I

INTRODUCTION

A Equality as a Constitutional and a Procedural Principle

The equality of the parties is a fundamental element of a fair system of adjudication, whether within a national legal system or at international law. The International Court of Justice has observed that: ‘The principle of equality of the parties follows from the requirements of good administration of justice.’¹

One of the objectives that States sought to achieve through their development of international investment arbitration by treaty was ‘the transformation of a relationship from one of disequilibrium . . . to equilibrium’.² Investment arbitration aims to do this by placing disputes between two parties of a different and asymmetrical character – a private investor and a State – before an international arbitral tribunal before whom each party is in principle to be treated equally.

The fundamental character of the equality principle in investment arbitration was recognised from the outset of the development of the ICSID Convention.³ In one of the earliest decisions to construe the scope of annulment of an award for ‘a serious departure from a fundamental rule of procedure’, an ad hoc Committee stated: ‘a clear example of such a fundamental rule is to be found in Article 18 of the UNCITRAL Model Law on International Commercial Arbitration which provides: “The parties shall be treated with equality and each party shall be given full opportunity of presenting his case.”’⁴

Yet, as the International Court has also had cause to observe, the concept of equality in its actual application to the procedure of courts and tribunals has developed over time.⁵

Experience with investment arbitration, especially over the last two decades in which it has been most actively utilised, has given rise to debate as to the application of the equality

¹ Judgments of the Administrative Tribunal of the ILO upon complaints made against UNESCO (Advisory Opinion) [1956] ICJ Rep 77, 86.
² Franck 1993: 452.
⁴ Maritime International Nominees Establishment (MINE) v Guinea (Decision on Annulment) ICSID Case No ARB/84/4 (1989) 4 ICSID Rep 87 (Sucharitkul P. Broches & Mbaye), [5.06].
principle in this distinctive form of international dispute resolution. The debate has engaged at two levels: procedural and constitutional.

6 At a procedural level, arbitral tribunals and institutions have had to consider the implications of the equality of the parties for jurisdiction and admissibility of claims and counter-claims; as well as for the production of evidence and the protection of the arbitral process from abusive conduct. These issues have arisen in the practice of arbitral decision-making. They form part of a larger enquiry into the fundamental elements of the procedure of international courts and tribunals.6

7 At the constitutional level, there has been an increasing controversy over whether arbitration is in fact the most appropriate forum for the resolution of investment disputes. A debate among scholars and in civil society has led to a number of initiatives to examine different dispute settlement mechanisms. Most notable among these is the European Commission proposal for an Investment Court, with a standing Tribunal and Appeal Tribunal – a proposal that has already resulted in the inclusion of such arrangements in the text of two free trade agreements.7 At its Fiftieth Session in July 2017, and following a preparatory study prepared by the Geneva Center for International Dispute Settlement (CIDS),8 UNCITRAL decided to include ‘Reforms of investor–State dispute settlement’ on its future work programme.9 The CIDS Report is an important scientific contribution to the current debate, which addresses the legal issues that would arise in the design of an International Tribunal for Investments in the event that States were to decide to pursue the establishment of such a Tribunal.

8 On 20 March 2018, the Council of the European Union endorsed the European Commission’s proposal to create a Multilateral Investment Court and conferred a negotiating mandate upon the Commission.10 These negotiations are taking place in the first instance through UNCITRAL Working Group III (Investor–State Dispute Settlement Reform).11 Within its broad mandate to work on the possible reform of investor–State dispute settlement, the Working Group has given consideration to the establishment of a multilateral advisory centre, development of a code of conduct for arbitrators, third-party funding, appellate and multilateral court mechanisms, as well as selection and appointment of tribunal members.12 The Working Group has a number of further reform options on its agenda, including security for costs, means to address frivolous claims and multiple proceedings (including counterclaims).13 In the course of the policy debate, one of the

6 Kotuby and Sobota 2017; Sarvarian et al 2015.
8 Geneva CIDS (Kaufmann-Kohler and Potestà) 2016.
9 UNCITRAL 2017a, UN Doc A/CN.9/917.
10 EU Council 2018.
11 Ibid. [4]; UNCITRAL 2018, UN Doc A/CN.9/935. For an analysis of States’ preliminary positions, see Roberts 2018.
12 UNCITRAL 2020a, UN Doc A/CN.9/1004/Add.1.
13 UNCITRAL 2019a, UN Doc A/CN.9/1004.
criticisms of investment arbitration that has been made concerns whether *constitutionally* arbitration is capable of offering a fair and balanced method for the resolution of international investment disputes.\(^{14}\) Other prominent scholars argue that investment arbitration does provide a fair system for the resolution of investment disputes and should not be abandoned or replaced, precisely because it offers the best means of balancing the interests of both parties.\(^{15}\)

