

CNUDCI/UNCITRAL – Réforme du règlement des différends investisseurs/Etats (ISDS)  
Academic Forum  
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## English

- 1. Abrogation or repeal:** withdrawal of a right.
- 2. Abuse of rights:** use of a right for purposes other than those for which it was conferred upon the owner of the right or for the sole aim of harming another subject.
- 3. Abuse of process:** improper use or perversion of process to gain an unfair advantage; includes (but is not limited to) the restructuring of the investment in order to gain benefit from a treaty otherwise not applicable, the commencement of parallel proceedings for the purpose of harassing the respondent or the submission of abusive document production requests; cf. treaty shopping
- 4. Multilateral agreement on investment:** Draft multilateral agreement on the treatment of foreign investments containing both substantive and procedural provisions negotiated in the context of the OECD in 1995 but finally abandoned in 1998.
- 5. Consent as a circumstance precluding wrongfulness:** consent to the commission of a given act by another State precludes the wrongfulness of that act in international law in relation to the former State to the extent the act remains within the limits of that consent.
- 6. Document instituting proceedings:** procedural act whose purpose is to commence juridical or arbitral proceedings. Usually called a Notice of Arbitration or Request for Arbitration; some investment treaties require the submission of a Notice of Intent to Submit a Claim to Arbitration or a Notice of Dispute prior to submitting the Notice of Arbitration or Request for Arbitration.
- 7. Class action (or collective action):** the opportunity offered to a group of individuals affected by the same measure (or series of measures) of the host State to unite to file a common claim; in a class action the group is represented collectively by a member of that group, whereas in a collective action each claimant continues to act for itself.
- 8. Shareholder (or stockholder):** holder of one or more shares of a capital company whose best known form is the limited liability company. Depending on the investment treaty, a shareholder may qualify as an investor owning an investment under the treaty.
- 9. Minority shareholder:** shareholder owning less than 50% of the shares of a company.
- 10. Ad hoc (arbitration):** Arbitration organized outside an institutional framework specifically designed for this purpose, often conducted under the UNCITRAL Arbitration Rules; contrast with institutional arbitration such as that administered by the International Centre for Settlement of Investment Disputes (ICSID).
- 11. Ad hoc (committee):** a committee of three members constituted in the context of an ICSID arbitration to hear an application for annulment of an award rendered under the ICSID Convention.
- 12. Adjudicator:** one who makes a decision in the exercise of judicial authority. See *Neutral*

**13. Admission:** act of admitting a foreign investment into a State's territory. Depending on the applicable law, the foreign investor may benefit from a right of admission or admission may be at the discretion of the host State. See also entry.

**14. NAFTA:** North American Free Trade Agreement, which entered into force in 1994 between Mexico, the United States and Canada, and which contains Chapter 11 on investment protection.

**15. Amiable composition:** task given to the arbitrator by the parties to decide *ex aequo et bono*, that is to say on an equitable basis, without having to follow the rules of law that would otherwise be applicable.

**16. Amicus curiae:** "friend of the court" presenting an opinion in a separate submission intended to assist the arbitral tribunal in its decision-making process, without the tribunal being bound to take into account the amicus curiae's argument.

**17. Annulment (or vacatur or set-aside):** the result of a successful challenge to the validity of the award by an *ad hoc* committee (ICSID) or a national judge. The annulment may only be based on specific grounds previously identified either in the applicable Convention (ICSID) or in the national law of the State of the seat of the arbitration tribunal.

**18. Appeal:** resort to a superior court or tribunal to review the decision of any inferior court or tribunal for errors of law or fact.

**19. Standard of treatment (clause):** provision in some investment agreements on the protection of investments providing that the covered investors may seek the benefit of the more favourable of either municipal or international standards, of a regulatory or of a contractual nature.

**20. Provisional application:** Temporary effectiveness of a treaty prior to its formal entry into force. Can arise from party agreement or from a specific treaty mechanism providing either that the entirety of the agreement or only some of its provisions will enter into force on a date prior to the expected date of entry into force of the treaty, particularly if the entry into force is subject to ratification of the agreement by multiple parties. The Energy Charter Treaty and CETA provide mechanisms for provisional entry into force. In the case of CETA investment protection, investment market access for portfolio investment, and the investment court system are matters of shared competence between the European Union and the Member States; those aspects of the Agreement will not enter into force unless they are ratified by the Member States.

**21. Arbitrability:** the nature of a dispute that makes it legally capable of resolution by arbitration.

**22. Arbitrator:** an individual appointed by the parties or an appointing authority to decide the dispute submitted to it.

**23. Party-appointed arbitrator\*:** arbitrator selected by one of the disputing parties, who is typically referred to as a « co-arbitrator » or « wing » arbitrator.

