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## BOOK REVIEW

### LUCY REED, JAN PAULSSON, AND NIGEL BLACKABY, *GUIDE TO ICSID ARBITRATION* (2d ed., 2011).

Jack J. Coe, Jr.\*

#### I. INTRODUCTION

In recent years, investor-State arbitration has inspired an impressive array of high-quality commentary in a range of forms and fora. The public domain is graced by numerous books,<sup>1</sup> dozens of journal articles,<sup>2</sup> and abundant offerings seeming to appear spontaneously in the digital realm. The topic has been pursued with distinction at the Hague Academy<sup>3</sup> and in other prominent lecture series.<sup>4</sup> Several empirical studies testing our assumptions have also emerged.<sup>5</sup> Judging, moreover, from the still-increasing number of theses devoted to investor-State topics, the sense that more remains to be said continues to thrive among academic supervisors and entry level scholars.<sup>6</sup> Certainly, the topic persistently features in a significant percentage of the many arbitration-related conferences regularly sponsored by learned and professional societies.

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<sup>1</sup> Among the many bound works and collections of essays are: *ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS* (Norbert Horn ed., 19th ed. 2004); *INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW* (Todd Weiler ed., 2005); *NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS* (Todd Weiler ed., 2004); *CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* (2008); *THE FUTURE OF INVESTMENT ARBITRATION* (Catherine A. Rogers & Roger P. Alford eds., 2009).

<sup>2</sup> For a non-exhaustive bibliography comprising fourteen pages (limited to NAFTA Chapter Eleven subjects alone), see Charles H. Brower II et al., *NAFTA Chapter Eleven Reports*, 683-99 (2006); see also ICSID, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDBibliographyRH&actionVal=ViewArticleAndBooks> (last visited May 28, 2012).

<sup>3</sup> Concerning ICSID, essential reading is Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DES COURS (HAGUE ACADEMY OF INT'L L.) 330 (1972) (discussing the history of the ICSID Convention). More recently at the Academy, Professor Jose Alvarez examined the Investor-State field more broadly. See Jose E. Alvarez, *The Public International Law Regime Governing International Investment*, 344 RECUEIL DES COURS (HAGUE ACADEMY OF INT'L L.) 195 (2011).

<sup>4</sup> See James Crawford, Professor, Jesus College at Cambridge University, Address at the 22nd Freshfields Lecture on International Arbitration, in London (Nov. 29, 2007), <http://www.lcil.cam.ac.uk/Media/lectures/pdf/Freshfields%20Lecture%202007.pdf>.

<sup>5</sup> See Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1 (2007); Susan D. Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 WASH. U. L. REV. 769, 805-38 (2011); Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT'L L. 825 (2011) [hereinafter *ICSID Effect*].

<sup>6</sup> Such theses often result in excellent monographs. See, e.g., IOANA TUDOR, *THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* (2008) (resulting from doctoral research at the European University Institute in Florence).

The investor-State arbitration story is intimately linked in turn to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention)<sup>7</sup> and the center it created—the International Centre for Settlement of Investment Disputes (ICSID or the Centre). The Convention, and hence the Centre, have been examined in at least one substantial treatise,<sup>8</sup> and in several shorter works. Among the latter is Reed, Paulsson and Blackaby, *Guide to ICSID Arbitration* (the *Guide*), first published in 2004, which has recently appeared in a second, thoroughly revised, edition.<sup>9</sup> As will be clear from a comparison of the first and second editions, much has transpired at ICSID in recent years. Although the *Guide* aims to be a concise, reliable desk reference rather than a policy oriented commentary of the academic sort, in succeeding at its task it manages to touch upon many of the compelling themes that surround investor-State arbitration and the substantial literature it has prompted. Some of these themes are surveyed below.

## II. THE CONVENTION'S UNDERPINNING RATIONALE AND PREMISES

Unlike most other administering institutions, ICSID exists to serve development goals.<sup>10</sup> Its undergirding supposition is that private investment flows are more likely to occur if prospective investors know that such disputes as may arise with the host country can be referred to an effective disputes regime that both functions independently of the host State's local courts and has the imprimatur of the World Bank.<sup>11</sup> As part of this calculus, host States are in effect offered a bargain. Among other inducements, in exchange for participation in the ICSID Convention regime, host States are assured that once the ICSID Convention process has been initiated by the investor, the investor's home State will be greatly restrained

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<sup>7</sup> International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

<sup>8</sup> A leading commentary on the ICSID Convention is CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* (2d ed. 2009).

