

No. 2

2017

OCCASIONAL POLICY PAPERS SERIES
ON THE LEAST DEVELOPED COUNTRIES

LEGAL ASSISTANCE TO MAKE FOREIGN INVESTMENT WORK BETTER FOR SUSTAINABLE DEVELOPMENT IN THE LEAST DEVELOPED COUNTRIES



United Nations Office of the High Representative
for the Least Developed Countries,
Landlocked Developing Countries and
Small Island Developing States

Dispute Resolution Clauses in Investment Contracts/Investor-State Agreements: Practical Considerations

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1. Introduction

Investment contracts, also known as “investment agreements” or “Investor-State Agreements (“ISAs”),” are contracts entered into by foreign investors and a host State (or a State agency or instrumentality, or a State-owned entity). Such contracts are designed to govern the terms and conditions under which an investment will be made in the recipient country. They generally relate to major long-term investment projects in the host State, often in high-cost and risky investments, such as in the infrastructure, energy, mining, transportation, and telecommunications sectors. ISAs can take a variety of forms, including, among others, concession agreements, joint venture agreements, production-sharing agreements, licensing agreements, and legal stabilization agreements.

ISAs are often signed before the investment is made, but they can also be signed after the relevant project has already started, or once specific conditions in the market change (for example, in the context of supplemental investments, acquisitions, or privatizations). Although in many instances the terms of an ISA can be the subject of negotiations between the investor and the State, some of them (for example, many of the contracts that are entered into in a context of public tender proceedings, such as licensing or concession agreements) can be contracts of adhesion, in which the terms of the contract are established by the public entity or agency, with little or no latitude granted to the investor to seek modifications.

ISAs are often used by developing States as a mechanism to promote foreign direct investment. Another mechanism that has been used in recent decades is that of State-to-State international investment treaties.¹ One key difference between ISAs and investment treaties is that ISAs are governed by the domestic law of the host State, whereas investment treaties are governed mainly by international law. Furthermore, the parties to the ISAs are, on the one hand, the specific investors who will take part in the project at hand, and, on the other hand, the host State of the investment, or a particular agency or instrumentality thereof, or a State-owned entity. In contrast, the parties to an investment treaty are exclusively the States whose nationals will be protected by the treaty; thus, rather than being a party to such instruments, individual investors are merely potential or eventual beneficiaries of the rights that emanate from the treaty.

¹ Examples of such treaties are Bilateral Investment Agreements (“BITs”) and the investment chapters of Free Trade Agreements (“FTAs”). The latter include bilateral FTAs, or multilateral ones such as the North America Free Trade Agreement (NAFTA). Whether in fact these agreements have a positive impact in attracting foreign investment has been questioned. Foreign direct investment has been dropping in recent years, in LDCs in particular. According to United Nations Conference on Trade and Development (UNCTAD), in 2016, global flows of foreign direct investment fell by 2 per cent from the 2015 figures, to about \$1.75 trillion. Investment in developing countries declined even more, by 14 per cent, and flows to LDCs and structurally weak economies remain volatile and low. However, UNCTAD predicted a recovery of FDI flows in 2017–2018. See unctad.org/en/PublicationsLibrary/wir2017_en.pdf. The issue of whether FDI can be promoted by means of investment treaties and/or ISAs thus remains a relevant one.

The ISAs allocate rights, risks, and responsibilities of the investor and State and/or State-owned entity that are the parties to the contract. ISAs usually also include dispute settlement provisions, and it is such provisions that are the focus of this paper.

1.1. Obligations Undertaken by the State Pursuant to ISAs

There are a wide range of potential obligations that the State can undertake pursuant to an ISA. It is common for the State to be responsible pursuant to ISAs for the “support” or “promotion” of the relevant project by assisting the investor in various ways, such as in obtaining permits from independent local agencies. By signing ISAs, States often also undertake obligations of a procedural nature, such as “dealing in good faith” or with “best efforts” in the pursuit of objectives required for the success of the project.