**24. Legitimate Expectations:** the expectations of the investor generally considered to be protected under the fair and equitable standard of protection. Legitimate expectations can be

rooted in guarantees given by the host State, based on representations made by the host State, or found in the idea that the State must not thwart the general expectations that any foreign investor may have. Analogous concepts are found in a number of municipal administrative laws.

**25. Hearing:** oral phase of the proceedings wherein the parties present their arguments and the tribunal has the opportunity to ask them questions directly.

**26. Party Autonomy:** freedom of parties regarding the conduct of the arbitration, including with respect to the appointment of arbitrators, the rules of procedure, and the designation of the law applicable to the merits.

**27. Bifurcation:** the splitting of the procedure into several phases, which may have to do respectively with jurisdiction, merits, or remedies. While bifurcation is often dictated by the will of the parties, the tribunal may decide against bifurcation if it wishes.

**28. Calvo (clause):** clause in a contract pursuant to which the investor that is a party to the contract with the State waives the benefit of diplomatic protection. Considered to be of no legal effect insofar as diplomatic protection is a right of the State and not of the investor. Accordingly, the investor cannot waive it [in the name of the State].

**29. Calvo (doctrine):** the doctrine developed by some Latin American countries that a foreigner in the territory of a State must waive the diplomatic protection of its home State. More broadly, the view that a State can deny a foreigner the benefit of more favourable treatment granted by international law on the ground that national treatment is the only standard that the foreigner is entitled to claim. See also Calvo clause

**30. Capacity to submit to arbitration:** the ability of an entity to submit a dispute to an arbitration tribunal.

**31. ICC:** the International Chamber of Commerce, a private international organization founded in 1923 in Paris. In the arbitral context ICC refers to the International Court of Arbitration of the ICC.

**32. Energy Charter (Treaty):** a treaty signed in 1994, which entered into force in 1998, containing, *inter alia*, provisions on the protection of investments in the energy sector and providing access to arbitration. The treaty was signed by both Western and Eastern European States, among other States (it also includes Asian States such as Japan or Mongolia), and includes the European Union among its members.

**33. Irrevocable choice / *Electa una via* / fork in the road:** treaty clause providing that if more than one mechanism is available to the investor to resolve a dispute (for example, on the basis of a contract or on the basis of the treaty), the initiation of a procedure amounts to a final waiver of the right to access the other available forum. In practice has been held applicable only when the claim in the other forum involves the same object, legal basis and parties. Cf. *res judicata*

**34. *Res judicata*:** refers to a matter decided by a court or tribunal that cannot be re-litigated. Requires identity of the subject matter, of the legal grounds, and of the disputing parties.

**35. Forum-selection clause:** clause in an instrument (treaty or contract) conferring on an arbitral tribunal or court the jurisdiction to adjudicate disputes relating to a violation of the contract or treaty in which the forum selection clause is found.

**36. Inviolability clause:** a provision in a contract concluded between a State and an investor providing that certain changes in the municipal law applicable to the contract or to the investment more generally will not be enforceable in the context of that investment transaction.

**37. Most-favored-nation clause/principle:** provision of a bilateral or multilateral treaty providing that the treatment granted by a Contracting Party to investors or investments of the other Contracting party shall be no less favorable to the treatment which the former Contracting Party grants investors or investments of third States. May apply only to municipal laws, or extend to substantive treaty provisions or even to procedural provisions, depending on its wording.

**38. Stabilization clause:** a clause in a contract concluded between a State and an investor whereby the State undertakes not to modify one or more municipal laws applicable to the contract or the investment established under the contract.

**39. Investment Code (or law):** domestic legislation, not necessarily formally organized into a “code”, designating all the relevant provisions for the promotion and protection of foreign investments in the territory of a State. Refers to substantive provisions but may also incorporate the State’s consent to arbitration.

**40. Consistency:** the quality of being harmonious, congruous, or compatible with something else; not contradictory.

**41. Mixed Claims Commission:** Usually a joint body established by two States, dating from the end of the 18<sup>th</sup> century, to hear multiple claims involving individual rights in international law. These Commissions contributed a great deal to the definition of the minimum standard of treatment in customary international law and more generally to the international law of State responsibility for injuries to aliens.

**42. Competence:** The power of a court or tribunal to hear a case submitted to it. In arbitration it depends in the first instance on the consent of the parties. As used in English competence encompasses jurisdiction (see above) and admissibility. See also *recevabilité*.

**43. Jurisdiction:**

*Ratione voluntatis:* expression of the consent of the parties to the jurisdiction of a tribunal.

*Ratione materiae:* the principle whereby a dispute must fall within the subject matter jurisdiction of the tribunal; in investment arbitration the dispute must be in relation to an “investment”.