<sup>9</sup> LUCY REED ET AL., *GUIDE TO ICSID ARBITRATION* (2d ed. 2011) [hereinafter *GUIDE*]. This edition of the *Guide* contains 468 pages—more than twice as many pages as are found in the first edition. It remains compact and portable, however. Its dimensions are roughly 6 inches by 8 inches by 1 inch. The second edition also retains many of the structural features of the first edition. For example, the book's six chapters unfold under the original headings: 1) Introduction to ICSID; 2) Contractual ICSID Arbitration; 3) ICSID Investment Treaty Arbitration; 4) ICSID Arbitration Procedure; 5) The ICSID Review Regime; and 6) Recognition, Enforcement and Execution of ICSID Awards.

The book's primary materials have been updated. Among other features, the Second Edition's appendices contain well-chosen documents such as the ICSID Convention and current rules sets, NAFTA Chapter 11, the Energy Charter Treaty, and two BITs (the UK Model text, and the US-Argentina BIT). There is also a comprehensive list of cases, a selective bibliography, and an exceedingly useful series of tables dissecting issue-by-issue the ICSID docket to date (a feature introduced in the new edition). Its index is sensibly organized mainly around individual ICSID Rules and Convention Articles.

<sup>10</sup> *Id.* at 3-4.

<sup>11</sup> See Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, I ICSID REV.-FILJ 1 (1986); IBRAHIM F.I. SHIHATA, *LEGAL TREATMENT OF FOREIGN INVESTMENT: THE WORLD BANK GUIDELINES* 97 n.68 (1993) (ICSID sponsored by the World Bank to help increase investment flows by establishing disputes machinery detached from domestic courts); News Release, ICSID, Designations to the ICSID Panels of Conciliators and of Arbitrators by the Chairman of the ICSID Administrative Council (Sept. 15, 2011), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement95> (indicating that private capital flows remain ICSID's principal aim).

in its ability to exert diplomatic protection on behalf of its aggrieved national.<sup>12</sup> Investors, in turn, will also be limited in the extent to which they might seek local court remedies during the arbitration.<sup>13</sup>

### III. CASELOAD<sup>14</sup>

ICSID's standing as the leading administering institution associated with investor-State arbitration can readily be substantiated by examining its case-load.<sup>15</sup> As of the beginning of 2012, the ICSID docket of concluded and pending cases comprised well over 360 arbitrations, involving claims totaling many billions of dollars. While its case-load is less impressive when viewed in light of the nearly five decades during which ICSID has been available to claimants, to amortize the docket in that way obscures the two extremes that punctuate ICSID's history: a long glacial period beginning with the Convention's coming into effect in late 1966 (a period characterized by a very modest caseload) disturbed rather abruptly by a sudden, but subsequently steady, stream of claims beginning in the late-1990s. Thus, ICSID's Annual Report for 1994 reported five pending cases,<sup>16</sup> whereas, as 2012 dawns, 140 cases are on-going. The number of concluded cases in turn has reached 229.<sup>17</sup>

Paralleling the burgeoning docket, and to a large extent explaining it, is the breathtaking increase in the number of Bilateral Investment Treaties (BITs) and analogous instruments that have come into force during the last fifteen years.<sup>18</sup> Their significance for ICSID is both jurisdictional and substantive. Most BITs extend a continuing host-State offer, conditionally made to qualifying investors, to arbitrate investment claims. Under the terms of that undertaking, investors seeking to pursue BIT arbitration commonly may resort to whichever of the two ICSID regimes<sup>19</sup> applies to the dispute in question.<sup>20</sup> By

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<sup>12</sup> GUIDE, *supra* note 9, at 190.

<sup>13</sup> *Id.* at 50. Under the Convention and associated procedural rules, a disputant may seek interim remedies from a domestic court only if both parties have agreed to permit such petitions. *Id.* at 147.

