

**Second Opinion:**  
**The Nature of ICSID Arbitration**  
**for Purposes of 28 U.S.C. §1782**

Legal Opinion by

*Christoph Schreuer*

Vienna, September 12, 2022

**CONTENTS**

<b>1. Introduction .....</b>	<b>2</b>
<b>2. The Origin and Nature of ICSID Arbitration under a Multilateral Treaty .....</b>	<b>3</b>
<b>3. Comparison of the ICSID Convention and Rules to the UNCITRAL Arbitration Rules.....</b>	<b>5</b>
<b>4. Organization of ICSID .....</b>	<b>6</b>
<b>5. Financing of ICSID’s Activities.....</b>	<b>7</b>
<b>6. Legal Personality and Immunities of ICSID.....</b>	<b>8</b>
<b>7. Designation and Appointment of Arbitrators.....</b>	<b>10</b>
<b>8. The Screening of Requests for Arbitration .....</b>	<b>11</b>
<b>9. Jurisdiction of an ICSID Tribunal.....</b>	<b>12</b>
<b>10. Review and Enforcement of ICSID Awards .....</b>	<b>14</b>
<b>11. Publication of ICSID Awards.....</b>	<b>18</b>
<b>12. Conclusion .....</b>	<b>19</b>

## 1. Introduction

Counsel for Webuild S.p.A. (“Webuild”) have asked me for a second legal opinion in response to the Expert Report of Mr. Barton Legum of August 11, 2022 (“Legum Report”) (ECF 45).

This Second Legal Opinion is designed to supplement my First Legal Opinion of July 7, 2022 (“Schreuer First Opinion”) (ECF 38) the contents of which I confirm.

I have described my qualifications to submit these Opinions in the Introduction to my first Opinion, as well as in my Statement of Qualifications attached thereto.

In *ZF Automotive US Inc v. Luxshare Ltd.*,<sup>1</sup> the U.S. Supreme Court held that to qualify as a “foreign or international tribunal” for purposes of 28 U.S.C. § 1782, an arbitral panel must be an adjudicative body that exercises governmental authority.<sup>2</sup> The Supreme Court summarized its finding as follows:

In sum, we hold that §1782 requires a ‘foreign or international tribunal’ to be governmental or intergovernmental. Thus, a ‘foreign tribunal’ is one that exercises governmental authority conferred by a single nation, and an ‘international tribunal’ is one that exercises governmental authority conferred by two or more nations. Private adjudicatory bodies do not fall within §1782.<sup>3</sup>

In my First Legal Opinion I showed that an arbitration tribunal constituted under the ICSID Convention<sup>4</sup> exercises governmental authority conferred by multiple nations. This conclusion follows from:

- The origin and nature of ICSID arbitration pursuant to a multilateral treaty;
- The role of sovereign States in the creation, administration, and governance of ICSID;
- The financing of ICSID by the States Parties to the Convention (“Member States”);
- The legal personality and legal immunities enjoyed by ICSID as an international organization;

---

<sup>1</sup> *ZF Automotive US Inc. v. Luxshare Ltd.*, 142 S. Ct. 2078 (2022).

<sup>2</sup> *Id.* at 2089.

<sup>3</sup> *Id.* at 2089.

<sup>4</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270 (“ICSID Convention”).

- The designation and appointment of arbitrators to ICSID tribunals by the Member States as Respondents, as well as the appointment of arbitrators to ICSID tribunals (absent the parties' agreement) and to ICSID annulment committees by the Chairman of the Administrative Council, comprised of the Member States;
- The screening of requests for arbitration by ICSID;
- The jurisdiction of ICSID;
- The applicability of arbitration rules adopted by a body composed of State representatives;
- The self-contained review procedure within the ICSID system; and
- The binding force and enforceability of awards in all Member States, which are bound to treat an ICSID award as if it were a final judgment of a court in that State.

Mr. Legum disagrees with my conclusions. He states that there is no material difference between the ICSID tribunal hearing the underlying dispute between Webuild and the Republic of Panama and the *ad hoc* UNCITRAL tribunal in *ZF Automotive US Inc. v. Luxshare Ltd.*, 142 S. Ct. 2078 (2022).<sup>5</sup> I respectfully disagree with Mr. Legum's position for the reasons set out below.

## **2. The Origin and Nature of ICSID Arbitration under a Multilateral Treaty**

As explained previously, the ICSID Convention—a multilateral treaty that has been ratified by 157 States, including the United States, Italy, and Panama—provides a procedural framework for arbitration and conciliation of investment disputes between States and foreign investors.<sup>6</sup> The aim of the ICSID Convention is the avoidance of political disputes between States by removing the political element from investment disputes and instead submitting them to an impartial tribunal.<sup>7</sup> In addition, the ICSID Convention created a permanent intergovernmental institution, the International Centre for Settlement of Investment Disputes between States and Nationals of other States (“ICSID”, or “the Centre”), which serves a public purpose common to the States

---

<sup>5</sup> Legum Report ¶¶ 5, 7, 106.

