Arbitration

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Question

- Can international arbitration contribute to the creation of a peaceful world through the settlement of disputes between states and between states and non-state actors?
- Content
- Historical overview

Historical overview of international arbitration

- When did international arbitration emerge?
- For which types of disputes was it used?
- what can we learn today from these historical examples?

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- In fact, disputes between states and ***state like entities*** were settled through international arbitration well before the first international court or tribunals were created by states.
- Even at the time of ancient Greece,
- early forms of what we could call arbitration were used to solve disputes between allied states and city states relating to their independence and sovereignty.
- In the Middle Ages, arbitration was also largely used.
- In those arbitrations, the dispute was often settled by *a single arbitrator called an Empire*. Most often the single arbitrator was the ***Pope or a King or Emperor*** from another state.
- But these arbitrations involved different entities than what we now call states. And the way in which the dispute was settled did not ***resemble modern day practice.***

- The decision was regularly based on principles of ***equity than law***, was not reasoned and the arbitrators were not fully ***independent and impartial.***
- With the 1648 peace treaties of *Westphalia*, which followed the 30 years war in Europe, and the primacy of ***states sovereignty*** that came along, arbitration almost disappeared in *interstate relations*.

- But arbitration resurfaced towards the end of the ***18th and 19th century.***
- These arbitrations paved the way for the contemporary arbitration we now have.
- The Jay Treaty arbitration is usually considered as the starting point of modern international arbitration.
- The treaty was signed between ***Great Britain and the United States***, mainly to settle outstanding issues following the ***American War of Independence***.
- The mechanism established under that treaty to settle these disputes is remarkable in several respects.
- First, the treaty established ***three types of commissions.***
- First commission was established to settle the dispute between the two states in relation mainly to boundaries.
- The second and third commission were established to hear two types of mixed disputes. First, claims for compensation due to *British nationals for debts owed to them by US nationals,* which would be compensated by the US.
- Secondly, claims from United States nationals against Great Britain for t*reatment of their property subsequent to the independence of the United States*.
- The treaty paved the way not only for a modern form of arbitration to settle disputes between two states, but also for disputes between n***ationals of one state and another state.***

- It also set precedents since the decisions of the commissions were based on law and contained reasons.
- At the same time, the commissions were composed ***exclusively of nationals of both parties.***
- The Alabama Claims arbitration is another notable example in this respect. The dispute related to damages suffered by the US government, due to attacks on union ships by Confederate Navy ships which had been built in British shipyards during the American Civil War.
- **One of the ships was the CSS Alabama**.
- In 1871, the U.S. and the United Kingdom signed the ***Washington Treaty.*** In which they decided to have this and some other claims settled through an ***international arbitration tribunal in Geneva.***

- This was the beginning of a series of several other mainly **interstate arbitrations,** and paved the way for the ***1899 Hague Convention which created the Permanent Court of Arbitration.***

- the 19th and the start of the 20th centuries, saw more than ***120 so-called mixed claims commissions.***
- Like the model of the Jay treaty, this commissions heard several types of claims, *interstate claims and/or claims from nationals of one state against another state*.
- They were very often created following an armed conflict between two states or internal disturbances in one state during which nationals of other states had suffered injuries. Examples are: several United States Mexico claims commissions in the late 19th and early 20th century and the various commissions established after the second world war *to settle claims with Germany.*

- It's important to note however, that the claims of individuals very often especially in the early examples, had to be brought by the state of their nationality. In other words, individuals often had no direct access to the commission or tribunal

- I mentioned this because this stands in stark contrast to the current practice in for example, Investment Treaty Arbitration.
- Since the creation of first the ***Permanent Court of International Justice*** in 1921, and its successor the ***International Court of Justice in 1945***,
- arbitration became less popular especially to settle interstate disputes. Arbitration of interstate disputes still took place outside the context of the Permanent Court of Arbitration but the numbers were clearly in decline.
- More generally, recourse to judicial settlement also declined as did the use of mixed claims commissions.

- Since the end of the Cold War, arbitration has been increasingly popular among states, as is illustrated by the growing number of cases settled under the auspices of the **Permanent Court of Arbitration.**
- Moreover, this is evidenced by the large interstate arbitration practice in subject matters such as
- diplomatic protection,
- environmental disputes,
- territorial disputes, or
- disputes under the law of the Sea Convention.
- The last decades of the 20th century also saw a parallel increase in ***so-called mixed arbitrations***

- First, companies which had obtained large concessions in the extraction of natural resources in developing states, had secured the use of arbitration to settle disputes arising under the states contracts.
- This in turn resulted in the creation of the ***International Center for the Settlement of Investment Disputes*** in the 1960s which although under utilized in the first decades after its creation, paved the way for an impressive rise in the number of arbitrations between foreign investors and states starting at the beginning of the 21st century.