<sup>14</sup> *Id.* at 6-9.

<sup>15</sup> See *ICSID Effect*, *supra* note 5, at 839.

<sup>16</sup> INT'L CTR. FOR THE SETTLEMENT OF INV. DISPUTES, ANNUAL REPORT 6 (1994).

<sup>17</sup> Cf. Roberto Danino, Secretary General, ICSID, Opening Remarks at the Conference: Making the Most of Investment Agreements: A Common Agenda (Dec. 12, 2005), available at <http://www.oecd.org/daf/internationalinvestment/internationalinvestmentagreements/36053800.pdf>, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListConcluded> (by the end of 2005 there were 113 pending cases, representing "exponential growth").

<sup>18</sup> See GUIDE, *supra* note 9, at 57-58 (majority of cases now BIT cases); UNCTAD, *Bilateral Investment Treaties 1959-1999*, iii, U.N. Doc. UNCTAD/ITE/IIA/2 (2000), available at <http://www.unctad.org/en/Docs/poiteiid2.en.pdf> (describing the "rapid increase" in BITs during the 1990s, amounting to a nearly a five-fold increase between the end of the 1980s and the end of the 1990s).

<sup>19</sup> ICSID Convention arbitration is not available unless both the host State and the investor's home State have become parties to the ICSID Convention (typically by ratification). GUIDE, *supra* note 9, at 24-25, 32-35. When one of the two States involved has ratified the Convention, ICSID Additional Facility Rules Arbitration may still be available. *Id.* at 17-19; Indeed, the Additional Facility has been pressed into service in recent years for NAFTA Chapter Eleven disputes. Of the three NAFTA States, only the United States has ratified the ICSID Convention, with the consequence that a claim involving only Mexico (as home or host State) and Canada (as home or host State), does not qualify for Additional Facility arbitration. See generally Jack J. Coe, Jr., *Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA?*, 19 J. INT'L ARB. 185 (2002) [hereinafter Coe, *Achilles Heel*]. A U.S. investor's choice under Chapter Eleven is thus between UNCITRAL Rules arbitration and Additional Facility Arbitration. The two regimes have in common a role for the courts of the seat of arbitration not present in ICSID Convention Arbitration. GUIDE, *supra* note 9, at 17-19. Global enforcement of Additional Facility and UNCITRAL Rules awards are similarly subject to the "refusal" grounds found in the fifth articles of the New York and Panama Conventions. *Id.*; Coe, *Achilles Heel*, *supra* at 194-96.

setting forth substantive treatment assurances, BITs also supply the governing standards by which the arbitrators will judge the Respondent State's conduct in the case at hand.<sup>21</sup>

Since a given State's BIT promise to arbitrate redounds to many potential claimants, and because a given State may have made dozens of such promises, regulatory acts by a State that generate sector-wide effects can give rise to dozens of claims. Argentina alone, for instance, has been named respondent in scores of claims involving several BITs, the majority of those claims arising out of the drastic economic measures implemented in an effort to stabilize Argentina's economy.<sup>22</sup> This multiplier effect explains much about the precipitous growth in ICSID's work-load in recent years, and about the disaffection that some States now hold for ICSID.<sup>23</sup>

The BIT-centric caseload of contemporary ICSID can in some senses be traced to Chapter Eleven of the North American Free Trade Agreement (NAFTA Chapter Eleven). The initial claimants to test treaty-based arbitral remedies were investors relying on NAFTA Chapter Eleven. They enjoyed success sufficient to signal to some—misleadingly—that NAFTA's BIT analogue offered somewhat predictable recompense for those prejudiced by government mistreatment.<sup>24</sup> As a longer view would demonstrate, however, the settlement in *Ethyl Corp.*,<sup>25</sup> and the award in *Metalclad*<sup>26</sup> were unusual events in Chapter Eleven history.<sup>27</sup> Nevertheless, those early claimant successes and the growing availability of equivalent treaty remedies caught the attention of investors and of firms large and small.