B The Contribution of the Institut

The Institut has considered issues of arbitral procedure in both public and private international law since its foundation. It considered the general aspects of arbitral procedure in public international law at its session in The Hague in 1875, returning to this subject in Lausanne in 1927. It addressed arbitration in private international law at its Amsterdam session in 1957 and dealt with more specific aspects of arbitral settlement of disputes in 1999\(^{16}\) and 2003.\(^{17}\)

*The previous contributions of the Eighteenth Commission.* The Eighteenth Commission has previously dealt with arbitration between States and foreign investors in two phases of its work:

2. Between 2009 and 2013, the Commission (Rapporteur A Giardina) took up legal aspects of recourse to arbitration by an investor against the authorities of the host State under inter-State treaties.

In each case, the research of the Commission resulted in a resolution that was adopted by the Institut after debate in plenary session. These resolutions provide both the background to the present work of the Commission and contribute some relevant elements to the issue.

*Arbitration between States and foreign enterprises.* The Institut adopted a resolution on ‘Arbitration between States, state enterprises, or state entities and foreign enterprises’ at its Santiago de Compostela session in 1989.\(^{18}\) At that stage, the Eighteenth Commission’s work and the resulting resolution were primarily concerned with arbitrations pursuant to


\(^{16}\) ‘Judicial and Arbitral Settlement of International Disputes involving more than two States’ (Berlin, 1999).

\(^{17}\) ‘Arbitral settlement of international disputes other than between States involving more than two parties’ (Bruges, 2003).

specific contractual agreements between States and foreign enterprises. The Rapporteurs considered that treaty-based arbitrations raised quite different problems, the Preamble noting that this Resolution is without prejudice to the applicable provisions of international treaties.  

13 The preparation of that report and resolution occasioned an extended debate in the Institut about the specific issues arising in arbitrations between States and foreign enterprises. In its Resolution, the Institut accepted that the issues arising in such arbitrations are ‘a subject of great practical as well as theoretical importance’ and require a ‘statement of a coherent body of principle regarding the arbitrator’s role and obligations in such arbitrations [which] will clarify certain fundamental questions and contribute to legal security.’  

14 Its operative provisions lay primary emphasis upon the parties’ agreement for arbitration as the basis for the arbitrators’ authority and powers (art 1). It seeks to uphold such agreements ‘guided in every case by the principle in favorem validitatis’ (art 4), and specifically excluding objections to the tribunal’s jurisdiction based upon a State’s incapacity to arbitrate (art 5) or sovereign status (art 9). It emphasises the autonomy of the parties to choose the applicable procedural as well as substantive rules, enjoining the tribunal in the absence of such choice to supply the necessary rules and principles, choosing from a wide array of potential legal sources (art 6).  

15 The Institut did not regard the parties’ autonomy to control the procedure as unlimited. Article 1 imposes a duty on the arbitrator to ‘exercise his functions impartially and independently’. Article 2 adds: ‘In no case shall an arbitrator violate principles of international public policy as to which a broad consensus has emerged in the international community.’ A working draft introduced by the Rapporteurs in the course of the plenary session would have specifically referred in this context to ‘the principles of due process’. Although this express statement did not survive in the final text, this was not because members expressed any doubt that due process is a principle of international public policy. Rather, the plenary decided that it did not wish to limit the principles of international public policy to procedural matters. It rather wished to embrace a more capacious conception of international public policy to include substantive policies.  