*Ratione personae:* the principle that a tribunal’s jurisdiction can extend only to an investor who is entitled to claim the protection of the treaty

*Ratione temporis:* the principle that a tribunal established pursuant to a treaty has a limited jurisdiction in time, since in particular it can hear only disputes arising after the treaty has entered into force

**44. Kompetenz-Kompetenz (competence-competence):** the principle that a court or tribunal has the power to determine its own jurisdiction.

**45. Prima Facie Jurisdiction:** Jurisdiction of a court or tribunal provisionally recognized, prior to the full examination of the conditions necessary to establish jurisdiction, usually for the purpose of considering a preliminary application.

**46. Submission agreement (or Compromis):** agreement reached between the parties to a dispute after it has arisen whose main purpose is to crystallize their consent to the jurisdiction of an arbitration tribunal and to define the substantive limits of the dispute. Compromis refers to a stand-alone agreement but one might also find a compromissory clause within a broader agreement.

**47. Conciliation:** a non-judicial mechanism for the settlement of disputes that involves a third party trying to find a solution which nonetheless cannot be imposed on the parties unless they consent to it. There is a conciliation mechanism in the ICSID Convention, alongside arbitration. Often used as a synonym for “mediation”. Cf. Mediation

**48. Shared jurisdiction:** situation in which several courts or tribunals have jurisdiction over the same subject matter. It may be two arbitral tribunals or an international court or tribunal and a domestic court, or two international tribunals, etc.

**49. Confidentiality:** the principle that the elements of an arbitration procedure (parties’ submissions, procedural documents, composition of the tribunal, claim, etc.) are not made public, except by agreement of the parties. The principle of confidentiality has tended to diminish in investment arbitration, as demonstrated by the adoption of the UNCITRAL Rules on Transparency and the Mauritius Convention.

**50. Conflict of interest:** A situation in which the task entrusted to a judge/arbitrator conflicts with his or her own interests such that his or her independence and impartiality are questioned.

**51. Legality of the investment:** the requirement that only an investment established in accordance with the domestic law is entitled to benefit from the substantive protections provided by the treaty.

**52. Commonality:** when two cases have questions of law or fact in common so that they can be consolidated before one arbitral tribunal. Generally refers to cases arising from the same measures of the State that affected several investors.

**53. Consent:** agreement of the parties to submit to the jurisdiction of a court / tribunal; arbitral tribunals draw their authority in the first instance from the consent of the parties. See Competence.

**54. Arbitration without privity:** mechanism specific to investment treaty arbitration (not to contractual investment arbitration) in which the consent of the parties is expressed in two separate instruments: the State’s consent is expressed as an offer to arbitrate in a law or a treaty and the acceptance of the investor is found in the submission of a claim to arbitration.

**55. Conflicting reasons:** a ground for the annulment of an arbitral award recognized by almost all domestic laws on arbitration and relevant conventions, although sometimes the grounds for

annulment are worded differently. In the ICSID system, “conflicting reasons” is viewed as being included in the “failure to state the reasons on which the award is based” ground for annulment.

**56. Contract:** an agreement between two or more persons which creates the obligation to do or not do a particular thing. With respect to investments, contracts organize the investment transaction, accord contractual protections to the investor, and often provide recourse to arbitration in the event of alleged violations of the contract

**57. State contract:** a contract entered into between a State or State entity and a foreign investor often subject at least in part to international law and often subject to an international dispute settlement mechanism - usually arbitration - and sometimes including an inviolability or stabilization clause.

**58. Control (criterion):** the criterion for linking a company to the State of the entity, whether natural or legal, that controls it.

**59. ICSID Convention:** the “Convention on the Settlement of Investment Disputes between States and Nationals of Other States” of 1965 establishing the International Centre for Settlement of Investment Disputes (ICSID).

**60. Corruption:** the act of bribing an individual (State official, arbitrator, expert, witness, ...) by paying him or her or offering him or her advantages in order to obtain from him or her an act which is contrary to that normally expected of him or her.

**61. Permanent Court of Arbitration (PCA):** an institution whose headquarters is located in The Hague that was established in 1899 in order to facilitate the peaceful settlement of disputes between States by means of arbitration, and which is available to administer investor-State disputes.

**62. Costs:** the costs of representation and operation of a tribunal which can be borne by one of the parties or divided among them; allocation of costs is decided at the end of a proceeding, according to the discretion of the tribunal, although some arbitral rules establish the presumption that costs follow the event (the loser pays). Cost allocations sometimes distinguish between tribunal costs and attorneys’ fees.

**63. Customary international law:** rule of international that is not enacted in a statute law based on consistent State practice undertaken out of a sense of legal obligation (*opinio iuris*).