#### IV. COMPETING REGIMES AND INSTITUTIONS

The reader hoping to find in the Guide an elaborate discussion of arbitration under the United Nations Commission on International Trade Law Rules (UNCITRAL Rules) will be disappointed (but presumably not surprised given the title of the book). Yet, in its modern BIT context, ICSID arbitration is pursued as an election, a choice ordinarily between two arbitral options.<sup>28</sup> As noted above, a typical

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<sup>20</sup> See Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV.-FILJ 232, 233 (1995) (discussing consensual basis upon which non-privity investors may pursue legal rights directly); Andrea K. Bjorklund, *Contract Without Privity: Sovereign Offer and Investor Acceptance*, 2 CHI. J. INT'L L. 183, 183 (2001) (examining NAFTA claims by investors who have no privity of contract with the government). By design, a State's ratification of the ICSID Convention is required but not sufficient to oblige it to arbitrate. See GUIDE, *supra* note 9, at 35. Rather, consent covering the particular dispute involved must also be established; in contemporary practice, BITs and similar treaties (now numbering approximately 3,000) supply that predicate. ICSID arbitrations in which consent derives from a contract have become the exception, and constitute a relatively small percentage of the total number of ICSID cases. *Id.* at 53.

<sup>21</sup> See *id.* at 58-106; KENNETH VANDEVELDE, UNITED STATES INVESTMENT TREATIES POLICY AND PRACTICE (2d ed. 2010).

<sup>22</sup> See Alvarez, *supra* note 3, at 368-434.

<sup>23</sup> See *infra* notes 50-54 accompanying text.

<sup>24</sup> See Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter Eleven in its Tenth Year, An Interim Sketch of Selected Themes, Issues and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1384-85 (2003) [hereinafter Coe, *Taking Stock*].

<sup>25</sup> *Ethyl v. Canada* ended in settlement after the tribunal's award on jurisdiction rejecting Canada's request for dismissal. *Ethyl Corp. v. Canada*, Award on Jurisdiction, June 24, 1998, 38 I.L.M.708 (1999). Reportedly, Ethyl Corp. received \$13 million dollars to settle. See Todd Weiler, *The Ethyl Arbitration: First of Its Kind and Harbinger of Things to Come*, 11 AM. REV. INT'L ARB. 187, 198 (2000); Alan C. Swan, *INTERNATIONAL DECISION: Ethyl Corporation v. Canada, Award on Jurisdiction (Under NAFTA/UNCITRAL)* 94 AM. J. INT'L L. 159, 160 (2000).

<sup>26</sup> Todd Weiler, *Metalclad v. Mexico: A Play in Three Parts*, 2 J. WORLD INVEST. 685 (2001).

<sup>27</sup> See Coe, *Taking Stock*, *supra* note 24, at 1459 (table of outcomes through 2003).

<sup>28</sup> See Stephen Jagush & Jeffrey Sullivan, *A Comparison of ICSID and UNCITRAL Rules Arbitration: Areas of Divergence and Concern*, in THE BACKLASH AGAINST INVESTMENT: PERCEPTIONS AND REALITY (Michael Waibel et al, eds., 2010); Piero Bernardini, *ICSID Verses Non-ICSID Investment Treaty Arbitration 2* (Sept. 15, 2009), [http://www.arbitration-icca.org/media/0/12970223709030/bernardini\\_icsid-vs-non-icsid-investent.pdf](http://www.arbitration-icca.org/media/0/12970223709030/bernardini_icsid-vs-non-icsid-investent.pdf).

modern BIT gives investors standing to press claims through ICSID. Ordinarily, however, there is a second arbitral option. Often, that option is UNCITRAL Rules arbitration. When the available ICSID option is Additional Facility arbitration, the choice between it and the UNCITRAL Rules does not involve fundamentally different systems; both are “seat” oriented regimes that envision a central role for the New York Convention and that permit domestic courts to exercise various forms of supervision over the arbitration and the resulting award.<sup>29</sup>

When the two relevant States’ have ratified the ICSID Convention, by contrast, the alternatives facing the investor are more divergent. An investor’s designation of the ICSID option in such circumstances is an election to pursue a-national arbitration in which the seat of arbitration is of little significance and local courts have a subdued role.

