CHAPTER 6

Expedited Arbitration Rules for Investment Disputes: ICSID Amendment Process and UNCITRAL Working Group II

Crina Baltag

In 1993, Lord Mustill referred to international arbitration as being 'by definition, fast-track' and he added, '[t]hat was why the parties chose it as their method of resolving disputes'.[1] However, Lord Mustill also noted, '[this] has changed in the last forty years [with] the creation of the new, slow-track arbitration which is the kind of arbitration which is the subject of almost everything written and spoken on the subject'.

With arbitration becoming increasingly costly and lengthy, stakeholders[2] have started to address these issues and propose suitable mechanisms for reinstating

1. Michael Mustill, *Comments on Fast-Track Arbitration*, Journal of International Arbitration, Volume 10, Issue 4 (1993), pp. 121–125, p. 122.
2. Peter Morton, *Can a World Exist Where Expedited Arbitration Becomes the Default Procedure?*, Arbitration International, Volume 26, Issue 1 (2010), pp. 103–114, p. 105, suggestively emphasizing that the delay in the arbitration proceedings is the result of the actions of all stakeholders involved:

   - Tribunal availability: 'The first date all three members of the tribunal are available for a one week hearing in the relevant window is in 18 months time'.
   - Counsel availability: 'I have four other cases coming to trial in autumn next year and we need to fit things in around that, so these dates are actually good for us'.
   - Expansive disclosure process: 'We need time to do a thorough trawl for all conceivably relevant documents, both hard copy and electronic, and we want to allow plenty of time to obtain disclosure from our opponents'.
   - Expansive witness evidence: 'We have 10 witnesses and we will need time to sit down with each of them and run through details of their involvement with the documents, after which we will need to prepare a detailed witness statement for them – all of that is going to take many months'.
   - Witness availability: 'Of our 10 witnesses, three are abroad, four have since left the company and it will take time to arrange a convenient time to meet with them and get

arbitration as an efficient mechanism for resolving commercial disputes.[3] Two notable arbitration rules are still to implement expedited arbitration proceeding: the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules and the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules.

At the fifty-first session of the UNCITRAL in 2018, it was agreed that Working Group II would take up issues relating to expedited arbitration.[4] The work of Working Group II is aimed 'at improving the efficiency of the arbitral proceedings, which would result in reduction of costs and duration of the proceedings',[5] and expedited arbitration, 'as a streamlined and simplified procedure with shortened time frame' could ensure this efficiency goal.[6]

At the same time, the ICSID Arbitration Rules Amendment Process, now at the 4th Working Paper published in February 2020, is advancing a set of expedited arbitration rules for ICSID investment arbitration proceedings. This is in line with the overall amendment process of the ICSID Arbitration Rules, and, in particular, with the efforts of reducing the duration of the arbitration proceedings, where possible. The UNCITRAL Working Group III on Investor-State Dispute Settlement (ISDS) Reform is also addressing concerns with costs and duration of investment disputes as ongoing concerns with the ISDS system, in addition to the outcome of the arbitration proceedings – inconsistency in arbitral decisions and the lack of predictability of such outcome –, and the arbitrators appointed in the investment arbitration cases.[7]

This chapter undertakes a brief review of the feasibility of expedited arbitration for investment disputes, given their peculiarities and complexity, noting that, at this

them to agree their statements and we understand that the first time all 10 are available is well into next year'.
- Dilatory tactics and their accommodation by the tribunal: 'Our opponents are looking to string things out to suit their purposes and the tribunal is unfortunately letting them get away with it'.

3. *See* Giacomo Marchisio, *Recent Solutions to Old Problems: A Look at the Expedited Procedure under the Newly Revised ICC Rules of Arbitration*, ICC Dispute Resolution Bulletin, Issue 1 (2017), pp. 76–81, p. 77.
4. UNCITRAL*, Settlement of Commercial Disputes. Draft Provisions on Expedited Arbitration. Note by the Secretariat*, A/CN.9/WG.II/WP.212, para. 1.

   For a discussion regarding the terminology used – 'expedited', 'fast-track', 'accelerated', *see* Yas Banifatemi, *Expedited Proceedings in International Arbitration,* in Laurent Lévy and Michael Polkinghorne (eds), *Expedited Procedures in International Arbitration,* Dossiers of the ICC Institute of World Business Law, vol. 16 (Kluwer Law International, 2017), pp. 9–33, pp. 9–10.
5. UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-Ninth Session (New York, 4–8 February 2019)*, A/CN.9/969, para. 13.
6. UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-Ninth Session (New York, 4–8 February 2019)*, A/CN.9/969, para. 14.
7. The UNCITRAL Working Group III began its works in November 2017 and was entrusted with a broad mandate to: (a) first, identify and consider concerns regarding investor-State dispute settlement; (b) second, consider whether reform was desirable in the light of any identified concerns; and (c) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. UNCITRAL, *Report of the U.N. Commission on International Trade Law 50th Session (3-21 July 2017),* U.N. Doc. A/72/17 (2017), para. 244.

time, this is still work in progress.[8] This is done with reference to the ICSID Amendment Process, as well as to the work of UNCITRAL Working Group II, although the Group is still to decide on whether the proposed expedited rules would apply to other types of arbitration proceedings than commercial ones.[9] Before advancing to these core issues, the chapter will first take a look at expedited arbitration provisions in institutional arbitration and identify some key unsettled issues, which are either likely to emerge or are already addressed in the UNCITRAL and ICSID discussions.