**64. Double Hatting:** in investment arbitration, the practice of simultaneously combining the roles of arbitrator and counsel, or arbitrator and expert, in different cases

**65. Correctness:** the quality or state of being free from error.

**66. Failure to state reasons:** ground for annulment of the award in the ICSID Convention allowing annulment in case of a failure to state the reasons on which the award is based but not in case of error with respect to the applicable law. See also conflicting reasons

**67. Respondent (Defendant):** a person against whom a legal claim is brought. In investment arbitration, the respondent is generally a State but can also be a State entity. (In an ICSID

Convention arbitration a subdivision or agency of the State may be a party if the State consents or if the State notifies the Centre that no such consent is required.)

**68. Counterclaim:** Claim submitted by the respondent in the main proceeding (the State) going beyond a mere defence and seeking redress for the wrongful conduct of the claimant (the investor).

**69. Claimant (petitioner or plaintiff):** a natural or legal person submitting a legal claim. In investment arbitration, the claimant is usually the investor. In a contractual dispute, the State may be the claimant.

**70. Denial of justice:** the State's failure to accord justice. Denial of justice is prohibited under the minimum standard of treatment and the standard of fair and equitable treatment, each of which requires that foreign investors be given the right of access to fair and appropriate remedy in the territory of the host State.

**71. Denial of benefits:** clause provided in some investment treaties allowing the host State to deny the benefit of the provisions of the treaty to certain categories of investors in order to combat abusive treaty shopping or other specified public policy interests.

**72. Denunciation (withdrawal):** the unilateral act by which a State announces its intention to withdraw from a treaty. Generally the treaty provides that its provisions remain applicable for a period after the withdrawal. See sunset clause [please consider including this term in the glossary]

**73. Legal Dispute:** Requirement for the jurisdiction of an ICSID tribunal under article 25 of the ICSID Convention.

**74. Reverse discrimination:** in international law, discrimination against nationals for the benefit of foreigners, which is not formally prohibited under international law unless it constitutes a violation of human rights.

**75. Acquired rights:** those rights acquired through the activity of a person and which cannot be limited by later laws enacted by the government. The theory of acquired rights remains contested in international law.

**76. Applicable law:** Refers to the set of rules, possibly found in several legal orders, applicable to a given situation.

**77. Due process:** obligation of the State to respect the legal procedures in its territory and, more generally, to respect international procedural standards.

**78. Direct effect / self-execution:** an international rule that is directly applicable within a municipal legal order and that can usually be invoked by an individual before a judge.

**79. *Ejusdem generis*:** limit to the application of the most-favored-nation principle according to which the latter only applies to benefits of the same nature or kind as those referred to in the clause or in the treaty in which the clause is provided.



**80. Unjust enrichment:** the legal basis of a subject's obligation to compensate for an enrichment from which it benefited at the expense of another.

**81. Exhaustion of local remedies:** a prerequisite to the submission of a claim before certain international courts or tribunals that requires the plaintiff to first have recourse to all domestic remedies available in the respondent State, unless they are obviously futile. It was developed in the context of diplomatic protection and has been found inapplicable to claims by an investor against a State under an investment treaty, unless the investment treaty so provides.

**82. Clear (Manifest) error:** ground for the annulment of the award provided for in some domestic rules on arbitration or relevant conventions.

**83. Estoppel:** a situation where a party is prevented by its own acts from claiming a right to the detriment of another party who was entitled to rely on such conduct and who has acted accordingly.

**84. Rule of law:** a general standard based on the assumption that the State abides by the law and that the State offers the opportunity to submit one's acts and behaviour to an independent court or tribunal.

**85. Host State:** State in whose territory an investment is made; the respondent State in investor-State arbitration.

**86. *Ex aequo et bono* (equity) (amiable compositeur):** power recognized by some arbitration rules, or granted by the parties, for the tribunal to rule in equity and not in law or, more broadly, to rule based on a sense of justice and fairness. See amiable compositeur

**87. Procedural objection:** plea raised by the respondent based on a procedural shortcoming, including challenging the tribunal's jurisdiction, the admissibility of the claim, or any element likely to preclude the examination of the claim on the merits by the tribunal.

**88. Manifest excess of power:** ground for the annulment of an award under the ICSID Convention, characterized by a tribunal's manifest disregard of the limits to its jurisdiction under the ICSID Convention and the parties' agreement.

**89. Enforcement of the award:** the legal process in a municipal court by which an arbitral award is reduced to a judgment that is then capable of execution.

89bis. **Execution of the award:** the legal process by which the relief granted in a judgment is obtained through measures ordered by or under the auspices of a court.