- Thirdly, other mechanisms are also evidence of this, such as *Iran-United States Claims Tribunal created in 1981 to settle disputes between Iran and the United States, and nationals of both against either state following the Iran hostage crisis.*
- The Iran-US Claims Tribunal is located in the Hague and has already decided the vast majority of the claims that have been filed.

Principles of International Arbitration.

- What are the main features of international arbitration?
- What are the main principles of international arbitration, and how does international arbitration differ from international courts and tribunals?
- Judicial settlement is settlement through recourse to international courts and tribunals.

- Arbitration, together with judicial settlement, are the two main methods in international law to settle disputes in a binding manner.
- Both are what we call **legal dispute settlement mechanisms.**
- They contrast with diplomatic dispute settlement methods such as ***mediation or conciliation***, and that these methods do not result in a decision binding on the parties.

I. Binding Nature

The first and main principle of international arbitration, thus is that the outcome of the arbitration, **the arbitral award**, is binding on the parties.

- Article 34 paragraph two of the UNCITRAL arbitration rules, binding character of an arbitral awards.

II. Party Autonomy

The second and probably the most fundamental principle of international arbitration is that arbitration is designed by the parties to the dispute themselves.

This is called the principle of party autonomy

- This implies that it is the parties to the dispute who choose the arbitrators, the procedural law, that is the law that applies to how the procedure will be conducted, and finally, also the law applicable to the settlement of the dispute the so-called applicable law.
- This principle also implies that the parties themselves define the **issue or subject matter to be decided by the arbitral tribunal**.
- In other words, the tribunal has the **authority or competence** to decide only those issues that the parties have submitted to decision by the tribunal.

- The fundamental principle that the parties choose their arbitrators is the main feature distinguishing ***arbitration from settlement by international courts and tribunals.***

- In the latter case, the court or tribunal is composed of judges that are appointed or elected for a fixed term and not by the parties.
- Also, the procedure is entirely pre-determined and the statutes of the courts and tribunals.
- The parties cannot, in principle, change these rules.
- As far as the composition and structure of arbitral tribunals is concerned, parties can choose freely how many arbitrators will compose the tribunal. Typically, tribunals are composed of three or five arbitrators.
- Sometimes, the dispute is referred to a sole arbitrator, or tribunal composed of seven arbitrators. For interstate arbitration, the recent practice is to appoint **a five-member tribunal**, and for investor state arbitrations, the practice is a **three-member tribunal**. Usually, the parties themselves each appoint an equal number of arbitrators.

- That is, each one or two arbitrators in the case of a three or five-member tribunal. The remaining arbitrator who will act as president of the tribunal is appointed jointly by the party appointed arbitrators or the parties.
- In case of disagreement, an appointing authority usually is identified who will appoint the arbitrator if the parties disagree, or if one of the parties fails to appoint its own arbitrator.
- The appointing authority usually is the Secretary-General of the **Permanent Court of Arbitration**, or the president of the International Court of Justice, but it can, in fact, be anyone.

- It is important to point out in this respect that all arbitrators, including those appointed by the parties, need to be fully independent and impartial.
- Such as the Jay Treaty Arbitration, where the appointed arbitrators often saw their roles as an **extension of diplomacy.**

- Independent and impartiality implies that the arbitrators should not have any ***ties, family, financial, or otherwise, to the parties, and that they have not prejudged the case***.
- In case of doubt as to the independence and/or impartiality of an appointed arbitrator, procedures exist to *challenge these arbitrators.*

- The Procedural Law, as said, is freely chosen by the parties.
- The distinction between ad hoc arbitration and institutional arbitration. In institutional arbitration, the institution to which the dispute is submitted will function with its own rules of procedure. This means that this choice implies the use of the specific procedural rules of that institution. There are, however, exceptions to this principle.
- A notable example is the Permanent Court of Arbitration, which allows the parties to use other procedural rules than those of the PCA itself.
- For ad hoc arbitration, the choice of the parties as to which rules they will use is entirely open.
- Parties are free to draft their own rules, which is the case, for example, for arbitration under the law of the Sea Convention, which has specific procedural rules in its Annex seven. Alternatively, the parties can use existing sets or models of procedural rules.

- The most important set of rules are the arbitration rules of the United Nations Commission on International Trade Law, UNCITRAL.
- These rules can be used for interstate arbitration, investor state arbitration, and international commercial arbitration.
- The rules contain provisions on, for example, the Constitution of tribunals, the conduct of the procedure, the powers of tribunals in relation to evidence gathering, and the effect and form of the awards.

