearings are held in camera.

- Publication of the award

UNCITRAL (Rules) Article 34(5): The award may be made public only with the consent of all parties. Additionally, it may be made public when it results in a "legal duty" for the parties, the disclosure of that award. Finally, the award may become public because of its involvement in national courts, where it may be analysed in terms of enforcement.

- Submissions to the proceedings

UNCITRAL (Rules) Article 17(5): Submissions by third parties to the arbitral proceedings are not permitted. Third parties may be "joined" in the proceedings as "a party", "provided also that this party is a party to the arbitration agreement".

A recent Report of the UNCITRAL Working Group II (6-10 February 2012)[175] lays down draft rules on legal standards of transparency in investor-state arbitration and announces a further reform in UNCITRAL provisions. The fifty-sixth session of the Working Group put forward a number of issues and proposed 8 Articles dealing with transparency. The draft rules highlight a number of controversies including: a) the validity of the rules in terms of past, present and future

[174] G. Kaufmann-Kohler, "In search of transparency and consistency: ICSID reform proposal", (2005) 2 TDM 5, p. 2.

[175] General Assembly, A/CN.9/741 of 16 February 2012 available at: www.uncitral.org/uncitral/commission/working_groups/2Arbitration.html accessed 25 April 2012.

investment treaties, b) the consent of the parties as a condition to the application of transparency rules, c) the way the consent has to be expressed, d) the incorporation of transparency rules in the UNCITRAL Rules or their attachment in a separate annex, e) the relationship between transparency rules and transparency in investment treaty provisions. These draft rules show that UNCITRAL is close to adapt changes in transparency issue and the international community is eager to see them in practice.

The ICSID/AF rules offer the following scenario. Article 53(3) deals with the publication of the award and prohibits the Secretariat to publish the award without consent of the parties. Nonetheless, the Secretariat "shall include in the publications of the Centre excerpts of the legal reasoning of the Tribunal". Other than the above, there are no other provisions in the AFR dealing with issues of transparency. It is important to note however that the AFR have been extensively used in NAFTA cases and the Transparency issue has not been a major concern, given that NAFTA system has been at the forefront of transparency development in investment arbitration. In fact, many trends in amicus curiae and publication of awards originated from NAFTA cases. Some of these were cases arbitrated under the ICSID Additional Facility rules. NAFTA Annex 1137(4) is important to underline with reference to Mexico. This Annex clarifies transparency issues for Mexico in NAFTA cases. It states the following: "*Where Mexico is the disputing Party, the applicable arbitration rules apply to the publication of the award.*"[176]

Considering the above, publication of the award under NAFTA, in Mexico cases, will depend on the applicable arbitration rules. It may be Article 53(3) under the AFR, or the UNCITRAL rules in case of *ad hoc* choice.

Moreover, in NAFTA context, the NAFTA Note of Interpretation clarifies that NAFTA proceedings are public. The publicity covers the award, the memorials filed by the parties and the pleadings as well.[177]

[176] See NAFTA Annex 1137(4), available at: www.sice.oas.org accessed 10 May 2012.
[177] A. K. Bjorklund, "The emerging Civilization of investment arbitration", (2009) 113 Penn State Law Review 4, p. 1288.

ii. Amicus Curiae in Investment Arbitration

One aspect of transparency is *amicus curiae* participation in investment proceedings, i.e. participation of a non-disputing party. The first case where *amicus'* participation request was approved in investment arbitration was the *Methanex* Case. *Amicus curiae* participation raises a preliminary question consisting of whether the arbitral tribunals are empowered to do so in the first place.

Under Article 37(2) ICSID Rules, the tribunal has the power to admit written submissions from *amici.* To the contrary, the New 2010 UNCITRAL rules do not mention specifically the issue, but Article 17(1) has been interpreted as including this power of the tribunal in its ambit of discretion on the way it conducts the proceedings.[178]

Consequently, with reference to *amicus curiae* participation there is evidence in case law that there is no difference between different Arbitration Rules. Even if the power of the tribunal to do so is not expressly mentioned in the Arbitration Rules, other norms describing the discretion of the tribunal in conducting the proceedings will be used as the legal bases to admit *amicus curiae*.

iii. Conclusions

- ICSID, as compared to other investment arbitration dispute settlement rules is clearly more transparent. Though, concerns of closed doors proceedings and public interest issues are better accommodated within ICSID rules.
- More transparency in investment arbitration is advantageous for Mexico especially considering the role it can play in giving visibility to its own public policy interest.
- Mexico has already tested a high level of transparency in investment proceedings because of its NAFTA membership. Joining ICSID would not bring relevant unexpected changes with reference to transparency issues.

[178] M. Zachariasiewicz, "Amicus Curia in international investment arbitration: can it enhance the transparency of investment dispute resolution? (2012) 29 Journal of International Arbitration 2, p. 211.

c. Predictability and Consistency of Decisions

i. Premise

For purposes of the present paper, predictability will be analysed solely with reference to distinctions within the international arbitration system and not as opposed to non- arbitration system, like domestic courts practice.[179] The reason lays in the fact that Mexico's decision to join ICSID is separated from the decision to use international arbitration altogether and not linked to the above.

Legal predictability is a precondition for international business transactions[180] and one can easily understand why this is so. Both parties to an international transaction need to know the consequences deriving from those transactions and predictability creates expectations. We should start our consideration by underlying the fact that predictability concerns are not limited to the investment arbitration sector itself but cover the whole system of arbitration as a dispute settlement mechanism and, questions the risks related with such a choice.[181]

For this reason it is important to understand whether ICSID arbitral tribunals' awards ensure legal predictability or whether they are characterized by inconsistency of results.

ii. The Components of Predictability

The question of which aspects of the arbitral decisions does predictability cover, can be summarized in the following way: predictability relates to "consistency" of decisions; the value and role of "precedents", the existence of an "appeal system" and "transparency".

- Consistency

Consistency is defined in the following way: "*consistency is about delivering coherent decisions and avoiding contradictory results that undermine the credibility of investment arbitration*

[179] L. Trakman, "The ICSID under Siege", (2012) UNSW Law Research Paper No. 2012-6, available at: www.law.bepress.com, accessed 28 March 2012.
[180] F. Spoorenberg, J.E. Vinuales, "Conflicting decisions in international arbitration" in (2009) The law and Practice of International Courts and Tribunals 8, p. 92.
[181] Ibid., p. 92.

overall and jeopardize the development of investment law."[182] On one hand, consistency in ICSID jurisprudence can be individualized mainly on the following issues: a) questions of jurisdiction of the tribunal and b) questions of standards of protections contained in investment treaties.[183] On the other hand, inconsistency can be found on the following legal issues: a) umbrella clauses; b) most favoured nation clause's application to dispute resolution, c) fair and equitable treatment, d) necessity defence, e) damage calculation, f) *res judicata* and *lis pendens*.

Some examples of inconsistent decision in ICSID tribunals' awards can be observed below. The (non-exhaustive) table shows which issues of investment law have been mostly subject to inconsistent decisions and award's outcomes.

Selected Issues	**Pro-awards**	**Cons-awards**
Umbrella clause	*Eureko v Poland;* *Noble Venture v Romania;* *Siemens v Argentina*	*Salini v Jordan;* *Joy Mining v Egypt;* *El Paso v Argentina;* *SGS Pakistan*
MFN applicable to dispute resolution	*Maffezini v Kingdom of Spain;*	*Plama v Republic of Bulgaria;*
Necessity defense	*LG&E v Argentina*	*CMS v Argentina*
Fair Market Value as a measure for damages	*CMS Annulment*	*LG&E Damage*
Res judicata & lis pendens	*CME v Czech Republic*	*Lauder v Czech Republic*

Conflicting decisions reflect "a loss in terms of predictability in investment arbitration."[184] Nonetheless, some of the inconsistent decisions mentioned above can be considered as exceptions and novel issues of investment arbitration like interpretations of the "necessity defence" in several cases against Argentina. Given the novelty of these issues when they were first dealt with by arbitral tribunals, it is supposed they will not persist in future.

Notwithstanding the above, ICSID awards, as compared to other investment arbitral awards, may be considered more consistent, given that little information is available on how consistent are decisions of UNCITRAL or other arbitral institution's awards.

[182] G. Kaufmann-Kohler, "In search of transparency and consistency: ICSID reform proposal", (2005) 2 TDM 5, p. 1.
[183] E. Gaillard, "A black year for ICSID", (2007) 4 TDM 5, p. 1.
[184] F. Spoorenberg, J.E. Vinuales, "Conflicting decisions in international arbitration" in (2009) The law and Practice of International Courts and Tribunals 8, p. 94.

- The value of precedent

The rule of precedent is a "golden rule"[185], which helps harmonizing potentially conflicting decisions and improve legal predictability. The rule of precedent is normally used in both systems: 1) common-law and alike systems, which pose a legal obligation to follow precedents; 2) and civil-law systems and alike, which do not make that rule a legal binding obligation for the actors at stake.

In international Arbitration, a distinction has to be made between commercial and investment arbitration. With reference to the former, there is "no meaningful precedential value of awards."[186] To the contrary, investment arbitration tribunals are more willing to refer to previous case law, especially if ICSID tribunals are involved.[187] To illustrate the above, a passage from the *El Paso v Argentina* case, can be useful to mention: "…*international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals.*"[188]

Thus, a first conclusion can be drawn in the sense of ICSID system providing a more stable and predictable legal environment for both investors and states involved in investment disputes, as compared to commercial dispute settlement systems used to solve investment disputes. These tribunals no not refer to precedents as often as ICSID tribunals do.