**90. Exequatur:** Ruling, specific to some systems of civil law, by which a court makes enforceable, in its territory, an arbitration award or a foreign judgment or act. See execution of the award.

**91. Expert:** independent individual called by one of the parties or by the arbitral tribunal to assist the latter on a technical point in law or in any other matter relevant to the adjudication of the dispute.

**92. Expropriation:** A measure or series of measures by which the State deprives a foreign investor of its assets. Under international law the State can generally only expropriate for reasons of public interest, in a non-discriminatory manner and against the payment of adequate compensation.

**93. Grounds of claims:** refers to the legal rules relied upon by the claimant to establish the jurisdiction of the arbitral tribunal and the legal rules whose violation is alleged on the merits.

**94. Forum shopping:** practice whereby an entity seeks the forum most favourable to it; in investment arbitration can encompass seeking to benefit from a more favourable treaty or a more favourable court or tribunal. See treaty shopping.

**95. Grandfather clause:** a treaty provision providing for the right to maintain previously enacted legislation which is incompatible with the provisions of the treaty.

**96. Coherence:** the quality of being logical and consistent or of forming a unified whole. See also jurisprudence constante

**97. Immunity from execution:** a privilege granted to a sovereign State (and sometimes to its divisions) preventing its property and possessions from being the subject of execution measures.

**98. Immunity from jurisdiction:** a privilege granted to a sovereign State (and sometimes to its divisions) preventing it from being prosecuted before a court or tribunal (municipal, international, or arbitral) which is not a court of that State.

**99. Impartiality:** the quality required of an arbitrator according to which he/she shall not be biased in respect of the dispute submitted to it or any *a priori* inclination in favour of any disputing party.

**100. Imperium:** the right to command, which includes the right to employ the force of the State to enforce the laws. This is one of the principal attributes of the power of the executive.

**101. Changed circumstances:** The situation recognized in some legal systems that a contract's inviolability might be affected by changed circumstances. In the common law the doctrines of impossibility, impracticability, and frustration of purpose may excuse performance under a contract or otherwise affect it. In international treaty law, the analogous doctrine is known as *rebus sic stantibus*.

**102. Incorporation (criterion) (registration):** the criterion for linking a company to a State based on the domestic legal order in which it was created and by virtue of which it is recognized as having legal personality.

**103. Indemnity:** compensation for an injury caused by an internationally wrongful act in the form of the payment of an amount deemed equivalent to the loss suffered.

**104. Independence:** quality expected of juridical bodies, usually guaranteed by the status of its judges or arbitrators, where applicable, implying the absence of connections with the parties and the dispute and thus allowing them to carry out their duties freely.

**105. *Infra petita*:** description of an award in which the arbitrators have failed to rule on everything asked by the parties.

**106. Anti-suit injunction:** prohibition of a party's filing a claim before a judge or arbitrator other than the one seized or continuing proceedings that have already been brought before that other judge or arbitrator. This may be controversial but some arbitral tribunals in investment cases have issued such injunctions.

**107. Serious departure from a fundamental rule of procedure:** ground for annulment of an award recognized in the ICSID Convention referring to the alleged violation of a procedural rule deemed of primary importance such as, for example, respect for the adversarial principle or the respect for due process.

**108. Standing (injury-in-fact):** condition of admissibility of a claim before a court or tribunal, considered fulfilled when the claimant alleges a breach of its subjective right(s).

**109. Interest:** A sum of money calculated as a percentage of a principal sum awarded as compensation for an injury and intended to take into account the passage of time between when the injury occurred and the actual payment of the compensation. Can be simple or compound.

**110. Interpretation:** The technique of identifying the meaning of a legal rule.

**111. Investment:** an investment is an undertaking involving the dedication of resources for a certain duration and implying a certain risk made by a natural or a juridical person. The international investment treaties, international investment statutes, and the ICSID Convention contain definitions or mentions of this notion.

**112. Investor:** a natural or juridical person who has made an investment. Requirement to submit a dispute arising out of an investment to an arbitral tribunal.

**113. Consolidation (joinder):** joining two or more cases into a single procedure when the facts and legal issues are similar to the extent that it is more efficient to adjudicate the claims together.

**114. Judge ad hoc :** judge appointed to hear a specific case at the International Court of Justice when a State party to the dispute does not have a judge of its nationality sitting on the bench.

**115. Competent Authority (*Juge d'appui*):** municipal judge of the State where the seat of arbitration is located or chosen by the parties, whose duty is to assist the arbitration proceedings when a problem arises, either at the request of the arbitration tribunal or at the request of one of the parties.

**116. *Jura Novit Curia*:** principle that the judge is supposed to know the applicable law. Opinions diverge as to whether this principle applies in arbitration.