<sup>6</sup> Schreuer First Opinion, pp. 4–5.

<sup>7</sup> *Id.* at 13 & n.52.

participating in it. This purpose is the promotion of economic development through the creation of a safe and favorable investment climate.<sup>8</sup>

The ICSID Convention is complemented by the ICSID Arbitration Rules, which are adopted by ICSID’s governing body, the Administrative Council.<sup>9</sup> The Administrative Council is composed of representatives of the ICSID Member States.<sup>10</sup>

Mr. Legum generally agrees with the description of the origin and nature of the ICSID Convention set out in my opinion, but asserts that I do not adequately distinguish between the role of ICSID in administering and facilitating arbitration proceedings and the proceedings themselves.<sup>11</sup> Relying upon the Preamble to the Convention, he contends that the ICSID Convention “draws a clear distinction between the role of ICSID, the Centre it created to facilitate arbitration proceedings, and the arbitration proceedings themselves[,]” and that “the organization of ICSID is a separate topic from the establishment and organization of tribunals supported by ICSID.”<sup>12</sup>

Mr. Legum’s argument overlooks the role of the Centre and its Administrative Council in the establishment and organization of ICSID tribunals. For example, the Centre’s Administrative Council enacts the rules of procedure applicable to ICSID arbitrations—the ICSID Arbitration Rules.<sup>13</sup> The Chairman of the Administrative Council, who is the President of the World Bank, is responsible for appointing tribunal members not appointed by the parties,<sup>14</sup> and for selecting all annulment committee members to hear any application to annul an award issued by an ICSID tribunal.<sup>15</sup>

---

<sup>8</sup> *Id.* at pp. 4–5; ICSID Convention, Preamble (“Considering the need for international cooperation for economic development, and the role of private international investment therein[.]”).

<sup>9</sup> Schreuer First Opinion, p. 5; ICSID Convention, art. 6(1).

<sup>10</sup> Schreuer First Opinion, p. 5; ICSID Convention, art. 4(1).

<sup>11</sup> Legum Report ¶¶ 21–23.

<sup>12</sup> *Id.* ¶¶ 23–28.

<sup>13</sup> Schreuer First Opinion pp. 5–6, 14–15; ICSID Convention, art. 6(1).

<sup>14</sup> Schreuer First Opinion, p. 10; ICSID Convention, art. 38.

<sup>15</sup> Schreuer First Opinion, p. 10; ICSID Convention, art. 52(3).

The enforceability of ICSID Awards in all Contracting States to the Convention like the highest judgment of a domestic court clearly distinguishes the ICSID system from other arbitral tribunals.

### **3. Comparison of the ICSID Convention and Rules to the UNCITRAL Arbitration Rules**

Mr. Legum argues that there is no basis to distinguish ICSID arbitration from UNCITRAL arbitration because both are “arbitrations under rules adopted by intergovernmental organizations and administered by an intergovernmental organization.”<sup>16</sup> He asserts that, just as the ICSID Rules are adopted by ICSID’s Administrative Council, the UNCITRAL Arbitration Rules are adopted by an intergovernmental body, the U.N. General Assembly.<sup>17</sup> According to him, “[n]either set of rules confers authority on an arbitral tribunal to adjudicate a dispute[,]” and such authority is instead “conferred by the parties to the dispute in their agreement to arbitration.”<sup>18</sup> Mr. Legum also notes that just as ICSID arbitrations are administered by the Centre, an UNCITRAL arbitration may be administered by the Permanent Court of Arbitration (“PCA”), another intergovernmental organization.<sup>19</sup>

Mr. Legum’s argument ignores the fact that ICSID arbitration is governed primarily by the ICSID Convention, a treaty between sovereign States. The Convention circumscribes the jurisdiction of ICSID tribunals. At the outset, the host State of an investment and the home State of the investor must accede to the ICSID Convention before the investor can accept the host State’s offer to arbitrate in a BIT or other instrument.<sup>20</sup> In other words, ICSID tribunals may only hear legal disputes between ICSID Member States and nationals of other Member States.<sup>21</sup> Therefore, in terms of personal jurisdiction, ICSID arbitration always involves a Contracting State to the Convention as a Respondent.

---

<sup>16</sup> Legum Report ¶ 31.

<sup>17</sup> *Id.* ¶ 26.

<sup>18</sup> *Id.* ¶ 29.

<sup>19</sup> *Id.* ¶¶ 30–31.

<sup>20</sup> Schreuer First Opinion, p. 12; ICSID Convention, art. 25(1).

<sup>21</sup> ICSID Convention, art. 25(1).

In terms of subject matter jurisdiction, ICSID arbitration always involves State action relating to an investment. The UNCITRAL Arbitration Rules, by contrast, do not govern the jurisdiction of *ad hoc* tribunals. They provide only the procedural rules that will apply to an *ad hoc* tribunal, if the parties agree to their application.