Whichever ICSID option obtains, however, investors often prefer to proceed under the UNCITRAL Rules, although the reasons for doing so vary with each investor. Generally, the lack of an institutional structure and of a second tier of treaty provisions may appeal to claimants seeking flexibility, added confidentiality and local court access. The UNCITRAL Rules, moreover (even before the recent revisions to them)<sup>30</sup> have proven serviceable over many years—perhaps most notably at the Iran-U.S Claims Tribunal where they have served for over three decades.<sup>31</sup> Relatedly, numerous commentaries explore the UNCITRAL Rules, thus providing considerable guidance.<sup>32</sup> Because several institutions are willing to administer UNCITRAL Rules arbitrations involving States, the parties need not necessarily forgo institutional support when the claimant elects the UNCITRAL Rules option.<sup>33</sup> In any event, the regularity with which the UNCITRAL Rules have governed BIT disputes suggests that ICSID arbitration, while accounting for the majority of investor-State proceedings, is by no means the whole story.<sup>34</sup>

## V. FINALITY VERSUS QUALITY CONTROL

Consistent with ICSID’s purposeful detachment from domestic legal systems, ICSID Convention awards are not subject to annulment proceedings in municipal courts; nor is enforcement of such awards subject to defensive arguments under grounds of the types specified in the New York and Panama Conventions. Rather, in place of domestic court control is an internal regime by which ICSID Convention awards are, at the request of a party, tested against enumerated grounds set forth in the Convention.<sup>35</sup> The task of ruling on an annulment request is given not to a domestic court but to an ad

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<sup>30</sup> See JAN PAULSSON & GEORGIOS PETROCHILOS, REVISION OF THE UNCITRAL ARBITRATION RULES, available at [http://www.uncitral.org/pdf/english/news/arbrules\\_report.pdf](http://www.uncitral.org/pdf/english/news/arbrules_report.pdf) (unofficial report).

<sup>31</sup> See generally Howard Holtzmann, *Drafting the Rules of the Tribunal*, in THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 75 (David Caron & John Crook eds., 2000).

<sup>32</sup> Among these are: LEE CAPLAN & DAVID CARON, THE 2010 UNCITRAL ARBITRATION RULES: A COMMENTARY (2010); DAVID CARON & MATTI PELLONPAA, THE UNCITRAL ARBITRATION RULES AS INTERPRETED AND APPLIED 7-8 (1995); JACOMIEN J. VAN HOF, COMMENTARY ON THE UNCITRAL ARBITRATION RULES 5 (1991).

<sup>33</sup> The Permanent Court of Arbitration (PCA) has attracted a number of investor-State arbitrations in the last ten years. The PCA website indicates that nearly four dozen proceedings in which a State or State entity is a party have been lodged with the Permanent Court. See [http://www.pca-cpa.org/showpage.asp?pag\\_id=1029](http://www.pca-cpa.org/showpage.asp?pag_id=1029).

<sup>34</sup> Franck, *ICSID Effect*, *supra* note 5, at 840.

<sup>35</sup> See GUIDE, *supra* note 9, at 159-177; Andrea Giardina, *ICSID: A Self-Contained, Non-National Review System*, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS “JUDICIALIZATION” AND UNIFORMITY? 199 (Richard B. Lillich & Charles N. Brower eds., 1994).

hoc committee constituted only for the particular award in question; it is the annulment rulings of such committees that have generated much debate.<sup>36</sup>

When annulment is granted the question naturally arises whether quality control and finality—both elements affecting systemic legitimacy—have been properly balanced. Even when not successful, annulment proceedings generally add many months to the arbitration in question; and when an award is annulled, the process often starts anew, with the second arbitration sometimes lasting longer than the first one.<sup>37</sup> In light of the exclusive and restrained annulment grounds found in Article 52 of the ICSID Convention, which do not contemplate merits review for errors of fact or law,<sup>38</sup> one might expect that annulments would be rare. In fact, they have not been so rare.<sup>39</sup>