- Transparency

Again, with reference to transparency and its influence on legal predictability, investment and commercial arbitration differ a lot. Investment awards, especially those rendered under ICSID, are mostly published with the consent of the parties. When consent is missing, ICSID still has to make publicly available, excerpts of the legal reasoning of the arbitral tribunals.[189] Commercial awards by contrast are often confidential.

[185] Ibid., p. 102.
[186] G. Kaufmann-Kohler, "Arbitral precedent: Dream, Necessity or Excuse", The Freshfields Lecture, (2006) 23 Arbitration International 3, p. 373.
[187] J. Commission, "Precedent in Investment Treaty arbitration: A citation analysis of a developing jurisprudence, (2007) 24 Journal of International Arbitration 2, 129-158; G. Kaufmann-Kohler, "Arbitral precedent: Dream, Necessity or Excuse", The Freshfields Lecture, (2006) 23 Arbitration International 3, p. 373.
[188] See, *El Paso v Argentina,* ICSID Case No ARB/03/15, Award of 27 April 2006, para. 39.
[189] For more, please refer to this paper's section on Transparency.

Conclusion: ICISID as a forum for investment disputes is more predictable than ICSID/AFR, UNCITRAL, ICC, PCA, in that awards are made public and the legal reasoning of the tribunals is not fully disclosed. Moreover, non-ICSID tribunals may hinder a higher level of inconsistent decisions in investment disputes, which nonetheless remains unknown because of transparency purposes.

- Appellate System

Lack of a proper appellate body in investment arbitration and in ICSID system in particular, does not help to achieve predictability. The existing status quo provides some form of scrutiny represented by the annulment proceedings under ICSID, but this aspect is far from being considered similar to an appellate mechanism and in some cases, is in itself cause for more inconsistency. There is a desire in ICSID to promote consistency and this is reflected in the initiatives taken for that purpose and the idea of providing ICSID with an Appeal Facility. This idea was disregarded in that such an amendment to the ICSID Arbitration rules would complicate further the arbitration procedure.[190]

iii. Conclusions

ICSID usually provides predictability if compared to other arbitration institutions for the following reasons:

- It is more transparent in the first place and access to information is easier. It permits interested parties to scrutinize the claims and deduce conclusions on tendencies in investment protection standards and outcome of the awards.
- Minority unpredictable decisions in ICSID jurisprudence are more related to new issues of investment arbitration and reflect the novelty of those concepts, the particularity of factual contexts and the continuous evolvement nature of investment law. As such, those inconsistent concerns may end in future.
- ICSID tribunals tend to rely more than other tribunals on previous awards.[191] As a result, the precedential value of awards is recognized as "persuasive".

[190] E. Gaillard, "A black year for ICSID", (2007) 4 TDM 5.
[191] See, *El Paso v Argentina*, ICSID Case No ARB/03/15, Award of 27 April 2006, para. 39.

- Compared to other dispute settlement mechanisms, ICSID provides more predictable decisions, in that ICSID arbitral tribunal are more specialized in investment disputes. They thus may have different opinions on specific issues, but they are better prepared on investment law.

Part III Implications of Signing and/or Ratifying the ICSID Convention, the Case of Mexico

1. ICSID Membership: Conditions and Reasons for Joining and Denouncing the Convention

This section of the project will analyze reasons and effects deriving from ICSID membership or from its denunciation. The reason for focusing on these issues is that those reasons and effects can be helpful to individualize general policy advantages/disadvantages and trends on investment claims flows on a longer-term period. These issues will be analyzed from two main perspectives: the governmental perspective and the investor's perspective. The conclusions reached will be helpful to see whether from both perspectives, which at first sight can look opposite to each other, ICSID membership is a valuable tool, which complements the existing investment arbitration system in Mexico. Quantitative empirical research has also been conducted on selected aspects, in order to support the findings.

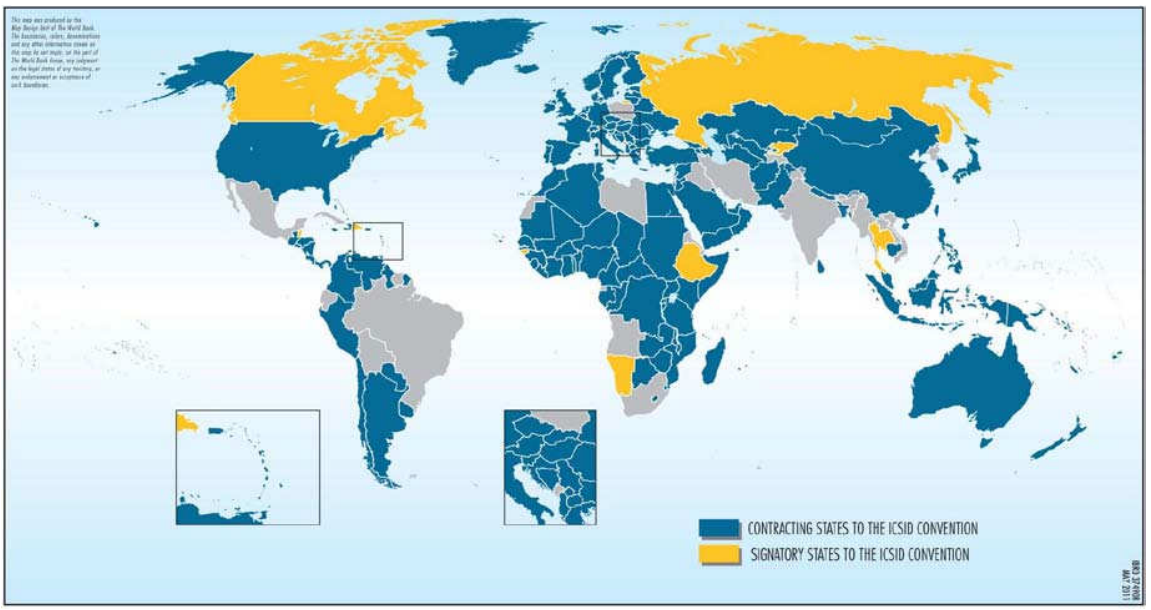
a. Recent Adherences to the ICSID Convention: Reasons for Signing, Ratifying and Consequences on Investment Claims

i. Data and Reasons for Signing and Ratifying the ICSID Convention

ICSID membership started in 1965 after the ICSID Convention was adopted. Adherence to the ICISD convention is an ongoing process, with latest memberships registered less than a year

ago.[192] The present situation of ICSID contracting members and signatory parties as to 31 December 2011 is the following, referring to data from ICSID.[193]

Figure 1: Map of the ICSID Contracting States and Other Signatories to the ICSID Convention as of December 31, 2011[194]



Full ICSID membership encompasses two stages:

1) Signature of the Convention (Article 67, final Provisions) and;

2) Ratification of the Convention (Article 68, final Provisions).

In order to be bound by the Convention (an international treaty in nature) the contracting state has to pass both steps, according to the Vienna Convention on the Law of the Treaties.[195] Examples show that signature and ratification can take place at the same time or can distance

[192] South Sudan and Moldova were the latest states to ratify the ICSID Convention, which took place on 18.04.2012 and 05.05.2011 respectively.
[193] "The ICSID Caseload-Statistics", Issue 2012-1, available at: www.icsid.worldbank.org accessed 7 May 2012, p. 6.
[194] Please consider that in addition to those countries represented in the map, South Sudan joined ICSID on 18 April 2012.
[195] For more, see Article 12 and 14 of the VCLT.

from each other by relevant time periods.[196] In minority cases, ratification after signature is still pending and states do not express any intent to provide for it in the immediate future.[197]

Table 14: Signatory Countries Not Providing for ICSID Ratification

Country	Signature
Belize	**1986**
Canada	**2006**
Dominican Republic	**2000**
Ethiopia	**1965**
Guinea Bissau	**1991**
Kyrgyz Republic	**1995**
Namibia	**1998**
Russia	**1992**
Sao Tome and Principe	**1999**
Thailand	**1985**

Canada is among those that are currently considering ratifying ICSID though the difficulty that Canada faces is more a federal structure type[198], than a willingness issue. All Canadian provinces and territories need to pass the implementing legislation in order for the latter to enter into force. Nonetheless, it is believed that Canadian federal government will ratify ICSID despite some province's inactivity.[199]

Apart from non-ratifying States, there are States that have not even signed ICSID like Brazil, Poland, and India. Their reasons for such a choice are different, but a few words must be said with reference to Brazil, considering its regional similarities with Mexico.

[196] See for example, Guatemala 1995 (signature) -2003 (ratification), Cambodia 1993-2004, Haiti 1985-2009, Kazakhstan 1992-2000, Moldova 1992-2011, Uruguay 1992-2000 etc.
[197] The only exception is represented by Canada, which is still going through relevant discussions on ICSID ratification.
[198] F. Gonzalez de Cossio, "Mexico before ICSID, rebel without a cause?" (2008) 9 Journal of World Investment and Trade 5, available at: http://www.gdca.com.mx/PDF/arbitraje/Mexico%20and%20ICSID%20Rebel%20Without%20a%20Cause.pdf accessed 15 April 2012.
[199] For discussion, see the following: http://kluwerarbitrationblog.com/blog/2010/08/24/why-has-canada-not-ratified-the-icsid-convention/ accessed 15 April 2012.

ii. Brazil: Why not ICSID and Future Considerations

Brazil is often used in legal literature as a counterargument for a country's ICSID membership. Brazil has attracted a huge amount of foreign direct investment, especially after the 1991, time when the privatization process started. In addition to that, Brazil is the largest exporting capital of the Latin America region. Interesting to note that in 2006 for example, outward investment flows were higher than inward investment flows.[200] However, Brazil has not signed the ICSID Convention and has not ratified BITs.