In some instances the State undertakes a so-called “stabilization” commitment, which is intended to insulate the investor from future changes in the legal framework that is applicable to the investment. Provisions of this nature include (i) “freezing clauses,” pursuant to which the domestic legislation or regulations concerning the project are fixed for the term of the project, such that the investor is exempted from any change in the relevant legislation or regulations; (ii) “economic equilibrium clauses,” pursuant to which a change of legislation does indeed apply to the investor, but the host State agrees to indemnify the investor for any adverse consequences suffered by the latter as a result of such changes; and (iii) “hybrid clauses,” which consist of some combination of the preceding two clauses. Stabilization clauses are attractive to investors because they help reduce the investor’s risk, by establishing clear “rules of the game” and enabling the investor better to adapt to new circumstances that may arise during the life of the contract, thereby reducing the “surprise factor” of sudden changes to the legal framework.

In some instances, ISAs also incorporate certain legal obligations that are more typically found in investment treaties. Such obligations involve the adoption by the State of certain “standards” of treatment designed mainly to protect investors against unfair, arbitrary, unreasonable and/or discriminatory actions or omissions by the host State of the investment. Such standards of treatment can include one or more of the following:

(i) “fair and equitable treatment,” which prohibits the State from engaging in arbitrary, unreasonable, or abusive treatment; from thwarting an investor’s legitimate expectations concerning the project; and from incurring in denials of justice or significant violations of due process which adversely affect the foreign investor. The fair and equitable treatment standard is an absolute standard of protection, which means that its application does not depend on the treatment that the host is giving to investors of third States, or to its own nationals.

(ii) “most favored nation treatment,” which prohibits discrimination of a foreign investor as compared to a similarly situated third-party national. This standard is not an absolute one, but rather a relative one, since it depends on a comparison of the treatment of the foreign investor with the treatment of investors from one or more third States.

(iii) “national treatment,” which requires the host State to give the foreign investor treatment no worse than that which it confers upon its own nationals. This standard, too, is a relative rather than absolute one.

1.2. Potential Liability by the State

A State could be held liable for a breach of a contractual obligation contained in an ISA, either because the State has failed to perform an obligation that it has contractually undertaken to perform under the ISA, or because the State has failed to comply with a guarantee concerning another entity's performance under the ISA. The relevant contractual claim would be governed by the applicable law of the contract (typically, the law of the host State of the investment).

Importantly, however, the State can be held responsible not only under domestic law for breach of the contract, but also potentially under the international law principles that govern the responsibility of States, since an investor may be protected not only by the ISA but also by an international treaty, such as a bilateral investment treaty (BIT) or the investment provisions of a free trade agreement (FTA). Certain BITs and FTAs contain what is known as an "umbrella clause," which creates an obligation for the State under the treaty to observe whatever commitments it may have undertaken with respect to the investor or investment (including — many observers would argue — purely contractual commitments).

2. *Dispute Resolution Clauses in Investor-State Agreements*

2.1. What type of dispute resolution mechanism should be included in an ISA?

The effectiveness of the dispute resolution clause in an ISA will depend on a number of factors, including the nature of the dispute resolution method selected (*e.g.*, litigation or arbitration), and the degree to which the dispute resolution procedures have been tailored to address the necessities of the case at hand, and the governing law. A "multi-step" or "multi-tiered" dispute resolution clause that features a direct negotiation phase, and possibly a mediation phase, can be useful in resolving certain disputes (especially minor ones) at an early stage.

States and State-owned entities often prefer to include in ISAs dispute resolution clauses that provide for litigation in the host State's courts, since that can be the most practical form of dispute resolution for the State from a bureaucratic and political perspective. Moreover, local judges are well trained in the interpretation and application of the host State's laws and regulations, and are generally more sympathetic to the State's cause.

Investors, on the other hand, generally prefer international arbitration as the method of dispute resolution for ISAs, for different reasons. First, international arbitration removes the dispute to a neutral forum, away from the sphere of the domestic courts (which foreign investors often suspect of bias, or view as susceptible either to interference or pressure from government authorities, or to corruption, or both). Second, arbitration allows the parties at least some role in the selection of the arbitrators, which enables them to conform a tribunal with knowledgeable experts who are able to handle the legal and technical difficulties of the case. Third, arbitral proceedings are generally confidential, which can help prevent disclosure of the investor's commercially sensitive information to the public (including potential competitors). Fourth, unlike domestic litigation (which normally provides for two or more levels of appeal of first-instance judicial decisions), an arbitral award is final once issued, and is typically not subject to appeal.² Finally, arbitration

² Arbitral awards are, however, subject to annulment or set-aside, on certain limited grounds. The feature of finality has the obvious advantage to the investor of providing a swifter determination in the event of disputes. However, many multinational companies dislike the fact that there is no recourse of appeal if, for example, the tribunal has

gives the parties some control over the rules that will govern the arbitral procedure, and over other practical aspects of the arbitration which can be important to a foreign investor, such as the language of the proceeding.