As the *Guide* notes, ICSID annulment practice can be thought of as passing through distinctive periods.<sup>40</sup> Its early (some would say “notorious”) period was characterized by annulment committees that attracted robust criticism for having too willingly second-guessed the arbitrators.<sup>41</sup> Then came a period of recalibration (typified by “more measured” ad hoc committee holdings)<sup>42</sup> followed by a third generation involving the first attacks against BIT-based awards.<sup>43</sup> The most recent instances of these BIT-related proceedings, it seems, have introduced a return to greater intervention by ad hoc committees, reminiscent – some would say – of the earliest, much criticized, annulment proceedings.<sup>44</sup>

Those that would favor robust scrutiny of ICSID awards can rightly stress that once an award clears the ICSID system—unlike the New York Convention regime with which it competes<sup>45</sup>—there is no secondary layer of control; States must enforce the pecuniary obligation contained in the award without reference even to their own rules of public policy.<sup>46</sup> In such circumstances, it might be argued that award-debtor States and enforcing States alike deserve awards that are tightly reasoned and that demonstrate jurisdictional self-restraint.<sup>47</sup> States, so goes the argument, are not merely commercial entities whose primary stakeholders are shareholders.

The insistence on lucid and coherent reasoning that often preoccupies ad hoc committees, in turn, promotes awards that give guidance to States and investors in the individual case and contributes to a more satisfactory and durable jurisprudence. These salutary goals are undercut, of course, to the extent that ad hoc committees diverge in the standards they apply,<sup>48</sup> and there no doubt comes a point at which

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<sup>36</sup> See generally W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739 (1989) [hereinafter *Breakdown*].

<sup>37</sup> See generally Jack J. Coe, Jr., *Settlement of Investor-State Disputes through Mediation—Preliminary Remarks on Processes, Problems and Prospects*, in ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS 73, 77-81 (R. Doak Bishop ed., 2009) [hereinafter *Prospects*].

<sup>38</sup> ICSID Convention, *supra* note 7, art. 52.

<sup>39</sup> See *Guide*, *supra* note 9, at 401-05 (tables).

<sup>40</sup> *Id.* at 162-74.

<sup>41</sup> See Reisman, *supra* note 36.

<sup>42</sup> See *Guide*, *supra* note 9, at 168.

<sup>43</sup> *Id.* at 169.

<sup>44</sup> *Id.* at 174.

<sup>45</sup> See generally Albert Jan van den Berg, *Refusals of Enforcement Under the New York Convention of 1958: The Unfortunate Few*, in ARBITRATION IN THE NEXT DECADE 75 (1999) (discussing grounds for refusal of enforcement of award).

<sup>46</sup> See *GUIDE*, *supra* note 9, at 162-66.

<sup>47</sup> Cf. Tai-Heng Chen, *What's Reasonable Depends Who's Asking*, 8 BALTIC Y.B. INT'L L. 389, 391-92 (2005) (reviewing THE REASONS REQUIREMENT IN INTERNATIONAL ARBITRATION: CRITICAL STUDIES (Guillermo A. Alvarez & W. Michael Reisman eds., 2008) and noting the suggestion that investor-State awards ought to be held to a higher standard of explicated reasoning).

<sup>48</sup> See *GUIDE*, *supra* note 9, at 174-75 (ICSID has repeatedly appointed certain individuals to ad hoc committees to promote coherent annulment jurisprudence). *But see* Franck, *ICSID Effect*, *supra* note 5, at 845 n.90 (describing complaints by counsel concerning ad hoc committee over reaching).

an assessment of reasoning quality, like a quest for excess of mandate,<sup>49</sup> masks unauthorized merits review.<sup>50</sup>

## VI. THE PERSPECTIVES OF CIVIL SOCIETY

Reaching the proper calibration of ICSID's internal control machinery is a dilemma specific to ICSID Convention arbitration. It subsists, however, within a broader and more multifaceted debate to which investor-State arbitration has given rise, cabined under the "legitimacy" rubric. The notion that a private enterprise might directly achieve through arbitration a monetary remedy for host-State violations of BIT obligations has long been a central feature of BITs.<sup>51</sup> Claims filed in the mid-1990's under NAFTA Chapter Eleven, however, alerted new cadres of observers to an arbitral mechanism that had been in plain view for several decades, albeit without being regularly utilized. The resulting critiques spanned a wide spectrum, varying both in orientation and in levels of authoritativeness.<sup>52</sup> The associated legitimacy assessments, sometimes unaided by a good grasp of context or historical perspective,<sup>53</sup> questioned authority, process fairness and transparency in light of various societal interests and the perceived quality and impact of outcomes.<sup>54</sup> The system's capacity for circumnavigating democratic values and its vulnerability to being commandeered by wealthy multinationals were recurrent themes.<sup>55</sup> These critiques have become more subdued, one might speculate, because of the implementation of

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<sup>49</sup> See ICSID Convention, *supra* note 7, art. 52(1)(b).