§6.01 OVERVIEW OF THE CURRENT EXPEDITED ARBITRATION PROVISIONS

In 2015, the White & Case – Queen Mary Arbitration Survey discussed the benefits of expedited arbitration proceedings.[10] Ninety-two per cent of the participants favoured the inclusion of simplified arbitration proceedings in institutional arbitration rules, 59% as an opt-in mechanism and 33% as a mandatory provision, based on a certain value of the claim.[11] On this latter aspect, while a significant number of respondents (40%) suggested the amount of USD 1 million as the yardstick for the application of simplified/expedited proceedings, the follow-up interviews revealed that the value of a claim does not necessarily reflect the complexity of a dispute and due attention must be paid to what parties consider to be fit for an expedited resolution of the dispute.[12]

The first institutions to provide for expedited arbitration proceedings were World Intellectual Property Organization (WIPO), in 1994, followed by China International Economic and Trade Arbitration (CIETAC), later in 1994, and The Arbitration Institute of the Stockholm Chamber of Commerce (SCC), in 1995.[13] In 2002, the International Court of Arbitration of the International Chamber of Commerce (ICC) set up a task force for exploring the ways in which time and costs in arbitration of small claims could be reduced.[14] The 2017 ICC Arbitration Rules currently provide for expedited

8. References in this paper are made available to documents on or before 12 Apr. 2020.
9. UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Seventieth Session (Vienna, 23–27 September 2019)*, A/CN.9/1003, paras 14–15.
10. White & Case and Queen Mary University of London, School of International Arbitration; *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf, last visited 8 Apr. 2020.
11. *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration,* p. 26.
12. *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration,* p. 26.
13. For an overview of the key provisions of the 2017 SCC Rules for Expedited Arbitration, *see* Anja Havedal Ipp, *Expedited Arbitration at the SCC: One Year with the 2017 Rules*, Kluwer Arbitration Blog, 2 Apr. 2018, available at http://arbitrationblog.kluwerarbitration.com/2018/04/02/expedited-arbitration-scc-one-year-2017-rules-2/, last visited 10 Apr. 2020.
14. ICC, *Guidelines for Arbitrating Small Claims under the ICC Rules of Arbitration*, ICC International Court of Arbitration Bulletin, Volume 14, Issue 1 (2003), pp. 29–35. *See also*, ICC, *Controlling Time and Costs in Arbitration*, 2007, available at https://iccwbo.org/content/uploads/sites/3/2018/03/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration-english-version.pdf, last visited 11 Apr. 2020.

proceedings under Article 30 and Appendix VI.[15] The 2016 Singapore International Arbitration Centre (SIAC) Arbitration Rules include specific provisions on expedited arbitration in Rule 5, while the 2018 Hong Kong International Arbitration Centre (HKIAC) Arbitration Rules regulate expedited arbitration in Article 42. The London Court of International Arbitration (LCIA) does not provide for expedited arbitration, but it does advance, in Article 9 of the LCIA Arbitration Rules, the expedited formation of the arbitral tribunal in case of exceptional emergency. Further, the LCIA Arbitration Rules give broad discretion to the arbitral tribunal, in particular under Article 14.4, which empowers the arbitral tribunal to expedite the proceedings if the circumstances of the case so require.[16]

Most expedited arbitration provisions allow parties to opt-in to such procedure, based on their consent, while few, including the ICC, provide for the automatic application of the expedited arbitration when certain criteria are met. It is common to see fallback provisions also included in the rules, referring to the circumstances in which expedited proceedings are no longer required, and the proceedings will follow the normal route. There is a general preference for a sole arbitrator, rather than a three-member arbitral tribunal (Article 17 of the 2017 SCC Rules for Expedited Arbitration; and even when the parties have agreed on a three-member tribunal, such as Article 2(1) of Appendix VI of the ICC Arbitration Rules); procedural timetable are adjusted to the expedited nature of the arbitration (in ICC proceedings, no Terms of Reference; in SCC proceedings, the case management conference to be scheduled in seven days as of the referral of the case to the arbitral tribunal (Article 29(4) of the 2017 SCC Rules for Expedited Arbitration)); limitation of exchange of submissions to one or maximum two rounds (Article 45(9) of the VIAC Arbitration Rules, etc.); frontloading of the case is provided (Article 6 of the SCC Expedited Rules provide that the request for arbitration constitutes the statement of claims); the procedure follows without a hearing (Article 33(1) of the 2017 SCC Rules for Expedited Arbitration); short deadlines, including for issuing the arbitral award, are advanced (in ICC arbitrations, given the scrutiny of the award, the deadline is shorter, although the scrutiny process is also shorter);[17] and the possibility to issue non-reasoned arbitral awards is also provided for (Article 42(1) of the 2017 SCC Rules for Expedited Arbitration).

Available statistics seem to confirm that expedited proceedings are a useful addition to institutional arbitration. In 2017, SCC had 36% of its cases under the expedited rules; between 2010 and 2017, SIAC had 341 applications for expedited

15. As explained, the interest in adopting specific expedited arbitration rules was triggered by the high number of claims below USD 2 million. *See* José Ricardo Feris, *The 2017 ICC Rules of Arbitration and the New ICC Expedited Procedure Provisions: A View from Inside the Institution*, ICC Dispute Resolution Bulletin, Issue 1 (2017), pp. 63–75, p. 65.
16. For examples of 'fast-track' arbitrations before the institutionalization of expedited arbitration, *see* Yas Banifatemi, *Expedited Proceedings in International Arbitration*, pp. 10–11.
17. ICC, *ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, in force 1 Jan. 2019, para. 135:

> If the Expedited Procedure Provisions apply, any draft award submitted to the Court will be scrutinised as soon as possible, and in any event no later than two to three weeks of receipt by the Secretariat.

proceedings, out of which 186 were accepted; in 2019, HKIAC had received 21 applications for the expedited procedure and had granted 15. As of 1 April 2019, 70 cases have been, or are being, conducted under the ICC expedited procedure provisions.