Mr. Legum is thus incorrect that the authority of an ICSID tribunal is conferred solely by agreement of the parties to a particular dispute. Unlike *ad hoc* tribunals, the authority of an ICSID tribunal depends also on the participation of the host State and the investor's home State in the ICSID Convention.

While parties to an UNCITRAL arbitration may invite intergovernmental organizations, such as the PCA, to administer their *ad hoc* arbitrations, the purely administrative role of the PCA is not comparable to the role of the Centre in disputes under the ICSID Convention. The former may only exercise an administrative function pursuant to the agreement of the parties, while the latter exercises official authority on the basis of a treaty.

#### **4. Organization of ICSID**

As explained previously, ICSID has two main organs, the Administrative Council, composed of representatives of the Member States, and the Secretary-General, who is elected by the Administrative Council.<sup>22</sup> The Administrative Council adopts the rules and regulations governing ICSID arbitrations, as well as ICSID's annual budget.<sup>23</sup> The Secretary-General is the principal administrative officer of ICSID.<sup>24</sup>

Mr. Legum asserts that a description of the organs of the Centre is not relevant to whether an ICSID tribunal is imbued with governmental authority. He suggests that while ICSID Member States have influence on the formation and operation of the Centre, they have no

---

<sup>22</sup> Schreuer First Opinion, pp. 5–6; ICSID Convention, arts. 4(1), 11.

<sup>23</sup> Schreuer First Opinion, pp. 5–6; ICSID Convention, arts. 6(1), 17.

<sup>24</sup> Schreuer First Opinion, pp. 5–6; ICSID Convention, art. 11.

such influence over ICSID tribunals, which are formed pursuant to the agreement of the parties.<sup>25</sup>

Mr. Legum downplays the role of ICSID Member States in the formation of ICSID tribunals. The ICSID Convention contains mandatory rules for the composition of tribunals.<sup>26</sup> The Administrative Council enacts the procedural rules that govern the formation of tribunals.<sup>27</sup> The Convention imposes a default method for the Chairman of the Administrative Council to appoint arbitrators from the Panel of Arbitrators if the parties fail to make the necessary appointments.<sup>28</sup> The appointment of members of all annulment committees—which exercise the ultimate oversight over awards issued by ICSID tribunals—is exclusively in the hands of the Chairman of the Administrative Council, who must make these appointments from the Panel of Arbitrators.<sup>29</sup> The Panel of Arbitrators is composed of persons nominated by the Member States and by the Chairman.<sup>30</sup> The formation of an ICSID tribunal is thus not “left for the parties to a given dispute” in the sense that Mr. Legum describes.<sup>31</sup>

## 5. Financing of ICSID’s Activities

As explained previously, the expenditures of the Centre are borne by the Member States to the extent they are not met by other income, while particular proceedings are financed by the parties.<sup>32</sup>

Mr. Legum asserts that the question of how the Centre is financed is different from how ICSID arbitration proceedings are financed.<sup>33</sup> He contends that ICSID tribunals, like *ad hoc* tribunals, are funded through advances on arbitrator fees and expenses paid by the

---

<sup>25</sup> Legum Report ¶ 35.

<sup>26</sup> Schreuer First Opinion, pp. 9–11, 12–14; ICSID Convention, arts. 25(1), 37(2), 38, 40(1).

<sup>27</sup> Schreuer First Opinion, p. 14; ICSID Convention, art. 6(1).

<sup>28</sup> Schreuer First Opinion, pp. 9–10; ICSID Convention, art. 38.

<sup>29</sup> Schreuer First Opinion, pp. 9–10; ICSID Convention, art. 52(3).

<sup>30</sup> Schreuer First Opinion, pp. 9–11.

<sup>31</sup> Legum Report ¶ 35.

<sup>32</sup> Schreuer First Opinion, p. 7; ICSID Convention, art. 17.

<sup>33</sup> Legum Report ¶¶ 39–41.



parties.<sup>34</sup> He further states that the Centre itself is fully funded from fees charged to the parties and publications and, as a result, the Member States have not been called upon to issue contributions in recent years.<sup>35</sup>

However, the financing of ICSID tribunals cannot be divorced from the financing of the Centre. ICSID tribunals exist and operate under the ICSID Convention, with the support of the Centre.

The fact that ICSID purportedly has not required funding from its Member States in recent years is irrelevant. The Member States have a duty under the Convention to provide such financing if called upon and are thus responsible for the Centre's funding.

## **6. Legal Personality and Immunities of ICSID**

As explained previously, ICSID enjoys full legal personality, as well as international privileges and immunities comparable to those of other international institutions.<sup>36</sup> ICSID arbitrators also enjoy full immunity from legal process with respect to acts performed by them in the exercise of their functions, except where the Centre waives this immunity.<sup>37</sup>

Mr. Legum does not address the privileges and immunities of ICSID. He states that the functional immunity granted to ICSID arbitrators is equivalent to that granted to U.S. arbitrators and to arbitrators under other major rules in *ad hoc* arbitrations.<sup>38</sup> He also suggests that ICSID arbitrators' exemption from certain taxation is irrelevant, because ICSID arbitrators are still subject to taxes in their country of residence.<sup>39</sup>

---

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Schreuer First Opinion pp. 7–9; ICSID Convention, arts. 18, 19, 20.

