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Beyond Boilerplate: Public Interest Safeguards for Arbitration in State–Investor Contracts

CCSI POLICY BRIEF

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Table of Contents

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Executive Summary

Contracts between States and investors, especially in the extractives and infrastructure sectors, are designed to endure. They often last for decades, lock in fiscal and regulatory commitments negotiated years earlier, and shape the lives of communities that were never at the negotiating table. The arbitration clause in these contracts can become one of the main mechanisms through which those long-term public consequences are later enforced and contested.

CCSI's starting point, building on decades of research, is that treaty-based investor–State dispute settlement (ISDS) is beyond incremental repair, and that domestic courts—with State–State dispute settlement available where needed—should be the default forum for investor–State disputes, including disputes arising from State–investor contracts. But because arbitration remains a common and often expected feature of these contracts, this brief asks a narrow and practical question: where an arbitration clause is likely to be included in a contract, what should it require to protect the public interest, avoid the pitfalls associated with treaty-style arbitration, and still remain acceptable in practice?

This brief answers that question with 17 mutually reinforcing safeguards organized into three clusters. The approach is deliberately ambitious: the safeguards are designed to reflect what the public interest requires, while treating acceptance by investors and the arbitration community as a constraint to be tested against practice, not the standard that determines the content of the proposals.

These safeguards are likely to be most durable when enacted through legislation and applied across contracts rather than negotiated one contract at a time, although negotiated safeguards remain a reasonable stopgap where legislation is absent. Examples of State practice are included to show that departures from boilerplate are feasible and that arbitration can continue to function where States adopt them.

CLUSTER 1: ANCHORING ARBITRATION IN THE HOST STATE'S LEGAL AND INSTITUTIONAL FRAMEWORK

Safeguard 1. Domestic law governs the contract. Leaving domestic law out of the contract's governing law clause invites tribunals to treat domestic law as fact or to apply international or "transnational" standards—legitimate expectations, full reparation, acquired rights—that give foreign investors protections domestic law does not confer. The clause should designate host State law as the governing law, require the tribunal to apply it as the State's own courts would, and allow unsettled questions to be referred to those courts for binding determination.

Safeguard 2. A narrow, defined scope of arbitrable disputes. Clauses allowing the arbitration of "any and all disputes" hand arbitrators the power to review regulatory choices. Arbitration should reach defined commercial matters only, expressly excluding generally applicable laws on the environment, health, taxation, labor, and human rights; unilateral termination on public interest grounds; and regulators' permitting, licensing, and consent decisions.

Safeguard 3. Limits on permissible remedies and damages. Tribunals should be limited to remedies available under domestic law, awarded only for proven, direct loss. Contracts should exclude speculative future profits and punitive, moral, or reputational damages, cap pre-operational compensation at documented costs actually incurred, only allow interest as domestic law permits, require the investor to mitigate its loss in accordance with domestic law, and require tribunals to consider unreasonable overstatement of claims when allocating costs.

Safeguard 4. An arbitral seat in the host State, or failing that, in the region. The seat determines which courts supervise the arbitration and may set the award aside. A foreign seat transfers that supervision to foreign courts applying their own public policy. A domestic seat keeps that supervisory power with the courts whose reading of domestic law the tribunal is bound to follow, while awards remain enforceable abroad under the New York Convention.

Safeguard 5. National or regional arbitral institutions. ICSID, the ICC, the LCIA, and the SCC operate within an ecosystem shaped by capital-exporting jurisdictions. Contracts should favor institutions closer to the host State's legal tradition, language, and public law context, and vetted for independence and competence—building domestic and regional arbitration capacity over time.

Safeguard 6. Proceedings in an official language of the host State. Defaulting to English or French where neither is an official language of the host State raises costs, sidelines government lawyers, entrenches dependence on foreign firms, and reduces transparency and community participation to a formality. Where the investor requires another language, the clause should allocate translation and interpretation responsibilities and costs to the investor.

Safeguard 7. Deliberate selection of arbitration rules. Rules carry consequential defaults the parties never negotiated, including where the arbitration is seated by default, who appoints arbitrators or rules on challenges to them, and whether that decision-maker must explain their reasoning. Clauses should fix the appointing and challenge authorities, require reasoned challenge decisions, and opt out of emergency arbitrator procedures.

Safeguard 8. Domestic rules of evidence. Absent an express choice, tribunals often default to the IBA Rules, which confer broad discretion over disclosure and admissibility. Host State procedural law should govern, with the IBA Rules as non-binding guidance. An optional, targeted document production mechanism can offset the limited disclosure tools of many civil law systems.

Safeguard 9. Pre-arbitration steps: exhaustion of local remedies and negotiation. Investors should exhaust local administrative remedies—and, where the other anchoring safeguards are absent, judicial remedies as well—followed by a cooling-off period and tiered negotiation. These steps should be jurisdictional preconditions to the State's consent to arbitrate, not waivable by tribunals or circumvented through most-favored-nation (MFN) treatment clauses.

Safeguard 10. Arbitration only once the investment is lawfully established. Access to arbitration should be conditional on the investor having obtained the required permits, completed the mandatory impact assessments, and carried out consultation, including free, prior and informed consent where applicable. Whether the State lawfully withheld those approvals is a question for domestic courts, not an arbitral tribunal.

CLUSTER 2: EXPANDING ACCESS AND ACCOUNTABILITY

Safeguard 11. Transparency by default. Confidentiality is an inheritance from commercial arbitration and has no defensible role where public revenues, natural resources, and regulatory space are at stake. Pleadings, hearings, and awards should be public—as should the contract itself—with narrow redaction categories defined in domestic law and the burden of justification on the party seeking them.

Safeguard 12. Symmetry: the State can also initiate arbitration. Treaty arbitration confines States to defense, and to counterclaims that survive only in narrow circumstances. Contracts should give the State a stand-alone right to arbitrate investor breaches of environmental, tax, labor, anti-corruption, and human rights obligations, and bind, where possible, the parent company and any guarantors—not just a thinly capitalized local subsidiary—so the State can actually enforce what it wins.

Safeguard 13. No advance waiver of immunity from execution. Consenting to an arbitral forum is not consenting to the global seizure of sovereign assets. Any waiver of execution immunity should be specific, narrow, and separately negotiated, preserving diplomatic, military, central bank, cultural, and other public purpose assets, and preserving immunity as well against pre-award attachments and other measures that could pressure the State before liability is established.

Safeguard 14. Meaningful participation and remedy for affected third parties. Amicus submissions confer neither standing nor any entitlement to a remedy, and depend on the tribunal's leave to submit them. Contracts should give advance consent for affected communities to bring claims directly against the investor—at their option, never foreclosing domestic recourse—paired with well-resourced grievance mechanisms, anti-retaliation protections, and funded legal, technical, linguistic, and logistical support.

CLUSTER 3: PROCEDURAL INTEGRITY

Safeguard 15. The contractual forum as the exclusive remedy. Parallel treaty claims increase cost, allow inconsistent awards on the same facts, and offer investors a route around the safeguards. The investor, together with its parent, affiliates, and shareholders, should waive treaty-based arbitration over the same investment. Because such a waiver's enforceability is uncertain, treaty termination remains the surest way to close that route.

Safeguard 16. Institutional appointment and enforceable conflict of interest rules. Party appointment has yielded a small pool of arbitrators under repeat appointments and pervasive double-hatting. Arbitrators should be appointed by an independent authority from a vetted roster that reflects diversity of nationality, gender, and legal background, and demonstrated competence in host State law; the UNCITRAL Code of Conduct should be incorporated as a floor and strengthened; and arbitrator challenges should be decided, with reasons, by a body independent of both tribunal and institution.

Safeguard 17. Review for legal error by specialized host State or regional courts. Annulment, set-aside, and enforcement review reach procedure, not substance: a tribunal can misapply the governing law with no avenue for correction. Without waiting for a new permanent tribunal to be built, States should route appellate review through host State or regional courts now, or adapt and incorporate existing opt-in ad hoc appellate mechanisms into their contracts.

None of the safeguards work in isolation, and weakening one tends to weaken the others. For instance, domestic governing law is only as strong as the carefully circumscribed scope of arbitrable disputes, the chosen seat, and the arbitration rules; if any is loosened, a tribunal can fall back to treaty-style outcomes. Transparency and community standing work the same way: transparency does little good if affected communities have no standing to act on what it reveals, and standing means little if the proceedings behind it stay confidential. And channeling all recourse into a single forum is only defensible if that forum's decision-makers are independent and their errors of fact or law correctable.

The proposed safeguards are designed as a package. Each one presupposes a State with the legal capacity and resources to negotiate its terms and defend its inclusion. Even fully adopted, they cannot cure a structurally unbalanced contract. Where a government cannot secure the safeguards, the more defensible course to protect the public interest is to entrust contract-based investor–State dispute resolution to the host State's domestic courts.

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Introduction

State–investor contracts—particularly those governing major extractive and infrastructure projects—often run for decades, lock in fiscal and regulatory terms across changes of government, constrain the State's regulatory space, and shape the lives of communities far removed from the negotiating table.[1] They are also among the most consequential and least scrutinized instruments of international investment governance.[2] This policy brief grapples with the question of what role, if any, contract-based investor–State arbitration should play.

This question cannot be answered in isolation from the treaty-based regime, which shapes expectations about arbitration arising from investor–State disputes. As demonstrated by decades of research, the treaty-based investor–State dispute settlement (ISDS) regime is fundamentally flawed,[3] and incremental reform will not fix it.[4] The most defensible path forward is for States to terminate their investment treaties, withdraw advance consent to ISDS,[5] and build a new approach to investment governance that moves beyond investor protection and arbitration and engages directly with the economic, social, and environmental determinants of investment in service of human rights and the Sustainable Development Goals, including climate action.[6] Domestic courts and State–State dispute settlement can serve as the primary fora for resolving investor–State disputes, supported, where needed, by technical and financial assistance to strengthen domestic judicial systems.[7]

At the same time, these options are often dismissed as unrealistic or unpalatable by some investors and members of the arbitration community. Whether that dismissal is justified, evidence-based, or shaped by entrenched assumptions, many still expect arbitration to play at least some role in investor–State disputes. Precisely because arbitration is unlikely to disappear from State–investor contracts in the short term, the terms on which it operates matter. The narrow question addressed here is therefore practically urgent: when a State–investor contract includes an arbitration clause, what safeguards should be built in to protect the public interest and avoid the known pitfalls of treaty-based ISDS while remaining acceptable to investors and the arbitration community?

The answer may well be that no set of safeguards can be both sufficiently effective in protecting the public interest and sufficiently acceptable to investors. If so, this analytical work will have helped clarify the case against arbitration in State–investor contracts. The framing of this brief should not be read as an endorsement of arbitration as the preferred mechanism for settling investor–State disputes. Arbitration is a private dispute settlement process: proceedings are typically closed to the public; the transparency and participation requirements that govern domestic courts do not apply; third-party interests are sidelined; and rights of appeal are usually waived, even on questions of law that arbitrators may decide erroneously.[8] These features are difficult to reconcile with the public interests at stake in major State–investor contracts. For that reason, the default recommendation remains that such contracts route disputes to domestic courts, with State–State arbitration reserved, at most, for situations in which domestic courts demonstrably cannot resolve a dispute even after local remedies have been exhausted.[9] For governments that, despite these concerns, find themselves negotiating contracts including an arbitration clause, this brief proposes the accompanying safeguards.

The orientation here is deliberately ambitious. The task is to articulate what the public interest requires, not to predict what investors and the arbitration community will readily accept. Where the two diverge, priority is given to greater ambition in favor of public interest concerns. Acceptability is of course pragmatically relevant, but it is treated here as a constraint to be tested against practice, not the measure by which to judge the proposals.

Although the proposed safeguards are framed as potential elements of the arbitration clause, they are most durable when a State embeds them in domestic legislation rather than negotiating them contract by contract. Legislated safeguards operate as default terms across contracts, lighten the burden on individual negotiators, reduce transaction costs, and insulate public interest protections from case-by-case bargaining—though the speed and extent of their feasibility vary with each State's legal and political circumstances. In the absence of legislated safeguards, negotiating them into arbitration clauses can be a useful stop-gap measure.[10]

Departing from boilerplate demands negotiating capacity, robust legal advice, and time that some governments lack, and investors—together with the financial institutions behind them—may resist bespoke arbitration clauses or price the perceived added risk into the transaction, particularly in smaller or lower-income jurisdictions. These trade-offs should be weighed against the public costs that standard-form arbitration imposes on regulatory space, public finances, and the interests of affected communities—costs that are themselves rarely priced into the original bargain.

Among the structural drivers of the current landscape, the inertia of boilerplate is probably more important than any deliberate policy choice. Practice in this area varies. Some State–investor contracts import approaches or language drawn from investment treaties—substantive protections, including fair and equitable treatment (FET), protection against indirect expropriation, and treaty-style international arbitration. Others confine the arbitration clause to the mechanics of dispute resolution and to disputes over the interpretation or validity of the contract, governed by the host State's law. The treaty regime itself is widely understood to be broken: it has expanded privileges for a narrow class of foreign investors with the resources and sophistication to use it, while constraining the regulatory and fiscal space of host States and excluding domestic investors, investment-affected individuals and communities. Importing that regime into contracts compounds the problems documented in the treaty system, while adding the opacity and limited oversight characteristic of contract-based arbitration. One purpose of this brief is to push back against that copy-paste impulse and to articulate, in plain terms, what a contract-specific arbitration clause should, and should not, look like.