There are, however, controversial issues in expedited arbitration that are still subject to debate, as also emerges from the UNCITRAL Working Group II discussions. For example, whether the parties should consent to expedited arbitration (opt-in mechanism) or automatically be directed to expedited arbitration (opt-out mechanism with fallback provisions, when the expedited procedure is no longer suited to the case) when the criteria are met. This particular aspect is relevant not only from the perspective of consent – party autonomy as the cornerstone of arbitration – but also with regard to the criteria to be applied for an automatic application of the expedited arbitration rules. For instance, the amount in dispute is not the only element defining the complexity of a dispute. Further, a cut-off value is a controversial issue which may be misused by the parties. For the latter concern, the ICC, for instance, provides that the arbitral tribunal may take into account whether, by artificially inflating its claims, a party has prevented the Expedited Procedure Provisions from applying.[18] Both ICSID and UNCITRAL advance consent (i.e., opt-in mechanism) as the only criteria for the application of the expedited arbitration rules.

A further matter relates to the composition of the arbitral tribunal, and in particular, cases when the parties have agreed to a three-member arbitral tribunal, but the expedited arbitration rules provide for a sole arbitrator (Article 2(1) of Appendix VI of the ICC Arbitration Rules; Rule 5.2(b) of SIAC Arbitration Rules). On this point, the Singapore High Court in 2015 in *AQZ v. ARA*, under 2010 SIAC Arbitration Rules, upheld the sole arbitrator's award even in the presence of the parties' express provision to refer the dispute to a three-arbitrator tribunal.[19] The court concluded 'that the arbitral proceedings were conducted in accordance with the parties' agreement'.[20] Following this decision, the 2016 SIAC Arbitration Rules expressly included in Rule 5.3 that '[b]y agreeing to arbitration under these Rules, the parties agree that, where arbitral proceedings are conducted in accordance with the Expedited Procedure under this Rule 5, the rules and procedures set forth in Rule 5.2 shall apply even in cases where the arbitration agreement contains contrary terms'. This has been recently confirmed by Singapore International Commercial Court in *BXS v. BXT*.[21] The court highlighted that, by agreeing to the 2016 SIAC Arbitration Rules, the parties also agreed

18. ICC, *Note to Parties and Arbitral Tribunals*, para. 104.
19. *AQZ v. ARA* [2015] SGHC 49. *See* further, Gary Born and Jonathan Lim, *AQZ v ARA: Singapore High Court Upholds Award Made under SIAC Expedited Procedure*, Kluwer Arbitration Blog, 9 Mar. 2015.
20. *AQZ v. ARA*, para. 135. *See also*, José Ricardo Feris, *The 2017 ICC Rules of Arbitration and the New ICC Expedited Procedure Provisions: A View from Inside the Institution,* p. 65, explaining that the 2017 ICC Arbitration Rules have two general principles characterizing the expedited proceedings. One of them, in Art. 30 of the 2017 ICC Arbitration Rules, provides that the parties agree that the expedited procedure provisions shall prevail over any contrary term in the arbitration agreement. As such, parties cannot depart from the essential features of the expedited arbitration.
21. *BXS v. BXT* [2019] SGHC(I)10.

to Rules 5.2 and 5.3 of the SIAC Rules, which include the fact that a dispute shall be heard by a sole arbitrator, rather than by a three-member tribunal.[22] Therefore, the court concluded, 'the fact that the arbitration was heard by a sole arbitrator under the Expedited Procedure did not contravene the parties' arbitration agreement'.[23] Both draft UNCITRAL Expedited Arbitration Provisions and the proposed ICSID Arbitration Rules give preference to the consent of the parties, and, in the absence of such agreement, provide for the sole-arbitrator tribunal as the default option.

A last issue[24] refers to the relationship between due process and expedited proceedings. In the discussions in the Working Group II, it was explained that arbitrators are often concerned that the award would be challenged on the basis that the tribunal has failed to give the opportunity to the parties to be heard, the so-called due process paranoia.[25] As explained in the context of the Working Group II, as 'the notions of due process and fairness were stressed as important elements of international arbitration that should not be overlooked in streamlining the arbitration procedure',[26] UNCITRAL is working to prepare 'expedited arbitration provisions … to balance on the one hand, the efficiency of the arbitral proceedings and on the other, the rights of the parties to due process and to fair treatment'.[27]

The issue of due process in the context of expedited arbitration proceedings was addressed by the Svea Court of Appeal in 2012. In Case No. T-6238-10, the Court had to decide whether the fact that in the expedited arbitral proceedings under the SCC Rules the sole arbitrator decided not to hold a hearing to hear the witnesses' testimony constituted a breach of Swedish public policy.[28] Considering that Article 27(1) of the applicable 2010 SCC Rules for Expedited Arbitrations provided that '[a] hearing shall be held if requested by a party and if deemed necessary by the Arbitrator', the Court concluded that the decision not to hold a hearing did not contradict the rules applicable to the proceedings.[29] In *China Machine v. Jaguar,* where the parties had consented to expedited ICC arbitration proceedings, Singapore High Court emphasized that expedited proceedings do not trump arbitral tribunal's 'responsibility to ensure due