Accordingly, whether a State should include in its dispute resolution clause a provision for international arbitration (which is generally more appealing to foreign investors) or one for domestic litigation (which can be more favorable to the State) can depend on the degree of “leverage” that the State has vis-à-vis the investor, and/or the degree to which the State wishes to appeal to the interests of the foreign investors as a way to induce their investment. If international arbitration is selected, the State can take certain steps to minimize the disadvantages thereof, as discussed below.

2.2. If international arbitration is selected, what type of arbitration should it be?

The type of international arbitration that is selected for the dispute resolution clause in an ISA can significantly affect whether the clause will prove beneficial or detrimental to the interests of the State. There are several threshold determinations that a State must make with respect to the type of international arbitration it will select for an ISA.

First, the clause can provide either for *institutional arbitration* (in which the arbitral proceeding is administered by a dedicated international arbitral institution, such as the International Chamber of Commerce (ICC), or the International Centre for Settlement of Investment Disputes (ICSID)), or for *ad hoc arbitration*, in which the parties themselves administer the arbitration. There can be a substantial difference in cost for the parties between institutional and *ad hoc* arbitrations, since the arbitral institutions charge fees that can be significant, especially in complex and long-running disputes. On the other hand, a complex and long-running dispute can be quite difficult to manage from a practical and logistical perspective, so it is often well worth the expense for the parties to have an arbitral institution handle the proceedings. For relatively simple or smaller scale disputes, often an *ad hoc* proceeding will suffice.

The other major choice that must be made is whether to submit the disputes to *investment arbitration* or to *commercial arbitration*. Some ISAs provide for consent by the parties to investment arbitration, for example by agreeing that any dispute relating to the investment that is the subject of the contract can be submitted to arbitration at ICSID, which is the world’s leading investment arbitration entity. For the first few decades of ICSID (which was founded in 1966), the majority of the disputes that were heard at that institution were brought pursuant to ISAs. This has drastically changed, as most arbitrations at ICSID nowadays are asserted pursuant to investment treaties and the investment chapters of free trade agreements.

The implications of this choice — investment v. commercial arbitration — can be significant, both from a practical perspective (because in some instances litigating at ICSID can be somewhat more expensive than doing so in other fora, and the proceedings can last somewhat longer), and also from a legal perspective (including because (i) an award issued by an ICSID tribunal is not subject to modification or annulment by any national court (which implies a certain loss of control by the State), and (ii) an ICSID award is subject to a special enforcement regime delineated in a multilateral treaty to which over 150 States are a party — the ICSID Convention).

made a mistake, minimum due process guarantees of the parties were not observed, or the arbitral procedure had other flaws.

Further, there are certain provisions that States can include in an ISA dispute resolution clause that can help limit the overall cost of any eventual arbitral proceedings, even in instances in which a body of international arbitral rules (such as those of the ICC, or of the United Nations Conference on International Trade Law (UNCITRAL)) will apply. For example, in the dispute resolution clause, the ISA can provide that the relevant arbitral proceedings will be administered by a locally-based arbitral institution or chamber of commerce, rather than by an international institution (even if such local institution or chamber is directed to apply a set of international arbitral rules). By having a local entity administer the arbitration, the State can avoid the often steep costs charged by the major international arbitral institutions (although there is sometimes a significant difference in the quality of the services provided by the institution).

Another way in which the State can help minimize the disadvantages of international arbitration as the dispute resolution mechanism in an ISA is to establish that the seat of the arbitration will be a specified city in the host State (as opposed to one of the more commonly designated seats for international arbitration, such as Paris, London, Geneva, New York, Singapore, and Hong Kong). The seat of the arbitration not only determines which country's law will govern procedural aspects of the arbitration, but it is also generally where the arbitral hearings take place. Further, the seat determines the jurisdiction in whose courts annulment or set-aside of an award can be sought once the award is issued. Therefore, having such seat be a city in the host State can help the State (i) limit the costs of the arbitration, since it obviates the need for the State's counsel team to travel internationally, and to hire lawyers in foreign jurisdictions to handle procedural issues governed by national law (such as compulsion of witness testimony and production of evidence), (ii) avoid annulment or set-aside proceedings in a foreign jurisdiction, once the arbitral award is issued.