But the clause is not the whole story. No arbitration clause, however carefully drafted, can salvage a fundamentally unbalanced contract. The analysis must begin earlier, with how these contracts come into existence. Many State–investor contracts, particularly in extractives and infrastructure, are negotiated under conditions of acute information asymmetry, unequal bargaining power, limited technical and legal capacity on the government side, and heightened corruption risk.[11] A clause that ensures transparent, fair, and well-reasoned dispute resolution does little for a government, or for the public, if the contract has already conceded fiscal terms the State cannot sustain or regulatory commitments it cannot honor. Procedural safeguards in arbitration are therefore necessary, but not sufficient. They must be paired with substantive safeguards in the contract itself, including limits on stabilization commitments; rules on consequential damages; requirements that investors comply with host State environmental, social, and human rights law; and mechanisms for periodic review and renegotiation of contractual terms as circumstances change.[12] Although this brief focuses on the arbitration clause, it refers, where relevant, to safeguards on these substantive provisions, which form an indispensable backdrop to broader contract reform.

Given this scope, a word on method is warranted. This brief takes a principles-based approach. Rather than surveying the literature exhaustively or proposing model language, it identifies 17 safeguards to guide the structure of arbitration clauses in State–investor contracts and to articulate the broader commitments those clauses should reflect if they are to be compatible with the public interest. The safeguards draw on CCSI's research and were refined through engagement with trusted experts and partners familiar with these issues, before being opened to wider scrutiny within that group and beyond.

The proposed safeguards are directed at four audiences: governments, as the public parties to these contracts and the primary users of the proposed safeguards; civil society organizations, as advocates for fair dispute settlement in investment projects; legal academics, whose scrutiny can sharpen the framework; and the investor and arbitration communities, whose practice will ultimately determine the safeguards' effect.

The brief illustrates the safeguards with examples of State practice, drawn principally from Brazil and, more broadly, Latin America, with occasional examples from other regions. These examples are, by design, illustrative, not representative. They are concentrated in jurisdictions that have resorted to State–investor contracts while moving out of—or remaining outside—the treaty-based arbitration system. This group of States is comparatively small, which itself narrows the available pool—and Brazil in particular, as a large economy with a sophisticated legal sector and deep domestic capital markets, may not share the characteristics of many other developing economies. The point of the examples is not that any one of them is universally transferable, but that alternative approaches are feasible: they are evidence of State practice in departing from mainstream templates, and arbitration has continued to function.

The remainder of the brief sets out these safeguards and explains the rationale for each. They are organized into three mutually reinforcing clusters:

A. ***Anchoring arbitration in the host State's legal and institutional framework:*** domestic law as the governing law; a clear definition and limitation of the scope of arbitrable disputes; limits on permissible remedies and damages; the host State as the arbitral seat; reliance on national or regional arbitral institutions; the language of the proceedings; careful selection of arbitration rules; rules of evidence; pre-arbitration steps; and temporal sequencing.

B. ***Expanding access and accountability:*** transparency as the default; symmetry in the State's ability to initiate arbitration; no advance waiver of sovereign immunity; and meaningful participation of affected third parties.

C. ***Procedural integrity:*** exclusivity of the contractual forum; arbitrator qualifications, appointment procedures, and conflict of interest protections; and appellate or review mechanisms.

A short concluding section addresses how these safeguard clusters work together.


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First Cluster: Anchoring the arbitration in the host State's legal and institutional framework

The first cluster of safeguards keeps arbitration tethered to the host State's legal and institutional order. The first three substantive safeguards address the law governing the contract, the disputes that may be submitted to arbitration, and the remedies a tribunal may award. The remaining safeguards are procedural: they address where the arbitration takes place, who administers it, the language of the proceedings, the applicable arbitration rules, the evidentiary standards that the arbitrators should apply, the pre-arbitration steps that must be followed, and conditions precedent to the investor's access to arbitration. Each is addressed in turn.

1 *Domestic law as the governing law of the contract*

The first and most consequential safeguard is to designate the host State's domestic law expressly as the law governing the contract. The choice of governing law shapes how arbitrators characterize the parties' rights and obligations, assess the validity of regulatory measures, define the scope of investor expectations, and determine the remedies available in the event of breach. Where contracts are silent or ambiguous on this point, arbitrators may treat international, "internationalized," or transnational standards, such as legitimate expectations, full reparation, acquired rights, or general principles of law, as supplementing or even displacing host State law. The result can be to grant foreign investors substantive protections broader than those available under the domestic legal framework.[13]

This safeguard is intended to prevent tribunals from applying domestic law merely "as fact," that is, from treating national statutes, regulations, and administrative decisions as evidentiary inputs subject to arbitral reinterpretation. Contracts should also specify that domestic courts are the authoritative interpreters of domestic law, and that the tribunal may not read extra-contractual standards of investment protection into the agreement.

State practice shows that this safeguard can be implemented in concrete legal terms. Brazil's Arbitration Act provides that arbitrations involving the public administration must be decided according to law,[14] and the federal decree governing arbitration between the Union and concessionaires in the port, road, rail, waterway, and airport sectors expressly requires the application of Brazilian substantive law and prohibits decisions in equity.[15] Ecuador and Bolivia adopt comparable approaches. Ecuadorian law governs investment contracts even when the State agrees to international arbitration,[16] while the Bolivian Constitution subjects all foreign investment to Bolivian law, jurisdiction, and authorities.[17]

However, there are limits to relying on the governing law clause alone. Even where domestic substantive law applies, there is a risk that international arbitrators will not interpret and apply it as domestic courts would—for example, by applying forms of interest that domestic law restricts or does not permit. The risk is sharper where a single proceeding mixes contractual and treaty claims, leaving the tribunal to decide which body of law governs and inviting it to default to international standards. The underlying difficulty is that designating domestic law hands its interpretation to arbitrators who may apply it as they see fit, with no appellate check. To reduce this risk, the contract should build in an explicit mechanism of deference to the domestic law's authoritative domestic interpretation. First, the clause should require the tribunal to apply domestic law as the host State's competent courts would, to follow settled domestic jurisprudence, and to refrain from substituting international or transnational standards for domestic rules. Second, where a dispositive question of domestic law is genuinely unsettled, the contract may empower the tribunal—or require it, at a party's request—to refer that question to the competent domestic court for a binding determination, staying the arbitration in the meantime; this is a contractual analogue to the preliminary reference and case-stated procedures familiar from several legal systems. Third, where contractual and treaty claims might otherwise overlap, the contract should confirm that the contractual claim is governed by domestic law and is to be adjudicated as such.

These commitments are reinforced by the structural safeguards that follow: an arbitral seat in the host State preserves the supervisory jurisdiction of its courts (Safeguard 4); national or regional institutions are more likely to be steeped in the domestic legal tradition (Safeguard 5); arbitrator qualification and appointment rules can require demonstrated competence in that tradition (Safeguard 16); and review for errors of law offers a possibility of correction where a tribunal departs from it (Safeguard 17). Deference to domestic interpretation does, however, presuppose capable and independent domestic courts. Where corruption, armed conflict, or civil unrest have compromised them, this safeguard—like the others in this cluster—must be paired with sustained investment in domestic judicial and administrative capacity (Safeguards 5 and 9).

2 *Clear definition and limitation of the scope of arbitrable disputes*

A well-designed arbitration clause should not allow arbitration of "any and all disputes" arising from the contract. Instead, it should define with precision the categories of disputes that may be submitted to arbitration. These should generally be limited to narrowly commercial matters, such as the calculation of contractually agreed payments, payment delays, or other clearly defined contractual obligations.

The clause should also expressly exclude exercises of public authority. These include the adoption and enforcement of generally applicable laws and regulations on the environment, climate change, public health, labor, taxation, human rights, and anti-corruption; the State's prerogative to terminate public contracts unilaterally on public interest grounds; and administrative decisions taken by independent regulators in the public interest, including decisions to grant, deny, condition, or withdraw the permits, licenses, approvals, and consultation outcomes—such as free, prior and informed consent (FPIC)—on which an investment's lawful establishment depends.

This exclusion of investment establishment requirements from arbitration is a counterpart to the temporal sequencing safeguard below (Safeguard 10): because an investor's access to arbitration is conditioned on having lawfully and fully established the investment, any dispute over whether the State's permitting or consultation decisions were themselves lawful, arbitrary, or made in bad faith must be resolved before the host State's domestic courts.

Without such carve-outs, arbitrators may be invited to review the merits of regulatory and legislative choices that, under domestic constitutional and administrative law, belong to the political branches, regulators, and domestic courts. These carve-outs should be drafted as specifically as possible. General exclusions for "public matters" are too imprecise and, under the competence-competence principle, may leave arbitrators themselves to decide whether a dispute is public or commercial.

Brazilian law offers one example. Arbitration involving the public administration is limited to "direitos patrimoniais disponíveis," meaning disposable patrimonial rights capable of waiver or settlement.[18] In federal infrastructure contracts, arbitrable matters include issues such as economic and financial equilibrium, indemnities arising from termination or transfer of the agreement, and breaches of contractual obligations, including penalties.[19] In oil and gas concession disputes, contractual matters with monetary content may be arbitrated, while the regulator's police powers remain subject to judicial review.[20]

Bolivia and Tanzania illustrate more categorical approaches. Bolivian law excludes several matters from arbitration, including issues affecting public order, administrative contracts subject to limited exceptions, and disputes concerning ownership of natural resources.[21] Tanzanian law goes further by reserving disputes arising from the extraction or use of natural resources to judicial bodies or other organs in Tanzania, applying Tanzanian law.[22] Whether framed as a limit on arbitrability or as a requirement of domestic adjudication, the underlying principle is the same: exercises of permanent sovereignty over natural resources may not be submitted to international arbitration.

3 *Limitation to permissible remedies and damages*

The third substantive safeguard concerns remedies. The tribunal's authority should be limited to the remedies available under the host State's domestic law and to any further limits set out in the contract. Depending on the domestic legal framework, those remedies may include compensation for proven contractual loss, restitution, specific performance, declaratory relief, interest, or costs. But the tribunal should not have the authority to award remedies that domestic law does not recognize or would not permit against the State or a public authority.

This is especially important in relation to liability and damages. A contract governed by domestic law should not allow arbitral tribunals to import international investment law standards into a contractual dispute. Expansive approaches to compensation in international arbitration, under both investment treaties and contracts, have produced very large awards, including in disputes involving projects that had not entered operation or had not demonstrated commercial viability.[23] Contract-based arbitration should therefore include safeguards that prevent it from reproducing the same problematic valuation methods, speculative damages, and disproportionately large awards associated with international investment arbitration.

Where domestic laws are silent or ambiguous, a robust arbitration clause, and the contract more broadly, should therefore expressly provide that:

- *Remedies are limited to domestic law*: The tribunal may award only those remedies available under the host State's domestic law, subject to any exclusions, caps, or conditions set out in the contract.
- *Damages must reflect actual loss*: Damages should be available only for losses that are proven, direct, and legally recoverable under domestic law.
- *Speculative damages are excluded*: The contract should exclude damages based on speculative future profits, hypothetical business opportunities, or assumptions about projects that had not become operational or commercially viable.

- *Pre-operational compensation is capped*: Before the project becomes operational, any compensation should be limited to documented costs actually and reasonably incurred, plus any interest available under domestic law or expressly agreed in the contract.
- *Punitive, moral, and reputational damages are excluded*: Unless domestic law requires otherwise, the tribunal should have no authority to award punitive, exemplary, moral, or reputational damages.
- *Interest follows domestic law*: Interest should be calculated only as permitted under domestic law or as expressly provided in the contract.
- *Mitigation requirements are preserved*: The claimant should be required to mitigate its loss in accordance with domestic law, and damages should be reduced where the claimant failed to do so.
- *Inflated claims affect costs*: The tribunal should be able to consider unreasonable overstatement of claims when allocating costs.

The point is that any compensation for investors should be grounded in the domestic law governing the contract and should reflect actual, legally recoverable loss.

A substantive ceiling on damages—which heads of loss are recoverable and in what amount—belongs, strictly speaking, in the contract's remedies or damages provisions rather than in its arbitration clause. It is addressed here for two reasons. First, the tribunal's authority to grant any remedy derives from the arbitration agreement, so the agreement is the natural place to delimit that authority. Second, the assessment and quantification of damages have a pronounced procedural dimension and have been a focus of UNCITRAL Working Group III (WGIII) on ISDS reform,[24] including work on the draft provision on the assessment of damages and compensation. The practical recommendation is to define substantive limits in the contract's remedies clause and to mirror those limits by circumscribing the tribunal's remedial powers in the arbitration clause.

4 *Arbitral seat in the host State or in the region*

The seat of arbitration is a legal construct, distinct from the physical place where hearings are held. The seat determines the lex arbitri, that is, the procedural law of arbitration, which sets the general framework for the conduct of the arbitration. This law fills gaps in the parties' agreement, governs the supervisory role of local courts, and provides the framework for challenges to arbitrators and awards. Most importantly, the courts of the seat have primary supervisory jurisdiction over the arbitration, including the power to set aside the resulting award.[25]

The case for a host State seat in contract-based arbitration is straightforward. Courts in the host State are usually best placed to assess whether an award is consistent with the State's constitutional and legal order, domestic public policy, and rules governing public contracts, public assets, and regulatory authority. A domestic seat also gives practical effect to the deference mechanism described under Safeguard 1: the courts with power to set aside the award are the same courts whose authoritative interpretation of domestic law the tribunal is bound to follow. A domestic seat can also reduce costs and logistical burdens for State counsel, who would not need to litigate procedural challenges before foreign courts. Where enforcement is sought against assets located in the host State, a domestic seat also avoids one layer of cross-border procedural complexity. At the same time, awards seated in the host State remain capable of enforcement abroad under the New York Convention, where its requirements are met.[26]

If the arbitration is seated outside the host State, any set-aside proceedings will take place before foreign courts, applying the procedural law and public policy standards of that foreign seat. The host State's courts may still be able to refuse recognition or enforcement if enforcement is sought domestically, but they will not ordinarily have authority to annul or set aside the award itself. The State therefore loses the ability to have awards concerning its public budgets, regulatory authority, or State-owned resources reviewed under its own supervisory framework.