<sup>37</sup> Schreuer First Opinion pp. 7–9; ICSID Convention, art. 21.

<sup>38</sup> Legum Report ¶¶ 42–46.

<sup>39</sup> *Id.*

Mr. Legum overlooks the fact that the functional immunity granted to ICSID arbitrators is an absolute immunity from legal process,<sup>40</sup> as opposed to the mere limitation of liability granted to arbitrators in other systems, such as the ICC, UNCITRAL or ICDR.<sup>41</sup>

Most importantly, arbitrators in an *ad hoc* arbitration enjoy any immunities based on an agreement of the parties, *i.e.*, if the parties select rules of procedure that provide such immunities (*e.g.*, the ICC or UNCITRAL Arbitration Rules). By contrast, the immunities granted to ICSID arbitrators are based on a treaty. They are set out in the ICSID Convention, and thus apply to all ICSID tribunal members *vis-à-vis* all Member States.

Gary Born, a leading authority on international commercial arbitration, writes in this respect:

Like other aspects of the arbitrator's status, rights and obligations, most international arbitration conventions are silent regarding the subject of arbitrator immunity. In particular, the New York, Inter-American and European Conventions all contain no provisions addressing the subject of the arbitrator's immunities. In contrast, the ICSID Convention provides arbitrators (as well as witnesses, experts and counsel) with a very broad grant of absolute immunity from national court jurisdiction or civil liability.<sup>42</sup>

---

<sup>40</sup> ICSID Convention, art. 21 (“The Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed pursuant to paragraph (3) of Article 52, and the officers and employees of the Secretariat:

(a) shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity;

(b) not being local nationals, shall enjoy the same immunities from immigration restrictions, alien registration requirements and national service obligations, the same facilities as regards exchange restrictions and the same treatment in respect of travelling facilities as are accorded by Contracting States to the representatives, officials and employees of comparable rank of other Contracting States.”).

<sup>41</sup> ICC Arbitration Rules, art. 41 (2021) (“The arbitrators ... shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law.”) (emphasis added); UNCITRAL Arbitration Rules, art. 16 (2010) (“Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators ... based on any act or omission in connection with the arbitration.”) (emphasis added); ICDR Arbitration Rules, art. 38 (2014) (“The members of the arbitral tribunal ... shall not be liable to any party for any act or omission in connection with any arbitration under these Rules, except to the extent that such a limitation of liability is prohibited by applicable law ...”) (emphasis added).

<sup>42</sup> G. Born, *Chapter 13: Rights and Duties of International Arbitrators*, in *International Commercial Arbitration 2027* (3d ed. 2021).

With respect to taxation, the Convention's provision on taxation<sup>43</sup> reflects a choice of the Member States not to tax arbitrators at the seat of the arbitration. Other regimes, such as the UNCITRAL Rules, do not contain such a provision.

### 7. Designation and Appointment of Arbitrators

As explained previously, ICSID maintains a Panel of Arbitrators appointed by the Member States and the Chairman to serve for a defined term.<sup>44</sup> The parties may but need not select arbitrators from the Panel.<sup>45</sup> If the parties fail to agree on the appointment of an arbitrator, the Convention mandates that the Chairman of ICSID's Administrative Council must select the arbitrator from the Panel of Arbitrators.<sup>46</sup> In addition, any arbitrator adjudicating an application for annulment of an ICSID award must be appointed by the Chairman from the Panel.<sup>47</sup> Arbitrators appointed from the Panel of Arbitrators thus have ultimate oversight over awards issued by ICSID tribunals, regardless of the method of appointment of the tribunals rendering those decisions.

Mr. Legum opines that the existence of a Panel of Arbitrators appointed by the Member States is not significant because the parties are not obliged to choose their arbitrators from the Panel and in practice rarely do so.<sup>48</sup> He suggests that some arbitrators on the Panel have little experience.<sup>49</sup> He further opines that the existence of a default method of appointment of arbitrators from the Panel of Arbitrators is not a distinguishing feature because parties in *ad hoc* arbitrations can similarly agree on an appointing authority.<sup>50</sup>

An important distinction between ICSID arbitration and *ad hoc* arbitration is that the ICSID Convention allows Member States to exercise influence over the appointment of arbitrators in the event the parties fail to appoint. Where this occurs, the arbitrators must

---

<sup>43</sup> ICSID Convention, art. 24(3).

<sup>44</sup> Schreuer First Opinion, pp. 9–11; ICSID Convention, art. 3.