**117. *Jure gestionis* (commercial act):** refers to a measure or an asset of the State connected with a commercial activity and thus not protected by State immunity.

**118. *Jure imperii* (governmental act):** a measure or asset of the State connected with a sovereign activity and thus protected by State immunity.

**119. Case law:** a set of decisions of one or more courts or tribunals that are sufficiently consistent to constitute a body of applicable rules; of subsidiary importance in international law.

**120. *Jurisprudence constante*, or consistent jurisprudence:** a series of decisions resulting in a persisting jurisprudence that secures unification and stability of juridical activity.

**121. *Lex mercatoria*:** body of unwritten principles, whose binding effect is disputed, arising from the practice of private actors in economic and commercial matters and consisting essentially of rules applicable to international contracts.

**122. Free transfer of capital:** guarantee provided in investment treaties that the investor can both import funds into the territory of the host State and repatriate funds from it. The host State can limit such transfers, in particular to ensure that the investor honours its debts or assumes its tax obligations.

**123. *Lis pendens*:** situation in which two courts or tribunals of competent jurisdictions are seized of two cases involving the same parties, based on the same cause of action, and having the same object, which should in principle lead one of the courts or tribunals to decline jurisdiction in favour of the other.

**124. Investment Statute:** municipal law providing substantive protection for foreign investors and in most cases, a right to have recourse to arbitration in the event of a dispute. In that case, the law contains the State's consent to the jurisdiction of the tribunal.

**125. ICSID Additional Facility:** A mechanism allowing access to the ICSID arbitral institution when either the home State of the investor or the host State of the investment is not a party to the ICSID Convention or the dispute does not directly relate to an investment. The ICSID Additional Facility Rules apply, and the ICSID Convention itself is not applicable to the dispute, which excludes in particular the applicability of art. 54 of the Convention on the automatic enforcement of awards.

**126. Mediation:** a non-judicial dispute settlement mechanism which consists of having recourse to a third party whose role is to assist the parties in their negotiations with the objective of reaching a mutually agreed-upon solution. See also conciliation.

**127. Interim measures:** measures taken by a tribunal that grant temporary relief to preserve the status quo, help ensure the satisfaction of a subsequent award, or otherwise protect the rights of one or more parties and promote the efficacy of the arbitration and the eventual award on the merits.

**128. Reasons:** the bases for an arbitral tribunal's decision grounded in an analysis of the parties' respective arguments regarding elements of fact and law.

**129. Grounds for annulment:** Limited criteria permitting the annulment of an arbitration award that are listed in the ICSID Convention or in the municipal law of the seat of the arbitration.

**130. Obligation to state reasons:** the obligation for an arbitral tribunal to state explicitly the reasons for its decision. This obligation does not exist in all legal systems and, if it exists, is not always of the same breadth.

**131. Nationalization:** The decision of a State transferring a company, a business, an enterprise or an economic sector to the public sector in order to take over its management.

**132. Nationality (legal persons):** link with a State permitting the applicability of a law or treaty to a legal person and critical for that legal entity to benefit from the treaty, which by definition is applicable solely to the nationals of the States which are parties to it.

**133. Preliminary Negotiations:** obligation for the parties to a dispute to negotiate on the object of the dispute in order to resolve it without having recourse to a third party. This obligation is usually explicitly provided in investment treaties.

**134. Neutral:** any third party who is asked to settle a dispute, being a judge, an arbitrator, a mediator or a conciliator.

**135. Neutrality:** Principle that a judge / arbitrator should be completely disinterested in the dispute before it and in the parties to that dispute.

**136. *Non bis in idem*:** Latin maxim referring to the prohibition on holding accountable the same person twice for the same offence.

**137. Non-retroactivity:** prohibition on applying rules to a situation that were not in force at the time when it occurred.

**138. Concurring opinion:** opinion expressed in an award, decision, order, or other ruling by a member of the tribunal in which he or she does not contest the operative part of the award but wishes to clarify and develop his or her own position with respect to the reasons adopted by the majority.

**139. Dissenting opinion:** opinion expressed in an award, decision order, or other ruling by a member of the tribunal in which he or she challenges the majority's award and develops his or her own argument and solution.

**140. Opting out (clause):** in some treaties, right for States parties to the treaty to notify the exclusion of some measures or sectors from the scope of application of the treaty or from a specific treaty provision.

**141. Procedural Order:** a ruling issued by the tribunal that organizes the proceedings or resolves a procedural incident raised by one of the parties.

**142. Contribution to the economic development of the host State:** sometimes considered as a criterion for defining the notion of "investment".