22. *BXS v. BXT*, para. 12.
23. *BXS v. BXT*, para. 12.
24. For arbitrators, another concern might be the lower fees in expedited arbitration proceedings. *See*, for example, in ICC expedited proceedings, fees lower than the general scales (*see* 2017 ICC Arbitration Rules, Appendix III: Arbitration Costs and Fees).
25. *See also*, White and Case and School of International Arbitration, Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration*, available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF, last visited 9 Apr. 2020, p. 27.
26. UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-Ninth Session (New York, 4–8 February 2019)*, A/CN.9/969, para. 23.
27. UNCITRAL, *Settlement of Commercial Disputes. Draft Provisions on Expedited Arbitration. Note by the Secretariat*, A/CN.9/WG.II/WP.212.
28. Case No. T 6238-10, Judgment of the Svea Court of Appeal, 24 Feb. 2012, p. 6.
29. Case No. T 6238-10, p. 9.

process'.[30] However, the Court continued, 'the Tribunal had to do so within the strictures that the parties had placed it in, principally the constraint of time'.[31]

On the particular issue of due process, Working Group II emphasized that '[t]he limited number of case law where due process in the context of expedited arbitration was mentioned indicates that, in their scrutiny of awards, enforcement courts have sought to strike a balance between, on the one hand, the arbitrators' powers and discretion in implementing expedited procedure and giving effect to the policy of time and cost efficiency and, on the other hand, the requirements of due process and fairness'.[32]

§6.02 INVESTMENT ARBITRATION AND THE SUITABILITY OF EXPEDITED PROCEEDINGS

Arbitrating investment disputes has its peculiarities stemming out of the nature of the dispute, as well as from the parties involved,[33] which become relevant when assessing the feasibility of implementing expedited arbitration provisions. State party involvement is the main element which should be factored in, with a view of the complexity of State apparatus, complex internal organization, approvals and authorizations to be

30. *China Machine New Energy Corporation v. Jaguar Energy Guatemala LLC and AEI Guatemala Jaguar Ltd* [2018] SGHC 101, para. 127.
31. *China Machine v. Jaguar,* para. 129.
32. UNCITRAL, *Settlement of Commercial Disputes. Draft Provisions on Expedited Arbitration. Note by the Secretariat*, A/CN.9/WG.II/WP.209, para. 12.
33. *See* Karl-Heinz Böckstiegel, *Commercial and Investment Arbitration: How Different Are They Today? The Lalive Lecture 2012,* Arbitration International, Volume 28, Issue 4 (2012), pp. 577–590, explaining the difference between commercial and investment disputes – not always a straightforward distinction:

> Distinguishing between commercial and investment arbitration may sometimes already be difficult or misleading. Quite often disputes concern a contract between a corporation created by a foreign investor in a state on one side and on the other side a state enterprise. Such a contract will contain what one would consider a 'normal' arbitration clause referring to an institution of commercial arbitration. However, a closer look shows that it is really an investment dispute. A recent example from my own practice is our ICC award of last December between daughter companies of Exxon Mobil and PDVSA in Venezuela which was published immediately. I might add that in that case, we had a scenario which is also found frequently nowadays, namely that the investor starts additionally a parallel BIT arbitration to be on the safe side (p. 578).

Anthea Roberts explains that the 'growing divergence between commercial and investment arbitration … is occurring due to differences in the fields' substantive law and professional communities.' (Anthea Roberts, *Divergence Between Investment and Commercial Arbitration,* Annual Meeting of the American Society of International Law 2012, American Society of International Law, New York, United States, pp. 297–300).

See also, Stephan Wittich, *The Limits of Party Autonomy in Investment Arbitration*, in Christina Knahr, Christian Koller, Walter Rechberger and August Reinisch (eds), *Investment and Commercial Arbitration: Similarities and Divergences* (Eleven International Publishing, 2010), pp. 47–71.

cleared before any decision.[34] The 'involvement of States, even if represented … by a law firm, tend to make the proceeding more formal' and also translate in 'longer periods for submitting their memorials and evidence, because the decision process between counsel and the various state agencies involved may be more complex and time consuming'.[35]

Further, investment arbitration proceedings raise specific issues, such as the public interest in the underlying dispute, in particular when the alleged breach of State's obligations towards investor concerns its legislative and executive decisions or the conduct of its judiciary.[36] The nature of the disputes and the public interest thereof also raises issues of transparency of investment arbitration,[37] usually reflected in the additional time added to the procedural milestones and to the proceedings, in general.[38] As explained by Professor Böckstiegel, 'regarding confidentiality and transparency, we have what is probably the most striking difference between commercial

34. *See* Carolyn B. Lamm, et al., *Users' Perspectives on Challenges Facing the Institutions in a Changing World,* ICSID Review-Foreign Investment Law Journal, Volume 24, Issue 1 (Spring 2009), pp. 23–35, p. 26:

> Given the unique nature of sovereign parties, respondent-States generally need more time to prepare pleadings than private parties. Public policy implications require intra-government coordination of various agencies, often with divergent interests.

See other consequences deriving from State participation in the proceedings, such as resource constraints and problems with evidentiary gathering: Adam Raviv, *Achieving a Faster ICSID*, pp. 710 et seq.

This is not limited to investment disputes; it must be equally considered in commercial disputes when State and State entities are involved. *See*, for example, the 2012 *ICC Report on State, State entities and arbitration*, which refers to certain practices of the ICC when it comes to arbitrations involving States, such as the appointment of a three-member arbitral tribunal (paras 62–64), as well as elements to be taken into consideration by States, such as transparency of arbitral proceedings (para. 21). Further on ICC practice on investment treaty arbitration cases, *see* Andrea Carlevaris and Joel Dahlquist Cullborg, *Investment Treaty Arbitration at ICC*, ICC Dispute Resolution Bulletin, Issue 1 (2017), pp. 25–31.