- The choice of which law the tribunal should apply depends largely on the type of dispute which the parties submit to the tribunal.
- In the case of an interstate dispute, the parties will generally ask the tribunal to apply international law.
- In doing so, they are free to ask the tribunal to apply specific convention or conventions.
- This was the case in the Mox Plant Arbitration between Ireland and the United Kingdom under the Convention for the Protection of the Marine Environment of the North-East Atlantic, the OSPAR Convention

- The OSPAR Convention itself contains a provision which asks any arbitral tribunal, established under that treaty, to primarily apply the OSPAR convention itself and international customary law.
- Parties are also free to ask an arbitral tribunal to apply soft law norms. I already pointed to the **Alabama Claims Arbitration**.

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- In the case of an investor-state arbitration, the parties usually ask the ***tribunal to apply international law coupled with domestic law***.
- This is so because, as we will discuss in a later module, investment disputes require sometimes not only the application of international law but also the principles of the domestic law of the state where the investment was made.
- If the parties failed to identify the applicable law, the tribunal will itself be able to do so. Most arbitration rules grant this power to an arbitral tribunal.
- Examples are Article 35 of the UNCITRAL Arbitration Rules and Article 42 of the ICSID Convention.

- A tribunal generally is prohibited from deciding a dispute based on ***equity, often called ex aequo et bono***, unless of course the parties have explicitly asked the tribunal to do so. Otherwise, an arbitral tribunal should decide a dispute only based on the law as defined by the parties

- In international law, states have no obligation to ***submit disputes to court or tribunal or to an arbitral tribunal***. This fundamental principle here, is that states need to consent to settlement by legal means and thus to international arbitration.
- This is a fundamental principle of international dispute settlement on which many of the principles already discuss derived from.
- There are generally ***two*** ways of consenting to arbitration.

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- The first and the originally most common way is to ***sign a special treaty*** in which the parties decide to submit an existing dispute for settlement to arbitration. This is called a **'compromis',** special agreement, or more specifically for arbitration, an **arbitration agreement**.
- The second and now more common way, is to include the ***provision in a treaty that deals with a certain set of issues in which the parties agree*** in advance that any future dispute that may arise under that treaty can be submitted to arbitration at the request of any party. This is called a **compromissory clause.**

- In both cases however, it is important that the agreement contains the necessary information on how the arbitration will be conducted.
- The parties are free to determine this themselves and therefore to avoid any ambiguity or disagreement, it is fundamental that all issues just discussed are regulated in the agreement.
- The reference to a set of procedural rules or a detailed explanation of the procedure itself, the subject matter of the dispute, the composition of the tribunal, the applicable law,

- When the tribunal has been established, the so-established tribunal is the sole judge of its competence and the limits thereto.
- In other words, once established the tribunal will itself decide whether it is competent to hear the dispute. This is called the principle of ***'Compétence de la compétence'***, another legacy from the Jay Treaty Arbitrations.

Dispute Settlement Architecture of the law of the Sea Convention

- UNCLOS is a very sophisticated text that devotes nearly 100 articles to dispute settlement, and provides for a multiplicity of procedures. For this reason, it is often contended that it constitutes a comprehensive framework. But, is it really so? In other words, does UNCLOS regulate every aspect of dispute settlement, or is there room for mechanisms outside the conventions framework?

- The dispute settlement procedures under UNCLOS are set out in Part 15 of the Convention. They form an integral part of the convention rather than being contained in a separate optional protocol.

- And bear in mind that no reservations to UNCLOS are possible, therefore states cannot opt out. To make this possible, it was necessary to grant state parties freedom to choose what procedures for settling disputes they preferred, and a wide array of options to choose from. The basic principle underpinning Part XV is, as long as states resolve their disagreements through peaceful means, they can freely choose the means of settlement.

- The convention provides for both voluntary and compulsory procedures for settling disputes. Voluntary procedures are traditional consent-based procedures, such as negotiation, reconciliation, or settlement through a separate agreement. Voluntary procedures include ad hoc arbitration outside the conventions framework if both parties consent to it. You will find more details on these procedures in Part XV Section 1 of UNCLOS.

International Arbitration

- Specific form of mixed arbitration, the arbitration of investment disputes.
- Arbitration between states and non-state actors, individuals, or private companies is often referred to as mixed arbitration in international scholarship.

- Mixed arbitration does imply as arbitral procedure in which only one of the parties is a **state**.
- There are two notable examples of mixed arbitrations in international law.
- First, the Iran-US Claims Tribunal, and
- secondly, **investment arbitration**.