**143. Precedent:** an adjudged case or decision, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law.

**144. Injury:** harm from a wrongful act giving rise to a right to compensation.

**145. Prescription (statute of limitation):** extinction of a right after the expiry of a certain period of time.

**146. Performance requirements:** Obligations imposed by domestic law on the investor to comply with a number of requirements frequently aimed at involving it in the development of the local economy, such as the employment of nationals of the host State, the use of local products, the transfer of certain technologies, etc. Some treaties strictly regulate the power of States to impose such requirements.

**147. President (of the arbitration tribunal):** an individual appointed by the arbitrators, or by the mutual agreement of the parties, or by the arbitral institution, or the competent authority (as the case may be) to assume the presidency of the tribunal.

**148. Evidence:** any species of proof, or probative matter, legal presented at a hearing of an issue for the purpose of convincing the tribunal of the merits of a claim.

**149. Parallel proceedings:** contentious proceedings relating to the same dispute brought simultaneously before several international or domestic courts or tribunals. See also *lis pendens*.

**150. Due process:** the requirement that a trial or hearing be conducted in accordance with the guarantees of independence and impartiality of the adjudicators, with the principle of equality of the parties, and with respect for the other procedural rights of the disputing parties and the good administration of justice.

**151. Document Production:** disclosure during proceedings of documents as evidence of disputed facts.

**152. Proportionality:** the principle that a measure, adopted by a State and necessary for the pursuit of an objective of general interest, should not cause excessive harm to an investor compared with the importance of the general interest being pursued.

**153. Diplomatic protection:** diplomatic or juridical action of a State espousing the claim of one of its nationals against another State.

**154. Full protection and security:** standard provided in investment treaties obliging the host State to guarantee the physical security of the investor and the material protection of the investment. Some tribunals have recognized its extension to the legal protection of the investment, especially when the investment is made in the form of intangible rights such as intellectual property rights.

**155. Publicity of an award:** an award known to the public by means of official publication or other form of dissemination.

**156. Standing:** a condition referring to the claimant's having a sufficient stake in a judicable controversy to obtain juridical or arbitral resolution of the controversy. In investment arbitration, this quality is generally recognized in any party that has the status of investor.

**157. Preliminary ruling:** question asked by a court seized of a dispute to another judge about an issue of law whose resolution is necessary to decide the dispute and which cannot be adjudicated by the court seized.

**158. Connecting Factor:** criterion establishing a link between a natural or legal person and a State in order to determine, for example, its nationality.

**159. Admissibility:** the quality describing a claim that meets the criteria required for assessment on the merits.

**160. Recognition of an award:** acceptance in a State of the effects of the award (for example, *res judicata*), irrespective of its enforcement.

**161. Application for annulment:** request seeking the annulment or setting aside of an award, submitted to a court or tribunal other than the tribunal which rendered the award.

**162. Application for interpretation:** a request, generally addressed to the tribunal that issued an award, to clarify its meaning or scope.

**163. Application for revision:** a request, usually addressed to the tribunal that issued an award, seeking to modify the award because of the discovery of a fact likely to exert a decisive influence on the award and which was not taken into account at the time when it was rendered.

**164. Correction:** correction of a material error affecting a decision by a court or tribunal.

**165. Disqualification:** the exclusion of one of the members of a tribunal, in particular because of circumstances raising doubts about his or her independence or impartiality, often in the case of conflict of interest.

**166. Arbitration rules:** set of rules governing the conduct of arbitration proceedings. Each arbitral institution has its own rules. For *ad hoc* arbitration, it is not uncommon to use the UNCITRAL Rules.

**167. Waiver:** an explicit or implicit unilateral act by which its author abandons, or elects not to enforce, a right or claim.

**168. Reparation:** restitution, compensation or satisfaction of the injured party by an internationally wrongful act.

**169. Full reparation:** compensation for all damage caused, either by a restitution or by compensation.

**170. Reply:** usually, claimant's written submission filed in response to the defendant's counter-memorial; is in principle followed by the defendant's rejoinder; these same terms are used in the English version of the ICSID Arbitration Rules.

**171. Reply:** claimant's response to the counter memorial in ICSID arbitration.

**172. Request (submission, application, or motion):** formal demand addressed to the tribunal.

**173. Application instituting proceedings:** request initiating arbitration proceedings by briefly presenting the claims and the underlying facts. Usually referred to as a request for arbitration or a notice of arbitration. May be accompanied or replaced by a more detailed statement of claim.

**174. Attachment:** the legal process of seizing property in accordance with a writ or judicial order for the purpose of securing satisfaction of a judgment or award.

**175. Seizure:** the time in the proceedings when the tribunal, having been constituted, receives the document instituting the proceedings (notice of arbitration), the documents that accompany it and, if applicable, any other document already submitted by the parties.