35. Karl-Heinz Böckstiegel, *Commercial and Investment Arbitration: How Different Are They Today? The Lalive Lecture 2012*, p. 585. *See also* the statement of Chile with respect to the amendment of the ICSID Arbitration Rules and the inclusion of expedited proceedings: 'la apropiada defensa del Estado requiere tiempo y la coordinación de más de una entidad, además de los asesores externos. Por lo tanto, la inclusión de este capítulo es una preocupación para nuestro país.' (ICSID, *Compendium of State and Public Comments on WP #3*, 27 Feb. 2020, p. 47).
36. *See also* participation of *amici curiae* (non-disputing parties): ICSID Arbitration Rules, Rule 37(2); SCC Arbitration Rules, Art. 3 of Appendix III. Investment Treaty Disputes; NAFTA Free Trade Commission on Non-disputing Party Participation of 7 Oct. 2003.
37. *See* increased transparency obligation in arbitration proceedings further implemented in the past years with the new generation of IIAs – *see* CETA Art. 8.36 – and the adoption of the UNCITRAL Transparency Rules.
38. *See*, for example, *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania,* ICSID Case No. ARB/15/31, under Canada-Romania BIT, in force 23 Nov. 2011, and UK-Romania BIT, in force 10 Jan. 1996, whereas the Canadian BIT, in Annex C contains transparency obligations. The burden on the costs and duration of the proceedings are reflected in the 27 Procedural Orders issued by the arbitral tribunal.

and investment arbitration'.[39] However, while there might be 'good reasons for the increased transparency, … it does not make the procedure more efficient'.[40]

Further, the consent to arbitrate investment disputes is usually the result of the offer of the host State to arbitrate under an international investment agreement (IIA), followed by the acceptance of the offer by the investor by submitting the dispute to arbitration.[41] As such, a separate agreement to opt for expedited proceedings might be difficult to obtain after the dispute arises, in particular in consideration of the host State's presence in the arbitration. This is confirmed by the fact that the settlement rate in investment disputes is very low,[42] which raises the question of whether such agreement is attainable at all.

A discussion about the characteristics of investment arbitration and expedited proceedings, in particular, the aim being the increased efficiency of the proceedings by reducing the duration and costs thereof, can only be properly addressed with reference to the work of the UNCITRAL Working Group III on ISDS Reform. Among the three categories of concerns with ISDS identified by the Working Group III are the costs and duration of ISDS.[43] Regarding duration, concerns are directed at the following stages of the arbitration process: '(i) the appointment/composition of the tribunal, (ii) disclosure, discovery or document production and (iii) the issuance of the award (the period between the final hearing and the rendering of the award including deliberations when drafting the award)'.[44] No doubt, as also confirmed in the discussions in the Working Group III, costs and duration are interrelated issues, with lengthy proceedings resulting in higher costs.[45] Statistics show that the average length of ICSID arbitration cases between 2015 and 2017 was three years and seven months from the constitution of the tribunal to the arbitral award.[46] However, when discussing the length of investment arbitration proceedings and suggesting that their duration is a concern, this cannot be

39. Karl-Heinz Böckstiegel, *Commercial and Investment Arbitration: How Different Are They Today? The Lalive Lecture 2012*, p. 587.
40. Karl-Heinz Böckstiegel, *Commercial and Investment Arbitration: How Different Are They Today? The Lalive Lecture 2012*, p. 587.
41. *See*, in general, Jan Paulsson, *Arbitration Without Privity*, ICSID Review – Foreign Investment Law Journal, Volume 10, Issue 2 (1995), pp. 232–257.
42. *See* National University of Singapore, *Survey on Obstacles to Settlement of Investor-State Disputes*, Centre for International Law Working Paper 18/01, 2018, pp. 11 et seq.
43. UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session (Vienna, 27 November–1 December 2017)*, A/CN.9/930/Rev.1, paras 35–78.
44. UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Cost and Duration. Note by the Secretariat*, A/CN.9/WG.III/WP.153, para. 25.
45. UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session (Vienna, 27 November–1 December 2017)*, A/CN.9/930/Rev.1, para. 38; UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Cost and Duration. Note by the Secretariat*, A/CN.9/WG.III/WP.153, para. 27.
46. ICSID, Working Paper #1, Schedule 9: Addressing Time and Cost in ICSID Arbitration, para. 3. As metaphorically put by a scholar, '[i]nvestment arbitration is not for the impatient.' (Adam Raviv, *Achieving a Faster ICSID*, in Jean E. Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System. Journeys for the 21st Century* (Brill. Nijhoff, 2015) pp. 653–717, p. 653.

done in the abstract, but with reference to a 'suitable comparator'.[47] What may appear to be a lengthy proceeding in one dispute, might be perfectly reasonable in another. Short proceedings should not be automatically labelled as better proceedings.