Brazil illustrates how a host State seat can work in practice. Its arbitration statute, sectoral legislation on concessions and public-private partnerships, and an implementing federal decree together require that arbitrations involving the federal government in the port, road, rail, waterway, and airport sectors be seated in Brazil and conducted in Portuguese,[27] with comparable requirements at the sub-national level.[28] Supported by a specialized State counsel function within the Advocacia-Geral da União (AGU) and a broadly pro-arbitration jurisprudence from Brazilian courts, this framework has made the domestic seat workable for both the State and foreign investors. Bolivia is another example. Investment arbitration involving the State must be seated in Bolivian territory, with Bolivian courts retaining supervisory authority over annulment of the resulting award.[29]

Some State–investor contracts designate a seat outside the host State because foreign investors and their counsel insist on a "neutral" seat. In practice, this often means defaulting to traditional arbitration seats in the Global North, such as Geneva, London, or Paris. Where a host State seat is genuinely not workable, a regional seat may be preferable to one in the Global North, to the extent it keeps the supervisory courts closer to the legal, institutional, and public interests affected by the dispute. A regional seat is not, however, preferable for its own sake. Before choosing one, the State should examine the candidate's arbitration legislation, its set-aside record, the independence and competence of its courts, and how close its legal tradition is to the host State's. The objective is a seat whose supervisory framework the host State has reason to trust, regardless of geographic or political proximity.

Ecuador's experience illustrates this intermediate option. Ecuadorian State entities have chosen Santiago de Chile as the seat in commercial State-investor contracts.[30] Where Santiago is the seat, Chilean courts have supervisory jurisdiction over annulment. Ecuadorian courts may still consider recognition and enforcement issues if enforcement is sought in Ecuador, but they cannot set aside the award.

Two caveats are important. First, a host State seat is not a panacea. Its value depends on the independence, capacity, and credibility of the local judiciary. In States where courts have been subject to executive interference or capture, a domestic seat may simply relocate the problem rather than solve it. Second, foreign seats are not invariably hostile to host State interests. In *P&ID v. Nigeria*, a London-seated arbitration tribunal produced an award of approximately USD 6.6 billion against Nigeria, rising to more than USD 11 billion with interest, but the English Commercial Court ultimately set the award aside in 2023 on grounds of fraud and serious irregularity.[31] That case, however, is a difficult precedent on which to build expectations. Successful set-aside challenges are exceptional, and Nigeria had to litigate for years before obtaining relief.[32] The default position should therefore remain that the host State should seek a domestic seat, with a credible regional seat as the alternative where a domestic seat cannot be secured.

5 National or regional arbitral institutions rather than ICSID, ICC, LCIA, or the SCC

The contract should favor national or regional arbitral institutions over the default use of major Global North institutions such as the International Centre for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), or the Stockholm Chamber of Commerce (SCC). The point is not that national or regional institutions are invariably better, or that international institutions can never administer public interest disputes fairly. Rather, the concern is that the major international institutions operate within a professional ecosystem that has long been criticized for repeat appointments,[33] limited geographic and demographic diversity, and a procedural culture shaped largely by capital-exporting jurisdictions.[34] In State–investor contract disputes, especially those involving public services, infrastructure, natural resources, or regulatory authority, the administering institution should be closer to the legal system, language, public law traditions, and development context of the host State.

A national or regional institution may be better placed to administer proceedings under rules and rosters that reflect host State realities. It may also reduce costs, facilitate the use of the host State language (Safeguard 6), support the development of domestic and regional arbitration capacity, and make the process less dependent on a small transnational circle of arbitrators and counsel. The institution should, however, meet minimum standards of independence, competence, transparency, and integrity. The objective is not localization for its own sake, but institutional alignment with the public interests affected by the dispute.

Choosing a national or regional institution is also a form of long-term institution-building. As local and regional arbitral institutions administer more cases, they accumulate expertise, develop rosters of qualified arbitrators drawn from the region, and refine rules adapted to local legal traditions. Working alongside domestic courts, these institutions can help strengthen the host State's broader legal infrastructure and reinforce the domestic rule of law. Institutions steeped in the host State's legal tradition also reinforce the deference mechanism (Safeguard 1), while domestic courts retain their supervisory role (Safeguard 4).

Brazil provides one useful example. Federal government arbitrations in specified infrastructure sectors must generally be administered by an arbitral institution accredited by the AGU, unless ad hoc arbitration is duly justified.[35] To be accredited, an institution must have operated for at least three years, be recognized for ethics, good standing, competence, and experience, and have its rules available in Brazil's official language, Brazilian Portuguese. The AGU maintains a published list of institutions that meet these criteria.[36] This kind of vetting mechanism allows the State to avoid defaulting to foreign institutions while still requiring minimum institutional quality.

6 Language of the arbitration proceedings

Arbitration clauses often default to English or French as the language of the proceedings, sometimes as a matter of boilerplate rather than deliberate choice. Where neither language is an official or working language of the host State, this can create significant problems. It increases translation and interpretation costs, limits the effective participation of the State's in-house legal team and public officials, encourages dependence on foreign law firms, and reduces the ability of domestic institutions and the public to follow the dispute.

Language also affects whether other safeguards can work in practice. A proceeding conducted in a language that the host State's regulators, legislators, journalists, and affected communities cannot read is transparent only in form. The safeguards on transparency (Safeguard 11) and meaningful third-party participation (Safeguard 14) both presuppose that the proceedings can actually be understood by those they affect. Language is therefore a precondition for accountability.

The arbitration clause should therefore provide that the language of the arbitration will be an official language of the host State, ordinarily the working language of government administration. If the foreign investor requires another language, the clause should allocate the resulting translation and interpretation responsibilities and costs to that investor.

Brazil again offers a useful example. Arbitrations involving the federal Union in specified infrastructure sectors must be conducted in Portuguese,[37] and similar requirements apply in state-level arbitrations in São Paulo[38] and Rio de Janeiro.[39] This allows career public lawyers to defend the State directly and ensures that evidence, pleadings, and procedural materials are in Brazilian Portuguese, accessible to Brazilian regulators and the public. Where key documents are in another language, the contract can allow translation without displacing the host State's language as the default language of the proceedings.[40]

Requiring the host State's language narrows the pool of arbitrators where that language is not one of the major languages of international arbitration: the supply of experienced arbitrators working in, say, Swahili or Farsi is smaller than the pool working in English or Spanish, and for less widely spoken languages it may be very small. This constraint should be weighed when negotiating the language clause. States can also mitigate it by permitting arbitrators to rely on interpretation and translated materials, drawing on national or regional rosters (Safeguard 5), or accepting bilingual proceedings in defined circumstances.

Furthermore, conducting the arbitration in the host State's language may not eliminate the need for experienced international counsel in complex cases. While the language safeguard lowers the barriers to the State's effective participation, it does not, on its own, eliminate the asymmetry of resources and experience that States frequently face.

7 *Careful selection of arbitration rules*

Different sets of arbitration rules embed materially different arrangements concerning who appoints arbitrators in the absence of agreement, who decides challenges to arbitrators, whether reasons for those decisions are given, the existence and scope of emergency arbitrator procedures, the default seat in the absence of party choice, and the level of confidentiality versus transparency. Most rules incorporate emergency arbitrator procedures that can produce binding interim measures against the State within days, before a full tribunal is constituted and often without the depth of scrutiny that public interest issues require.

These defaults can matter. For example, under the SCC Rules, if the parties have not agreed on the seat of the arbitration, the SCC Board decides, and the default presumption is that the seat will be Stockholm.[41] Likewise, challenges to arbitrators under the SCC Rules are decided by the Board, an institutional body whose members the parties have not chosen.[42] Although the Rules do not formally require the Board to give reasons, the SCC has provided brief reasoned decisions on arbitrator challenges as a matter of practice since 2018—a safeguard that depends on institutional policy rather than a binding rule, and one a differently constituted or differently minded Board could in principle depart from. A State that agrees to arbitration under the SCC Rules without specifying the seat may therefore find itself bound to Stockholm as the seat—with Swedish supervisory courts—through what looks like a purely procedural choice; and a State whose arbitrator challenge is rejected has no guaranteed right to an explanation, only a discretionary institutional practice that could change. Different rules allocate these default powers in different ways, and the consequences for the State depend on what the arbitration clause leaves unsaid.

A safeguard should therefore:

- select rules whose fallback provisions are predictable and do not default to a foreign seat;
- specify who appoints arbitrators in the event of party disagreement and who decides any challenge to an arbitrator, ensuring in both cases that the designated authority is one the State has reason to trust and that any challenge decision is supported by reasons;
- opt out expressly from emergency arbitrator procedures; and
- retain consent rights for the host State over key procedural choices.

Institutional vetting mechanisms such as Brazil's AGU accreditation, discussed under Safeguard 5, also screen the suitability of the rules an institution applies. Ecuador's approach restricts the choice of rules only where the State elects international arbitration for investment contracts above defined monetary thresholds (USD 10 million) and disallows emergency arbitrator procedures.[43] Under Bolivian law, where the parties have not specified applicable rules, the rules of the Bolivian arbitration institution administering the case apply by default, eliminating the risk that imprecise drafting will trigger the importation of foreign institutional rules.[44]

8 *Rules of evidence: defaulting to domestic procedural rules*

Institutional arbitration rules typically say very little about evidence. In practice, in the absence of an express choice, international arbitral tribunals commonly draw on the IBA Rules on the Taking of Evidence in International Arbitration as de facto guidance. The IBA Rules are a soft-law instrument blending common law and civil law practices.[45] While they are widely respected, they grant arbitrators broad discretion on document production, witness evidence, and the admissibility of illegally obtained evidence. In contract-based investor–State disputes, this discretion can result in outcomes that diverge significantly from what the parties would expect under the host State's procedural law.

Contracts should instead provide that the rules of evidence applicable to the arbitration are those of the host State's domestic procedural law, with any reference to the IBA Rules treated as non-binding guidance. This approach reduces tribunal discretion, gives State counsel a familiar evidentiary framework, brings practice into closer alignment with how the same disputes would be litigated before domestic courts, and avoids the importation of disclosure regimes alien to the host State's legal tradition.

Many civil law systems, whose procedure will often govern, provide only limited means of compelling one party to produce documents in the possession of the other. A State seeking to establish, for example, an investor's costs, related-party dealings, or environmental compliance may have no effective way of obtaining documents that the investor holds and declines to disclose. To address this, the contract should allow the parties to opt in to a targeted and controlled document production mechanism modeled on the document production provisions of the IBA Rules.

9 *Pre-arbitration steps: exhaustion of local remedies and mandatory negotiation*

State–investor contracts should require investors to exhaust local *administrative* remedies before commencing arbitration. This would give the host State "an opportunity to redress [the violation claimed] by its own means, within the framework of its own domestic system."[46]

Where the other safeguards in this cluster are absent—particularly where the governing law is international law—the contract should go further and require exhaustion of both local administrative *and judicial* remedies before arbitration. Only then can the host State's "international responsibility … be called into question."[47] The rule of exhaustion of local remedies is a firmly established norm of customary international law.[48] The ICSID Convention acknowledges and preserves the right of a contracting State to require the exhaustion of local administrative or judicial remedies as a condition of its consent to international arbitration.[49] Though investment treaties and contracts have been interpreted as treating the rule as silently waived, this trend should be reversed. India's 2016 Model BIT provides useful language, requiring investors to pursue domestic administrative and judicial remedies for a minimum of five years before commencing international arbitration, subject only to a futility exception.[50]

Contracts should also include a meaningful cooling-off period and tiered negotiation steps, typically six to twelve months, with formal escalation within the host State's government. This gives the State an opportunity to resolve the dispute through the responsible ministry, regulator, attorney general's office, or other competent authority before arbitration begins. Mediation, where appropriate and useful, could also be considered as a complement to exhaustion, cooling-off, and negotiation requirements, particularly for disputes involving ongoing projects, community impacts, or technically complex performance issues. The IBA Rules for Investor–State Mediation (2012)[51] and the Singapore Convention on Mediation (2019)[52] offer useful approaches and language for structuring mediation and enforcing mediated settlement agreements.

For these clauses to be effective, they should be framed as conditions of the State's consent to arbitration. The contract should specify that compliance with requirements such as domestic recourse, negotiation, cooling-off periods, and any mediation processes constitutes a jurisdictional precondition to arbitration. The clause should also make explicit that these obligations cannot be waived by arbitral tribunals[53] or circumvented through MFN clauses or similar treaty-based mechanisms.[54]

These pre-arbitration requirements presuppose what they also help to build: administrative and judicial institutions capable of resolving investor claims within a reasonable time. Accordingly, this safeguard must be paired with sustained investment in the capacity of the administrative bodies, regulators, and courts.