<sup>50</sup> Cf. GUIDE, *supra* note 9, at 168 (appellate style review might threaten to undercut finality and thus investor confidence in the dispute system).

<sup>51</sup> See, e.g., Barton Legum, *The Innovation of Investor-State Arbitration Under NAFTA*, 43 HARV. INT'L L.J. 531 (2002) (tracing the history of mixed claims processes and concluding that Chapter 11 is not fully unprecedented); Antonio R. Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID REV. 287 (1997) (direct arbitral standing for investors a common feature).

<sup>52</sup> See generally Ari Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis*, 17 GEO. INT'L ENVTL. L. REV. 51 (2004); Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37 (2003); Naveen Gurudevan, *An Evaluation of Current Legitimacy-Based Objections to NAFTA's Chapter 11 Investment Dispute Resolution Process*, 6 SAN DIEGO INT'L L.J. 399 (2005); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005).

<sup>53</sup> See Thomas Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773, 827 (2002) ("Nothing was ever said - and, therefore, understood - about the larger operation and aspirations of NAFTA. The critics never bothered to communicate an understanding of the difficulty of international adjudication or of how instrumental a functional system of adjudication is to the pursuit of international trade."); see *id.* (certain characterizations of Chapter 11 have been so misleading as to amount to "misrepresentations pitched at a level of deceit").

<sup>54</sup> See, e.g., Anthony De Palma, *NAFTA's Powerful Little Secret; Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say*, N.Y. TIMES, Mar. 11, 2001, at 1 (describing the investor-state arbitral process as a form of "secret government"); Editorial, *The Secret Trade Courts*, N.Y. TIMES, Sept. 27, 2004, at A1 (reform needed given "one-sided" arbitration process favoring wealthy corporations over poor States).

<sup>55</sup> See generally Bill Moyers Reports: *Trading Democracy* (PBS television broadcast), available at [http://www.pbs.org/now/printable/transcript\\_tdfull\\_print.html](http://www.pbs.org/now/printable/transcript_tdfull_print.html) (last visited May 29, 2012). The fact that arbitrators are not elected officials nor subject to appellate review, of course, must be viewed in light of a party's ability to challenge an arbitrator if significant conflicts of various types can be demonstrated. See GUIDE, *supra* note 9, at 133-37. Parties have regularly challenged arbitrators. The GUIDE's table on challenges lists thirty attempts leading to eight resignations. Some arbitrations have given rise to multiple challenges; see also *id.* at 406-09.



transparency-related reforms<sup>56</sup> and data that demonstrate that claimants face more of a gauntlet than might have seemed true based upon the earliest invocations of NAFTA Chapter Eleven.

## VII. STATE “BACKLASH” AND RELATED MATTERS

ICSID’s capacity for even-handedness is of course an important question. At least as to ICSID arbitration, concerns that anti-State bias has infected the system seem not to be supported by the data,<sup>57</sup> which suggest that choosing ICSID does not improve a claimant’s chances of winning or of maximizing a recovery compared to other arbitral fora.<sup>58</sup> Similarly, in smaller samples generated by ten years of NAFTA Chapter Eleven arbitration (both under the UNCITRAL Rules and the Additional Facility) most claims were unsuccessful and those that succeeded resulted in recoveries much lower than the amounts sought.<sup>59</sup> There have been, however, enough large recoveries to cause several States to reassess their commitment to ICSID<sup>60</sup> and, relatedly, to BITs that offer investors a direct arbitral remedy tied to somewhat indeterminate standards of treatment. Although a macro view shows that ICSID membership continues to grow, a few States—principally in the Americas—have withdrawn or threatened to withdraw from the Convention.<sup>61</sup> It does not follow, of course, that those States will denounce the BITs into which they have entered, nor that they will refuse to comply with such ICSID awards as may have been rendered; those are separate questions.<sup>62</sup>