2.3. Examples of different types of dispute resolution clauses in ISAs

Set forth below are examples of a variety of dispute resolution clauses that are frequently incorporated into ISAs, including in particular international arbitration clauses, domestic arbitration clauses, "multi-tiered" dispute resolution clauses, and "hybrid" dispute resolution clauses. These are intended merely to illustrate different ways in which ISA dispute resolution clauses can be framed, so that such clauses can be assessed in the light of the practical considerations and recommendations identified in this paper.

2.3.1. International Investment Arbitration Clauses

2.3.1.1. ICSID Model Clause:

Under the ICSID Convention, consent to arbitration can be given in advance of a dispute, with respect to a defined class of future disputes. Clauses relating to future disputes are a common feature of ISAs. The model ICSID clause of this nature for ISAs reads as follows:

"The [Host State] (hereinafter the "Host State") and the Investor (hereinafter the "Investor") hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the "Centre") for settlement by arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the following dispute [...]"³

³ See <http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/model-clauses-en/7.htm>. Note also that Article 26 of the ICSID Convention provides as follows: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State

2.3.1.2. Peru - Legal Stability Agreement:

“It is the intention of both parties that any problems that may arise in connection with the performance of this Agreement shall be settled in the most expeditious manner possible. As from this moment, it is agreed that any litigation, controversy or claim among the parties, in connection with the construction, performance, enforcement or validity hereof, shall be submitted to the International Center for the Settlement of Investment-Related Discrepancies, to be solved through international de jure arbitration under the Conciliation and Arbitration Rules set forth in the Covenant for the Settlement of Investment-Related Discrepancies among States and Nationals from Other States, approved by Peru through Legislative Resolution 26210.”⁴

2.3.2. International Commercial Arbitration Clauses

2.3.2.1. ICC model clause:

The International Chamber of Commerce (ICC) has the following model arbitration clause that is often used in international contracts, including in ISAs:

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”⁵

2.3.2.2. Bolivia clause:

“Within the framework of Article 69 of the Hydrocarbons Law, any dispute regarding or relating to this Agreement that cannot be resolved in accordance with the procedure established in Clause 22.2 will be resolved by arbitration, in accordance with the provisions of the Law of Arbitration and Conciliation No. 1770 of March 10, 1997. The number of arbitrators shall be three (3), one appointed by YPFB, one appointed jointly by the Participating Company or the Participating Companies party to the dispute and the third one by the two appointed arbitrators previously appointed, with the consent of the Parties to the dispute. If the third arbitrator is not appointed within a period of sixty (60) days from the appointment of the second arbitrator, or if one of the Parties does not appoint an arbitrator, then that arbitrator shall be appointed in accordance with the provisions of the Regulation mentioned below. The seat of the arbitration will be the city of La Paz, Bolivia. The applicable laws will be the laws of the Republic of Bolivia. The arbitration shall be conducted in accordance with the procedure and the Arbitration Rules of the International Chamber of Commerce (ICC). The arbitration shall be conducted in Spanish. In the event that an arbitration related to this Agreement and an arbitration under the

may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.” See ICSID Convention Regulations and Rules https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf.

⁴ See Award, *Aguaytia Energy LLC v. Republic of Peru*, ICSID Case No. ARB 06/13, dated 11 December 2008, at para. 44 (available at https://www.mef.gob.pe/contenidos/inv_privada/sicreci/c_arbitrales/Laudo_Aguaytia.pdf). The Tribunal cited the translation of the Legal Stability Agreement furnished by the Claimant Aguaytia Energy LLC.

⁵ See International Chamber of Commerce, Arbitration Clause, <https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/>.

Guarantee of Compliance refer to the same matter, such arbitrations shall be consolidated and treated as a single arbitration before the same Arbitral Tribunal.”⁶