16 Investment treaty arbitration. More recently, the Eighteenth Commission (Rapporteur A Giardina) addressed a broad range of topics of current importance concerning legal aspects of recourse to arbitration by an investor against the authorities of the host State under inter-state treaties, following a general outline of work adopted at the Naples session in 2009. This work culminated in a resolution adopted at Tokyo in 2013 on ‘Legal aspects
of recourse to arbitration by an investor against the authorities of the host State under interstate treaties’. \(^{24}\)

This resolution endorses ‘the need to ensure a balanced protection of the interests of the involved parties’. It deals with general and substantive law issues. Apart from the matters dealt with under ‘General Issues’, this resolution does not cover procedural issues.\(^{25}\) The Commission decided to exclude procedural topics, since otherwise it would not have been possible for it to complete its mandate. In the preamble to the resolution, the Institut reserved such ‘more specific matters for further discussion’ on the basis that ‘certain recurring problems call for the elaboration of principles enjoying wide support’.

In summary, prior to its work on equality that is the subject of the present resolution, the Institut had recognised that party autonomy in arbitrations between States and foreign enterprises is subject to the limits imposed by international public policy, which concept it considered undoubtedly includes the requirements of due process. It had not given detailed consideration to what might be the content of procedural principles of international public policy. It has reserved matters of procedure within the context of investment treaty arbitration for subsequent consideration in its search for principles enjoying wide support. It is against this background that a reconstituted Eighteenth Commission was invited in 2015 by the Commission des travaux to study the application of the principle of the equality of parties before international investment tribunals.

The present work of the Eighteenth Commission on equality. The Commission consisted of: M Alexandrov, Mme Boisson de Chazournes, MM. Crawford, d’Argent, Gaja, Giardina, Greenwood, Kazazi, Kohen, Mikulka, Reinisch, Mme Stern, MM. Treves, Rao and Vinuesa. It first met in Hyderabad on Sunday 3 September 2017 – the occasion of the 78th Session of the Institut.

The Members of the Commission had before them a detailed rapport préliminaire prepared by the Rapporteur and circulated to them on 20 August 2017, which provided background research on the issues.

The Rapporteur had also included in that report a questionnaire to members on the issues of law and legal policy arising from his research on the issues, as to which he sought the guidance of the Commission’s members. Members furnished full responses to the questionnaire.\(^{26}\) These responses revealed a large measure of consensus among Commission members on many of the issues raised.

In light of members’ responses, the Rapporteur revised the rapport préliminaire and circulated members in October 2018 with a draft of the rapport provisoire, which also included reference to a number of material contributions to State practice, doctrine and


jurisprudence in the year to 30 September 2018. At the same time, he prepared a draft avant-projet for a resolution that might be presented to the plenary.

23 The report and draft resolution were revised in light of the comments of members of the Commission.

24 The resolution was tabled for debate and adoption at the 79th Session of the Institut held at the Peace Palace, The Hague on 27 and 28 August 2019. It was adopted by the Institut by a large majority on 28 August 2019.

C Scope of the Resolution

25 The topic as framed by the Institut’s Commission des travaux links two elements. The subject of study is the equality of parties as a procedural principle. Its object is the forum constituted by international investment tribunals. Some preliminary elucidation of each element is required.

26 In the first place, the present Resolution is limited to the application of the principle of the equality of the parties in the process by which international investment disputes are resolved. It will not examine the substantive principles enshrined in investment treaties.

27 In the second place, the object of study refers generally to ‘international investment tribunals’. This expression is apt to include both arbitral tribunals and standing international tribunals with competence in the investment field. The latter category could include both extant tribunals, such as the Iran–US Claims Tribunal (which has extensive relevant practice on this topic) and those that are not yet established (such as the standing tribunals now incorporated in some EU bilateral treaties or the proposed International Tribunal for Investments).

28 The question of the most appropriate forum and procedures for the resolution of investment disputes raises a much wider set of issues than the equality principle. Ultimately, the question of whether a new standing tribunal is to be created is a policy question for States. Even if such a tribunal is established, it is unlikely to replace arbitration, which would continue to apply in cases not covered by any new arrangements or where States and investors agreed to resolve their dispute by arbitration instead of resorting to the standing tribunal. In any event, an elucidation by the Institut of the equality principle and an

27 (2019) 80 Annuaire 1–70.
28 81 votes in favour, 2 votes against and 7 abstentions: (2019) 80 Annuaire 51.
29 The substantive assurance of equality of treatment forms an important part of the standards of fair and equitable treatment, national treatment and most favoured nation treatment commonly found in investment treaties: Dolzer and Schreuer 2012: chs 18–20; McLachlan et al 2017: [7.214]–[7.223].
30 Some proposals for standing tribunals envisage in any event that they may properly be treated as a form of arbitration, whose decisions will be enforceable as awards: arts 8.23 and 8.41, CETA; Geneva CIDS (Kaufmann-Kohler and Potestà) 2016: [91]–[99].
examination of the problems that have arisen in practice in its application will assist in the progressive development of fair procedures for the resolution of international investment disputes, whether by arbitration or within a standing international tribunal.