- Investor-State arbitration as such is not as old as interstate arbitration.
- There are some early examples. We discussed in the first module the history of international arbitration,
- various mixed claims commissions which adjudicated disputes between **nationals of one state and another state.**

- Also, the substantive protection offered to foreign investors, notably protection from **unlawful expropriation**, does have ancient roots and dates from the late 19th and early 20th century.
- The current organization of investment arbitration finds its origin in the middle of the 20th century, when large multinationals obtained important concessions for the extraction of **natural resources in developing countries.**

- Typically and traditionally, if a foreign investor, and more generally, a national of another state, had a dispute with the state in which the investment was made, which we call the host state, the dispute would need to be brought before the domestic courts of the host state.
- This is so because a foreign state cannot be brought to justice in another state's courts, since states enjoy immunity from foreign jurisdiction.
- If such a claim in the domestic courts of the host state could not remedy the violation complained of, the foreign investor could ask his state to **file a claim in diplomatic protection against the host state.**

- A procedure in which the **home state of the investor espouses the claim of its national.**
- **Diplomatic protection**, however, is not always efficient.
- First, the foreign investor should exhaust all **local remedies.**
- Secondly, the right to act in diplomatic protection is a right of the **home state of the investor**, not of the investor itself. In other words, no state is under an obligation to act in **diplomatic protection.**
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- Thirdly, if the home state of the investor decides to act in diplomatic protection, one still needs the consent of both states to have such claim settled through **arbitration or judicial means**.
- Fourthly, claims and diplomatic protection were in practice, very often accompanied by **economic and military pressure by the home state,** and this caused an important politicization of the dispute.
- Moreover, the domestic tribunals of the host state were perceived as being biased and lacking independence

- The main objective of the recourse to arbitration and concession contracts was to
- **depoliticize the settlement of investor-State disputes** and to
- **provide a neutral forum to have such disputes settled.**
- Arbitration was thus increasingly incorporated in contracts concluded by states and foreign investors regarding specific investment operations.
- Nowadays, investor-State arbitration is mainly used to settle disputes arising out of **bilateral or multilateral investment treaties concluded between states.**

- These treaties grant certain rights to investors of states that invest in another state party.
- For investors usually have the right to be **treated fairly and equitably**. The right not to be **discriminated**. Or the right not to have their property expropriated without compensation.

- When an investor considers that the rights contained in the treaty have not been respected, and that the host state therefore in which the investor has invested has breached its treaty obligations, ***the investor can bring a claim directly against that state.***
- Of course, this presupposes that there is a treaty signed by the home state of the investor and the host state, and that the treaty contains an arbitration clause which allows the ***investor to bring such a claim.***
- At this stage, there are more than ***3,000 signed investment treaties*** which grant rights to foreign investors, and which, for the vast majority, contain an arbitration clause allowing investors to bring claims directly against the host state for breaches of that treaty.

Investment Dispute Arbitration

- In the investment treaty arbitration, that is, the arbitration of investment disputes based on an investment treaty, the consent of the parties to the dispute is disconnected one from the other.
- The arbitration clause is contained in a treaty, signed between **two or more states**. And the **class of foreign investors** are not parties to that treaty.

- The investors in turn give their consent at the later stage when they submit their claim **through a request for arbitration.**
- States are free to condition their consent to arbitration.
- One often finds such conditions in recent treaties. States can for example include,
- *a loan or in combination,*
- *a prior notification of the intention to bring a claim,*
- *a cooling off period between the notification of a claim, and*
- *effective submission of a request for arbitration to allow the parties to the dispute to settle the dispute through negotiations.*
- *The choice between several forums or arbitration rules or even the domestic courts of the host states.*

- The most frequent fora are the International Center for the Settlement of Investment Disputes, ICSID.
- Arbitration under the auspices of the Permanent Court of Arbitration, PCA.
- Ad hoc arbitration under the UNCITRAL Arbitration Rules
- traditional venues for commercial arbitration

The Arbitration Institute of the Stockholm Chamber of Commerce, the International Chamber of Commerce in Paris, or the London Court of International Arbitration.

- only those investors who meet the definition of ***investor in the treaty***, and who have made an investment as defined in the treaty can have access to arbitration under that treaty.
- Who can be considered an investor of a state party is typically defined differently for **natural persons and for companies(legal persons)**

- One finds definitions which are considered as investor of one of the state parties, companies which are registered in that state, have been established in that state, have their official seat or the seat of management in that state, or are controlled directly or indirectly by nationals or legal persons of that state.
- What an investment is, is usually defined very broadly in investment treaties. And it is relatively similar in most treaties. I invite you again to have a look at such a definition Article one of the Bilateral Investment Treaty between the Netherlands and Argentina. You will see that the definition contains many forms of investment.
- There is however general agreement that usually a purely commercial transaction such as a ***purchase and sale agreement is not an investment***. However, some treaties do include such transactions in their definition.

- Investment arbitration is a term incorporates in reality two types of arbitration. The term itself, simply implies that the arbitration relates to an investment and that there is a dispute over the investment.
- However, the legal basis of in which the investment of arbitration is founded, has important consequences on which types of claims investors can bring and which arbitral tribunal has competence to hear such claims.
- In general terms, the arbitration can be based on an **investment contract or an investment treaty**. A third, but less used method, is **arbitration based on an national legislation** that provides access to arbitration.