Nonetheless, Brazil represents a country with particular features from an economic and political point of view. As a result, the comparison with Brazil for purposes of ICSID membership cannot help in addressing the issue in other Latin American countries. The particular features mentioned above which make Brazil's situation a bad comparator, are the following:

1) Brazil does not object to ICSID as a forum to resolve investment disputes, but it objects to the system of investor-state arbitration in general, whether ICSID or non-ICSID, when dealing with investment disputes. Its main objection remains the investor-state arbitration option, although state-to-state arbitration is accepted and often used.[201] Furthermore, Brazil is "quite successful in solving problems encountered by foreign investors through diplomatic means."[202]
2) Brazil finds a serious impediment to investor-state arbitration in its Constitution in the first place and the related Calvo Doctrine that it embraces. This doctrine provides for national courts of the host state to rule over investments made in its territory.
3) Brazil is "blessed with natural resources"[203] and finds it easier than other countries to attract investment.

[200] E. Whitsitt, D. Vis-Dunbar, "Investment Arbitration in Brazil: Yes or No", (30 November 2008) available at: www.iisd.org, accessed 18 April 2012.
[201] PAGBAM Attorneys at Law, Arbitration Newsletter, 8 March 2010, available at: http://www.pagbam.com.ar accessed 18 May 2012.
[202] E. Whitsitt, D. Vis-Dunbar, "Investment Arbitration in Brazil: Yes or No", (30 November 2008) available at: www.iisd.org, accessed 18 April 2012. Supporting the same view, A. Ross, "Brazil's BIT dilemma", (2009) 4 GAR 6, available at: www.globalarbitrationreview.com accessed 22 April 2012.
[203] A. Ross, "Brazil's BIT dilemma", (2009) 4 GAR 6, available at: www.globalarbitrationreview.com accessed 22 April 2012.

Notwithstanding the above, there are elements that show a willingness of Brazil to change its investment policy and shift the previous trend. One is represented by the fact that Brazil has negotiated BITs, though they were not ratified. There are 13 of them, referring to the Foreign Trade Information System.[204] Moreover, Brazil and Chilean officials have met in 2010 to discuss on a Chile-Brazil BIT[205] in order to afford protection to their mutual investments. In fact, one of the major criticisms to Brazil's investment policy is its failure to grant protection to its own companies abroad. Petrobras, a leading Brazilian company, was subject to expropriation measures by the government of Bolivia.[206] Another Brazilian company, Odebrecht, had to initiate proceedings under a third country BIT and bring actions through a Dutch subsidiary. Looks like time has come for Brazil to take a step forward and consider changing its actual investment policy, in order to better respond to the needs of its investors as well.

To the contrary, Mexico's situation is different. Mexican Constitution is open to investor-state arbitration. Mexico has already an investment policy based on BITs which provide for arbitral tribunals to rule over investments made in its territory and include ICSID as dispute settlement mechanism. Mexico has already experienced investor-state arbitration under ICSID/AFR and UNCITRAL.

iii. South Sudan and Moldova: Why ICSID?

South Sudan is the latest country to sign and ratify the ICSID Convention. H.E. Kosti Manibe Ngai, Minister of Finance and Economic Planning of South Sudan, signed and deposited the instrument of ratification of the Convention at the premises of World Bank in Washington DC, on 18 April 2012.[207] The convention will enter into force on 18.05.2012.

[204] See www.sice.oas.org, accessed 11 May 2012.
[205] PAGBAM Attorneys at Law, Arbitration Newsletter, 8 March 2010, available at: http://www.pagbam.com.ar.
[206] A. Ross, "Brazil's BIT dilemma", (2009) 4 GAR 6, available at: www.globalarbitrationreview.com accessed 22 April 2012.
[207] For more, see the ICSID website: http://icsid.worldbank.org accessed 20 April 2012.

This signature and ratification was unexpected, considering the threats to peace taking place in South Sudan[208] and concerning the border delimitations with Sudan. South Sudan declared its independence from Sudan on 09.07.2011, but disputes over the north territories borders are ongoing. Especially with reference to oil control issues, South Sudan sent its troop to Heglig oilfield, a region previously subjected to international arbitration on border delimitation conflict.[209] One reference as to South Sudan reasons to ratify the Convention in this conflict situation is Gary Born opinion on the event:

> *"South Sudan's ratification of the ICSID Convention evidences its commitment to both the resolution of disputes by neutral international adjudication and the creation of a legal framework for foreign investment in its territory".*

Another country that ratified lately the Convention is Moldova. The reasons for ratifying ICSID after 19 years from its signature can be summarized in the following way:

- "It is a step taken to encourage inward investment in the country"[210];
- "Shows Moldova's commitment to the transparency and ease of enforcement embodied in the instrument and … this is welcomed by foreign investors"[211];
- "Moldova (already) fights a number of significant bilateral investment treaty cases under the UNCITRAL Rules and…is currently facing five investment treaty claims"[212];
- The recent investment dispute between Moldova and the shareholder of *Le Bridge Corporation Limited* increased the interest toward the ICSID jurisdiction to settle disputes where Moldova is a party."[213] Initially this case was presented to the ECHR claiming violations of Article 1 and 6 of the Convention[214]; Right to a fair hearing and Right to Property.

[208] A. Ross, "South Sudan joins ICSID as forces occupy Heglig", (2012) GAR, available at: www.globalarbitrationreview.com accessed 19 April 2012.
[209] Ibid.
[210] D. Elward, "Moldova ratifies the ICSID Convention", (2011) GAR, citing Mathew Hodgson and available at the following: http://www.globalarbitrationreview.com/news/article/29456/ accessed 16 May 2012.
[211] Ibid.
[212] UNCTAD, "Latest developments in investor-state dispute settlement", IIA Issue Note No 1, March 2011, p. 12.
[213] For more, see: http://www.aci.md/en/publications/news-and-publications/publications/investment-disputes-settlement.
[214] Application no. 48027/10 by LE BRIDGE CORPORATION LTD SRL against Moldova, lodged on 17 August 2010 (ECHR).

Among the reasons gathered above, one can note both policy considerations and legal concerns. From the date of ratification, Moldova has seen 1 case registered against it under ICSID, Case *Mr Franck Charles Arif v Republic of Moldova,*[215] which is still pending and concerns duty free concessions.

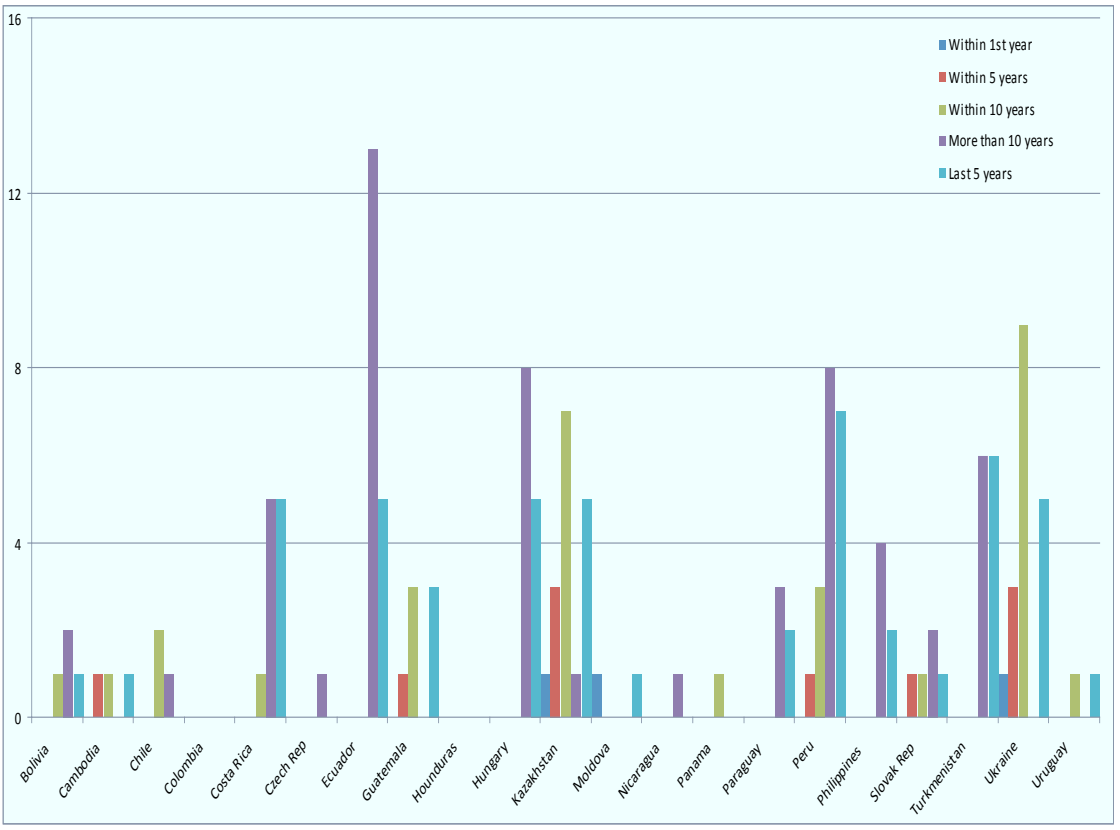
iv. Membership's Consequences on Investment Claims

One major concern for contracting states is whether membership to ICSID will inevitably bring a major number of claims against that state.