<sup>45</sup> Schreuer First Opinion, p. 10; ICSID Convention arts. 37, 38, 40.

<sup>46</sup> Schreuer First Opinion, pp. 9–10; ICSID Convention, art. 38.

<sup>47</sup> Schreuer First Opinion, p. 10; ICSID Convention, art. 52(3).

<sup>48</sup> Legum Report ¶¶ 50–54.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

be appointed by the Chairman of the Administrative Council from the Panel of Arbitrators.<sup>51</sup> The persons on the Panel of Arbitrators are designated by the ICSID Member States and the Chairman.<sup>52</sup> Thus, the parties to an ICSID arbitration may not select an appointing authority if they fail to agree. There is no appointing authority that may select any arbitrator, as is the case in *ad hoc* arbitrations.

Moreover, Mr. Legum minimizes an important distinction between ICSID arbitration and *ad hoc* arbitration: appointments to annulment committees are made by the Chairman of the Administrative Council exclusively from the Panel of Arbitrators.<sup>53</sup> As further explained below, these individuals have the sole authority to annul ICSID awards.<sup>54</sup> Annex I attached to this Opinion lists all ICSID annulment proceedings that occurred from 2012 to 2022. In all of these proceedings, the arbitrators adjudicating the application for annulment were selected from the Panel of Arbitrators designated by the Member States. Therefore, States exercise a dual control over the composition of the annulment committees. First, appointments are made by the Chairman of the Administrative Council, an intergovernmental body.<sup>55</sup> Second, in making these appointments, the Chairman is restricted to the persons who have been nominated by States to the Panel of Arbitrators.<sup>56</sup>

## **8. The Screening of Requests for Arbitration**

As explained previously, the ICSID Convention provides for screening by the Secretary-General of the request for arbitration to assess whether the dispute is manifestly outside the jurisdiction of the Centre.<sup>57</sup>

Mr. Legum argues that it is commonplace for arbitration institutions to provide administrative support to *ad hoc* tribunals and to engage in a screening process to ensure

---

<sup>51</sup> Schreuer First Opinion, pp. 9–10; ICSID Convention, art. 38.

<sup>52</sup> Schreuer First Opinion, pp. 9; ICSID Convention, art. 13(1).

<sup>53</sup> Schreuer First Opinion, p. 10; ICSID Convention, art. 52(3).

<sup>54</sup> Schreuer First Opinion, pp. 15–18; ICSID Convention, art. 52.

<sup>55</sup> Schreuer First Opinion, p. 17; ICSID Convention, art. 52(3).

<sup>56</sup> Schreuer First Opinion, p. 17; ICSID Convention, art. 13.

<sup>57</sup> Schreuer First Opinion, p. 11; ICSID Convention, art. 36(3).

that a colorable basis exists for the institution to administer the proceedings.<sup>58</sup> He lists as examples the ICC Court and the SCC.<sup>59</sup> He further contends that a similar screening process exists in *ad hoc* arbitrations under the UNCITRAL Arbitration Rules, because the PCA may designate an appointing authority if the parties fail to do so, and in exercising this function, the PCA must ensure that the requesting party furnishes a copy of the arbitration agreement.<sup>60</sup>

The key distinguishing factor in the ICSID screening process is that it is conducted by the Secretary-General, who is elected by the Member States under the Convention. The Member States thus have indirect control over the screening process. In contrast, the ICC Court is appointed by the ICC World Council, which is composed of “business executives,” not sovereign States.<sup>61</sup> The SCC Board is similarly not composed of individuals appointed by sovereign States.<sup>62</sup>

Further, any screening role that the PCA has in *ad hoc* arbitrations under the UNCITRAL Arbitration Rules arises only in the narrow situation where the parties fail to pick an appointing authority, and a party requests the PCA to designate an appointing authority. Thus, unlike the ICSID Secretary-General, who screens all requests pursuant to the ICSID Convention, the PCA has this authority only if the parties confer it on the PCA.

### **9. Jurisdiction of an ICSID Tribunal**

As explained previously, the jurisdiction of an ICSID tribunal requires the host State and the investor’s home State to have ratified the ICSID Convention, and for the parties to the particular dispute to express their consent to arbitration separately through a BIT or other instrument.<sup>63</sup>

---

<sup>58</sup> Legum Report ¶¶ 57–59.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Governance*, ICC, available at <https://iccwbo.org/about-us/governance/>.

<sup>62</sup> SCC Arbitration Rules, Appendix I, Art. 4 (2017).

<sup>63</sup> Schreuer First Opinion, pp. 12–14; ICSID Convention, art. 25(1).