10 *Temporal sequencing: arbitration available only once regulatory and consultation requirements are met*

Arbitration under the contract should be available to the investor only once the investment has been lawfully and fully established—at a minimum, once the investor has obtained the permits, licenses, and approvals required by domestic law, completed any mandatory environmental, climate, social, and human rights impact assessment, and carried out the required consultation processes, including, where applicable, the free, prior and informed consent of affected Indigenous Peoples.[55] An investor that has not met these requirements has no lawfully established investment to protect and should not be able to invoke the contract's arbitration clause.

The clause should make completion of these regulatory and consultation steps a condition precedent to the investor's access to arbitration—distinct from, and additional to, the exhaustion, negotiation, and cooling-off requirements of Safeguard 9. Disputes over whether the State lawfully denied or withheld these approvals are not arbitrable; they fall within the public authority exclusion in Safeguard 2 and belong before the host State's domestic courts. This sequencing withholds the protection of arbitration from investments that bypass the host State's legal requirements and protects the State's regulatory authority against the use of arbitration to pressure officials into granting approvals.

PHOTO BY RDNE STOCK PROJECT

Second Cluster: Expanding access and accountability

The second cluster of safeguards addresses four features of arbitration in State–investor contracts that are essential to its legitimacy: transparency, symmetry, the integrity of sovereign immunity, and meaningful participation by affected third parties.

Unlike a private commercial dispute between two equally situated parties, arbitration under a State–investor contract, simply because one party is a sovereign, may affect public assets or revenues, regulatory authority, and the rights of communities. Features that may be typical in international commercial arbitration—such as confidentiality, sovereign immunity waivers, and the exclusion of non-parties—map poorly onto that reality. The safeguards in this cluster identify features of arbitration that operate against the public interest, and propose contractual mechanisms for correcting them.

11 *Transparency of proceedings*

The default rule in any contract-based arbitration involving a State should be that the proceedings, pleadings, hearings, and final award are public, upholding the same rigorous open-court standards that govern domestic litigation—standards many countries already apply as a matter of course. Confidentiality is a feature inherited from private commercial arbitration. It has no defensible role where one party is exercising sovereign authority, where public revenues and natural resources may be at stake, or where the outcome of the dispute can affect the State's regulatory space. In contract-based investor–State disputes, confidentiality operates as a smoke screen: it prevents legislatures, affected communities, and the public from scrutinizing matters of public interest. Transparency is therefore not only a safeguard in its own right, but also a condition for accountability and participation. Legislatures cannot oversee fiscal exposure they cannot see, and affected communities cannot make submissions, engage grievance mechanisms, or otherwise participate meaningfully in disputes whose existence is unknown to them (Safeguard 14).

Several jurisdictions provide useful examples. Grounded in the constitutional command of publicity for public administration, Brazil's Arbitration Act provides that arbitrations involving the public administration are subject to the principle of publicity; this is operationalized through subnational decrees and through institutional partnerships that publish terms of reference, procedural orders, awards, and main submissions in arbitrations involving Brazilian federal states and State entities.[56] Ecuador extends the same logic through its constitution and transparency legislation, which reach private law entities that exercise State authority or manage public resources.[57] In Bolivia, information in State arbitration becomes reserved only where it has been specifically classified as such by regulation—openness is the default, and confidentiality requires affirmative justification.[58]

At the international level, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)[59] and the Mauritius Convention on Transparency (2014)[60] provide useful language—covering publication of the notice of arbitration, pleadings, expert reports, transcripts, and awards; open hearings; and non-disputing party submissions—that can be incorporated into contracts. The 2022 ICSID Arbitration Rules have moved in the same direction by deeming party consent to publication of awards absent a written objection within 60 days, requiring publication of orders and decisions, and opening hearings to the public.[61] Going further than these baselines, contracts should require—not merely permit—publicity of all arbitration-related documents and decisions. Redactions for confidential commercial or personal data should be narrowly tailored, with the burden of justifying any redaction on the party seeking it.

The same logic that justifies open proceedings should extend to the contract itself. Contract publication is established global practice: as of October 2024, 41 of the 55 EITI-implementing countries had disclosed at least some extractive contracts, and 27 countries worldwide now have laws requiring contract disclosure.[62] CCSI has both documented and enabled this shift, co-maintaining public repositories of State–investor contracts and supporting host governments in building their own disclosure platforms.[63]

In both settings—the publicity of proceedings and the publication of the contract—the criteria governing what may be withheld or redacted are best fixed in domestic law. Legislation or regulation should define the narrow categories of genuinely sensitive information—such as trade secrets, security-sensitive details, or personal data—specify that everything else is presumptively public, and place the burden of justifying any redaction on the party seeking it. Setting these standards in law lends them consistency across contracts, removes leverage from investors to negotiate confidentiality case by case, and aligns the redaction standard with any applicable open government and freedom of information rules.

12 *Symmetry: ensuring the State can also initiate arbitration*

In the treaty-based ISDS regime, only the investor can initiate a claim. The State is confined to a defensive posture and, at most, to counterclaims whose admissibility depends on the wording of the dispute resolution clause, the applicable arbitration rules, and the tribunal's interpretation of its jurisdiction. Contract-based arbitration offers an opportunity to correct this asymmetry.

The jurisprudence on counterclaims in treaty-based ISDS shows why a stand-alone right of action is necessary. In *Urbaser v. Argentina*, the tribunal accepted jurisdiction over Argentina's human rights–based counterclaim—a first in ISDS—but the counterclaim ultimately failed on the merits, and jurisdiction depended in part on the relatively broad and neutral wording of the Argentina–Spain BIT's dispute resolution clause.[64] In *Burlington v. Ecuador*, the tribunal ordered the investor to pay Ecuador USD 41.7 million for environmental remediation and infrastructure-related breaches, but jurisdiction over Ecuador's counterclaims was not inherent in the treaty structure; it rested on a separate agreement between the parties after Ecuador had already been sued.[65] In the parallel *Perenco v. Ecuador* arbitration, the tribunal awarded Ecuador slightly more than USD 54 million on its environmental counterclaim.[66] These cases show both the importance and the limits of counterclaims: they allowed States to raise investor misconduct only because the investor had first opened the arbitral forum, and only because the tribunal accepted jurisdiction over the counterclaim.

Rather than waiting to be sued or relying on arbitrators to infer symmetry from ambiguous clauses, State–investor contracts should build symmetry in from the outset. The contract should expressly empower the State to commence arbitration for any breach by the investor of its legal or contractual obligations, including obligations relating to the environment, climate, taxation, anti-corruption, labor, social standards, and human rights.

This safeguard concerns the procedural capacity to enforce investor obligations, not the content of those obligations. The contract must either refer to domestic law obligations on the investor or set out contract-based substantive and enforceable investor commitments—on environmental and social performance, climate, taxation, anti-corruption, labor, and human rights, among other matters.

Two further design features are essential. First, the contract should identify who may bring claims and against whom, so that investors cannot manipulate corporate structures to obtain procedural advantages or avoid responsibility. Second, State–investor contracts should bind the operating company, the ultimate parent company, and any guarantors, so that the State can enforce investor obligations against entities with real assets and decision-making authority. This addresses the problem of projects being carried out through thinly capitalized local subsidiaries that may be unable to satisfy liabilities when they arise. The contract should ensure that the relevant guarantees or undertakings survive for as long as the corresponding obligations may give rise to liability, or pair them with dedicated financial assurance, such as reclamation and closure bonds, escrowed funds, or insurance.

The IBA Model Mine Development Agreement (MMDA) illustrates one way to address this problem by requiring the parent company to guarantee the obligations of the operating affiliate and by providing that the company cannot avoid its obligations through the interposition of contractors or subsidiaries.[67] CCSI's work on climate-related clauses in State–investor mining contracts reinforces the same point: substantive investor obligations are meaningful only if the State has a procedural mechanism to enforce them.[68]

13 *No advance waiver of sovereign immunity from execution*

Arbitration clauses in State–investor contracts sometimes provide that the State waives, in advance, both immunity from jurisdiction and immunity from execution in any forum where enforcement of an award may be sought. These two forms of immunity are conceptually and functionally distinct and should be treated separately. While a State may legitimately consent to the jurisdiction of the agreed arbitral forum—the consent that is the basis of the arbitration agreement—there is no reason for the State to consent, in advance and globally, to the seizure, attachment, or execution of its sovereign assets.[69] Broadly drafted waivers can have consequences far beyond the original dispute:[70] they may enable award creditors, assignees, or other third parties to pursue State assets across multiple jurisdictions,[71] generating costly satellite litigation and increasing pressure on public finances.

This safeguard proposes a carefully tailored waiver limited to identified commercial assets, or to an agreed pool of such assets, coupled with the firm preservation of immunity over sovereign and public assets. By default, the arbitration clause should limit any immunity waiver to the immunity from jurisdiction of the agreed arbitral forum, and should expressly preserve immunity from execution. Any waiver of execution immunity should be specific, narrow, and separately negotiated. It should identify the assets or categories of assets to which it applies and should preserve immunity for diplomatic and consular property, military assets, central bank reserves, cultural property, and assets used for sovereign or public purposes.[72] The contract should also preserve immunity in relation to provisional measures, pre-award attachments, security for costs,[73] and other measures that could be used to pressure the State before liability has been established.

The contractual position should therefore be that immunity from execution is preserved unless the State has made a specific, informed, and limited waiver. Boilerplate waivers should not be accepted.

14 *Meaningful mechanisms for participation of affected third parties*

Large-scale investments addressed in investor–State arbitration, including mining, oil and gas, hydropower, and major infrastructure projects, often have their deepest impacts on rural and Indigenous communities whose lands, waters, livelihoods, and cultural life are at stake. Yet under investment treaties, State–investor contracts, and the arbitration clauses they contain, those communities typically have no standing, no voice, and often no access to information about the dispute. Their rights and interests are often directly implicated in the underlying dispute that gives rise to the arbitration, and may also be affected by its outcome. Because the process is structured as a dispute between the investor and the State, however, those rights and interests are often ignored or denied.[74]

The narrow amicus curiae submission route is not an adequate answer to this problem. Amicus participation may allow affected communities or civil society organizations to offer a different perspective on facts or law, but it does not give them standing, party status, or any entitlement to a remedy. As it is also tribunal-dependent, it can be and has been sidelined in practice.[75] A contract-based arbitration clause, more than permitting amicus submissions, should create meaningful procedural pathways for affected communities to be heard and, where appropriate, to seek remedy.

To bridge this gap, the State and the investor should provide, in the contract itself, advance consent for affected third parties, particularly Indigenous Peoples and rural communities, to bring claims directly against the investor for environmental, social, labor, and human rights harms arising from the investment. The point is not to transform every community grievance into arbitration; it is to ensure that where arbitration is used to resolve disputes arising from the project, it is not only available to the investor and the State but also to the people most directly affected.

While this proposed safeguard may appear to sit in tension with the brief's general preference for domestic courts, access to arbitration here is the affected community's choice: the community may or may not invoke it, and electing it never waives or diminishes the community's access to domestic remedies. The contract should say so expressly. The principal value of arbitration to affected communities is that it can make a remedy enforceable abroad. Just as investors rely on arbitration for cross-border enforceability under the New York Convention, an affected community would be able to seek an arbitral award to reach assets held elsewhere by the investor and, where applicable, its corporate group (Safeguard 12).

The clause must guarantee the conditions that make participation by under-resourced rights-holders possible. The Hague Rules on Business and Human Rights Arbitration provide one useful starting point. They address barriers to access to remedy, allow witness protection and confidentiality of identity where necessary, and contemplate class, mass, and multi-party procedures, including the participation or joinder of third-party beneficiaries.[76] They also proceed from a default of transparency and meaningful participation by interested third persons. State–investor contracts should build on this approach while addressing its gaps, including by providing robust anti-retaliation protections, avoiding loser-pays cost rules that could deter rights-holder claimants, and ensuring that affected communities have access to legal, technical, linguistic, and logistical support.[77]

Recent work by the Office of the United Nations High Commissioner for Human Rights (OHCHR) on remedy in development finance reinforces the need to design grievance mechanisms as part of a broader remedy ecosystem. The OHCHR emphasizes that affected people should have a voice in deciding and designing reparative solutions, and that meaningful engagement with those harmed is a critical dimension of delivering remedy.[78]

Because even reformed arbitration is unlikely to be the most appropriate, affordable, or accessible forum for most community grievances,[79] State–investor contracts should build that ecosystem by pairing any arbitration mechanism for affected third parties with independent, well-resourced operational-level grievance redress mechanisms. These mechanisms should meet the effectiveness criteria of Principle 31 of the UN Guiding Principles on Business and Human Rights: they should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue.[80] IFC Performance Standard 1 similarly requires clients, where there are affected communities, to establish a grievance mechanism to receive and facilitate resolution of concerns about the project's environmental and social performance.[81]

Finally, the contract should require the investor and the State to make these remedy pathways real in practice. Affected communities should be informed, in accessible and culturally appropriate forms, of all available grievance and remedy mechanisms. The investor should also be required to budget for remedy in advance, including through insurance, guarantees, escrow arrangements, trust funds, or other ring-fenced resources where appropriate.[82] At a minimum, these mechanisms should be operational before project activities begin, independently funded and monitored, protected against retaliation, and expressly incapable of waiving or limiting community access to judicial, administrative, constitutional, or other accountability mechanisms.

PHOTO BY SHOX ART

Third Cluster: Procedural integrity

Procedural integrity holds the other safeguards together. If arbitration is conducted by decision-makers who lack independence, impartiality, or familiarity with the host State's legal system, or who produce errors that cannot be corrected, the substantive limits built into the contract may be eroded in practice. The safeguards in this cluster are intended to ensure that the contract's forum is the investor's exclusive avenue of recourse, that tribunals are properly constituted, and that awards remain subject to meaningful correction where they contain serious factual or legal errors.