- I explained that originally investment arbitration was included in contracts. Investment treaties are a phenomenon that emerged only in the end of the 60's, early 70's. At this moment, if we rely on the statistics of the ICSID, around 74% of ICSID arbitrations are based on treaty. 17% on an investment contract and 9% on national legislation.
- In practice foreign investors, when investing in a foreign state will sign an investment contract with the host state or one of its agencies.
- This is often the case in the event of an oil or mining concession, but keep in mind that there is not always a contract.

- One can well imagine situations, where an investment is acquired abroad without any contract being signed with the host state.
- In the event of the coexistence of an **investment contract and a treaty,** a distinction should be made between the contract claims and treaty claims.
- Tribunals have over the past years held, the tribunals established under treaty have competence to hear claims based on breaches of the treaty by the host state.
- Conversely, claims that are based on bridges of the contract by the host state or one of its sub divisions or agencies should be brought before the dispute settlement forum provided for in the contract.

- The contract dispute settlement forum can be arbitration but one also frequently finds domestic courts or tribunals. However, some treaties also provide for the possibility of a treaty based tribunal to hear contract claims.
- One should always carefully look at how the **arbitration clause in their treaty is formulated.**
- The distinction as said is important. If an arbitral tribunal based on an arbitration clause in a contract has competence, the law it will apply to the disputes will be the law provided for in the contract, most often **the domestic law of the host state.** I
- International law then only plays a marginal role, it will only be used and applied to supplement or correct the domestic law.

- If an arbitral tribunal is based on an investment treaty, its task is to appraise whether there has been a breach of the treaty by the host state.
- The tribunal then primarily applies **public international law, the treaty, customary international law**, so long as the treaty has not deviated from custom and general principles of public international law.
- However, even then, domestic law may be relevant. For instance, to determine the existence and contours of investment related rights of the foreign investors, such as the existence and validity of an oral concession.
- The main grounds invoked in case of treaty claims are breaches of **fair and equitable treatment standard and protection against arbitrary and discriminatory treatment**. Such standards of treatment are present in the vast majority of the investment treaties.

- Historically, investment disputes related to the expropriation of the foreigner's investment and the resulting obligation to pay a compensation.
- Nowadays, **direct and outright expropriations** have become less frequent. **Indirect expropriations** on the other hand, are often in ground for by foreign investors.
- Indirect expropriations are in essence measures taken by the host state which have an effect similar to a direct expropriation. Such acts may amount to be a breach of an investment treaty, provided that the act in question was not taken for the **protection of the public interest.**
- Indirect expropriations are often invoked by foreign investors in treaty claims, yet it is often difficult for a foreign investor to **successfully argue their case.**

Arbitration of Investment Disputes

- The ICSID was created in 1965 by the Convention on the Settlement of Investment Disputes between states and nationals of other states called the **ICSID Convention or the Washington Convention**. The treaty entered into force in 1966
- It was created under the auspices of and as part of the World Bank Group and it has its seat in Washington.

- ICSID's purpose as stated in the preamble is to **stimulate economic development** through the **promotion of foreign investment** by providing a **neutral forum for the settlement of investment disputes.**
- ICSID currently has 153 contracting parties. ICSID is governed by an administrative council composed of one representative of each contracting state.

- It is chaired by a Chairman who amongst other functions has the authority to appoint an arbitrator if the parties fail to do so.
- ICSID further has a secretariat headed by a Secretary-General who is responsible for its administration.
- The Secretary-General has several important function in the arbitral procedure, since the secretariat's legal counsels act as secretaries to the arbitral tribunals. ICSID in a way resembles the PCA.

- It is an arbitration institution which administers arbitrations and maintains a list of arbitrators.
- As the PCA, ICSID is not a **standing tribunal**.
- If the parties to an investment dispute wish to submit a dispute to arbitration under the ICSID Convention, **a tribunal needs to be established for each dispute.**
- Arbitrators can be members of the ICSID list of arbitrators, but individuals from outside that list **can also be appointed.**
- ICSID also provides for facilities for conciliation.

- ICSID has several specific features, and differs in those respects from the PCA, other arbitration institutions, or arbitration under the uncitral arbitration rules.
- First, submitting a dispute to **ICSID automatically incorporates the ICSID arbitration rules**, which are thus to be applied to the proceedings. One cannot conduct arbitration under the ICSID Convention while using other arbitration rules.
- Secondly, ICSID has a specific provision detailing which disputes can be submitted to the center. Article 25 of the ICSID Convention which I invite you to read carefully, entitled to jurisdiction of the Center establishes five conditions.
- A dispute arising **directly out of an investment between the national of one contracting party and another contracting party**, which the parties consent in writing to submit to the center.