**176. Just satisfaction:** in the system of the European Convention on Human Rights, compensation that the Court may award to the victim pursuant to Article 41 of the Convention.

**177. Legal certainty:** the principle of clarity, stability, predictability, and transparency of the applicable legal framework.

**178. Self-judging:** refers to a right for which it is left to its holder to assess whether the conditions for its exercise are met.

**179. Award:** a decision of an arbitral tribunal terminating the dispute or ruling on a preliminary question, e. g. ruling on jurisdiction or liability. To be distinguished from a (procedural) order which only organizes the procedure. In the framework of the ICSID Convention, only the final decision is called an “award”.

**180. Consent award:** award declaring an agreement of the parties.

**181. Declaratory judgment:** a binding adjudication of the rights and status of litigants even though no consequential relief is awarded.

**182. Default judgment or award:** award rendered in the absence of the respondent’s participation.

**183. Partial award:** an arbitral award that disposes of some, but not all, claims, defences, or issues in a case. Those not addressed are deferred to a subsequent decision. A partial award does not refer to an order addressing, scheduling, procedural, or evidentiary matters, though it can address them.

**184. Separability of the arbitration clause:** autonomy of the arbitration clause preserving it from defects that may affect the instrument (contract or treaty) in which it is contained.

**185. Social Seat (criterion):** a criterion connecting a company to a State that refers to the main place of business or a place designated in its statutes or by-laws, sometimes called “registered office” used for the purpose of determining its nationality or domicile.

**186. Minimum standard of treatment:** international obligations related to fundamental rights and derived from customary international law that a host state must accord to foreigners on its territory.



**187. Subrogation (clause):** a provision in a treaty authorizing the State or any body that has made payments to the investor under a guarantee to substitute itself for the investor in pursuit of its rights and debts under the treaty in which the clause is located.

**188. Stay of execution:** decision of a court or tribunal to temporarily suspend the effects of a decision, for example pending the outcome of an appeal or petition for annulment.

**189. Stay of proceedings:** decision of a tribunal to temporarily suspend the proceedings, for example pending the issuance of a judgment by another court or tribunal.

**190. Suspension of the award:** provisional discontinuance of the effects and enforcement of the award (expression borrowed from the law of treaties and used by extension in arbitration).

**191. Witness:** a person foreign to the proceedings who shares what he or she knows about the facts of the case.

**192. Third-Party funder :** an entity that is not a party to the dispute that provides a party, an affiliate of that party, or a law firm representing that party, (a) funding or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and (b) such support or financing in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute or provided through a grant or in return for a premium payment.

**193. International investment treaty or international investment agreement:** A bilateral or multilateral treaty concluded between States to promote and provide reciprocal protection of investments made by the nationals of each Party in the territory of the other Party.

**194. Fair and equitable treatment:** a level of treatment that is sometimes viewed as part of the international minimum standard at customary international law and sometimes viewed as a stand-alone obligation included in an investment treaty. It includes, *inter alia*, the prohibition of denial of justice as well as arbitrary or discriminatory measures, respect for the duty of good faith and legal procedures, the prohibition of harassment, and arguably substantive transparency and treatment that takes into account an investor's legitimate expectations. Some tribunals have asserted that it includes protection only against grossly unfair actions.

**195. National treatment:** treatment accorded by a State that is no less favourable than that enjoyed by the State's nationals.

**196. Transparency:** can be "substantive" or "procedural". "Substantive" transparency normally refers to access to the rules applicable to an investment operation, and to access to information relating to the negotiation and conclusion of applicable standards [aligner les deux versions]. "Procedural" transparency applies in the area of dispute settlement, and refers both to access to information about the dispute as well as to the ability of third parties to participate in the proceedings as *amicus curiae*.

**197. Treaty shopping:** An expression derived from "*forum shopping*" which refers to the manipulation of a requirement for application of a treaty connecting element for the sole purpose of benefiting from the protection of that treaty which would not otherwise be applicable.

**198. Arbitral tribunal (arbitration tribunal):** non-permanent body composed of private judges (arbitrators) appointed to resolve a given dispute.

**199. *Ultra petita*:** description of an award in which the arbitrators have ruled beyond what was asked by the parties.

**200. Umbrella clause or observance of undertakings clause:** provision in a treaty by which the States parties undertake to respect any commitment made regarding the investments or investors at issue. May cover, depending on the wording of the provision and its interpretation, unilateral and/or contractual commitments.

**201. Recourse:** Procedure to challenge a decision that is generally available when the decision puts an end to the dispute (cf. application for annulment, application for revision).

**202. Corporate veil:** legal personality of companies that screens directors and shareholders from personal liability for acts of the company; in certain circumstances, the corporate veil can be lifted/pierced.