The following graphic represents many Latin and Central American Countries as well as Eastern European ones, with a special reference to those who joined ICSID recently. The data gathered and represented in the graphic, are those available on the ICSID website only. The study has considered trends in investment claims registered against a state by foreign investors in the following time periods: a) Claims registered within the first year of ICSID ratification, b) Claims registered within 5 years from that date, c) Claims registered within 10 years, d) Claims registered 10 years after the ratification of ICSID and e) Claims registered in the last 5 years (2007-2012).

[215] See, *Mr Franck Charles Arif v Republic of Moldova,* ICSID Case No ARB/11/23 of 23/08/2011.

Figure 2: Trends in Investment Claim Increase after Member States' Ratification of the ICSID Convention



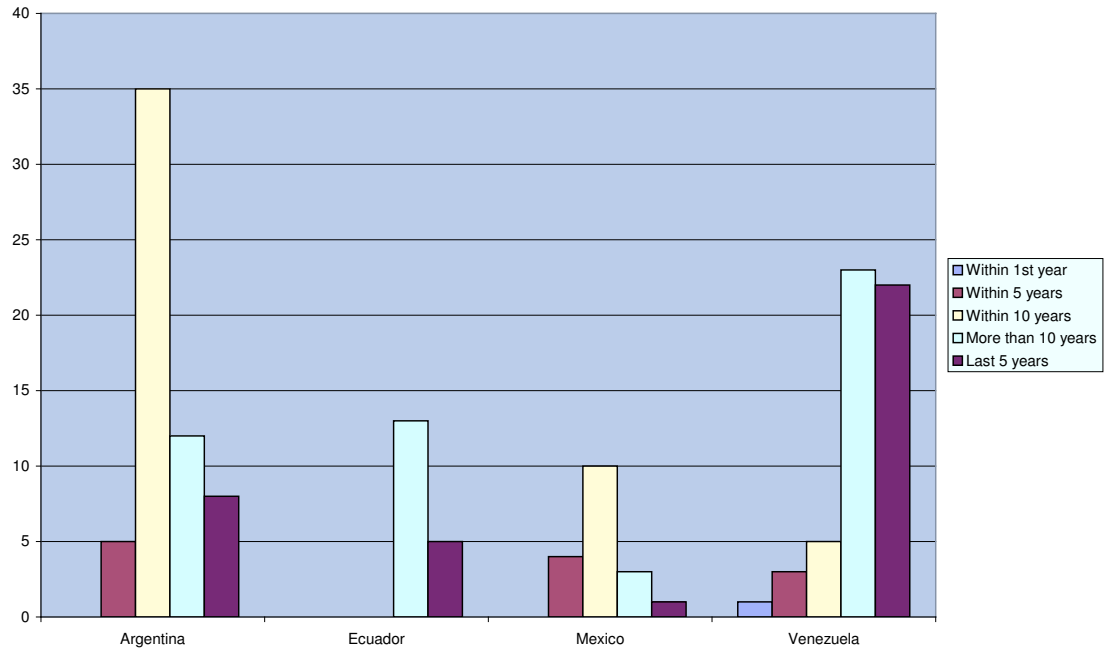
It can easily be spotted that the highest number of claims registered against states takes place after 10 years from the ratification of the ICSID Convention. There is also considerable rise in investment claims within 10 years from ratification. However, one element to be considered is that there is not an immediate increase of investment claims after ratification as there are only few cases initiated within 1 or 5 years from the date of ICSID ratification in those countries. Lastly, there is a trend of investment claims decrease in the last five years, notwithstanding global economic crises.

The following graphic shows the trends in investment claims for Argentina, Venezuela, Ecuador and Mexico only, considering their position as top responding states in investment claims as of 2012.[216] Again the data gathered refers to ICSID sources exclusively. Though Mexico is not a

[216] UNCTAD, "Latest developments in investor-state dispute settlement", IIA Issue Note No 1, April 2012, p. 17.

member of ICSID, its trends of investment claims under ICSID/AF have been added in order to compare that tendency with ICSID claim's tendency.

Figure 3: Trends in Investment Claims in Top Responding Countries



v. Conclusions

By joining ICSID, Mexico can spread a global message to its investor partners consisting of:

- Mexico intends to create sound grounds for investments made on its territory.
- Mexico grants foreign investors not only formal protection through BITs/FTAs, but also the means to achieve that protection. It gives foreign investors access to a dispute settlement mechanisms tailored for investor- state disputes which makes effective the BITs/FTAs formal protection.
- The tendency of investment claims against Mexico experienced under ICSID/AFR reflects the tendency of investment claims registered against other countries under ICSID. As a result, the future situation would not be unpredictable for the Mexican government.
- Mexico is already a top-responding state in investment disputes and was ranked third in 2010. The choice for ICSID non-signature did not prevent this from happening. This fact demonstrates that there is no clear link between ICSID membership and increase of

investment claims against a country. In practice, investment claims can hit the reputation of a country by passing through the back door, i.e., through other arbitration rules.

b. Recent Denunciations of the ICSID Convention

i. State of Play in South America

Three South American countries have denounced their respective membership to the ICSID Convention: Bolivia in 2007, Ecuador in 2009, and Venezuela's denunciation will come into effect at the end of June 2012. These denunciations have taken place in the context of economic and financial crises in South America, specifically Argentina, and a seismic shift in the political, economic, and strategic direction of many countries in the Latin and South America.

Venezuela, Ecuador, and Bolivia have all implemented political and economic reforms increasing the State's role in the economy. One effect of these reforms has been a wave of nationalising strategically important sectors and reducing foreign-owned investment. In response to State action and expropriation, several claims potentially worth billions of dollars have been registered with ICSID, specifically contesting the amount government's were and are willing to pay in compensation for their nationalisation schemes.[217] In an effort to send a strong political message, as well as to limit their future obligations and arbitration claims, these three states withdrew from the ICSID convention.

All three denouncing States have criticised ICSID for an alleged bias of the institution and/or the arbitrators that make up ICSID Tribunals. The institution is alleged to harbour a bias favouring the interests of transnational and multinational corporations and foreign investors (usually from Western, developed capital-exporting States) over those of the responding government.[218] Venezuela argued that in the 234 cases brought before ICSID, 232 favoured transnational

[217] Sergey Ripinsky, "Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve." *Investment Treaty News* (April 13 2012) Issue 3. Volume 2.

[218] At the Presidential Summit of April 2007 in the context of the *Alternativa bolivarianas para las americas y caribe* (ALBA), Bolivia, Nicaragua, and Venezuela jointly declared to denounce the ICSID Convention specifically for this reason. See also: Fernando Cabrera Diaz, "Bolivia expounds on reasons for withdrawing from ICSID arbitration" (27 May 2007) *Investment Treaty News*.

interests.[219] Noting that these criticisms are politically motivated and serve policy objectives, they are not entirely without merit and have solicited much debate and studies on the negative consequences of investment arbitration for States.[220] Nonetheless, such criticisms are not unique to the ICSID arbitration facility and are generally applicable to the international investment arbitration system.

Argentina and Nicaragua have also vocalised their frustrations with ICSID, however rather than denouncing the conventions, they have taken measures to limit the direct applicability of ICSID awards and the reach of investment arbitration. Rather than denouncing ICSID, these two countries have implemented measures such as constitutional reforms or amendments to legislative provisions limiting the direct applicability of ICSID awards.[221]

Unlike the three denouncing countries, Argentina faced a disastrous economic crisis from 1999 to 2003, and defaulted on its foreign debt crippling the value of the Argentine Peso. The subsequent ripple effects had serious implications not only for investors awarded with concession contracts but also for the general economic stability of investment in Argentina. As many investments were made under the umbrella of Argentinean BITs, over 40 ICSID cases have been filed against Argentina before ICSID.

Currently a respondent to some 20 pending cases[222] before ICSID, Argentina has delayed payment and refused to recognise the enforceability of ICSID awards. Based on its

[219] Elisabeth Eljuri, Ramón J. Alvins S., Gustavo A. Mata " Venezuela denounces the ICSID Convention" (January 2012)Norton Rose <http://www.nortonrose.com/knowledge/publications/62427/venezuela-denounces-the-icsid-convention> accessed 29 April 2012

[220] See among others: Olivia Chung "The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration" (2007) 47 *Virginia Journal of International Law* 953; Ibironke T. Odumosu, "The Antinomies of the (Continued) Relevance of ICSID to the Third World" (2007) 8 *San Diego International Law Journal* 345; Gus Van Harten "Contributions and Limitations of Empirical Research on Independence and Impartiality in International Investment Arbitration" (May 2011) Volume 1, Issue 4 *Oñati Socio-Legal Series*.; Gus Van Harten, "The Public—Private Distinction in the International Arbitration of Individual Claims against the State" (March 2007), Volume 56, Issue 2, *International and Comparative Law Quarterly*

[221] Katia Fach Gomez, "Latin America and ICSID: David Versus Goliath?" (2011) 17 Law & Bus. Rev. Am. 195, 209.