15 *Exclusive contractual remedy: waiver of parallel treaty-based claims*

The prospect of parallel proceedings—based on contracts or one or more investment treaties—is a threat to procedural integrity. If the investor pursues other avenues alongside contract arbitration, the result is duplicated cost, the risk of inconsistent or divergent awards on the same facts, and pressure on the State to settle rather than fight on multiple fronts. Where the contract embodies the public interest safeguards set out above, parallel treaty arbitration also offers the investor a route around them.

To close that route, the contract should provide that its arbitration clause is the sole and exclusive remedy for disputes arising out of or relating to the investment, and that the investor waives any right to commence or pursue arbitration under any investment treaty in respect of the same investment or the same measures. The waiver should extend beyond the contracting entity to its parent, affiliates, and shareholders (see also Safeguard 12). Waiver requirements of this kind are not novel—investment treaties have long used them in the opposite direction.[83]

The enforceability of such a waiver is not certain, whether against the investor itself before a treaty tribunal or against non-party shareholders or affiliates. Tribunals have distinguished contract claims from treaty claims, treating the latter as independently grounded in the State's own consent under the treaty;[84] accordingly, an exclusive forum clause may not, on its own, defeat a parallel treaty claim. The waiver should therefore be drafted as broadly and explicitly as the applicable law permits and, where possible, reinforced by the State's wider policy of treaty termination, which remains the surest way to prevent parallel proceedings. The waiver should be explicitly directed at parallel treaty-based arbitration initiated by the investor, without affecting the affected community's or the State's access to domestic courts and administrative remedies, which should remain available. The aim is to channel the investor's recourse into a single, contractually defined forum.

16 *Institutional appointment and oversight of arbitrators to ensure diversity, competence, independence, and impartiality*

The appointment of arbitrators by the parties in investor–State arbitration has contributed to the repeated appointment of a relatively small pool of arbitrators, many of whom also act as counsel or experts in other investment disputes (double- or triple-hatting). In the context of UNCITRAL WGIII's discussions on ISDS reform, States have identified various resulting concerns as warranting reform, including conflicts of interest, double-hatting and issue conflicts, and the effect of appointment mechanisms on diversity.[85] States have also noted that this concentration limits the presence of arbitrators attuned to the policy considerations of developing countries and feeds perceptions of partiality, and that party appointment reinforces a professional culture in which arbitrators may be more familiar with investment arbitration doctrine than with the domestic public law, regulatory context, and institutional realities of the host State.[86]

State–investor contracts should therefore move away from unilateral party appointments. Arbitrators should instead be appointed by a national or regional arbitral institution, or by another independent appointing authority, from a vetted roster maintained by a respected appointing authority. The appointing authority should be required to consider diversity of nationality, gender, professional background, and legal tradition, as well as demonstrated competence in the host State's domestic law, working language, and relevant public interest fields. Where the contract is governed by host State law, arbitrators should be capable of engaging seriously with that legal system, rather than relying on generalized international arbitration concepts or comparative analogies detached from the domestic framework.

Contracts should also include strict, mandatory conflict of interest rules. At a minimum, arbitrators should be prohibited from serving concurrently as counsel or expert in disputes involving the same project, measure, parties, related corporate group, or closely connected contractual provisions. The rules should be explicit about what they reach: concurrent counsel or expert roles, issue conflicts arising from an arbitrator's prior expression of views on a dispositive question, repeat appointments by the same party or its law firm, and any financial or professional relationship with a party, its counsel, its experts, or a third-party funder of the proceedings—each subject to mandatory, continuing disclosure. The UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution, adopted by the UN General Assembly in 2023, offers a useful reference point, particularly in its general duties of independence and impartiality and its disclosure requirements, complementing the IBA Guidelines on Conflicts of Interest in International Arbitration.[87] The Code also restricts some forms of double-hatting, including concurrent or successive roles. But the Code should be treated as a floor, not a complete solution; for example, its double-hatting rules are limited and waivable by the disputing parties.[88] As the Code is non-binding and defers to the parties' instrument of consent,[89] the UN General Assembly has urged governments to reference it when drafting investment instruments.[90] Accordingly, State–investor contracts should, at a minimum, incorporate the Code, including sworn disclosure at appointment and continuing disclosure thereafter, while strengthening its multiple-role restrictions to prohibit concurrent counsel or expert work in any related dispute where the arbitrator's other role could create a real or apparent conflict of interest.

Finally, contracts should strengthen the mechanism for enforcing these standards. UNCITRAL WGIII has also identified the "contours of the challenge mechanism" as a distinct concern: under prevailing rules, a challenge to an arbitrator is decided either by the arbitrator's co-arbitrators, by the appointing institution, or by an institutional body the parties did not choose and that need not give reasons,[91] and proportionately very few challenges succeed[92] (the SCC Rules discussed in Safeguard 7 illustrate this dynamic).

In response to this concern, the essential requirement is that a challenge to an arbitrator be decided, through a reasoned decision, by a body independent of both the arbitral tribunal and the arbitral institution—not by the challenged arbitrator's co-arbitrators or by an unaccountable institutional organ. This role could be played by the competent courts of the arbitral seat (see Safeguard 4) or an independent appointing authority. What matters is that the decision-maker is independent, required to give reasons, and bound by the contract's standards.

17 *Appellate or review mechanism by specialized host State or regional courts*

As with arbitration generally, a structural defect of investor–State arbitration under treaties and contracts is that review is narrow and does not reach legal error. UNCITRAL WGIII, examining consistency and related concerns, identified unjustifiable inconsistency—where the same standard or rule is interpreted differently with no justifiable ground for the distinction[93]—as a genuine concern for the predictability and credibility of the regime, and noted that the often-cited examples include the conflicting awards rendered against Argentina arising out of its 2001 economic crisis.[94] In examining why this inconsistency persists, WGIII found that existing review mechanisms were designed to address a limited set of major procedural deficiencies and to protect the integrity and fairness of the process rather than the consistency, coherence, or correctness of outcomes.[95] Annulment under the ICSID Convention,[96] set-aside under the UNCITRAL Model Law,[97] and refusal of recognition or enforcement under the New York Convention are confined to narrow, mostly procedural grounds;[98] none provides a general appeal on the merits or permits a court or committee to correct an ordinary error in a tribunal's application of substantive law.[99]

Indeed, WGIII observed that ICSID annulment committees have themselves split on whether serious misapplication of the law is even a ground for annulment—inconsistency reaching the review mechanism itself.[100] This defect and the grounds for annulment or set-aside are built into the law of the arbitral seat, which a contract cannot amend. Establishing a stand-alone, contract-specific appellate body could be prohibitively costly. Accordingly, the proposed safeguard is for contracts to select as the arbitral seat (see Safeguard 4) a host State or regional court empowered to review for errors of law, beyond the grounds for annulment or set-aside. The scope of this review should be carefully circumscribed, reaching errors of law and manifest or serious errors of fact, but without extending to a de novo reconsideration of the merits.

Among the reform responses to unjustifiable inconsistency is the multilateral investment court and standing appellate mechanism[101] advocated by the European Union (EU) and under lengthy negotiations in WGIII, foreshadowed by the Investment Court System embedded in EU agreements.[102] States should not wait for the potential establishment of a new permanent tribunal whose composition, financing, and standards remain unclear. Routing review through host State or regional courts is available immediately and builds the capacity of domestic and regional courts rather than bypassing them.[103] Alternatively, existing opt-in ad hoc appellate mechanisms—allowing commercial arbitration awards to be reviewed for serious legal error before becoming final—can already be adapted as appropriate and incorporated into State–investor contracts.[104]

While beyond the contract-based approach proposed in this brief, States and arbitral institutions could pursue more ambitious structural reforms. For example, the instruments that confine review to narrow procedural grounds could themselves be revised: the New York Convention, and the analogous provisions of the ICSID Convention and the UNCITRAL Model Law, could be amended to allow a court to refuse recognition or enforcement of an award tainted by a manifest error of law.[105] In addition, arbitral institutions could design opt-in appellate mechanisms suitable to investor–State disputes.

The frequent objection that appellate review undermines arbitration's core virtues of finality and speed is unpersuasive in the investor–State context. Speed is valuable when both parties are private commercial actors negotiating a discrete transaction. It is far less compelling when the matter at stake is the lawful exercise of public regulatory authority over health, the environment, taxation, or natural resources, and when the financial consequences for the public fisc may reach hundreds of millions of dollars. Finality purchased at the price of substantive legal error in matters of public interest is not a bargain States should accept.

PHOTO BY REGINALDO G MARTINS

Conclusion

The proposed safeguards are mutually reinforcing and rest on a single premise: an arbitration clause in a State–investor contract is a public instrument that must be designed from the outset to serve the public interest. Taken together, they set out the minimum conditions under which contract-based arbitration can be made less damaging to the State's regulatory authority, public finances, and affected communities.

The first cluster addresses a basic but often overlooked objective: preventing contract-based arbitration from sliding into a treaty-style regime of investor protection detached from the host State's legal and institutional framework. Domestic governing law, a narrowly defined scope of arbitrable disputes, limits on remedies and damages, a host State or regional seat, reliance on national or regional institutions and rules, the use of the host State's language, domestic evidentiary standards, meaningful pre-arbitration steps, and investor access to arbitration conditional upon legal and consultation requirements work together to keep arbitration, where it is used at all, anchored in the constitutional, administrative, and public law order in which the contract operates. These elements are strongest when adopted as a package rather than piecemeal: the choice of governing law (Safeguard 1) is undermined if arbitrable disputes are drafted too broadly (Safeguard 2); limits on damages (Safeguard 3) are harder to sustain if the seat (Safeguard 4), rules (Safeguard 7), or evidentiary framework (Safeguard 8) invite treaty-style reasoning; and pre-arbitration steps (Safeguard 9 and 10) lose much of their value if they are not backed by a domestic or regional institutional setting that is capable of enforcing them (Safeguard 4 and 5).

The second cluster concerns legitimacy in public law terms. Transparency, symmetry of access, preservation of sovereign immunity from execution, and avenues for participation or remedy for affected third parties are baseline requirements in disputes that affect public revenues, natural resources, regulatory space, and community interests. As with the safeguards in the first cluster, these safeguards are most effective when they operate together. Transparency (Safeguard 11) and third-party participation (Safeguard 14) are mutually reinforcing: transparency is hollow if affected communities lack standing or practical means to use the information disclosed, while participation rights mean little if the proceedings remain confidential. Similarly, symmetry (Safeguard 12) is weakened if the State has granted broad waivers of immunity from execution (Safeguard 13), since the practical balance between the parties depends not only on who can bring claims, but also on how any award can be enforced. Taken as a package, these safeguards help align contract-based arbitration with the public character of the interests at stake, rather than treating it as a private dispute resolution mechanism transplanted into a public law setting.

The three safeguards in the third cluster are aimed at preventing the procedural machinery of investor–State arbitration from operating as a closed, self-validating system. An exclusive remedy clause channels the investor's recourse into a single, contractually defined forum; robust standards for the appointment, qualification, and conduct of arbitrators are meant to ensure that decision-makers in that forum are independent and impartial; and a review mechanism rooted in specialized host State or regional courts is intended to prevent serious legal errors with implications for the public interest from escaping correction. As with the safeguards in the first two clusters, these safeguards are most effective when they operate together: channeling recourse into a single forum (Safeguard 15) raises the stakes of getting that forum right, and doing so is only defensible if the forum's decision-makers are trustworthy (Safeguard 16) and its errors are correctable (Safeguard 17). Absent either, concentrating all recourse in one venue would simply trade the risks of parallel proceedings for the risks of an unaccountable one. Procedural integrity is thus a precondition for the disciplines in the first two clusters to work as intended.

These safeguards also presuppose a capacity to use them. A contract is only as strong as the State's ability to negotiate it and, if arbitration arises, to defend itself. Securing non-boilerplate terms and litigating them effectively requires competent and adequately resourced State counsel and access, where necessary, to external domestic and international counsel experienced in arbitration. The safeguards proposed here can deliver their intended benefits only where governments can draw on the necessary legal, technical, and institutional support. Sustained investment in State legal capacity and in domestic administrative and judicial institutions is therefore paramount to the safeguards' effectiveness.

Even wholesale adoption of these proposed safeguards cannot change the basic limitation emphasized at the outset of the brief: a carefully drafted arbitration clause cannot cure a structurally unbalanced contract. Public interest safeguards matter, but they must sit alongside fair fiscal terms, constrained stabilization commitments, enforceable investor obligations, meaningful grievance and remedy mechanisms, and opportunities for review and renegotiation over time. Where governments encounter resistance to incorporating safeguards in State–investor contracts, they may wish to reconsider whether arbitration is an appropriate dispute settlement mechanism. Where public interest safeguards cannot be secured, the more defensible course is to rely on domestic courts and other public, transparent, and accountable mechanisms for resolving disputes arising from State–investor contracts.

Several questions that lie beyond the scope of this brief merit dedicated work. Three stand out. First, how best to embed these safeguards in domestic legislation and model contracts, so that they operate as defaults rather than case-by-case concessions—including whether and how to develop model arbitration clauses, and how such models might relate to the work of standard-setting bodies such as the International Institute for the Unification of Private Law (UNIDROIT). Second, how to prioritize among the safeguards where political or negotiating capital is limited, which calls for criteria and metrics to assess each safeguard's relative public interest payoff and feasibility in a given setting. Third, how to evaluate the safeguards' effects empirically—through counterfactual analysis and simulation of how past disputes might have unfolded had these clauses been in place, and through monitoring of the contracts that adopt them. Work along these lines could support moving the proposed safeguards from principled design toward practice.