- This implies that ICSID's jurisdiction is restricted to investment disputes. For instance, disputes which are alien to an investment cannot be brought to ICSID.
- While the convention does not define what an investment is, several tribunals have over the past years defined it using what is now known as the ***Salini criteria, named after the award of the tribunal in the case Salini versus Morocco.***
- Also ICSID's jurisdiction extends only to mixed disputes, namely disputes between a state and a national of another state.
- Both states must have ratified the convention.

- The Salini tribunal identified four relevant criteria's which formed essential characteristics of an investment. Those were
- (i) contributions in assets or money,
- (ii) a certain duration of performance of the contract,
- (iii) an element of risk, and
- (iv) a contribution to the economic development of the host state.

- Note In this respect that nationals who have the nationality of ***both the home state and of the host state are excluded***.
- Finally, Article 25 of the ICSID Convention requires ***consent in writing***.
- Having ratified the Convention is not sufficient. Consent as nowadays mostly contained in investment treaties.
- In the case of ICSID arbitration, one must conform to these principles, but you should keep in mind that the foreign investors should also meet the definitions of investment and investor of the treaty.

- A third specific feature of the ICSID Convention is that awards rendered under the Convention are **more easily enforceable.**
- ICSID awards are to be recognized and enforced automatically by all ICSID member states as if these were decisions of domestic courts.
- And Non-ICSID arbitrations, recognition and enforcement is regulated by the 1958 New York convention, which lists the grounds on which a national court or of a signatory state can refuse recognition or enforcement of an award, including on public policy grounds.
- ICSID proceedings and awards on the contrary are fully internationalized. Because domestic courts cannot interfere during or after the proceedings.

- This feature makes ICSID very attractive for foreign investors. The counter side of the automatic enforcement is that on limited grounds contained in **Article 52 of the convention**, each party to a dispute can request the annulment of an award. S
- uch procedures are decided by an ad hoc Committee composed of arbitrators appointed by the chairman of the ICSID Administrative Council and which functions very much like an arbitral tribunal.
- This procedure can of course take time but it is a completely international procedure. So far, ICSID has registered 597 cases. The majority of which have been brought since the early 2000's.

Immunity and Enforcement

- the Yukos Arbitration, a complex case in which an award was invalidated, while the enforcement procedures continued.
- We will be looking at the stage after the arbitration proceedings, when the proceedings have come to an end, the arbitrators settled the dispute and rendered a final award.
- Rendering a final award implies that the mandate of a tribunal has come to an end.
- The proceedings are closed. This is also why, except in certain limited situations, the procedure that relates to the **enforcement of an award is conducted outside of the formal setting of the arbitral tribunal.**
- An arbitral award is a written decision by the arbitrators in which an answer is given to the issues and questions submitted by the parties to the arbitral tribunal.

- The result of an arbitral award may vary depending on the agreement between the parties. It may be in the form of an obligation for the unsuccessful party to pay a certain amount of money, or a non-financial award to abstain from a certain action.
- An arbitral award is **binding and final upon the parties.**
- That is why the successful party will expect the opposing party to comply with the award voluntarily once it has been rendered. If the unsuccessful party does not perform the obligation under the award, the successful party can initiate recognition and enforcement proceedings Before commencing an enforcement proceeding, it is important to make sure that the award is valid.
- To have a valid award, it needs to meet certain conditions outlined in the rules chosen by the parties. Usually, certain formalities are required.

- An award has to be in ***writing, dated, signed*** by the arbitrators, and the place of arbitration agreed upon should be mentioned.
- The award should state the reasons upon which it is based. This is what we call the obligation to render ***a reasoned award***.
- This is important to ensure the legitimacy of the arbitral process, notably from the perspective of the parties and the public in case of **treaty-based investment arbitrations.**

- Thirdly, the award has to be **communicated promptly to the parties to the dispute.**
- The fourth requirement concerns the **time limits for the arbitrators in which the award has to be rendered.**
- The time limits are always calculated from the **beginning of the proceedings until the final award**. This usually is also provided for in the arbitration rules that are used. When it has **reached the time limit, the authority of the tribunal is at an end.**

And it no longer has jurisdiction to make a valid award, unless, of course, an extension has been granted.

- The fifth requirement is that the award should answer the **issues defined by the parties**. A tribunal should not either fail to decide the issues nor decide issues not submitted by the parties. This is called **an '*excès de pouvoir*', *or excess of authority*.**

- A valid arbitral award is important for the **award to be recognized and enforced**.
- It is also important to point out that these conditions may vary from the different parties' agreement, including the rules about the arbitral institution the parties have chosen.

Annulment

- When an arbitral award has been rendered, it may occur that one party, mostly the unsuccessful party, believes that the award or the procedure is **tainted by some flaw or defect.**
- It can then file a claim in annulment of the arbitral award or a claim to set aside or vacate the award.