[222] Sergey Ripinsky, "Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve." *Investment Treaty News* (April 13 2012) Issue 3. Volume 2. ; At one point in time Argentina had over 30 pending cases before ICSID. See: http://www.iareporter.com/articles/20110201_9

Constitutional law,[223] Argentina refuses to accept some awards arguing that international treaties are subordinated to the Argentine Constitution and thus must be recognised by the domestic judiciary to be enforceable.[224] Interestingly, Bolivia, Ecuador, and Venezuela have all implemented constitutional reforms replicating Argentina's constitutional principle re-instating elements of the Calvos Doctrine and protecting States against the prospect of directly applicable ICSID awards.

Nicaragua, on the other hand has been sable rattling, with very little concrete action and justification other than popular political rhetoric. At the Presidential Summit of April 2007 of the *Alternativa bolivarianas para las americas y caribe* (ALBA), Nicaragua, Bolivia, and Venezuela jointly declared to denounce the ICSID Convention, with only the latter two fulfilling their commitment. Again in April 2008, the Attorney General of Nicaragua announced that the country was considering denouncing the ICSID Convention, however such a threat has not yet come into fruition.[225]

ii. The Process of Denunciation and Resulting Legal Issues

In accordance with the Vienna Convention on the Law of Treaties of May 22, 1969 and the Vienna Convention on the Law of Treaties between states and international organizations or between international organizations of March 21, 1986, signatories to a treaty are able to withdraw from that same treaty provided that the necessary provisions are laid out. [226] This has become a practice of customary international law and applies to the signatories of the ICSID Convention.[227] Article 71 of the ICSID Convention outlines the denunciation provision, and requires that a State provide a written notice to the Secretariat. The denunciation takes effect six

[223] Argentina's reasoning is based on the interpretation of Article 27 of the 1863 Constitution and Article 75 of the reformed 1994 Constitution.
[224] Carlos E. Alfaro & Pedro Lorenti, "Argentina: Argentina vs ICSID: Unconstitutionality of the BITs and ICSID Jurisdiction - the Potential New Government Defenses Against the Enforcement of the ICSID Arbitral Award - Issues That May Subject the Award to Revision by the Argentine Judiciary.", (May 17, 2005) MONDAQ See: http://www.mondaq.com/article.asp?articleid=32539
[225] Katia Fach Gomez, "Latin America and ICSID: David Versus Goliath?" (2011) 17 Law & Bus. Rev. Am. 195, at 209.
[226] Emmanuel Gaillard, "The Denunciation of the ICSID Convention" (June 26 2007) Vol. 237 no. 122 *New York Law Journal*.
[227] Ibid.

months after a notice is received; however during that six month period, claims involving the denouncing party before the arbitration centre can still be accepted by the Secretariat.

Much debate has arisen over how to interpret Article 72 of the ICSID Convention and whether a party can be subject to cases before ICSID even after they have denounced the ICSID Convention. The lack of arbitration awards directly addressing this issue have resulted in three possible interpretations.

A first interpretation suggests that that only disputes where both parties give mutual consent before the denunciation of the Convention fall within the scope of the jurisdiction of the Centre.[228] De facto, consent ends of the date on which the Secretariat receives the denunciation.

A second interpretation is that of Article 72 is that consent to arbitration is effective in accordance with Article 71, six months after the receipt of notice of a denunciation of the Treaty.

A third interpretation is that article 72 offers unilateral consent to ICSID arbitration as long as the BIT remains in effect. Upon examination of the exact wording of each investment protection treaty, a state may have given unqualified consent to the treaty (as opposed to an agreement to consent) in which case the rights and obligations attached to consent are not affected by the denunciation of the ICSID Convention.[229] This situation poses problems when the effect of an investment treaty is subject to a survival clause, which can last between 10 to 20 years. In such cases, even after the denunciation of the ICSID Convention, a state's consent to ICSID arbitration may remain in effect.

There is inconsistent case law addressing the interpretation and legal application of Article 72 of the ICSID Convention. Most denouncing State's have tried to amicably resolve existing disputes out of arbitration, and renegotiate their BITs. In the *E.T.I. Euro Telecom International N.V. vs. Republic of Bolivia* the complaint was registered on 31 October 2007, a few days before the

[228] See: C Schreuer, L Malintoppi, A Reinisch, A Sinclair, *The ICSID Convention: a Commentary*, (2nd ed., Cambridge University Press 2010), Article 72, Para. 4.
[229] Emmanuel Gaillard, "The Denunciation of the ICSID Convention" (June 26 2007) Vol. 237 no. 122 *New York Law Journal*.

denunciation of Bolivia to the ICSID Convention took effect. Although there was a discontinuance of proceedings pursuant to Rule 44, the decision is marred by political drama and offers little clarity on a predictable outcome or which interpretation ICSID arbitrators would support.[230]

Furthermore, there is little consensus within the international community on which legal interpretation should be applied. Most scholars support the 6-month interpretation, however there is a growing sentiment and openness to support the survival clause interpretation. Until the development of new case law, this issue remains an open question

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[230] Christian Tietje *Once and Forever? The Legal Effects of a Denunciation of ICSID*. (March 2008) Institute of Economic Law, Martin Luther University Halle-Wittenberg.

Table 15: Considerations for ICSID Denunciations

	RELEVANT DATES	PROCESS/ LEGAL JUSTIFICATION	REASONS STATED	OTHER CONSIDERATIONS
Bolivia	- Signed 3 May 1992 - Ratification 12 August 1994 - Denunciation submitted 2 May 2007 - Took effect 3 November 2007	ICSID Arbitration contradicts Articles 24 and 135 of the Bolivian Constitution[231]	Sites complexity, opacity, lack of neutrality, the high cost, and inability to appeal an award in the ICSID System[232]	- Electoral standing; political platform and electoral rise to is seen to stem from the Cochabamba protests against privatisation reforms by the World Bank [233] - Economic reforms including the nationalisation of the hydrocarbon industry and other key sectors resulted in many large investment disputes [234]
Ecuador	- Signed 15 January 1986 - Ratification 14 February 1986 - Denunciation submitted on 6 July 2009 - Took effect on 7 January 2010	Ecuadorian Executive Decree[235] from President Correa referred to Article 422 of the 2008 Ecuadorian Constitution prohibiting Ecuador from concluding treaties or international instruments that submit the State to international arbitration[236]	Bias of the ICSID courts and of the World Bank system,[237] and a breach of sovereignty[238]	- Economic reforms including the nationalisation of some petroleum, mining and other natural resource sectors,[239] and an increased tax on foreign oil companies[240] - Resulted in investment claims worth billions of dollars[241] - To note: Ecuador is terminating and re-drafting many of its BITs,[242] and President Correa threatened to expel any foreign

[231] Katia Fach Gomez, "Latin America and ICSID: David Versus Goliath?" (2011) 17 Law & Bus. Rev. Am. 195, 209.
[232] Ibid.
[233] Silvia Karina Fiezzoni, "The Challenge of UNASUR Member Countries to Replace ICSID Arbitration" (2011) *Beijing Law Review*, 2, 134-144, 137.
[234] Ibid.
[235] see: *Registro Oficial No. 632,* REVISTA JUDICIA, Jul.13, 2009, http://www.derechoecuador.com/index.php?option=comscontent&task=view&id=5048&Itemid=540#No1823.
[236] Republic of Ecuador: Constitution of 2008 art. 422, (Ecuador) *available at http://*pdba.georgetown.edulConstitutions/Ecuador/ecuador08.htrnl.
[237] Fernando Carbrera Diaz, "Ecuador continues exit from ICSID." (8 June 2009) *Investment Treaty News*. See: www.iisd.org/itn/2009/06/05/ecuador-continues-exit-from-icsid/
[238] Ibid.
[239] Joshua M. Robbins, "Ecuador withdraws from ICSID Convention" (12 August 2009) *Practice Law Company*. See: http://arbitration.practicallaw.com/2-422-1266
[240] Ibid.
[241] Jessica March, "CSIS Hemisphere Highlights" (June 2009) Vol. VIII Iss. 6 at 7, see: http://csis.org/files/publication/hh_09_06_0.pdf
[242] Katia Fach Gomez, "Latin America and ICSID: David Versus Goliath?" (2011) 17 Law & Bus. Rev. Am. 195, at 216.

				companies that initiate arbitration proceedings against Ecuador[243]
Venezuela	- Signed 18 August 1993 - Ratification 1 June 1995 - Denunciation submitted on 12 January 2012 - Will take effect on 25 July 2012	Venezuela's constitutional mandate as per Article 151 of the 1999 Constitution[244] which invalidates any consent to ICSID jurisdiction under the ICSID Convention	States that Venezuela "acted with the purpose of protecting the right of the Venezuelan people to freely choose their strategic economic and social orientations" citing that ICSID has "favored transnational interests in 232 of the 234 cases brought before it"[245]	- Chavez's broad economic and political reforms resulted in nationalization of domestic and foreign-owned assets in some sectors including petroleum, steel, agribusiness, and banking[246] - Resulted in many investment disputes, mainly regarding the amount of compensation offered by government, which usually awards the book value (i.e. the amount invested) as opposed to the market value (present value of future cash flows) of the asset - Currently has 20 ICSID cases pending (ICSID and ICSID AFR) - Sends a political message to the international investment community, setting a precedent for future awards; the message is also directed to a domestic audience appealing to anti-transnational corporation sentiment - To note: terminated Venezuela-Netherlands BIT which served as the basis for 10 ICSID cases[247]

[243] Joshua M. Robbins, "Ecuador withdraws from ICSID Convention" (12 August 2009) *Practice Law Company*. See: http://arbitration.practicallaw.com/2-422-1266