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Endnotes

1 Throughout, the term "State–investor contract" is used broadly. The safeguards proposed here are meant to apply whether the State party is the central government, a ministry or agency, or a State-owned enterprise (SOE), and whether that enterprise functions as an arm of the State or as a commercial actor. Where an SOE is the contracting party, even if the commercial nature of the arbitration may be self-evident, the safeguards apply with at least equal force. What engages the public interest is the deployment of public resources, authority, or responsibility, rather than the identity of the contracting party.

2 Lorenzo Cotula, *Foreign Investment, Law and Sustainable Development: A Handbook on Agriculture and Extractive Industries*, 2nd ed., *Natural Resource Issues* no. 31 (London: International Institute for Environment and Development (IIED), 2016); Columbia Center on Sustainable Investment, "OpenLandContracts.org," https://openlandcontracts.org, Natural Resource Governance Institute, World Bank, and CCSI, "ResourceContracts.org," https://resourcecontracts.org.

3 On the inconclusive empirical evidence regarding the benefits and costs of investment treaties, see Lise Johnson, Jesse Coleman, Brooke Güven, and Lisa E. Sachs, *Costs and Benefits of Investment Treaties: Practical Considerations for States* (New York: CCSI, March 2018), https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/81; Jonathan Bonnitcha, *Assessing the Impacts of Investment Treaties: Overview of the Evidence* (Winnipeg: International Institute for Sustainable Development (IISD), September 2017), https://www.iisd.org/publications/report/assessing-impacts-investment-treaties-overview-evidence; and Joachim Pohl, "Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence," *OECD Working Papers on International Investment,* no. 2018/01 (Paris: OECD Publishing, 2018), https://doi.org/10.1787/e5f85c3d-en.

4 Ladan Mehranvar, *ISDS Reform Without Remedy: A Report from the 51st Session of UNCITRAL WGIII* (New York: CCSI, 2025), https://ccsi.columbia.edu/sites/ccsi.columbia.edu/files/content/UNCITRAL-ISDS-Reform-Without-Remedy.pdf; Martin Dietrich Brauch, "Climate Action Needs Investment Governance, Not Investment Protection and Arbitration," *CCSI Blog* (April 2022), https://ccsi.columbia.edu/news/climate-action-needs-investment-governance-not-investment-protection-isds.

5 Ladan Mehranvar, with Martin Dietrich Brauch, Achyuth Anil, Anna-Sophie Kloppe, Lucas Clover Alcolea, and Madeleine Songy, *Breaking Free: Strategies for Governments on Terminating Investment Treaties and Removing ISDS Provisions* (New York: CCSI, October 2024), https://ccsi.columbia.edu/breaking-free-strategies-for-governments-on-terminating-investment-treaties-and-removing-isds-provisions; Lise Johnson, Jesse Coleman, Brooke Güven, and Lisa E. Sachs, *Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law* (New York: CCSI, 2018), https://ccsi.columbia.edu/clearing-the-path-withdrawal-of-consent-and-termination-as-next-steps-for-reforming-international-investment-law.

6 Martin Dietrich Brauch, Elena Klonsky, Fanny Marie Everard, Qiaozi Guanglin, Tyler Alviano, Justin Cuddihey, and Mary Wang, *An International Law Framework for Climate-Aligned Investment Governance*, CCSI Working Paper (New York: CCSI, January 2024), https://ccsi.columbia.edu/sites/ccsi.columbia.edu/files/content/docs/publications/ccsi-international-law-framework-climate-aligned-investment-governance.pdf; Brauch, "Climate Action Needs Investment Governance."; Ella Merrill, Martin Dietrich Brauch, and Lisa E. Sachs, *International Investment Governance and Achieving a Just Zero-Carbon Future* (New York: CCSI, November 2022), https://scholarship.law.columbia.edu/sustainable_investment/3; Lise Johnson, Lisa E. Sachs, and Nathan Lobel, "Aligning International Investment Agreements with the Sustainable Development Goals," 58(1) *Columbia Journal of Transnational Law* (2019) 58, https://ccsi.columbia.edu/wp-content/uploads/2020/02/fJohnsonetal58-1.pdf.

7 See Lise Johnson, Jesse Coleman, Brooke Güven, and Lisa Sachs, *Alternatives to Investor-State Dispute Settlement* (New York: CCSI, 2019), https://ccsi.columbia.edu/alternatives-to-investor-state-dispute-settlement (analyzing the strengthening of domestic legal systems—including through commitments and mechanisms for financial and technical assistance—and State–State cooperation and dispute settlement as alternatives to ISDS); Maria Rocha, Martin Dietrich Brauch, and Tehtena Mebratu-Tsegaye, "Advocates Say ISDS Is Necessary Because Domestic Courts Are 'Inadequate,' but Claims and Decisions Don't Reveal Systemic Failings" (New York: CCSI, 2021), https://ccsi.columbia.edu/news/advocates-say-isds-is-necessary-because-domestic-courts-are-inadequate-but-claims-and-decisions-dont-reveal-systemic-failings (finding little empirical basis for the assumption that domestic courts are systemically inadequate); and Martin Dietrich Brauch, "The Best of Two Worlds? The Brazil–India Investment Cooperation and Facilitation Treaty," *Investment Treaty News* 11, no. 1 (March 2020) (discussing a treaty model that routes disputes to dispute prevention and State–State arbitration rather than ISDS).

8 On arbitration as a private process transplanted into the public-law sphere, and in particular the absence of appellate review to correct errors of law, see Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007). On confidentiality as the default and the limited reach of transparency disciplines, see UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (adopted 2013, effective April 1, 2014); these rules apply by default only to arbitrations under treaties concluded after April 1, 2014, and are extended on an opt-in basis by the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, opened for signature on March 17, 2015, entered into force on October 18, 2017. For CCSI's accessible overview of these public interest deficits, see CCSI, *Primer on International Investment Treaties and Investor-State Dispute Settlement* (New York: CCSI, 2021), https://ccsi.columbia.edu/primer-international-investment-treaties-and-investor-state-dispute-settlement.

9 Martin Dietrich Brauch, *Exhaustion of Local Remedies in International Investment Law*, IISD Best Practices Series (Winnipeg: IISD, 2017), 12, https://www.iisd.org/system/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf.

10 CCSI, "Climate Change Clauses in Investor–State Mining Contracts" (June 30, 2022), https://ccsi.columbia.edu/climate-change-clauses-investor-state-mining-contracts. See Tehtena Mebratu-Tsegaye, Perrine Toledano, Martin Dietrich Brauch, and Mara Greenberg, *Five Years After the Adoption of the Paris Agreement, Are Climate Change Considerations Reflected in Mining Contracts?* (New York: CCSI, 2021), https://ccsi.columbia.edu/sites/ccsi.columbia.edu/files/content/docs/ccsi-climate-change-investor-state-mining-contracts.pdf; and Martin Dietrich Brauch, Perrine Toledano, and Cody Aceveda, *Allocation of Climate-Related Risks in Investor–State Mining Contracts* (New York: CCSI, June 2022), https://ccsi.columbia.edu/sites/ccsi.columbia.edu/files/content/docs/ccsi-climate-change-risk-allocation-investor-state-mining-contracts.pdf.

11 See CCSI, "Getting a Good Deal: Negotiating Extractive Industry Contracts" (CCSI Online MOOC), https://ccsi.columbia.edu/education/getting-a-good-deal-negotiating-extractive-industry-contracts; OECD, *Corruption in the Extractive Value Chain: Typology of Risks, Mitigation Measures and Incentives,* OECD Development Policy Tools (Paris: OECD Publishing, 2016), http://dx.doi.org/10.1787/9789264256569-en.

12 OECD, *Guiding Principles for Durable Extractive Contracts*, OECD Development Policy Tools (Paris: OECD Publishing, 2020), https://doi.org/10.1787/55c19888-en.

13 Julien Cantegreil, "The Audacity of the Texaco/Calasiatic Award: René-Jean Dupuy and the Internationalization of Foreign Investment Law," *European Jounal of International Law* 22, no. 2 (May 2011): 441-58, https://academic.oup.com/ejil/article/22/2/441/540717; Lise Johnson and Oleksandr Volkov, "Investor-State Contracts, Host State 'Commitments' and the Myth of Stability in International Law," *The American Review of International Arbitration* 24, no 3 (2013): 361-415, https://academiccommons.columbia.edu/doi/10.7916/D8K0727X.

14 Federative Republic of Brazil, Law No. 9,307 of September 23, 1996 (Lei de Arbitragem), art. 2, para. 3, as amended by Law No. 13,129 of May 26, 2015, https://www.planalto.gov.br/ccivil_03/leis/l9307.htm.

15 See Federative Republic of Brazil, Decree No. 10,025 of September 20, 2019, art. 3, incs. I–II, https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/decreto/D10025.htm; Orlando Cabrera, "Brazil Allows Arbitration in Public Contracts," *Kluwer Arbitration Blog* (October 12, 2019), https://legalblogs.wolterskluwer.com/arbitration-blog/brazil-allows-arbitration-in-public-contracts-in-the-port-road-rail-waterway-and-airport-sectors.

16 Republic of Ecuador, Ley Orgánica para el Fomento Productivo, Atracción de Inversiones, Generación de Empleo, y Estabilidad y Equilibrio Fiscal, Registro Oficial, Suplemento, No. 309, August 21, 2018, https://www.gob.ec/sites/default/files/regulations/2018-09/Documento_Ley-Org%C3%A1nica-Fomento-Productivo-Atracci%C3%B3n-Inversiones.pdf.

17 Plurinational State of Bolivia, Constitución Política del Estado, February 7, 2009, art. 320, https://www.planificacion.gob.bo/uploads/marco-legal/nueva_constitucion_politica_del_estado.pdf; Plurinational State of Bolivia, Law No. 708 of 2015 (Ley de Conciliación y Arbitraje), June 25, 2015, Title IV, Chapter II, https://www.procuraduria.gob.bo/ckfinder/userfiles/files/PGE-WEB/_MarcoLegal/Otras_normas/Ley_708.pdf.

18 Brazil, Law No. 9,307/1996, art. 1.

19 Brazil, Decree No. 10,025/2019; Cabrera, "Brazil Allows Arbitration in Public Contracts."

20 Andre de Luizi Correia, "Arbitrability of Disputes Involving the Public Administration in Brazil," in *The Arbitration Review of the Americas 2022* (London: Global Arbitration Review, 2021), https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2022/article/arbitrability-of-disputes-involving-the-public-administration-in-brazil.

21 Bolivia, Law No. 708, art. 4.

22 United Republic of Tanzania, Natural Wealth and Resources (Permanent Sovereignty) Act, 2017 (Act No. 5 of 2017), § 11, as amended by the Written Laws (Miscellaneous Amendments) Act, 2020, https://www.madini.go.tz/media/Natural-Wealth-and-Resources-Permanent-Sovereignty-Act-2017.pdf.

23 In *Tethyan Copper v. Pakistan*, the tribunal awarded the investor approximately USD 5.9 billion—close to 2% of Pakistan's GDP—for the denial of a mining lease at the early-exploration stage under the Pakistan-Australia BIT. The tribunal applied a "modern DCF" methodology to a project that had not entered production and adopted a risk-free discount rate. Contract-based arbitration can generate similar outcomes. *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, July 12, 2019, https://www.italaw.com/sites/default/files/case-documents/italaw10737.pdf. In *P&ID v. Nigeria*, the UNCITRAL tribunal seated in London awarded roughly USD 6.6 billion, rising to more than USD 11 billion with interest, under a gas-supply contract for a project that had never broken ground. *Process and Industrial Developments Ltd. v. The Ministry of Petroleum Resources of the Federal Republic of Nigeria*, Final Award, January 31, 2017, https://jusmundi.com/fr/document/decision/en-process-and-industrial-developments-ltd-v-the-ministry-of-petroleum-resources-of-the-federal-republic-of-nigeria-final-award-tuesday-31st-january-2017. The English Commercial Court, however, set this award aside in 2023, on grounds of fraud

and corruption, a case that has become a stark illustration of the dangers of opacity, speculative valuation, and weak procedural safeguards in contract-based arbitration. *The Federal Republic of Nigeria v. Process & Industrial Developments Ltd.* [2023] EWHC 2638 (Comm), Judgment of the High Court of England and Wales, October 23, 2023, https://www.judiciary.uk/wp-content/uploads/2023/10/Nigeria-v-PID-judgment.pdf. See also Jonathan Bonnitcha, "Corruption and Confidentiality in Contract-Based ISDS: The Case of P&ID v Nigeria," *Investment Treaty News* (International Institute for Sustainable Development), March 23, 2021, https://www.iisd.org/itn/2021/03/23/corruption-and-confidentiality-in-contract-based-isds-the-case-of-pid-v-nigeria-jonathan-bonnitcha.

24 See Josef Ostřanský and Nathalie Bernasconi-Osterwalder, "UNCITRAL Working Group III and the Assessment of Compensation and Damages: Thinning Scope for Impactful Reform or an Opportunity to Make a Difference?," *Investment Treaty News* (International Institute for Sustainable Development), October 7, 2022, https://www.iisd.org/itn/2022/10/07/uncitral-working-group-iii-and-the-assessment-of-compensation-and-damages-thinning-scope-for-impactful-reform-or-an-opportunity-to-make-a-difference-nathalie-bernasconi-osterwalder_josef-ostransky/; United Nations Commission on International Trade Law (UNCITRAL) Secretariat, "Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Provisions on Procedural and Cross-Cutting Issues," Note by the Secretariat, UN Doc. A/CN.9/WG.III/WP.253, June 30, 2025, https://docs.un.org/en/A/CN.9/WG.III/WP.253.