2.3.2.3. Panama clause:

“Any dispute, or claim arising out of, relating to or in connection with this Agreement, including, but not limited to, any matter relating to the existence, validity, performance, interpretation, termination, and / or compliance, will be resolved by arbitration under the law and in accordance with the Arbitration Rules of the International Chamber of Commerce (the "ICC") and will be administered by the ICC. The arbitral tribunal (the "Tribunal") shall be composed of three arbitrators. An arbitrator shall be appointed by the party initiating the arbitration (the "Plaintiff") in the Claimant's Request for Arbitration. The second arbitrator shall be appointed by the respondent (the "Respondent") in Respondent's Response. The arbitrators appointed by the parties shall select a third arbitrator, who shall preside over the Tribunal. If within thirty days after the appointment of the arbitrator of each party, said arbitrators have not reached an agreement with respect to the third arbitrator, said third arbitrator shall be appointed by the ICC. The place of arbitration shall be in Miami, State of Florida, United States of America and the law of the Republic of Panama shall apply. The minutes of the arbitration shall be conducted in Spanish but with simultaneous translation into English and all arbitrators shall be fluent in Spanish and English. All submissions must be submitted in English and Spanish, with their respective translation. Witnesses may testify in a language other than Spanish, provided that a simultaneous translation into Spanish and / or English is provided by the party that brings the witness to the procedure. Each party will cover translation costs for its own witnesses and documents. Any award of the Tribunal shall be final and binding upon the Parties, their successors and assignees without the possibility of appeal, or review. Any such decision may be enforceable, if necessary, by any court of competent jurisdiction. The costs of the arbitration, including reasonable attorney's fees, costs and expenses, shall be borne by the losing party or pro rata in accordance with the Tribunals decision in the event of a compromise decision.”⁷

2.3.3. Domestic Arbitration Clauses

2.3.3.1. Peru Clause:

“Any dispute, or claim, concerning the interpretation, execution or validity of this agreement, will be resolve through arbitration according to law. The arbitration shall be carried out in the city of Lima, by an arbitral tribunal made of three members, of which each of the parties shall appoint one, and the two of them will to appoint the third. The arbitrators are expressly authorized to determine the material controversy of the arbitration. The arbitration process shall not exceed sixty (60) working days, counted from the date of designation of the last arbitrator and shall be governed by the provisions of the Legislative Decree No. 1071 [...]”⁸

⁶ See Operation Contract between Yacimientos Petroliferos Fiscales Bolivianos, Repsol YPF E&P Bolivia S.A., BG Bolivia Coporation and PAE, E&P Bolivia LTD. <https://www.scribd.com/doc/249821355/40-A-CONTRATO-DE-OPERACION-YPF-BG-BOLIVIA-PAE-pdf>.

⁷ See Law Approving Contract No. 36-2017, Republic of Panamá and Banapiña de Panamá S.A. http://www.asamblea.gob.pa/proyley/2017_P_488.pdf.

⁸ See Investment Contract, Republic of Perú and APM Terminales Callao S.A., http://www.investinperu.pe/RepositorioAPS/0/1/JER/CONTRATOS_INVERSION_2010/00024.pdf. See also
Legislative Decree Regulating Arbitration,

2.3.4. “Multi-tiered” Dispute Resolution Clauses

2.3.4.1. Colombia Statutory Provision:

Act No. 80 of 1993 -

Art 68: “The entities referred to in article 2 of this statute and the contractors will seek to solve in an agile, fast and direct manner the differences and discrepancies arising from the contractual activity. To this end, once the differences arise, they will use the mechanisms for the solution of contractual disputes provided for in this Act and conciliation, amiable composition and settlement.

Art. 70: “State contracts may include an arbitration clause in order to submit to the arbitrators' decision any differences that may arise due to the conclusion of the contract and its execution, development, termination or liquidation. The arbitration shall rule according to law. In contracts with foreign persons (as well as in those with a national person), and in which long-term financing and payment systems are contemplated by means of the exploitation of the object constructed, or operation of goods for the celebration of a public service, it may be agreed that disputes arising out of the contract shall be subject to the decision of an International Arbitral Tribunal.”⁹

2.3.5. “Hybrid” Dispute Resolution Clauses

2.3.5.1. Chile Statutory Provision:

Law for the Concessions of Public Works –

Article 36: “Any discrepancies of a technical or economic nature that may occur between the parties during the execution of the concession contract may be submitted to the consideration of a Technical Panel at the request of any of the parties. The Technical Panel, which shall not exercise jurisdiction, shall issue, in accordance with the public procedure established in the regulations, a duly substantiated technical recommendation, within a period of 30 calendar days, extendable once, from the date of filing of the discrepancy . The recommendation shall be notified to the parties and shall not be binding on them. The recommendation of the Panel shall not preclude the authority of the concessionaire to proceed subsequently to the Arbitral Commission or the Court of Appeals of Santiago, even if the dispute rests on the same facts. In such case, the recommendation may be considered by the Arbitration Commission or the Court of Appeals as a precedent for the issuance of its judgment. [...]”