[244] Article 151**:** *All public interest contracts, if appropriate in accordance with their nature, shall be deemed to include, even if not expressly stated, a clause according to which all questions and controversies which may arise concerning such contracts and which may not to be resolved amicably by the contracting parties shall be decided by the competent courts of the Republic, in accordance with its laws, and under no circumstance or motive may give rise to foreign claims.*

[245] Elisabeth Eljuri, Ramón J. Alvins S., Gustavo A. Mata " Venezuela denounces the ICSID Convention" (January 2012)Norton Rose <http://www.nortonrose.com/knowledge/publications/62427/venezuela-denounces-the-icsid-convention> accessed 29 April 2012

[246] Sergey Ripinsky, "Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve." (April 13 2012) Issue 3. Volume 2 *Investment Treaty News*

[247] The Netherlands is often used by firms from other countries for incorporating holding companies and structuring investments.

iii. Conclusions

- Bolivia, Ecuador and Venezuela have all implemented political and economic reforms nationalizing strategically important sectors and reducing foreign-owned investment. In order to minimize the wave of claims brought before ICSID, generally over violations of State expropriation, these three countries denounced the ICSID Convention.
- The denouncing States and Nicaragua have targeted ICSID as a political symbol to appeal to domestic populist, leftist sentiment in their respective countries, and as a means to support their domestic economic reforms. Such economic reforms and policies are unlikely to take place in Mexico.
- Due to its economic crisis, Argentina is the one country most affected by ICSID claims however has *not* denounced ICSID. Also implementing economic reforms to nationalize key sectors, Argentina has taken practical measures to negotiate with ICSID claimants to dismiss claims, and minimized the enforceability of ICSID awards through a constitutional interpretation that bolsters its State sovereignty.
- The current legal uncertainty on how to interpret Articles 71 and 72 of the ICSIC Convention make it impossible to predict the actual effect of denouncing ICSID. Irrespective, investment claims can still be brought before the denouncing countries through other arbitration facilities.

2. Mexico in Investment Arbitration Disputes

a. Mexican Investors as Claimants

i. Mexican Companies and their Investments Abroad

Referring to web resources,[248] there has been 80% growth in Mexican investment abroad in 2010 as compared to 2009. In 2011, Foreign Direct Investment made by Mexican companies amounted to around US$14 billion. This placed Mexico among

[248] For more, see http://www.mexicanbusinessweb.com/english/noticias/comercio.phtml?id=5617 accessed 28 March 2012.

top investors abroad between emerging economies referring to World Bank Data.[249] Furthermore, Mexico's stock of direct foreign investment abroad has increased considerably in the last five years as shown by the following:

Country	2007	2008	2009	2010	2011
Mexico	39,010,000,000	46,700,000,000	53,460,000,000	62,930,000,000	84,920,000,000[250]

As can be seen from these data, the increase of stock in 2011 (compared to 2010) was even higher than the increase that Mexico experienced in 2010 (compared to 2009).

In order to have a clear idea as to the major Mexican actors in foreign direct investment abroad, suffice it to say preliminarily that there are about 20 multinational Mexican companies doing business in different jurisdictions of the World.[251] To illustrate the above, an indicative table of Mexican companies' names, their foreign business destinations and the sectors in which they operate is offered to the reader,[252] in order to assist them understand better the role of Mexican companies as foreign investors abroad.[253] Business destinations not covered by Mexican BITs, FTAs and investor-State dispute settlement provisions are represented by red coloured names.

Table 16: Mexican Companies Investing Abroad

COMPANY NAME	COUNTRY OF DESTINATION	BUSINESS INDUSTRY/SECTOR
Altos Hornos	Israel*[254]	Steel and metal products
América Movil	Guatemala, Ecuador, Argentina, Brazil, Colombia, Venezuela Puerto Rico,USA, Spain.[255]	Telecommunication Sector

[249] For more, see http://www.mexicaliindustrialpark.com/2011/?p=3462 which refers to "World Investment and Political Risks 2011", published by the World Bank last December, accessed 28 March 2012.
[250] CIA's resources placed Mexico 27th in stock of foreign direct investment –abroad, with a total of 84,920,000,000 US dollars in 2011. Information available on the following: https://www.cia.gov/library/publications/the-world-factbook/rankorder/2199rank.html, accessed 03 April 2012.
[251] B.Sepulveda, "Mexico and the Settlement of Investment Disputes: ICSID as the recommended option", (2005) 5 Pepperdine Dispute Resolution Law Journal 2, Article 9, p. 408.
[252] The authors do not consider this table to be exhaustive.
[253] Data represented in the table are collected from the following resources: J.G. Vargas- Hernandez, "Strategies and performance of new Mexican emerging multinational enterprises" available at: http://www.ecprnet.eu/databases/conferences/papers/125.pdf, accessed 11April 2012; Vale Columbia Center, "Striving to overcome the economic crisis: Progress and diversification of Mexican multinationals' export of capital", (Report), 28 December 2011; OECD Emerging Markets Network Working Paper "The emergence of Latin Multinationals", OECD Development Centre, (2007).
[254] There is a FTA between Mexico and Israel, but there is no investor-state dispute settlement provision included in the FTA.

COMPANY NAME	COUNTRY OF DESTINATION	BUSINESS INDUSTRY/SECTOR
Cementos Chihuahua	Bolivia and other	Non-metallic minerals
CEMEX	Operates in more than 50 countries, including Latin America, USA, England, Spain, Egypt, Philippines and Indonesia.[256]	Cement
Elektra	Not available	Retail trade
Gruma	Asia & Pacific, East % Central Europe, Latin America, North America, Russia,	Food and beverages
Grupo ALFA	USA, Japan, Europe, South America[257] and 2 companies in China and India respectively.	Different sectors including: automobile products, petrochemical products and food sector.
Grupo Bimbo	Operates in 22 countries in Latin America, Europe, East Europe and Asia, including China.	Baked food products
Grupo Carso	Not available	Telephone services
Grupo FEMSA	Latin America mainly and lately Canada and United States and Panama.	Food and beverages
Grupo Maseca	Asia and Oceania; considering also Russia, Africa, China	Tortilla and corn flour market
Grupo México	USA, Israel*, Peru, Bolivia, Ecuador, Chile and Argentina.[258]	Mining
Grupo Modelo (Corona)	140 markets worldwide	Brewery
Grupo Televisa	Latin America, USA, Spain.	Media production & telecommunications
Grupo VITRO	Hispanic market including Portugal, Spain, Colombia	Glass & non-metallic minerals
ICA	Latin America, USA	Civil engineering services
IMSA	Latin America, USA, Africa, Asia, Europe, Australia	Steel and metal products
Interceramic	Texas (USA), China (lately)	Floor and ceramic items & installation items
KUO	Including China and India[259].	Diversified
Mexichem	Operates in 18 countries including USA, Peru, Panama, Guatemala, Ecuador, Costa Rica, Brazil, Chile, Taiwan, Japan, Korea	Chemicals and petrochemicals
Pemex	Texas (USA)	Oil and Gas (state-owned)
TELMEX	USA, Portugal	Telephone (mostly fixed)

[255] OECD Emerging Markets Network Working Paper, "The emergence of Latin Multinationals", OECD Development Centre, (2007), p. 17.
[256] Ibid., p. 16.
[257] Ibid., p. 17.
[258] Vale Columbia Center, "Striving to overcome the economic crisis: Progress and diversification of Mexican multinationals' export of capital", (Report), 28 December 2011, available at: http://ru.iiec.unam.mx/1115/1/EMGP-Mexico-Report-2011-ingles.pdf, p. 24.
[259] Ibid., p. 28.

These data show that the position of Mexican investors abroad is relevant especially in the following geographic areas: USA, Latin and Central America, Europe, Asia, the Pacific and other emerging economies like China and India. There is only one geographic area completely excluded as a business destination for Mexican investors represented by Africa.

It is also relevant to underline the fact that outward FDI policies of major Mexican multinationals are not supported by the Mexican government for their business initiatives abroad and there is "*no specific strategy to promote Mexican investment abroad*".[260] Nonetheless, Mexican investors have not limited themselves from expanding globally their strategies and there is call for a bigger attention to be given to their protection needs.

Since the starting of trade liberalization process in Mexico (1990), another element of Mexican companies' business, Mexican exports, increased considerably but most importantly, it increased faster than Mexican imports with a value of 465% in the period going from1993 to 2008.[261] This was due to the Mexican market openness and relevant number of FTAs signed with country counterparts. Mexico's main exporting partners are: European Union, Japan, Chile, Guatemala and NAFTA countries, with the USA being the primary destination of Mexican exports.[262]

Table 17: Mexico's Import and Export Trading Partners[263]

Country	Mexico imports from	Mexico exports to
USA[264]	48%	81%
China	6%	6%
European Union	12%	6%
Japan	5%	1%
Other trading partners	29%	6%

[260] Ibid., p. 7.
[261] M. Angeles Villarreal, "Mexico's free trade agreements", (CRS Report for Congress R40784), 12 July 2010, available at: www.crs.gov, p. 11.
[262] See table for more info on the exports amount in million dollars (US) as of 2009.
[263] The table is prepared using the data available on CRS Report for Congress R40784 available at: www.crs.gov accessed 15 April 2012.
[264] M. Angeles Villarreal, "Mexico's free trade agreements", (CRS Report for Congress R40784), 12 July 2010, available at: www.crs.gov, accessed 11 April 2012, p.13.