25 Jus Mundi, "Wiki Note: Seat of Arbitration," https://jusmundi.com/en/document/publication/en-seat-of-arbitration.

26 Convention on the Recognition and Enforcement of Foreign Arbitral Awards [New York Convention], June 10, 1958, 330 U.N.T.S. 3, art. 1, United Nations Commission on International Trade Law, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards. This discussion concerns contract-based arbitration seated in a national legal order. It does not apply to ICSID Convention arbitration, which is not anchored in a national seat and is subject to the self-contained annulment and enforcement regime of the ICSID Convention.

27 Brazil, Law No. 9,307/1996; Federative Republic of Brazil, Law No. 8,987 of February 13, 1995 (Lei de Concessões, or Concessions Law), art. 23-A, https://www.planalto.gov.br/ccivil_03/leis/l8987cons.htm; Federative Republic of Brazil, Law No. 11,079 of December 30, 2004 (Lei das Parcerias Público-Privadas, or Public-Private Partnerships Law), art. 11, III, https://www.planalto.gov.br/ccivil_03/_ato2004-2006/2004/lei/l11079compilado.htm; Brazil, Decree No. 10,025/2019, art. 3, inc. II (requiring that federal-government arbitrations in the listed infrastructure sectors be seated in Brazil and conducted in Portuguese).

28 For example, State of Rio de Janeiro, Decree No. 46,245 of February 19, 2018, https://leisestaduais.com.br/rj/decreto-n-46245-2018-rio-de-janeiro-excepcionaliza-a-aplicacao-do-decreto-n-46-245-de-19-de-fevereiro-de-2018-na-hipotese-que-especifica; State of São Paulo, Decree No. 64,356 of July 31, 2019, https://www.al.sp.gov.br/repositorio/legislacao/decreto/2019/decreto-64356-31.07.2019.html.

29 Bolivia, Law No. 708, arts. 127 and 129.

30 Julio Pellegrini, Fernando Zuñiga, and Bernardo Aylwin, "Chile: Trends and Developments," in *Chambers Global Practice Guides: International Arbitration 2025* (London: Chambers and Partners, 2025), https://practiceguides.chambers.com/practice-guides/international-arbitration-2025/chile/trends-and-developments/O22057.

31 Under the fraud limb of section 68 of the Arbitration Act 1996; see: *Federal Republic of Nigeria v. Process & Industrial Developments Ltd.*, [2023] EWHC 2638 (Comm), Claim Nos. CL-2019-000752 and CL-2018-000182 (High Court of Justice, Business and Property Courts of England and Wales, King's Bench Division, Commercial Court, October 23, 2023), https://www.judiciary.uk/judgments/the-federal-republic-of-nigeria-v-process-industrial-developments-limited.

32 Paul Stothard and Olivia Fox, "Nigeria v P&ID: Caution Against an Arbitral Tribunal's Non-Interventionist Approach to Arbitration?," Norton Rose Fulbright, February 2024, https://www.nortonrosefulbright.com/en/knowledge/publications/8d1c52b3/nigeria-v-pid.

33 Sergio Puig, "Social Capital in the Arbitration Market," *European Journal of International Law* 25, no. 2 (2014): 387–424, https://doi.org/10.1093/ejil/chu045.

34 On the geographic and demographic composition of arbitrator pools, see Susan D. Franck et al., "The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration," *Columbia Journal of Transnational Law* 53, no. 3 (2015): 429–506, https://ssrn.com/abstract=2611214; and Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings, *Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings*, ICCA Reports No. 8 (Alphen aan den Rijn, Netherlands: Kluwer Law International, in cooperation with the International Council for Commercial Arbitration, 2020), https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-Report-8-Gender-Diversity_0.pdf. On the concentration of appointments within a small, densely connected network of practitioners, see Puig, "Social Capital in the Arbitration Market"; Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: University of Chicago Press, 1996), https://press.uchicago.edu/ucp/books/book/chicago/D/bo3640700.html; and Malcolm Langford, Daniel Behn, and Runar Hilleren Lie, "The Revolving Door in International Investment Arbitration," *Journal of International*

Economic Law 20, no. 2 (2017): 301–32, https://doi.org/10.1093/jiel/jgx018. On a procedural and intellectual culture oriented toward capital-exporting jurisdictions, see Gus Van Harten, "Beware the Discretionary Choices of Arbitrators," *Columbia FDI Perspectives*, no. 110 (December 9, 2013), https://ccsi.columbia.edu/no-110-beware-discretionary-choices-arbitrators-gus-van-harten; and Thomas Schultz and Cédric Dupont, "Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study," *European Journal of International Law* 25, no. 4 (2014): 1147–68, https://doi.org/10.1093/ejil/chu075.

35 Brazil, Decree No. 10,025/2019, art. 3, V–VI, para. 3.

36 Federative Republic of Brazil, Advocacia-Geral da União (AGU), Portaria Normativa AGU No. 75, December 23, 2022 (Dispõe sobre a competência, a estrutura e o funcionamento do Núcleo Especializado em Arbitragem), https://www.gov.br/agu/pt-br/composicao/cgu/cgu/neadir/arquivos/portaria-normativa-agu-no-75-de-23-de-dezembro-de-2022-dispoe-sobre-a-competencia-a-estrutura-e-o-funcionamento-do-nea.pdf/view.

37 Brazil, Decree No. 10,025/2019, art. 3, III.

38 State of São Paulo, Decree No. 64,356/2019, art. 4, para. 1, item 3.

39 State of Rio de Janeiro, Decree No. 46,245/2018, art. 4, III.

40 State of São Paulo, Decree No. 64,356/2019, art. 4, para. 2.

41 SCC Arbitration Institute, Arbitration Rules of the SCC Arbitration Institute, adopted by the Stockholm Chamber of Commerce, in force January 1, 2023, art. 25, https://sccarbitrationinstitute.se/en/scc-arbitration-rules-english-2023.

42 SCC Arbitration Rules (2023), art. 19.

43 Ecuador, Ley Orgánica para el Fomento Productivo (2018).

44 Bolivia, Law No. 708, art. 130.

45 International Bar Association (IBA), IBA Rules on the Taking of Evidence in International Arbitration, adopted December 17, 2020, https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b.

46 *Interhandel* (Switzerland v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1959, p. 6, at 27, https://www.icj-cij.org/sites/default/files/case-related/34/034-19590321-JUD-01-00-EN.pdf.

47 Antônio Augusto Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge: Cambridge University Press, 1983), 1.

48 Martin Dietrich Brauch, *Exhaustion of Local Remedies in International Investment Law*, IISD Best Practices Series (Winnipeg: International Institute for Sustainable Development, 2017), 12, https://www.iisd.org/system/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf.

49 Convention on the Settlement of Investment Disputes between States and Nationals of Other States [ICSID Convention], opened for signature March 18, 1965, 575 U.N.T.S. 159, art. 26, https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview.

50 Government of India, Model Text for the Indian Bilateral Investment Treaty (2015), art. 15.2, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download.

51 International Bar Association (IBA), IBA Rules for Investor-State Mediation, adopted October 4, 2012, https://docs.pca-cpa.org/2016/02/IBA-Rules-for-Investor-State-Mediation.pdf.

52 United Nations Convention on International Settlement Agreements Resulting from Mediation, adopted December 20, 2018, opened for signature August 7, 2019 (the "Singapore Convention on Mediation"), https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements.

53 In *BG Group plc v. Republic of Argentina*, the U.S. Supreme Court characterized an 18-month local-litigation clause as a procedural question for the arbitrators rather than a substantive precondition to consent. *BG Group plc v. Republic of Argentina*, 572 U.S. 25 (2014), https://supreme.justia.com/cases/federal/us/572/25.

54 In *Maffezini v. Spain*, the tribunal treated a six-month negotiation period as a procedural step that could be bypassed via an MFN clause. *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, January 25, 2000, https://www.italaw.com/sites/default/files/case-documents/ita0479.pdf.

55 On free, prior and informed consent, see United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (September 13, 2007), arts. 19, 32, https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf; and International Labour Organization, Indigenous and Tribal Peoples Convention, 1989 (No. 169), adopted June 27, 1989, entered into force September 5, 1991, art. 6, https://www.ilo.org/media/324306/download.

56 Brazil, Law No. 9,307/1996, art. 2, para. 3 (providing that arbitration involving the public administration shall always be at law and shall observe the principle of publicity); Federative Republic of Brazil, Constituição Federal [C.F.] [Federal Constitution], October 5, 1988, art. 37, http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm (establishing publicity as a governing principle of public administration); State of São Paulo, Decree No. 64,356/2019; State of Rio de Janeiro, Decree No. 46,245/2018. On the publication of procedural documents in arbitrations involving Brazilian public entities, see International Chamber of Commerce, "ICC Court Expands Access to Dispute Resolution Content on Arbitrations Proceedings Involving Brazilian States and State Entities," news release, November 13, 2023, https://iccwbo.org/news-publications/news/icc-court-expands-access-to-dispute-resolution-content.

57 Ley Orgánica de Transparencia y Acceso a la Información Pública [LOTAIP], Ley No. 24, Registro Oficial Suplemento No. 337, May 18, 2004 (Ecuador) (extending the principle of openness to private-law entities that exercise State authority and manage public resources); Republic of Ecuador, Constitución de la República del Ecuador, October 20, 2008, art. 18, Registro Oficial, No. 449, October 20, 2008, https://www.defensa.gob.ec/wp-content/uploads/downloads/2021/02/Constitucion-de-la-Republica-del-Ecuador_act_ene-2021.pdf (guaranteeing the right of access to public information).

58 Bolivia, Law No. 708, art. 7 (providing that, where the State is a party to a conciliation or arbitration, information is reserved only where it has been specifically classified as such by regulation).

59 United Nations Commission on International Trade Law (UNCITRAL), Rules on Transparency in Treaty-based Investor-State Arbitration, adopted July 11, 2013, effective April 1, 2014, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf.

60 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, G.A. Res. 69/116, U.N. Doc. A/RES/69/116 (December 10, 2014), opened for signature March 17, 2015 (the "Mauritius Convention on Transparency"), entered into force October 18, 2017, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/transparency-convention-e.pdf.

61 International Centre for Settlement of Investment Disputes (ICSID), ICSID Arbitration Rules, effective July 1, 2022, R. 62(3), 63, 65, https://icsid.worldbank.org/procedures/arbitration/convention/confidentiality-transparency/2022.

62 Extractive Industries Transparency Initiative (EITI), "Contract Transparency," accessed May 20, 2026, https://eiti.org/contract-transparency; and Fatma Nyambura, Daryll Griffith, and Skye Zheng, "Unlocking Progress: Global Steps Toward Contract Transparency," EITI (blog), November 7, 2024, https://eiti.org/blog-post/unlocking-progress-global-steps-toward-contract-transparency. Under Requirement 2.4 of the EITI Standard, implementing countries must disclose all contracts and licenses granted, entered into, or amended from January 1, 2021 onward. See Extractive Industries Transparency Initiative (EITI), *The EITI Standard 2023* (Oslo: EITI International Secretariat, 2023), Req. 2.4, https://eiti.org/sites/default/files/2023-06/2023%20EITI%20Standard.pdf.

63 See ResourceContracts.org, a database of publicly available oil, gas, and mining contracts developed by the Columbia Center on Sustainable Investment (CCSI) with the World Bank and the Natural Resource Governance Institute; OpenLandContracts.org, CCSI's database of land, agriculture, forestry, and renewable energy contracts; and OpenCommunityContracts.org, CCSI's database of community–investor agreements. On CCSI's support to host governments in establishing country-specific disclosure platforms, see Columbia Center on Sustainable Investment, "Making Resource Contracts Publicly Accessible," https://ccsi.columbia.edu/content/making-resource-contracts-publicly-accessible.

64 Edward Guntrip, "Urbaser v Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?," *EJIL: Talk!*, February 10, 2017, https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration.

65 International Institute for Sustainable Development (IISD), "Burlington v. Ecuador," *Investment Treaty News*, October 18, 2018, https://www.iisd.org/itn/2018/10/18/burlington-v-ecuador; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims, February 7, 2017, https://www.italaw.com/sites/default/files/case-documents/italaw8206.pdf; The tribunal separately awarded the investor approximately USD 380 million after finding that Ecuador had violated its treaty obligations.

66 Daniela Páez-Salgado and Natalia Zuleta, "Perenco v Ecuador: An Example of a 'Lengthy, Complex, Multi-faceted, Hard Fought and Very Expensive' Investment Arbitration?," *Kluwer Arbitration Blog*, November 14, 2019, https://legalblogs.wolterskluwer.com/arbitration-blog/perenco-v-ecuador-an-example-of-a-lengthy-complex-multi-faceted-hard-fought-and-very-expensive-investment-arbitration; The tribunal separately awarded the investor roughly USD 450 million on the merits.

67 Mining Law Committee, International Bar Association (IBA), *Model Mine Development Agreement 1.0: A Template for Negotiation and Drafting*, April 4, 2011, https://www.mmdaproject.org/presentations/MMDA1_0_110404Bookletv3.pdf.