Mr. Legum asserts that, just like *ad hoc* tribunals, ICSID tribunals may be formed merely through the parties' consent.<sup>64</sup> He states that "the *Webuild v. Panama* tribunal has authority to resolve the dispute (including disputes regarding the tribunal's jurisdiction) only because, as *Webuild* contends, Panama and it have consented to the arbitration."<sup>65</sup>

Mr. Legum also suggests that any differences between the jurisdictional requirements of the Convention and the jurisdictional requirements of *ad hoc* tribunals are merely "technical," and at most only represent a difference in the "scope" of jurisdiction.<sup>66</sup> As an example, he cites the fact that the ICSID Convention excludes jurisdiction over claims with a dual national as a party, while the UNCITRAL Arbitration Rules do not.<sup>67</sup> Finally, he assigns no significance to the fact that the claims decided by ICSID tribunals typically involve a sovereign State's compliance with its international obligations, noting that *ad hoc* tribunals also decide such issues.<sup>68</sup>

Mr. Legum's description of a consent agreement as the only basis for an ICSID tribunal's jurisdiction is incorrect. Unlike *ad hoc* tribunals, the jurisdiction of an ICSID tribunal cannot be established by the parties to the dispute merely pursuant to a BIT or other consent instrument. A consent agreement with respect to ICSID arbitration is possible only if the host State and the investor's home State participate in the ICSID Convention, a treaty among sovereign States.<sup>69</sup>

In turn, through the ICSID Convention, the Member States limit the types of claims that may be brought before an ICSID tribunal. The ICSID Convention requires that the dispute

---

<sup>64</sup> Legum Report ¶¶ 62–66.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* ¶¶ 69–70.

<sup>69</sup> See ICSID Convention, art. 25(1); see also Hanno Wehland, *Chapter 8: Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules 230*, in ICSID Convention after 50 Years: Unsettled Issues (Baltag ed. 2016) (explaining that ICSID arbitration requires both the "jurisdiction of the Centre" over the tribunal, as defined in the Convention, and the "special jurisdiction" of the tribunal, conferred by the parties' consent); see also *Chapter 28: Arbitration of Investment Disputes*, in *Comparative International Commercial Arbitration 777* (Lew, Mistelis & Kroll eds. 2003) (describing the double consent requirement of ICSID arbitration).

arise directly out of an investment.<sup>70</sup> ICSID tribunals cannot be convened by two private parties to decide commercial issues that do not arise directly out of an investment. The parties in ICSID proceedings are always a State or State entity and a foreign investor, and there must be a legal dispute arising directly out of an investment.<sup>71</sup> *Ad hoc* arbitral rules such as the UNCITRAL Arbitration Rules do not impose such limitations on the parties and types of claims that may be heard before an *ad hoc* tribunal. Thus, the differences between the jurisdictional requirements of the two systems are not simply technical or a matter of scope.

### 10. Review and Enforcement of ICSID Awards

As explained previously, one of the most important features distinguishing ICSID tribunals from *ad hoc* tribunals is the review and enforcement of ICSID awards.<sup>72</sup> Under Article 54(1) of the ICSID Convention, the Member States commit to enforcing ICSID awards as they would enforce final judgments of their own national courts. In addition, once issued, ICSID awards are subject to review only by ICSID annulment committees, composed of arbitrators appointed by the Chairman from the Panel of Arbitrators, under the exclusive grounds for annulment provided for in Article 52 of the Convention.<sup>73</sup>

Mr. Legum asserts generally that post-award remedies do not speak to whether a tribunal is vested with governmental authority. He contends that it is “odd” to assess whether a tribunal exercises governmental authority by looking at the enforceability of its decisions, because enforcement only occurs after the tribunal has issued an award and is *functus officio*.<sup>74</sup> He notes that the Supreme Court in *ZF Automotive* did not consider annulment or enforcement mechanisms in its analysis of whether *ad hoc* tribunals are imbued with governmental authority.<sup>75</sup>

---

<sup>70</sup> ICSID Convention, art. 25(1).

<sup>71</sup> *Id.*

<sup>72</sup> Schreuer First Opinion, pp. 15–21.

<sup>73</sup> *Id.*; ICSID Convention, arts. 13, 52, 53(1).

<sup>74</sup> Legum Report ¶¶ 81–86.

<sup>75</sup> *Id.* ¶ 8.

Mr. Legum opines that, in any event, there are no relevant differences between the annulment and enforcement mechanisms to which the *Webuild* tribunal is subject, and those of the *ad hoc* tribunal in *ZF Automotive*. He states that any annulment of the *ad hoc* award would follow a similar procedure and subject the award to similar grounds for set aside as those applicable to ICSID awards.<sup>76</sup> He states that, just as ICSID awards are enforced according to the multilateral ICSID Convention, *ad hoc* awards are subject to enforcement under the multilateral New York Convention.<sup>77</sup> He further points out that parties who wish to enforce an ICSID award, like parties enforcing *ad hoc* awards, must still file an action in national court for enforcement—there is no “automatic enforcement” of ICSID awards.<sup>78</sup>

There is nothing “odd,” however, about assessing whether a tribunal is imbued with governmental authority by considering the scope of adjudicative authority granted to that tribunal by sovereign States, in terms of the review and enforceability of a final award.