Referring to the same data, the main Mexican exporting sectors in 2009 cover the following[265]: crude petroleum oil, flat screen TV sets, Automobiles, Mobile telephones and gold products. The reason why we are also considering exports flows alongside investment flows in our analysis is its interaction with investment and this is supported by one of the latest cases involving Mexican "traders" and their argument for "investor" qualification under NAFTA Chapter 11. This issue will be dealt with in the following section.

ii. Mexican Companies and their Investment Claims

As we saw earlier, Mexican companies do business in different jurisdictions of the world, but not all jurisdictions are covered by an Investment Treaty (BIT/IIA/FTA) in force between Mexico and the host states. Mexico has signed 28 BITs and 14 FTAs to secure investment protection to its investors abroad. Nonetheless, Mexico falls behind many other countries with respect to the number of IT signed.[266] Many Mexican businesses face the risk of not being covered by any investment protection treaty if involved in disputes with the host countries where they operate. This situation creates uncertainties for Mexican investors' rights and their protection abroad and subjects their businesses abroad to high political risks.

In order to evade the above mentioned inconvenience, Mexican corporations can be established under the laws of a third country and gain protection from BITs signed by them with the host country of their operation. Consequently, there are examples of Mexican companies involved in investment disputes with host countries under third countries BITs. The most relevant example is represented by *CEMEX Caracas Investment and CEMEX Caracas Investment II v Bolivarian Republic of Venezuela* Case[267] which was filed under the Netherlands-Venezuela BIT. The claimant was incorporated in the Netherlands and indirectly owned CEMEX Venezuela. The dispute began in 2008 and after an upheld award on the jurisdiction of the arbitral tribunal, the Venezuelan government agreed to settle the dispute and pay the investor

[265] Ibid., p. 11.
[266] For comparative purposes, consider the high number of BITs signed by Germany, UK and USA amounting to more than one hundred in some cases.
[267] *CEMEX Caracas Investment and CEMEX Caracas Investment II v Bolivarian Republic of Venezuela,* ICSID Case No ARB/08/15, 30/10/2008.

the sum of $600 million[268]. This is the only public available case involving a Mexican investor protected under a third country BIT. Nonetheless, there are rumours[269] on another ICSID case involving a Mexican company, *GRUMA*, filed under Spain-Venezuela BIT. The object of the dispute concerns GRUMA, a Mexican company which handles investments in MONACA through its Spanish subsidiary, Valores Mundiales. MONACA was subject to the Expropriation Decree of 12.05.2010 of the Venezuelan government and the claimant argued violation of the BIT in force between the two countries. In addition to these cases, there is a third one filed by *Cemex Asia Holdings v Republic on Indonesia.*[270] Further information on this case is not publicly available and it is not possible to find out which BIT was under scrutiny in that case. Again, the dispute was settled between the parties.[271] To sum up the above information with regard to Mexican investors involved in investment claims under third country BIT, see the following:

Table 18: Mexican Investors' Filed Claims under Third Countries' BITs

Case	Claimant	Outcome of the dispute
Cemex v Venezuela ICSID Case ARB/08/15 Netherlands-Venezuela BIT	**Cemex Caracas Investment** and **Cemex Caracas Investment II- Mexican companies,** incorporated in the **Netherlands** and indirectly owning **Cemex Venezuela**	2008-2010 Award on jurisdiction: upheld **Settlement**: the Venezuelan government agreed to pay $600 million to Cemex[272]
Cemex Asia Holdings v Republic of Indonesia ICSID Case ARB/04/3 Unknown BIT	**Cemex Asia Holding**	2004- 2007 **Settlement**
Gruma v Venezuela ICSID Case No= not available Spain- Venezuela BIT	**Gruma, a Mexican company,** handles investments in MONACA through its Spanish **subsidiary, Valores Mundiales.** MONACA was subject to the Expropriation Decree of 12.05.2010 of the	**Data not available**. It is not possible to find the case in ICSID website, though commentators affirm that the Spanish company sued Venezuela before ICSID[273]

[268] For more, see http://www.reuters.com/article/2011/12/01/venezuela-mexico-cemex-idUSN1E7B00FX20111201, accessed 16 May 2012.
[269] It is not possible to find the case on the ICSID website. However, commentators affirm that the Spanish company sued Venezuela before ICSID, see Vale Columbia Center, "Striving to overcome the economic crisis: Progress and diversification of Mexican multinationals' export of capital", (Report), 28 December 2011, available at: http://ru.iiec.unam.mx/1115/1/EMGP-Mexico-Report-2011-ingles.pdf, p. 25.
[270] See, *Cemex Asia Holdings v Republic of Indonesia*, ICSID Case No ARB/04/3 of 17/01/2004.
[271] For reference, see http://icsid.worldbank.org/ICSID/FrontServlet accessed 4 May 2012.
[272] For reference, see http://www.reuters.com/article/2011/12/01/venezuela-mexico-cemex-idUSN1E7B00FX20111201, accessed 4 May 2012.
[273] Vale Columbia Center, "Striving to overcome the economic crisis: Progress and diversification of Mexican multinationals' export of capital", (Report), 28 December 2011, available at: http://ru.iiec.unam.mx/1115/1/EMGP-Mexico-Report-2011-ingles.pdf, p. 25.

Case	Claimant	Outcome of the dispute
	Venezuelan government	

Other than the above, there are other international conflicts engaging Mexican companies abroad and there is potential for future investment claims in these cases too. Examples can be found in the following conflicts involving investor's rights:

Table 19: Mexican Investors' Conflicts/Future Disputes

Conflict/Future dispute	Harmed Party/Future Claimant	Status of the conflict
Grupo Mexico v Peru (conflict on excessive use of water and environmental impact assessment in Arequipa, Peru)	**Grupo Mexico,** involved in a mining project in Arequipa (Peru) through its **subsidiary Southern Copper Peru, registered under Peruvian Law**[274]	The **project** is temporarily **suspended** and the company is considering taking the investment project elsewhere.[275]
Cementos de Chihuahua v Bolivia (conflict on confiscation of assets by way of government Decree)	**Cementos de Chihuahua, a Mexican company,** owned 47% of the shares of **Fabrica Nacional de Cementos S.A.** The later was confiscated on the basis of governmental Decree of September 2010[276]	Legal uncertainty and lack of clarity on conflict extension lead Cementos Chihuahua to **sell its assets** to a company based in Peru. It is believed that an arbitration claim may follow.[277]

When considering investment disputes involving Mexican investors, special attention should be given to NAFTA cases given the strong economic relations between NAFTA partners. Though under NAFTA, Mexico has been mostly responding in investment disputes, there are cases involving Mexican investors claiming violation of their rights. Among them, some are still pending and represent political implications as well. See the following for more details:

Table 20: Mexican Investors' NAFTA Claims

Case	Claimant	Outcome of the dispute
CANACAR v USA[278]	**CANACAR**, a trade association	**Pending**[279];

[274] For reference, see: http://www.southernperu.com accessed 4 May 2012.
[275] For reference, see: http://www.mineweb.com accessed 6 May 2012.
[276] Vale Columbia Center, "Striving to overcome the economic crisis: Progress and diversification of Mexican multinationals' export of capital", (Report), 28 December 2011, available at: http://ru.iiec.unam.mx/1115/1/EMGP-Mexico-Report-2011-ingles.pdf, p. 26.
[277] See: http://www.globalarbitrationreview.com, accessed 6 May 2012.
[278] This case is also interesting for the purposes of definition of "investment" given the argument that the claimant is using to qualify "cross-border trucking" as an "investment" under NAFTA Chapter 11. The claimant relies on payment of fees to a national Agency and for that reason it claims the "cross-border trucking services" constitutes an "investment".
[279] The dispute is strictly confidential. Consultants on this case and lawyers of the claimant could not comment on the content of the dispute. Nonetheless, some recent updates on the status of the dispute

Case	Claimant	Outcome of the dispute
Notice of Intent: 02.04.2009 UNCITRAL NAFTA Chapter 11	representing individual **Mexican carries** in the cross-border trucking services	The claimants argue that the US government restriction on cross-border services of the Mexican trucking industry, violate NAFTA provisions. On the same matter, an arbitral tribunal[280] decided on "*In the matter of cross-border Trucking Services*" and confirmed violations of Article 1105 NAFTA by the US government, pursuant NAFTA Chapter 20. The claimant in CANACAR dispute also relies on this earlier decision of NAFTA panel to support its argument in the pending dispute.
Cemex v USA Notice of Intent: September 2009 NAFTA	**Cemex, a Mexican** cement **company** doing business in the state of Texas (USA)	**Pending**[281] NAFTA Chapter 11
Signa S.A de S.V v Canada Lawsuit against Canada; Notice of Intent was never filed 04.03.1996 NAFTA	**Signa, a Mexican** drug **manufacturer** doing business in Canada	**Withdrawn**[282] NAFTA Chapter 11

Although the analysis focuses only on three cases, the number of investors involved is much higher. Suffice here to mention that CANACAR, a trade association, represents more than 4.500 trucking companies and this is huge number of investors represented in a NAFTA claim. On the other hand, cross-border trucking services, cement and drug manufacture are among the most profitable services for the Mexican economy. Limitations and restrictions on both trade and investment in those sectors can have a negative impact on the economic growth of the country, employment and national GDP.

can be recovered from www.citizen.org as of August 2011. Referring to the later, the Mexican claimants have asked $6 billion in damages for restrictions on the operation and investment of Mexican carries in the US territory and the dispute is still pending.