68 Brauch, Toledano, and Aceveda, *Allocation of Climate-Related Risks*.

69 The distinction is reflected in the UN Convention on Jurisdictional Immunities of States and Their Property, which provides that consent to the exercise of jurisdiction does not imply consent to measures of constraint against State property. See United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (December 2, 2004), arts. 18–21, https://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf. See also United States of America, Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602–1611), § 1610, https://www.congress.gov/94/statute/STATUTE-90/STATUTE-90-Pg2891.pdf (execution against property used for commercial activity); and United Kingdom, State Immunity Act 1978, c. 33 (UK), § 13(4), https://www.legislation.gov.uk/ukpga/1978/33/section/13 (exception permitting process against state property "for the time being in use or intended for use for commercial purposes").

70 For example, in *Argentina v. NML Capital,* the U.S. Supreme Court held that the Foreign Sovereign Immunities Act did not bar post-judgment discovery into Argentina's worldwide assets, in litigation arising from sovereign debt enforcement. The case illustrates how broad waiver and enforcement language can facilitate expansive asset-tracing efforts, even where questions of attachment remain governed by separate immunity rules. See *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134 (2014), https://supreme.justia.com/cases/federal/us/573/134.

71 See, for example, *Walker International Holdings Ltd. v. Republic of Congo*, 395 F.3d 229 (5th Cir. 2004), http://www.ca5.uscourts.gov/opinions/pub/04/04-20301-CV0.wpd.pdf (where an express waiver supported enforcement efforts against commercial assets), and *Democratic Republic of the Congo v. FG Hemisphere Associates LLC*, [2011] 14 H.K.C.F.A.R. 395, FACV Nos. 5, 6 & 7 of 2010 (Court of Final Appeal of the Hong Kong Special Administrative Region, June 8, 2011; final judgment September 8, 2011), https://www.hklii.hk/en/cases/hkcfa/2011/41 (which generated prolonged litigation over State immunity and attempts to enforce ICC awards against assets connected to the State).

72 This is consistent with the UN Convention on Jurisdictional Immunities, art. 21.

73 Security for costs and provisional measures can be particularly sensitive in investor-State disputes because they may impose financial pressure on the State before the merits are resolved. If such measures are permitted at all, the contract should specify that they do not authorize attachment of sovereign assets or operate as a waiver of immunity from execution.

74 Ladan Mehranvar, with Jessica Hennings, Robin Marie Kelly, Lena Raxter, and Ana Toimil, *How the International Investment Law Regime Undermines Access to Justice for Investment-Affected Stakeholders* (New York: Columbia Center on Sustainable Investment (CCSI), January 2024), https://ccsi.columbia.edu/sites/ccsi.columbia.edu/files/content/docs/ccsi-access-to-justice.pdf.

75 Nathalie Bernasconi, Martin Dietrich Brauch, and Howard Mann, "Civil Society and International Investment Arbitration: Tracing the Evolution of Concern," in *The Oxford Handbook of International Arbitration*, ed. Thomas Schultz and Federico Ortino (Oxford: Oxford University Press, 2020), 304–323, https://doi.org/10.1093/law/9780198796190.003.0012.

76 Bruno Simma, Diane Desierto, Martin Doe Rodríguez, Jan Eijsbouts, Ursula Kriebaum, Pablo Lumerman, Abiola Makinwa, Richard Meeran, Sergio Puig, Steven R. Ratner, Giorgia Sangiuolo, Martijn Scheltema, Anne van Aaken, and Katerina Yiannibas, *The Hague Rules on Business and Human Rights Arbitration* (The Hague: Centre for International Legal Cooperation, 2019), arts. 5(2), 18(5), 19, https://docs.pca-cpa.org/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration.pdf.

77 Brooke Güven, *The Business and Human Rights Arbitration Rule Project: Falling Short of Its Access to Justice Objectives*, CCSI Briefing Note (New York: CCSI, 2019), https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/152.

78 Office of the United Nations High Commissioner for Human Rights (OHCHR), *Guide to Contractual Provisions for Remedy in DFI Financing* (Geneva: OHCHR, March 2026), https://www.ohchr.org/sites/default/files/documents/issues/development/dfi/ohchr-dfis-guide-contractual-provisions-march-2026.pdf.

79 Güven, *Business and Human Rights Arbitration Rule Project*.

80 Office of the United Nations High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, HR/PUB/11/04 (New York and Geneva: United Nations, 2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

81 International Finance Corporation (IFC), Performance Standard 1, "Assessment and Management of Environmental and Social Risks and Impacts," in *IFC Performance Standards on Environmental and Social Sustainability*, effective January 1, 2012, para. 35, https://www.ifc.org/content/dam/ifc/doc/2010/2012-ifc-performance-standard-1-en.pdf.

82 OHCHR, *Guide to Contractual Provisions*.

83 Such waiver requirements are well established in treaty practice, deployed in the opposite direction: see North American Free Trade Agreement, Canada-Mexico-United States, December 17, 1992, 32 I.L.M. 289 and 605 (1993), 107 Stat. 2057, art. 1121, https://www.italaw.com/sites/default/files/laws/italaw6187%2814%29.pdf (conditioning an investor's submission of a treaty claim on the waiver of its right to initiate or continue proceedings over the same measures in other fora).

84 ICSID tribunals have held that "[a] state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty," since a treaty claim's 'fundamental basis' is the treaty's own independent standard, not the contract. *Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, paras. 101, 103, https://www.italaw.com/sites/default/files/case-documents/ita0210.pdf.

85 United Nations Commission on International Trade Law (UNCITRAL), Working Group III (Investor-State Dispute Settlement Reform), *Possible Reform of Investor-State Dispute Settlement (ISDS): Ensuring Independence and Impartiality on the Part of Arbitrators and Decision Makers in ISDS*, Note by the Secretariat, UN Doc. A/CN.9/WG.III/WP.151 (August 30, 2018), para. 6, https://documents.un.org/doc/undoc/ltd/v18/057/64/pdf/v1805764.pdf. The empirical record is unsparing: of the 372 individuals appointed to ICSID tribunals between 1972 and 2011, 37 took roughly half of all appointments (para. 26). A network analysis has documented a preferential-attachment dynamic in which each appointment makes the next more likely; see Malcolm Langford, Daniel Behn, and Runar Hilleren Lie, "The Revolving Door in International Investment Arbitration," *Journal of International Economic Law* 20, no. 2 (2017): 301–32, https://doi.org/10.1093/jiel/jgx018.

86 United Nations Commission on International Trade Law (UNCITRAL), Working Group III (Investor-State Dispute Settlement Reform), *Possible Reform of Investor-State Dispute Settlement (ISDS): Arbitrators and Decision Makers: Appointment Mechanisms and Related Issues*, Note by the Secretariat, UN Doc. A/CN.9/WG.III/WP.152 (August 30, 2018), paras. 21, 24–26, https://docs.un.org/en/A/CN.9/WG.III/WP.152.

87 United Nations Commission on International Trade Law (UNCITRAL), *Code of Conduct for Arbitrators in International Investment Dispute Resolution*, annexed to G.A. Res. 78/105 (December 7, 2023), published February 2024, arts. 4, 11, https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/2318944_coc_arbitrators_e-book_eng.pdf; United Nations General Assembly, Resolution 78/105, *Code of Conduct for Arbitrators in International Investment Dispute Resolution and Code of Conduct for Judges in International Investment Dispute Resolution with Respective Commentary of the United Nations Commission on International Trade Law*, UN Doc. A/RES/78/105 (December 7, 2023), https://docs.un.org/en/A/RES/78/105; International Bar Association (IBA), *IBA Guidelines on Conflicts of Interest in International Arbitration*, adopted by the IBA Council May 25, 2024 (London: International Bar Association, 2024), https://www.ibanet.org/document?id=guidelines-on-conflicts-of-interest-in-international-arbitration-2024.

88 Lise Johnson and Ladan Mehranvar, "Double-Hatting under UNCITRAL's Code of Conduct for Arbitrators: Outcomes and Implications for Future Reform Efforts," in *Investment Law, Justice, and Sustainable Development*, ed. Frank Emmert and Begaiym Esenkulova, GHEA21 Open Educational Resources 47 (2026), § 6.2, https://digitalcommons.bard.edu/osun_oer/47.

89 UNCITRAL, Code of Conduct for Arbitrators, art. 2(2).

90 UNGA Res. 78/105, para. 4.

91 UNCITRAL, WP.151, paras. 50, 53, 55 (sec. II.A.2(c), "Contours of the challenge mechanism"). Under the ICSID Convention, a challenge to a sole arbitrator or to a majority of the tribunal is decided by the Chairman of the ICSID Administrative Council, and a challenge to one arbitrator by the other members of the tribunal; under the SCC Rules, challenges are decided by the SCC Board, which is not required to give reasons.

92 Chiara Giorgetti, "Arbitrator Challenges in International Investment Tribunals," in *The Legitimacy of Investment Arbitration: Empirical Perspectives*, ed. Daniel Behn, Ole Kristian Fauchald, and Malcolm Langford, Studies on International Courts and Tribunals (Cambridge: Cambridge University Press, 2022), chap. 5, https://www.cambridge.org/core/books/abs/legitimacy-of-investment-arbitration/arbitrator-challenges-in-international-investment-tribunals/F236D1768D6997F2F9689F74910E07A1; UNCITRAL, WP.151, para. 59 (noting that "proportionately very few challenges are successful," whether measured against overall caseload or against challenge applications).

93 United Nations Commission on International Trade Law (UNCITRAL), Working Group III (Investor-State Dispute Settlement Reform), *Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters*, Note by the Secretariat, UN Doc. A/CN.9/WG.III/WP.150 (August 28, 2018), paras. 6–9, https://docs.un.org/en/A/CN.9/WG.III/WP.150 (distinguishing divergence that is justified—reflecting, for example, rules of treaty interpretation or differences in facts and evidence—from unjustifiable inconsistency, and noting the Working Group's agreement to focus on the latter).

94 UNCITRAL, WP.150, para. 11 and n. 5 (identifying, as often-cited examples of inconsistent decision-making, the awards in *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8; *Enron Corp. v. Argentina*, ICSID Case No. ARB/01/3; *LG&E Energy Corp. v. Argentina*, ICSID Case No. ARB/02/1; and *Continental Casualty Co. v. Argentina*, ICSID Case No. ARB/03/9). See also CCSI, *A Primer on International Investment Treaties and Investor-State Dispute Settlement*.

95 UNCITRAL, WP.150, para. 21 (noting that the existing review mechanisms "have been designed to review awards with the aim to address a limited set of major procedural deficiencies" and "address the integrity and fairness of the process rather than the consistency, coherence or correctness of the outcomes").

96 Under the ICSID Convention, an award may be annulled only where: the tribunal was not properly constituted; the tribunal manifestly exceeded its powers; there was corruption on the part of a tribunal member; there was a serious departure from a fundamental rule of procedure; or the award failed to state the reasons on which it was based. ICSID Convention, art. 52(1).

97 Article 34(2) of the UNCITRAL Model Law permits set-aside only on limited grounds, including incapacity or invalidity of the arbitration agreement, lack of proper notice or inability to present one's case, excess of mandate, improper composition of the tribunal or procedure, non-arbitrability, or conflict with public policy. United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Model Law on International Commercial Arbitration, adopted June 21, 1985, with amendments as adopted July 7, 2006, art. 34, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/07-86998_ebook.pdf.

98 Article V of the New York Convention similarly allows refusal of recognition or enforcement on limited grounds, including invalidity of the arbitration agreement, denial of due process, excess of mandate, irregularity in composition or procedure, non-binding or set-aside awards, non-arbitrability, and public policy. New York Convention, art. V.

99 See also UNCITRAL, WP.150, paras. 24, 26 (ICSID annulment "is based on assessment of the integrity of the procedure itself, and does not affect the substance of the dispute"; in non-ICSID cases, set-aside and enforcement review "does not include a review of the merits").

100 UNCITRAL, WP.150, para. 25 (noting that ICSID annulment decisions have reintroduced inconsistency into the annulment process, "in part because of differing views on whether a misinterpretation of the relationship between an investment treaty and customary international law constitutes grounds for annulment," with some committees concluding that serious misapplication of the law may lead to annulment and others rejecting that view).

101 Currently, the multilateral investment court is referred to as the "permanent tribunal," and the standing appellate mechanism as the "permanent appellate tribunal." See United Nations Commission on International Trade Law (UNCITRAL), Working Group III (Investor-State Dispute Settlement Reform), Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Fifty-Fourth Session (Vienna, March 23–27, 2026), UN Doc. A/CN.9/1240 (April 14, 2026), https://docs.un.org/en/A/CN.9/1240.

102 On the multilateral reform options, see UNCITRAL, WP.150, paras. 30–32 (Working Group consideration of the role of the dispute settlement method in developing consistent legal standards, and preliminary views of States).

103 Courts capable of serving this function already exist. For example, the OHADA Common Court of Justice and Arbitration, seated in Abidjan, exercises supervisory jurisdiction over arbitral awards across seventeen African States and simultaneously functions as a supranational commercial court of last instance—a regional model a group of States could adapt to provide error-of-law review. Organization for the Harmonization of Business Law in Africa (OHADA), "CCJA at a Glance," https://www.ohada.org/en/ccja-at-a-glance.

104 See, for example, American Arbitration Association (AAA) and International Centre for Dispute Resolution (ICDR), *Optional Appellate Arbitration Rules*, effective November 1, 2013, https://www.icdr.org/sites/default/files/AAA-ICDR_Optional_Appellate_Arbitration_Rules.pdf.

105 Such a reform would mean adding a new ground to the otherwise exhaustive list in Article V of the New York Convention; amending a convention with more than 170 contracting States is a formidable undertaking, which is among the reasons the host State or regional-court route is presented here as the immediately available alternative.

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