- The terminology used differs from state to state, but denotes very similar procedures. **Annulment, or setting aside proceedings, are very different in nature from an appeal**.
- An award generally is rendered in first and last instance, and it is **final and binding**.
- This means that awards are not in principle subject to appeal.
- Annulment or setting aside can only be based on the way in which the **procedure was conducted**. It does not cover disagreement by either party with the **merits, the substantive outcome of the dispute**. This also implies that if the original award is annulled, it is invalidated, and considered non-existent.

- When the originale award has been annulled, the concerned party will have **to resubmit the dispute to a new tribunal, which will then deliver a new award.**
- For international arbitral awards and mixed arbitrations that are not rendered under the ICSID Convention, the grounds and procedure to set aside or anull an award are usually regulated by the arbitration laws of the state **where the seat of the arbitration is.**
- This is the case not only for non-ICSID investment arbitrations, but also for international commercial arbitration involving a state, or between two private parties.
- Setting aside proceedings should be brought before the ***Domestic Courts of the Seat of Arbitration.***

- There are, however, some similarities in the various domestic laws.
- Many states have adopted the UNCITRAL Model Law on international commercial arbitration.
- Article 34 of the UNCITRAL Model Law limits the grounds to set aside an arbitral award to the following.
- *Invalidity of the arbitration agreement,*
- *no proper notice of the appointment of the arbitrator or of the arbitration proceedings,*
- *excess of authority by the tribunal,*
- *composition of the tribunal not in accordance with the agreement of the parties.*
- *The dispute was inarbitrable under the laws of the state of the seat of the arbitration.*
- *Recognition or enforcement is contrary to the public policy of the state of the seat of arbitration.*

- as you will have noticed, are limited to procedural flaws and defects and do not concern the merits of the decision. It must be added, however, that there are some countries which do allow for an **appeal, limited or not, of certain arbitral awards.**
- Under the ICSID Convention, the annulment of an award is regulated in Article 52.
- ICSID arbitration, as you will remember, is a form of arbitration which is completely detached from the domestic courts. As a consequence, the law of the seat of arbitration is irrelevant for ICSID arbitrations.
- ICSID awards are not subject to the jurisdiction of the domestic court where the seat of arbitration is situated.

- Instead, ICSID Convention has its own system. An ad hoc committee composed for each claim and comprised of three individuals appointed by the Chairman of the ICSID Administrative Council will decide on the claim and annulment of an ICSID award.
- All parties to the dispute can file and request an annulment to the Chairman of the ICSID Administrative Council.
- The restrictive and exhaustive grounds on which an ICSID award can be annulled are listed in Article 52 of the ICSID Convention.
- *First, the tribunal was not properly constituted.*
- *Secondly, the tribunal has manifestly exceeded its powers*.

- *Thirdly, corruption on the part of a member of the tribunal.*
- *Fourthly, a serious departure from a fundamental rule of procedure. And*
- *finally, the award has failed to state the reasons on which it is based.*
- As you will have noticed, these grounds are somewhat similar to those contained in the UNCITRAL Model Law. Yet there is one notable absent in the ICSID list.
- ***Annulment cannot be sought because the award is contrary to public policy. This is logic, since ICSID arbitration and annulment is detached from domestic law and is a fully international procedure. Public policies of states are irrelevant.***
- We will now look into the most invoked ground of setting aside an award, **excess of authority**. This will occur when a tribunal goes beyond what has been agreed by the parties. The powers of the tribunal are limited to what the parties have agreed on, and they cannot decide on issues beyond the agreement of the parties.
- Also, an arbitral tribunal may not apply any other laws than the ones that have been agreed upon by the parties to the dispute.

Enforcement and Validity of International Arbitral Awards

- In most cases, the unsuccessful party will voluntarily pay its due to the other party.
- However, it may occur that the unsuccessful party refuses to comply with the award and as a result enforcement proceedings will be necessary.
- The procedure to enforce an award varies and it depends on the legal system where you seek enforcement as well as on the arbitration rules that were used during the proceedings.
- In practice, enforcement will be sought in a state in which the party against whom you seek enforcement has sufficient assets.
- Often domestic legal systems will require recognition as a preliminary step before enforcement proceedings.
- It is important to emphasize that recognition is different from enforcement. **Recognition results in the award having the same status and effect as a court judgment.**

- Recognition of the award requires acknowledgment of the award as valid and binding.
- This gives an effect similar to a court judgment.
- Thus, the award has an official status and issues that have been determined by the award cannot be rearbitrated.
- On the other hand, enforcement of the award is the process to collect the amount owned or to otherwise carry out any obligation provided for the award.
- For Non-ICSID International Arbitral Awards, the convention was signed in 1958. The Convention on the recognition and enforcement of foreign arbitral awards, in short, The New York Convention. Many states are parties to the convention.
- The New York Convention imposes an obligation for national courts of one contracting state to recognize and enforce foreign arbitral awards made in other contracting states.