[280] On 6 February 2001, an arbitral tribunal decided on the State-to-State dispute, pursuant Chapter 20 NAFTA, Secretariat File No USA-MEX-98-2008-01 available at: http://www.worldtradelaw.net/nafta20/truckingservices.pdf , accessed 14 April 2012.

[281] Again, the only public available information can be found at: www.citizien.org, "Table of foreign investor-state cases and claims under NAFTA, CAFTA and PERU FTA", (October 2011), accessed 14 April 2012.

[282] For reference, see: http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/gov.aspx?view=d, accessed 14 April 2012.

Unfortunately, there are no awards in favour of Mexican investors under NAFTA, as can be observed from the above. In addition, Mexican investors either settle their disputes with the host countries or withdraw them. Finally, with reference to the case law involving Mexican investors, we have to consider that not all the data is available. First of all, the UNCITRAL awards are confidential and all claims involving Mexican investors under the UNCITRAL Rules cannot be easily accessed. We don't know how many awards have been decided and whether they were in favour or against the Mexican claimants.

iii. Conclusions

- Mexican private investors initiate proceedings against host states under third country BITs or NAFTA Chapter 11;
- Often, Mexican investors choose the Rules of UNCITRAL system to govern the disputes on investment;
- In none of the cases mentioned above have the Mexican investors had an award in their favour, or an award at all;
- The publicly available cases show that the disputes have been withdrawn, settled or are still pending.
- Mexican investors abroad lack sufficient protection.
- By signing ICSID, Mexico can assist its foreign investors abroad whose number is consistently increasing. This protection indirectly supports Mexican economy and increases the chances of investments expanding and turning back in Mexico for the benefit of the Mexican community.

b. Mexico as a Responding State

Since 1999, Mexico has been a respondent in 14 cases using the ICSID AFR and the UNCITRAL Rules.[283] During this time, all but two cases have been under the NAFTA against American and Canadian companies, and in total Mexico has had a 50% success rate in winning investment arbitration awards. Of the 14 cases, seven appeals have been made to national courts, five by Mexico. This data demonstrates

[283] When evaluating the present data, one must take into account it limitations – primarily the unique nature of the facts before the Tribunal, as well as the constitution of a new ad-hoc Tribunal for each case.

Mexico's desire for an effective review mechanism for awards that do not swing in its favour.

Interestingly, none of the appeals for a review of investment arbitration awards made to national courts (predominately in Canada) have overturned a decision. This may be in part due to a reticence of the Canadian courts to interfere in investment arbitration proceedings.[284] For instance, in March 2012, the Supreme Court of Canada denied leave to appeal in the Mexico v. Cargill case.

Should Mexico ratify the ICSID Convention, it would effectively close the option to seek appeal in the national courts and open the door to a review by an appointed ad-hoc Tribunal within the ICSID System. As stated above in the section addressing stability of awards under annulment and setting aside of awards, ad-hoc tribunals are more likely to overturn investment arbitration awards than national courts. Although this may be beneficial to Mexico with respect to their tendency to appeals, it may also open the possibility that an increase of appeals by investors, and consequently overturn cases favourable to Mexico.

Conclusions

- Under the ICSID AFR and UNCITRAL rules, Mexico has won 50% of the cases brought to international arbitration.
- Mexico has not been successful in reviewing awards by appealing to domestic national courts, however under the ICSID Convention, will have a greater success rate to review an award if appealed before an ICSID ad-hoc Tribunal.

[284] Andrew de Lotbinière McDougall and Mark A. Luz "Canadian Courts Uphold NAFTA Awards - Part II", (January 31, 2005) Vol. 15, No. 2, 10, North American Free Trade & Investment Report; Andrew de Lotbinière McDougall, Barry Leon and Daniel Taylor "NAFTA Countries Seeking to Set Aside 'Upstream Losses' Award: When Should Courts Intervene?" Vol. 21, No. 4, (February 2011) North American Free Trade & Investment Report.

Table 21: Mexico as a Respondent States in Chronological Order[285]

CASE	DATE	DISPUTE MECHANISM / RULES	APPLICABLE TREATY / BIT	FAVOURABLE RESULT FOR MEXICO?	REVIEWED
Azinian, Davitian, & Baca v. Mexico, **ICSID Case No. ARB (AF)/97/2.**	Award, 1 November 1999	ICSID AFR	NAFTA	Yes	
Waste Management, Inc. v. Mexico, **ICSID Case No. ARB(AF)/98/2**	Award on Jurisdiction, 2 June 2000	ICSID AFR	NAFTA	Yes	
Metalclad Corporation v. Mexico, **ICSID Case No. ARB(AF)/97/1**	Award, 30 August 2000	ICSID AFR	NAFTA	No – but award was partially set aside	-Review by British Columbia Supreme Court, 2 May 2001 which **partially set aside the award.** -Supplementary reasons for BCSC Decision, October 31 2001.
Feldman v. Mexico, **ICSID Case No. ARB(AF)/99/1.**	Awards, December 2002	ICSID AFR	NAFTA	No	- Correction and Interpretation of the Award, 13 June 2003 (not on substance) - Review by Ontario Supreme Court, 3 December 2003 which **dismissed Mexico's appeal** - Review by Ontario Court of Appeal, 11 January 2005 which **dismissed Mexico's appeal**
Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, **ICSID Case No. ARB (AF)/00/2**	Award, 29 May 2003	ICSID AFR	Spain/Mexico BIT	No	
Waste Management, Inc. v. United Mexican States **(Number 2), ICSID**	Award, 30 April 2004	ICSID AFR	NAFTA	Yes	

[285] See: http://italaw.com/alphabetical_list_respondant.htm; http://www.latinarbitrationlaw.com/mexico/#toc-anchor-5

Case No. ARB(AF)/00/3					
*Gami Investments, Inc. v. Mexico***.**	Award, 15 November 2004	UNCITRAL	NAFTA	Yes	
International Thunderbird Gaming Corporation v. Mexico	Award, 26 January 2006	UNCITRAL	NAFTA	Yes	Review by US District Court for the District of Columbia on petition to set aside award, 14 February 2007 which **dismissed the appeal**
*Fireman's Fund Insurance Company v. United Mexican States***, ICSID Case No. ARB (AF)/02/1.**	-Award on Jurisdiction, 17 July 2003. -Award, 17 July 2006.	ICSID AFR	NAFTA	Yes	
*Bayview Irrigation District et al. v. Mexico***, ICSID Case No. ARB(AF)/05/1.**	Award, 19 June 2007	ICSID AFR	NAFTA	Yes	- Review by the Ontario Superior Court of Justice 25 March 2008 which **dismissed the appeal**
Archer Daniels Midland Co. & Tate & Lyle Ingredients Americas Inc. and The United Mexican States **(ICSID Case No. ARB(AF)/04/5)**	Award, 21 November 2007	ICSID AFR	NAFTA	No	Decision on the Requests for Correction, Supplementary Decision and Interpretation (redacted version), 10 July 2008.
Corn Products International, Inc. v. United Mexican States, **ICSID Case No. ARB (AF)/04/1.**	Award, 18 August 2009 (not public)	ICSID AFR	NAFTA	No	Decision on the Correction and Interpretation of the Award, 23 March 2010 (not public)
*Cargill, Incorporated v. United Mexican States***, ICSID Case No. ARB(AF)/05/2.**	Award (redacted version), 18 September 2009	ICSID AFR	NAFTA	No	- Review by the Ontario Superior Court of Justice 26 August 2010 - Review by the Ontario Court of Appeal 4 October 2011 which **dismissed Mexico's appeal** - Supreme Court Decision on 10 May 2012 **refused to hear the Mexico's appeal**
*Gemplus S.A. and Talsud S.A. v. United Mexican States***, ICSID Case**	Award, 16 June 2010	ICSID AFR	France/Mexico BIT and	No	

Nos. ARB(AF)/04/3 and ARB(AF)/04/4			Argentina/Mexico BIT		
***Abengoa, S.A. y COFIDES, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/09/2)**	Pending; commenced in 2009	ICSID AFR			

Table 22 : Statistical Information of Mexico as a Respondent State (UNCITRAL and ICSID AFR)

No. of Cases with Mexico as the Respondent	14
Pending Cases with Mexico as the Respondent (2012)	1
Awards in Favour of Mexico	7
Awards Against Mexico	7
No. of Appeals	7
No. of Appeals made by Mexico	5
No. of Successful Appeals	0 – however partially set aside one award
No. of Appeals in the Canadian Courts	5
No. of Appeals in the American Courts	1

Final Conclusions: Why Should Mexico Join ICSID?

- The reference to ICSID as a dispute settlement mechanism is already provided for in Mexico's existing investment treaties.
- Joining ICSID will send a positive, investor-friendly message, to foreign investors and to the international community.
- ICSID membership will provide Mexican investors with an additional dispute settlement mechanism eliminating the need to resort to third countries' BITs.
- ICSID membership will not have an immediate impact on the increase of investment claims against Mexico.
- Ratifying the Convention will give Mexico the opportunity to influence and to participate in the Centre's governance as well as in the amendment process of the Convention and rules.
- The ICSID Convention provides for a uniform regime for the annulment of awards.
- The enforcement-friendly regime of the ICSID system will encourage incoming investments.
- Joining the Convention will not affect the law applicable to the merits of investment disputes involving Mexico as a responding state.
- Mexico already has an established familiarity with the role of the Secretariat.
- When the parties cannot agree on the appointment of arbitrators, the Secretariat will appoint them from a state-selected list.
- ICSID is the most transparent system among other dispute settlement mechanisms.
- Mexico will incur to no additional costs by joining ICSID.

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