The ICSID Convention’s grant of authority to ICSID tribunals to issue decisions that will be treated like final judgments issued by the national courts of the Member States demonstrates that ICSID tribunals are imbued with governmental authority. This grant of authority does not exist in *ad hoc* arbitration. ICSID awards are treated like final domestic judgments and are not subject to substantive review. By contrast, the decisions of *ad hoc* tribunals may be denied enforcement in national courts pursuant to the substantive grounds in Article V of the New York Convention.<sup>79</sup> These possibilities for review do not

---

<sup>76</sup> *Id.* ¶¶ 88–96.

<sup>77</sup> *Id.* ¶¶ 101-03.

<sup>78</sup> *Id.* ¶ 100.

<sup>79</sup> See U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (“New York Convention”), art. V (“1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to



apply to ICSID awards. ICSID awards are not subject to setting aside or to any other form of scrutiny by domestic courts.<sup>80</sup>

Therefore, to the extent that Mr. Legum suggests that national courts may review an ICSID award substantively, because enforcement of ICSID awards is not “automatic,” that suggestion is incorrect. ICSID awards are subject to the same requirements for enforcement as a “final judgment of a court” of the State where enforcement is sought.<sup>81</sup> Contrary to what Mr. Legum asserts,<sup>82</sup> ICSID awards are not subject to the same challenges to enforcement as foreign judgments.

In addition, as Mr. Legum recognizes,<sup>83</sup> awards of *ad hoc* tribunals may be enforced even if annulled at the seat. In contrast, ICSID awards may not be enforced under the ICSID Convention if annulled by an ICSID annulment committee.<sup>84</sup>

The authority to review awards of *ad hoc* tribunals rests with national courts. The ICSID Convention, in contrast, assigns the exclusive authority to review awards to ICSID

---

arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.”).

<sup>80</sup> See ICSID Convention, art. 53(1) (“The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”); see also *Pey Casado et al. v. Republic of Chile*, ICSID Case No. ARB/98/2, Second Decision on Annulment, Mar. 15, 2018, at ¶ 40 (recognizing that under the ICSID Convention, “an award is ‘binding’ on the parties and is not subject to any appeal or to any other remedy except those provided for in the Convention”).

<sup>81</sup> ICSID Convention, art. 54(1).

<sup>82</sup> Legum Report ¶ 82.

<sup>83</sup> *Id.* ¶ 102.

<sup>84</sup> Schreuer First Opinion, p. 18; see ICSID Convention, art. 52(6).

annulment committees.<sup>85</sup> ICSID annulment committees are composed solely of individuals appointed to the Panel of Arbitrators by the Member States or the Chairman.<sup>86</sup> Through this system, the Member States confer on ICSID Annulment Committees an authority otherwise reserved to national courts.

While not every ICSID award is reviewed by an ICSID annulment committee,<sup>87</sup> ICSID annulment is the only mechanism by which a party may seek to annul an ICSID award. Approximately 30 percent of ICSID cases result in annulment proceedings.<sup>88</sup>

Mr. Legum points to alleged similarities between the grounds for annulment under the ICSID Convention and set aside grounds for an *ad hoc* award before national courts.<sup>89</sup> These alleged similarities only reinforce the point that ICSID tribunals and annulment committees are imbued with governmental authority. Even if these similarities exist, the point is that the ICSID Convention grants annulment authority to ICSID annulment committees. The annulment committees therefore perform the review function that a national court would otherwise exercise with respect to an *ad hoc* award. As noted, once an ICSID award is rendered and not set aside by an annulment committee, the award is final and enforceable without any further review by a national court. No such authority is conferred on an *ad hoc* tribunal. In an *ad hoc* arbitration, the authority to review awards remains with the national courts.

The same is true of Mr. Legum's point that ICSID annulment procedures and set aside procedures for *ad hoc* awards in national courts both involve written submissions and a hearing, and that the decision is made by individuals appointed by sovereign governments.<sup>90</sup> This only reinforces the point that in an ICSID arbitration, annulment committees take the place of national courts and hence exercise governmental authority.

---

<sup>85</sup> Schreuer First Opinion, pp. 15–18; ICSID Convention, art. 52.

<sup>86</sup> Schreuer First Opinion, p. 17.

<sup>87</sup> Legum Report ¶ 90.

<sup>88</sup> See *The ICSID Caseload – Statistics, Issue 2022-2*, at 16, available at [https://icsid.worldbank.org/sites/default/files/publications/The\\_ICSID\\_Caseload\\_Statistics\\_2022-2\\_ENG.pdf](https://icsid.worldbank.org/sites/default/files/publications/The_ICSID_Caseload_Statistics_2022-2_ENG.pdf).

<sup>89</sup> Legum Report ¶¶ 89–96.

<sup>90</sup> *Id.* ¶ 96.