D Equality in Asymmetrical Dispute Resolution Systems

To what extent do the particular characteristics of investment arbitration pose unique challenges in the application of the equality of the parties? Can it be said that the asymmetrical character of such arbitration, which brings a private party and a State before the same tribunal, is inherently unequal or requires special adjustments to assure equality?

In order to address this question, it is necessary to examine in outline first the position in the context of two related systems of international adjudication: (1) diplomatic protection and the development of claims commissions and tribunals; and (2) international human rights commissions and tribunals. It will then be possible to turn to the solutions specific to investor–State arbitration adopted in the ICSID Convention 1965.

Diplomatic protection and claims commissions. The contemporary system under which an individual investor may pursue his or her claim directly against a State was developed in part as a response to perceived shortcomings in the remedy of diplomatic protection that is otherwise open to the investor’s home State in the event that its national suffers a wrong at the hands of the host State which constitutes a breach of international law.  

Arbitral tribunals determining diplomatic protection claims invoked the equality principle. But the nature of such a claim is that it substitutes the claim of the State for that of its national vis-à-vis the State whose international responsibility is said to have been engaged. As a result, the Tribunal has before it two States Parties, each of which is the juridical equal of the other.

Nevertheless, international law has developed procedures enabling an individual to pursue a claim directly against a host State outside the specific context of investment arbitration.

Prior to World War I, there were only isolated instances of claims procedures where the direct intervention of the affected individual had been permitted. The position changed in the inter-war period, where there was increasing (but not uniform) recognition that the individual might enjoy direct rights under an international treaty, including the right to seek compensation before an international tribunal from a State for breach of treaty rights. For example, the Upper Silesian Mixed Commission and Arbitral Tribunal recognised that the

32 Art 1, International Law Commission, Draft Articles on Diplomatic Protection [2006] 2(2) YB ILC 23.
33 Parlett 2011: ch 2.
individual had, pursuant to the treaties establishing them, full procedural capacity to pursue his or her claims against a State. 35

35 The most salient example of a standing tribunal with jurisdiction to determine individual claims against a State created in the post-World War II period is the Iran–US Claims Tribunal, which has consistently rejected the suggestion that it is determining diplomatic protection claims or inter-State disputes and insisted that it is a new forum in which individual claimants vindicate their own rights. 36 As the Tribunal adopted (in modified form) the UNCITRAL Arbitration Rules, its decisions form an important source of jurisprudence on the interpretation and application of the equality principle. 37

36 The Tribunal has particularly had cause to invoke the equality principle in its character as the principe de la contradiction, or right of each party to respond to the submissions of its opponent:

Article 15 of the Tribunal Rules requires that the Tribunal treat the parties equally. This is a fundamental principle of justice. In the circumstances of these cases, the delicate balance of equality would be tipped if one party were to be permitted to present an extensive Memorial and additional exhibits, without providing an opportunity for the other party to file a memorial in response. 38

37 The important point for present purposes is that the ability of individual claimants to assert claims before the Tribunal has not proved to be fundamentally inconsistent with an assurance of equality of the parties.

38 The international legal system has also accommodated an asymmetrical form of adjudication in the field of human rights. 39 Both the Inter-American and the European systems admit a right of individual petition against State action as ‘a key component of the machinery for protecting the rights and freedoms set forth in the Convention’. 40 In the Inter-American system, 41 and originally in the European system, this application had first to be made to a Commission.

39 In the case of the European Convention, the right of individual petition to the Commission was originally dependent upon the State Party making a declaration that it accepted this right. 42 In 1990, the Committee of Ministers adopted Protocol No 9, which provided for

35 Kaeckenbeeck 1946.
37 See Caron and Caplan 2013.
40 Mamatkulov v Turkey, Nos 46827/99 and 46951/99 (Merits and Just Satisfaction) [2005] ECHR 64, (2005) 41 EHRR 25 (6 February 2003), [122]; art 34, ECHR.
42 Schabas 2015: 735.
direct individual access to the Court. One of the reasons advanced for this amendment was that limiting access to the Court to the Commission and to States Parties, and excluding a right of direct individual petition, was incompatible with the norms enshrined in the Convention, being a denial of equality of arms. Ultimately, by Protocol No 11, which entered into force in 1998, the Commission was abolished and the right of individual direct access to the Court was enshrined in Article 34 of the Convention as revised.