The Working Group III discussions are useful exercise in this sense, as they try to identify the reasons why proceedings might have variable durations. This can be explained by the dispute itself: the complexity of the dispute requiring 'extensive volume of evidence'.[48] Or by the behaviour of the parties and their counsel: States generally take longer in preparing their representation in the proceedings and submitting their evidence and defences, 'as they may need to coordinate among a number of authorities'.[49] Or by the composition of the arbitral tribunal and the conduct of the proceedings: the constitution of the arbitral tribunal and the lack of a proactive case management are listed as the main sources of delay in the conduct of investment arbitration proceedings.[50] Among the possible measures to address the concerns about the duration of ISDS proceedings, the UNCITRAL Working Group III suggested various possible measures, including: (a) stricter timelines to address lengthy durations; (b) improved management of the proceedings, including the requirement of submission of memorial in full detail and the use of modern technologies etc.[51] It is interesting to point out here that the 2018 School of International Arbitration and White & Case International Arbitration indicates that lengthy proceedings are not confined to ISDS, but respondents consider this a problem of arbitration in general.[52]

§6.03 ICSID AMENDMENT PROCESS AND UNCITRAL WORKING GROUP II

While the mandate of the Working Group II is focused 'preliminarily on international commercial arbitration', still the relevance of the proposed rules on investment and other types of arbitration is reserved for the later stage of the discussions.[53] This cautious approach is understandable and recognized as such by the Working Group II, given the parallel work of the UNCITRAL Working Group III in ISDS reform,[54] and that

47. UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Cost and Duration. Note by the Secretariat*, A/CN.9/WG.III/WP.153, para. 66. *See* further discussion on the length of WTO and ICJ cases, UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Cost and Duration. Note by the Secretariat*, A/CN.9/WG.III/WP.153, paras 67–75.
48. UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Cost and Duration. Note by the Secretariat*, A/CN.9/WG.III/WP.153, para. 79.
49. UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Cost and Duration. Note by the Secretariat*, A/CN.9/WG.III/WP.153, para. 83.
50. UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Cost and Duration. Note by the Secretariat*, A/CN.9/WG.III/WP.153, paras 87–91.
51. UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Cost and Duration. Note by the Secretariat*, A/CN.9/WG.III/WP.153, para. 101.
52. White & Case and School of International Arbitration, Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration*, p. 31.
53. UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Seventieth Session (Vienna, 23–27 September 2019)*, A/CN.9/1003, paras 14–15.
54. For the work of the UNCITRAL Working Group III, *see*, https://uncitral.un.org/en/working_groups/3/investor-state, last visited 8 Apr. 2020.

certain issues might overlap.[55] This would become relevant in particular with regard to the application of the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration. If the expedited rules would be presented as an appendix to the UNCITRAL Arbitration Rules, then the UNCITRAL Rules on Transparency would apply to the expedited proceedings, unless expressly excluded by the parties.[56]

The ICSID Arbitration Rules Amendment Process[57] commenced in 2018 is presented with the purpose of achieving the following objectives: (i) continued modernization of ICSID procedure; (ii) simplification of the rules; (iii) reducing time and cost; (iv) going green, by reducing the paper burden of proceedings will further reduce time and cost and respect environmental concerns.[58] On reducing the duration of the ICSID arbitration proceedings, the proposed amendments address the constitution of the arbitral tribunals,[59] provide for a general obligation for parties and arbitrators to conduct the proceedings in an expeditious manner,[60] incorporate more flexibility in the organization of hearings and witness examination,[61] and introduce expedited arbitration provisions.[62] Working Paper #1 of the ICSID Amendment Process explains that the purpose of the proposed expedited arbitration provisions is to reduce the length of three main phases of the ICSID arbitrations, which have long durations: (i) the establishment of the arbitral tribunal; (ii) written procedures; (iii) rendering the arbitral award.[63] By implementing the expedited procedure, the arbitration proceedings could conclude within 470–530 days after the date of registration of the request for arbitration.[64] Compared to 49 months, the average duration of an arbitration

55. UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Seventieth Session (Vienna, 23–27 September 2019)*, A/CN.9/1003, para. 15:

> it was pointed out that if the work would eventually result in revisions of the UNCITRAL Arbitration Rules (the 'Rules'), caution should be taken as the Rules were generic in nature, with wide application, including in investment and State-to-State arbitration. It was reiterated that the Working Group should not seek to address the specific aspects of expedited proceedings in the context of investment arbitration, as Working Group III (Investor-State Dispute Settlement Reform) was currently tasked with considering the reform of investor-State dispute settlement. It was clarified that the Working Group could seek guidance from the Commission when addressing issues, which might overlap with the work of Working Group III.

See also, UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Seventy-First Session (New York, 3–7 February 2020)*, A/CN.9/1010, paras 16–18; UNCITRAL, *Settlement of Commercial Disputes. Draft Provisions on Expedited Arbitration. Note by the Secretariat*, A/CN.9/WG.II/WP.212, paras 7–10.

56. UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Seventy-First Session (New York, 3–7 February 2020)*, A/CN.9/1010, para. 18.
57. *See* the process at https://icsid.worldbank.org/en/amendments, last visited 11 Apr. 2020.
58. ICSID, *Working Paper #1. Proposals for Amendment of the ICSID Rules*, 2 Aug. 2018, para. 5.
59. ICSID, *Working Paper #4. Proposals for Amendment of the ICSID Rules*, February 2020, Rules 18 et seq.
60. ICSID, *Working Paper #4,* Rule 3.
61. ICSID, *Working Paper #4,* Rules 32 and 38.
62. ICSID, *Working Paper #4,* Rules 75–86.
63. ICSID, *Working Paper #1,* para. 657.
64. ICSID, *Working Paper #1,* para. 655.

procedure,[65] the proposal of expedited proceedings appears to substantially contribute to addressing the concern with the length of the arbitration proceedings and 'endeavour to strike a balance between an expedited procedure … and a realistic schedule for investment disputes given their special characteristics'.[66] Nevertheless, expedited arbitration will continue to be an arbitration under the ICSID Convention and, therefore, 'the framework and mandatory provisions of the Convention apply'.[67]

The proposed ICSID provisions provide for an opt-in model for expedited arbitration, meaning that an agreement is needed in addition to the agreement to arbitrate.[68] Draft ICSID Arbitration Rule 75(1) provides that:

> The parties to an arbitration conducted under the Convention may consent at any time to expedite the arbitration in accordance with this Chapter ('expedited arbitration') by jointly notifying the Secretary-General in writing of their consent.[69]

Reference to the expedited arbitration may be contained in the arbitration agreement, if there is a contract between the parties, or in the State's offer to arbitrate, be it in an IIA or in the domestic legislation of the host State.[70]

The current draft Expedited Arbitration Provisions of the UNCITRAL Working Group II also advances consent as the exclusive criterion for the application of the provisions. It was considered that an express consent will guarantee that awareness of the parties as to the application of the provisions, with the consequences deriving from this, as well as making it possible 'to introduce more stringent rules therein, without raising concerns about due process and the enforceability of the eventual award'.[71]

Both ICSID and UNCITRAL draft expedited arbitration provisions preserve the option to opt out of the rules when certain conditions are met. Proposed Rule 86 of the ICSID Arbitration Rules provides for the situations for exiting the expedited arbitration which include (i) the joint notification by the parties; (ii) upon request of a party, allowing the arbitral tribunal to decide that an arbitration no longer be expedited, based on the complexity of the issues, the stage of the proceedings and all other relevant circumstances. Similarly, Draft Provision 1 of the UNCITRAL Working Group II Expedited Arbitration Provisions provides that (i) the parties may decide to exit the expedited proceedings, and that (ii) in exceptional circumstances, a party may request

65. ICSID, *Working Paper #1*, para. 586:

> The latest available numbers based on all ICSID arbitration proceedings which concluded with an Award during the past 15 years demonstrate that the average duration from registration of the case until the rendering of the Award was approximately 49 months.

66. ICSID, *Working Paper #1,* para. 662.
67. ICSID, *Working Paper #1,* para. 673.
68. *See* comments from the ICSID Contracting States, confirming the preference for express consent for expedited arbitration: ICSID, *Compendium of State and Public Comments on WP #3*, 27 Feb. 2020, pp. 47–48.
69. ICSID, *Working Paper #4. Proposals for Amendment of the ICSID Rules*, February 2020, p. 74.
70. The consent to expedited arbitration shall not apply in case of resubmission of the dispute, including after annulment (proposed Rule 86).
71. UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Seventy-First Session (New York, 3–7 February 2020)*, A/CN.9/1010, para. 21.

the arbitral tribunal to determine that the expedited arbitration provisions shall not apply to the arbitration, in which case, consideration should be given to the overall circumstances of the case, including the amount in dispute, the urgency of the resolution of the dispute and the proportionality of the amount in dispute to the estimated cost of arbitration.[72]

Proposed ICSID Arbitration Rule 76 gives the parties the option to proceed with a sole arbitrator or with a three-member arbitral tribunal. In Working Paper #1, ICSID highlighted that '[t]ypically, a proceeding conducted by a Sole Arbitrator is more expeditious than a proceeding with several arbitrators'. This position is also reflected in proposed Rule 76(3), which provides for the sole-arbitrator tribunal as the default if the parties fail to agree on either option.[73] Draft Expedited Arbitration Provisions of the UNCITRAL Working Group II currently provide, in Provision 3, that there shall be one arbitrator, unless otherwise agreed by the parties.[74] Sole-arbitrator tribunals are, indeed, associated with lower costs and speedier proceedings, as also reflected in the new generation of international investment agreements, such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA), which provides for the sole-arbitrator rule when the investor is a small or medium-sized enterprise or the compensation or damages claimed are relatively low.[75]

Rules 80 and 81 of the proposed ICSID Arbitration Rules provide for a procedural timetable of the expedited proceedings. Bifurcation of the proceedings is not allowed under the expedited provisions or is the objection that a claim manifestly lacks legal merit under current ICSID Arbitration Rule 41(5). Rule 81(1)(g) advances that the hearing in expedited ICSID arbitrations shall be held within sixty days as of the filing of the last submission, that is nine months after the first session.[76] Unlike other

72. UNCITRAL, *Settlement of Commercial Disputes. Draft Provisions on Expedited Arbitration. Note by the Secretariat*, A/CN.9/WG.II/WP.212/Add. 1, p. 2.
73. This is also in line with Art. 37(2)(b) of the ICSID Convention.
74. UNCITRAL, *Settlement of Commercial Disputes. Draft Provisions on Expedited Arbitration. Note by the Secretariat*, A/CN.9/WG.II/WP.212/Add. 1, p. 2. For the UNCITRAL Working Group II Expedited Arbitration Provisions, an additional discussion in the context of the constitution of the arbitral tribunal concerns the appointing authority. UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Seventy-First Session (New York, 3–7 February 2020)*, A/CN.9/1010 offers interesting insight into this debate, with majority favouring the Secretary-General of the Permanent Court of Arbitration for designating the appointing authority (para. 76).
75. Article 8.23.5 of EU-Canada Comprehensive Economic and Trade Agreement (signed 30 Oct. 2016):

> The investor may, when submitting its claim, propose that a sole Member of the Tribunal should hear the claim. The respondent shall give sympathetic consideration to that request, in particular if the investor is a small or medium-sized enterprise or the compensation or damages claimed are relatively low.

76. On the effects of bifurcation on the timeline of ICSID arbitrations, *see* Lucy Greenwood, *Revisiting Bifurcation and Efficiency in International Arbitration Proceedings*, Journal of International Arbitration, Volume 36, Issue 4 (2019), pp. 421–430; Adam Raviv, *Achieving a Faster ICSID*, pp. 687 et seq.