- The New York Convention's main objective is to ensure a form of uniformity in the recognition and enforcement of Foreign Arbitral Awards.
- The Convention applies to Non-ICSID Investment treaty arbitration, as well as to International Commercial Arbitration involving a state or between two private parties.
- The party who seeks recognition and enforcement under the convention is required to provide the original award or certified copy thereof, as well as the original arbitration agreement.

- Article five of the convention lists the grounds on which courts and tribunals of states can refuse recognition and/or enforcement. These grounds are exhaustive, means that only those grounds on which recognition enforcement can be refused. The grounds are,
- *first, invalidity of the arbitration agreement.*
- *Secondly, no proper notice of the appointment of the arbitrator or of the proceedings.*
- *Third, excess of authority by the tribunal.*
- *Fourth, Constitution of the tribunal not in accordance with the agreement of the parties.*
- *Fifth, the award is not binding or has been set aside.*
- *Sixth, the dispute was inarbitrable under the laws of the state where recognition or enforcement is sought.*
- *And finally, recognition or enforcement is contrary to the public policy of the state where recognition enforcement is sought*

- The situation is very different in the case of ICSID Arbitrations. Article 53 of the convention provides that each contracting state shall recognize an ICSID award as binding and enforce the pecuniary obligations imposed by that award as if it were a final judgment of a court in that state.
- This means, that contrary to the New York Convention, domestic courts of the state where recognition and the enforcement of sought cannot refuse such a request.
- This is one of the main advantages of ICSID Arbitration. The counter side of this however, is that ICSID has its own procedure to deal with claims to annul arbitral awards on grounds that are similar yet not identical to the New York Convention

- Enforcement of Interstate Awards is regulated only by general principles of public international law. However, states usually voluntarily comply with International Arbitral Awards.

Yucos Case

- Yukos was Russia's largest company in the oil and gas sector. In 2006, Yukos went bankrupt, following several tax redress procedures initiated by Russian authorities. Three of Yukos' shareholders commenced arbitration proceedings against Russia as a consequence. The claim brought by the shareholders was based on the infringement of investment protection provisions, contained in the Energy Charter Treaty. Such as unlawful expropriation, an arbitrary, unfair, and discriminatory treatment by the Russian Federation.

- In July 2014, an arbitral tribunal operating under the the UNCITRAL arbitration rules, and established under the auspices of the PCA, issued three awards, one for each case. The tribunal found that the claimants were, indeed, indirectly expropriated, and that Russia had breached its obligation under the Energy Charter Treaty. Russia was ordered to pay 50 billion US dollars to former shareholders as compensation.

- The amount of the award is the largest amount ever awarded in investment treaty arbitration. The Russian Federation initiated setting aside proceedings before the Hague District Court. The case was brought in the Hague because the seat of the arbitration was the Netherlands. Russia requested the court to annul the awards in the Yukos' cases.

- After several rounds of pleadings, the Hague District Court, indeed, annulled the awards, based on the lack of jurisdiction of the arbitral tribunals. It considered that Russia had, in fact, not agreed to arbitrate such disputes. The case was immediately appealed by the Yukos' shareholders. And in 2017, the case was still pending before the Court of Appeal in the Netherlands. In the meantime, several enforcement proceedings were being pursued.

- Russia having not voluntarily compensated the claimants as requested by the award. It, indeed, refused to do so, as it considered the awards to be invalid, a claim that has been successful in first instance. Enforcement proceedings were brought in France, Belgium, and the United States, amongst others. Under article V (1)(e) of the New York Convention, when an arbitral award has been set aside in the country in which the award was rendered, recognition and enforcement may be refused. You should note that the convention uses the word, may, not shall.

- Enforcement proceedings have, as a consequence, been stayed in several states, such as Belgium, because of the setting aside of the awards by the Hague District Court. However, France has a different perspective, and has a long-standing jurisprudence, which allows enforcement proceedings despite a pending setting aside procedure. Although the awards have been set aside at the seat of arbitration, it does in France, not constitute a ground for refusing recognition and enforcement of foreign arbitral awards. France considers that an arbitral award is delocalized, or international, if you prefer, and it's not integrated in the law of the seat of arbitration. French courts would only refuse the enforcement of an arbitral award if the award has been set aside in France.

- It is of the opinion that recognition and enforcement of an award will fully depend on the law of the state where recognition and enforcement is sought. A key issue in the proceedings before the French courts, because enforcement proceedings continue, concerns Russia's assets in France. The first question is whether or not the assets found in France constitute assets of the Russian federation. And the second question is whether or not the assets can be used to enforce the awards. Russia has invoked its immunity from execution in various enforcement proceedings in France, but also in Belgium and the United States.

- The immunity has been upheld, for example, in France, where Yukos had attempted to seize a cultural center in Paris, which was owned by Russia, and under construction. The Paris Tribunal considered that the building was covered by immunity, as it was owned by Russia in its sovereign capacity.

Thank you !