In interpreting Article 34, the Court has held that bodies exercising public functions are not entitled to bring an individual application ‘as a person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention’. The Court explained that ‘the idea behind this principle is to prevent a Contracting Party acting as both an applicant and a respondent party before the Court’. The key distinction is not whether the applicant is publicly owned, but whether the body exercises public functions or is instead independent from the State.

As a result, the right of individual petition is designed as an asymmetrical system for the adjudication of the claims of private individuals against the State. Although the Convention contained from the outset Article 33, which entitles States to enforce the provisions of the Convention *erga omnes partes*, in practice that procedure has long been eclipsed in practical significance by the volume of individual complaints.

In deciding individual complaints, the human rights tribunals accept that they must themselves accord procedural equality. In the Inter-American system, the Court considered the compliance of the Inter-American Commission with due process requirements in an advisory opinion. It held: ‘The processing of individual petitions is regulated by guarantees that ensure each party the exercise of the right of defense in the proceedings. These guarantees [include] . . . procedural equality.’

### E The ICSID Convention

The ICSID Convention 1965, currently ratified by 155 States, constitutes a unique, self-contained system for the arbitration of investment disputes between ‘Contracting States and nationals of other Contracting States’. Although investment disputes may also be

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41 Protocol No 11, ETS 155.
42 *Islamic Republic of Iran Shipping Lines v Turkey*, No 40998/98 [2007] V ECHR 327, [81].
45 *Control of Legality in the Practice of Authorities of the Inter-American Commission of Human Rights* (Advisory Opinion) OC-19/05 IACtHR (28 November 2005) Ser A No 19, [27].
47 Preamble recital 4, ICSID Convention.
arbitrated ad hoc or under the auspices of other arbitration institutions, the special character and wide ratification of the ICSID Convention as a dispute resolution system mean that its own treatment of the equality principle is of particular importance to the present study.

44 The Convention does not mention the equality principle expressly. Nevertheless, the equality of the parties was an important guiding principle in its framing. Aron Broches, General Counsel to the World Bank and the driving force behind the creation of the Convention, identified one of its most distinctive features as being the creation of facilities for arbitration ‘to which the host country and the foreign investors would be parties on an equal procedural footing’. The Executive Directors emphasised that, ‘since the Convention permits the institution of proceedings by host States as well as by investors’, they ‘have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases’.

45 The requirement on tribunals to observe equality of the parties as a procedural matter is a fundamental rule of ICSID arbitral procedure. It is given effect in the structure of the arbitral procedure contemplated by the ICSID Convention and implemented by the Arbitration Rules. Its content has been elaborated in particular in the decisions of ad hoc annulment committees charged with determining whether ‘there has been a serious departure from a fundamental rule of procedure’.

46 By its current Proposals for Amendment of the ICSID Rules, the Secretariat proposes to make explicit that which was previously implicit by adding a new Rule 11(1), which states: ‘The Tribunal shall treat the parties equally and provide each party with a reasonable opportunity to present its case.’ The accompanying Working Paper for the first version of the Proposed Rules explains that this addition is confirmatory and adopts wording similar to Article 17(1) of the UNCITRAL Rules.

47 The framers of the ICSID Convention ensured the application of the equality principle by providing that one ground for the annulment of an award is ‘that there has been a serious departure from a fundamental rule of procedure’. This provision adopts the language of the International Law Commission (ILC) Model Rules. The travaux préparatoires indicate that the fundamental rules of procedure that the drafters had in mind were to be restricted to the principles of natural justice, including that both parties must be heard with adequate opportunity for rebuttal.

51 For the division between ICSID and non-ICSID cases, see UNCTAD 2020.
52 Broches 1972: 344.
53 ICSID 1965: [13].
54 Art 52(1)(d), ICSID Convention.
55 ICSID 2020b: vol 1, 125.
56 ICSID 2018a: [108].
57 Art 52(1)(d), ICSID Convention.