    But see the concern expressed by some ICSID Contracting States that this removes important defence tools for States: ICSID, *Compendium of State and Public Comments on WP #3*, 27 Feb. 2020, p. 47.

institutional rules, as shown above, the proposed expedited provisions of the ICSID Arbitration Rules keep the presumption of a need for oral hearings. The UNCITRAL Working Group II draft provisions currently provide for different options to be considered in the context of holding an oral hearing: some States have expressed the view that the arbitral tribunal should be obliged to hold a hearing, in order to provide the parties with the opportunity to be heard,[77] while others favour the discretion of the arbitral tribunal whether to hold a hearing, given the accelerated nature of expedited arbitration.[78] Further, under Rule 81 of the proposed ICSID Arbitration Rules, written submissions are limited to two rounds of submissions, with an additional limitation in the second round, on the number of pages submitted – 100 pages. Similarly, interpretation, revision and annulment of arbitral awards rendered in ICSID expedited proceedings have adjusted time limits, in the light of the expedited nature of the proceedings. The UNCITRAL Working Group II Expedited Arbitration Provisions are still to define the timeframes of the arbitration, but there is a general preference for the draft rules to include a time frame for rendering the arbitral award.[79]

§6.04 CONCLUDING REMARKS

Expedited arbitration proceedings for investment disputes could be a response to the concerns with duration and costs, as highlighted by both UNCITRAL Working Groups II and III, as well as by ICSID. However, one must also pay due attention to solutions which are available at the pre-arbitration stage as well as possibly addressing the length and, consequently, the costs of the arbitration, including by way of drafting the arbitration agreement or effectively making use of the procedural mechanisms in the underlying IIA, such as the cooling-off periods.

The main concern with the feasibility of expedited proceedings for investment disputes is the condensed timeframe. Comments from ICSID Contracting States to the amendments of the ICSID Arbitration Rules appear to confirm, first, that States do require more time for preparing their submissions, and, second, that this reality might have a serious impact on the feasibility of effective expedited proceedings. The comment from the Slovak Republic in the context of the ICSID Arbitration Rules Amendment Process summarizes this concern: 'This tool might be effective for claimants. Nevertheless, respondents, being states may face lack of time for preparing submissions'.[80] This tension between allowing realistic and sufficient time to the

77. UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Seventy-First Session (New York, 3–7 February 2020)*, A/CN.9/1010, para. 108.
78. UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Seventy-First session (New York, 3–7 February 2020)*, A/CN.9/1010, para. 109.
79. UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of Its Seventy-First Session (New York, 3–7 February 2020)*, A/CN.9/1010, para. 92.
80. ICSID, *Rule Amendment Project – Member State & Public Comments on Working Paper # 1 of 3 August 2018,* p. 395. *See also* the comment made by Israel: 'We suggest to reconsider whether this timeline provided in this rule (and for the entire procedure) is feasible, especially on the part of states.' (ICSID, *Rule Amendment Project – Member State & Public Comments on Working Paper # 1 of 3 August 2018,* p. 402).

parties in these complex investment disputes and ensuring the efficiency of the arbitration proceedings is also emphasized in one of the ICSID Working Papers:

> Electing an EA [Expedited Arbitration] necessarily means parties and counsel have to make certain compromises. First, parties and counsel must be prepared to limit the length of submissions and the number of separate procedural applications they bring (e.g., requests for provisional measures and production of documents). Practice has shown that many arbitrations are delayed due to the high number of procedural applications made by the parties during the proceeding. By definition, an arbitration cannot be expedited if there are numerous disputes as to refusals to produce documents, special procedures, and the like. As a result, the approach of counsel will be vital to making the EA effective.[81]

Further, both as a perceived benefit and as a concern, one should consider that expedited arbitration provisions might trigger an increase in small value investment arbitration claims, as well as the increased access of small- and medium-size investors to this dispute resolution mechanism.[82]

Ending on a positive note, expedited arbitration proceedings for investment disputes would potentially address the legitimacy of the ISDS and the confidence in the system and the institutions involved in the process. To this end, the words of Judge Holtzmann in 1995 are still valid:

> When discussing this subject in London ten years ago, I spoke of the sloth and the dinosaur, cautioning that we must not allow arbitration to be as slow as the sloth or as cumbersome – and therefore as obsolete – as the dinosaur. Reassessing the situation today, I suggest that while all international arbitrations may have not yet developed the swiftness of the gazelle, some progress has been made toward curing the slothfulness of arbitrations and averting the fate of the dinosaur.
>
> Perhaps the most significant development in this regard has been an increasing recognition by the arbitration community – users, practitioners and arbitrators – that there is a pressing need to improve the efficiency of arbitral proceedings.[83]

81. ICSID, *Working Paper #1,* para. 663.
82. *See* Corporate Counsel International Arbitration Group (CCIAG), *Submission by the CCIAG to UNCITRAL Working Group III,* 18 Dec. 2019, para. 75. *See also* comments from ICSID Contracting Parties on the amendments of the ICSID Arbitration Rules: 'The expedited procedure would in many cases be of great use to SMEs, while at the same time it could bring significant efficiency to ISDS, thus benefiting the respondent State as well.' (Portugal, 21 Dec. 2018, comment to Working Paper #1, ICSID, *Rule Amendment Project – Member State & Public Comments on Working Paper # 1 of 3 August 2018,* p. 392).
83. Howard M. Holtzmann, *Streamlining Arbitral Proceedings: Some Techniques of the Iran-United States Claims Tribunal*, Arbitration International, Volume 11, Issue 1 (1995), pp. 39–50, p. 39.