The enforcement and annulment mechanisms of ICSID awards are unique to ICSID arbitration. Therefore, it is unremarkable that the Supreme Court in *ZF Automotive* did not consider the ICSID mechanisms in its analysis of commercial and *ad hoc* tribunals.<sup>91</sup>

### 11. Publication of ICSID Awards

Mr. Legum notes that a factor indicating the absence of governmental authority is that an award may only be made public with the consent of the parties, which is true for *ad hoc* as well as ICSID arbitrations.<sup>92</sup>

But publication of decisions is not a distinctive feature of the exercise of governmental authority. Some governmental courts, including courts of ICSID Member States, do not publish their decisions, or have a practice of publishing only some decisions.<sup>93</sup>

In any event, the transparency of ICSID arbitration activity by far surpasses that of most *ad hoc* arbitrations. The Secretary-General of ICSID is under an obligation to publish information about the existence and progress of pending cases.<sup>94</sup> This is achieved primarily through ICSID's website. In addition, Rule 48(4) of the ICSID Arbitration Rules provides that while the Centre may not publish an award without the consent of the parties, the Centre shall "promptly include in its publications excerpts of the legal reasoning of the tribunal."

The parties are free to release awards and other decisions for publication unless they have otherwise agreed. Most ICSID awards have been published in one way or another, either by ICSID or by the parties. By contrast, *ad hoc* awards are published only sporadically.

The new ICSID Arbitration Rules, which came into effect on July 1, 2022, contain a Chapter X dealing with Publication, Access to Proceedings and Non-Disputing Party

---

<sup>91</sup> See *id.* ¶ 8.

<sup>92</sup> *Id.* ¶¶ 104–05.

<sup>93</sup> See, e.g., El Ameir Noor et al., *Legal Systems in the United Arab Emirates: Overview*, Thomson Reuters Practical Law (2021) (explaining that records and judgments of United Arab Emirates courts are restricted only to the parties in dispute), available at [https://uk.practicallaw.thomsonreuters.com/w-032-5816?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/w-032-5816?transitionType=Default&contextData=(sc.Default)); Saudi Arabia Law of Criminal Procedure, art. 183, available at [http://hrlibrary.umn.edu/research/saudi-arabia/criminal\\_procedure.html](http://hrlibrary.umn.edu/research/saudi-arabia/criminal_procedure.html) (establishing that only the accused, claimant, and the public prosecution are entitled to copies of criminal judgments).

<sup>94</sup> ICSID Administrative and Financial Regulations 22 and 23.

Submissions.<sup>95</sup> The central provision is Rule 62, dealing with the *Publication of Awards and Decisions on Annulment*.<sup>96</sup> The new Rules presume that the parties' consent to the publication of an award is given unless a party objects within 60 days of the issuance of the award.<sup>97</sup> They further provide that, even in the absence of consent of the parties, the Centre shall publish excerpts of every award and decision on annulment.<sup>98</sup> In addition, Rule 63 of the new ICSID Rules mandates that ICSID shall publish all interim orders and decisions issued by ICSID tribunals, subject only to redactions agreed by the parties.<sup>99</sup>

## 12. Conclusion

For the above reasons, I continue to believe that, unlike commercial or *ad hoc* tribunals, arbitral tribunals constituted under the ICSID Convention have unique and distinguishing features demonstrating that they are imbued with governmental authority.



Christoph Schreuer

Vienna, September 12, 2022

---

<sup>95</sup> See *ICSID Releases 2022 Versions of its Rules and Regulations*, ICSID News & Events, available at <https://icsid.worldbank.org/news-and-events/communiqués/icsid-releases-2022-versions-its-rules-and-regulations>.

<sup>96</sup> ICSID Rules (2022), Rule 62 on *Publication of Awards and Decisions on Annulment* (“(1) With consent of the parties, the Centre shall publish every Award, supplementary decision on an Award, rectification, interpretation, and revision of an Award, and decision on annulment.

(2) The parties may consent to publication of the full text or to a jointly redacted text of the documents referred to in paragraph (1).

(3) Consent to publish the documents referred to in paragraph (1) shall be deemed to have been given if no party objects in writing to such publication within 60 days after the dispatch of the document.

(4) Absent consent of the parties pursuant to paragraphs (1)-(3), the Centre shall publish excerpts of the documents referred to in paragraph (1). The following procedure shall apply to publication of excerpts . . .”).

<sup>97</sup> *Id.* at Rule 62(3).

<sup>98</sup> *Id.* at Rule 62(4).

<sup>99</sup> *Id.* at Rule 63 on *Publication of Orders and Decisions*

“(1) The Centre shall publish orders and decisions, with any redactions agreed to by the parties and jointly notified to the Secretary-General within 60 days after the order or decision is issued.

(2) If either party notifies the Secretary-General within the 60-day period referred to in paragraph (1) that the parties disagree on any proposed redactions, the Secretary-General shall refer the order or decision to the Tribunal to decide any disputed redactions. The Centre shall publish the order or decision in accordance with the decision of the Tribunal . . .”).