Article 36 bis: “Disputes or claims arising as a result of the interpretation or application of the concession contract or its execution, may be brought by the parties to the knowledge of an Arbitral Commission or the Court of Appeals of Santiago. The Ministry of Public Works may only appeal to the Arbitration Commission once the final commissioning of the work has been authorized, except for the serious declaration of non-compliance

http://portal.osce.gob.pe/arbitraje/sites/default/files/Documentos/Legislacion_aplicable/DL-1071-ley-que-norma-el-arbitraje.pdf.

⁹ See Act No. 80 of 1993, http://www2.igac.gov.co/igac_web/UserFiles/File/web%202008%20/ley%2080-93.pdf (emphasis added).

referred to in Article 28, which may be requested at any time. The technical or economic aspects of a dispute may be brought to the knowledge of the Arbitration Commission or the Court of Appeal, only when they have previously been submitted to the Technical Panel's knowledge and recommendation. The Arbitration Commission will be composed of three university professionals, of which at least two will be lawyers and one of them will preside. The members will be jointly appointed by the parties from two rosters of experts, the first of which will be composed of lawyers and made for the purpose by the Supreme Court, and the second, composed of professionals appointed by the Court of Defense of the Free Competition, by means of public competitive examination, based on objective, transparent and non-discriminatory conditions. Both the Supreme Court and the Court of Defense of Free Competition, must verify the suitability of the professionals chosen and the absence of disabilities and incompatibilities that affect them. The process must comply with the procedure established in the regulations of this law, and be developed within a maximum period of 60 calendar days.¹⁰

3. *Conclusions and Recommendations for States on Dispute Resolution Clauses in ISAs*

Investor-State Agreements, or investment contracts, typically include dispute resolution clauses, although the contents of such clauses vary widely, depending on the nature of the investor and investment, and the purpose of the contract. Such dispute resolution clauses generally provide for resort to litigation in the courts of the State of the investment — *i.e.*, the host State — or to international arbitration, but in some instances they provide for multi-tiered dispute resolution, in which a negotiation-based mechanism (such as friendly consultations, conciliation, or mediation) precedes an adversarial mechanism (such as domestic litigation, international arbitration, or domestic arbitration).

In many instances it can be less expensive and more advantageous (including in terms of the substantive outcome) for a State to have the ability to resolve disputes in its own judicial system. Accordingly, it can be tempting for the State to include a domestic litigation clause in its ISAs. However, foreign investors prefer international arbitration, amongst other reasons because it inoculates them from the bias that they sometimes face when seeking to redress injury in the domestic courts of the very State against which they are seeking recourse. Arbitration can also prove beneficial to small and medium-sized enterprises, which often lack the resources to litigate in the judicial courts. Accordingly, an international arbitration clause in an ISA can help make the investment more attractive to a foreign investor.

If for this reason the State opts to elect to include an international arbitration clause in its ISA, there are many aspects that the State should consider in order to maximize the benefits, and minimize the risks and disadvantages, posed by such clauses. For example, while institutional arbitration can be more prudent for the State (as well as the investor) for complex disputes, *ad hoc* arbitration should be considered for simpler or lower-value disputes, as such form of arbitration can be less expensive than institutional arbitration.

States should also consider whether they wish to subject to investment arbitration as opposed to commercial arbitration. In many instances, investment arbitration can be more expensive than commercial arbitration, and also can have certain implications for the State in terms of legal

¹⁰ See, Law for the Concessions of Public Works, Decree No. 900, October 31, 1996 <https://www.leychile.cl/Navegar?idNorma=16121>.

recourses, which in certain contexts are different for an investment arbitration context than for a commercial arbitration (for example, with respect to the ability to seek annulment or set-aside of the arbitral award by a national court).

Finally, in selecting an international arbitration clause for their ISAs, and to avoid protracted and potentially expensive disagreements between the parties once a dispute has already arisen, States should make sure to address in the international arbitration clauses of their ISAs certain key issues, such as the seat of the arbitration, the governing law, the language of the arbitration, the number and method for selection of the arbitrators, and the arbitral rules that will apply.

Originally published in the Occasional Policy Papers Series on the Least Developed Countries, “Legal Assistance to Make Foreign Investment Work Better for Sustainable Development in the Least Developed Countries.” The full paper is available at:

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