## VIII. KEEPING UP WITH AMPLIFIED CASELOADS

Among the other concerns voiced by observers in recent years has been that ICSID’s exploding docket had outstripped its institutional capacities.<sup>63</sup> In 2006, one well-informed observer of ICSID—an institution which he called “the best run, best staffed, with the best rules and the best treaty”—spoke

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<sup>56</sup> See *infra* notes 60-65 and accompanying text.

<sup>57</sup> Despite the arrestingly large recoveries often *sought* by investors through ICSID arbitration, and sometimes recovered, it is not true that choosing ICSID improved a claimant’s likelihood of success or amount of recovery. See Franck, *ICSID Effect*, *supra* note 5, at 825; *Cf. Coe, supra* note 25, at 1459-60 (recovery tables as of 2003 comparing amount sought and amount recovered under NAFTA Chapter 11).

<sup>58</sup> Franck, *ICSID Effect*, *supra* note 5, at 857-59.

<sup>59</sup> See Coe, *supra* note 25, at 1459-60 (tables listing outcomes).

<sup>60</sup> See, e.g., *Campania de Aguas and Vivendi v. Argentina*, ICSID Case No. ARB/97/3 Award of 20 August 2007 (awarding approximately \$104 million USD in one of dozens of claims brought against Argentina). Argentina, however, has not denounced its ICSID treaty obligations.

<sup>61</sup> See Franck, *ICSID Effect*, *supra* note 5, at 845-47 (discussing Bolivia’s withdrawal from ICSID and related reactions of States to liability exposure and perceived systemic unfairness); *Ecuador’s Notification under Article 25(4) of the ICSID Convention*, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES (Dec. 5, 2007), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement9>; but see Benedict Mander, *Venezuela-ICSID: Leaving is Easier Said than Done*, FIN. TIMES (Jan. 17, 2012, 10:37 PM), <http://blogs.ft.com/beyond-brics/2012/01/17/venezuela-icsid-leaving-is-easier-said-than-done/#axzz1p3CyBoNU> (notice period for effective denunciation and need for investment complicate withdrawal decision).

<sup>62</sup> Significantly, States have tended to honor monetary obligations embodied in ICSID awards. Argentina is proving to be an outlier in this respect, however. GUIDE, *supra* note 9, at 17.

<sup>63</sup> See William Rowley, *ICSID at a Crossroads*, 1 GLOBAL ARBITRATION REV., no. 1, available at [http://www.mcmillan.ca/Files/JWRowley\\_ICSID\\_AtCrossroads\\_0906.pdf](http://www.mcmillan.ca/Files/JWRowley_ICSID_AtCrossroads_0906.pdf).

nevertheless of an institution “under threat,”<sup>64</sup> an admonition apparently inspired by the budget priorities set by the World Bank.<sup>65</sup> Equally, users of ICSID might well have noticed with dismay the recent period in which ICSID’s leadership changed with surprising frequency.<sup>66</sup> Such a revolving door effect could not have promoted forward looking agendas or stability, particularly while caseloads continued to enlarge apace.

## IX. TRANSPARENCY

Among the legitimacy-related themes underscored by many observers was the need to introduce greater “transparency” into the system.<sup>67</sup> Prefigured by NAFTA policies, States have increasingly accepted that a measure of openness in the investor-State process is desirable, and perhaps inevitable.<sup>68</sup> With few obstacles enshrined in the ICSID Convention, the Centre was able to act in accordance with an obvious trend to accomplish enhanced access through ICSID Rules changes; those occurred in 2006.<sup>69</sup> The Rules amendments<sup>70</sup> embellish what had already been ICSID’s policy of relative openness by

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<sup>64</sup> V.V. Veeder, Queen’s Counsel, Essex Court Chambers, *Why Bother? And Why It Matters*, Speech Before The Institute for Transnational Arbitration (Summer 2006) (transcript available in News & Notes from The Institute for Transnational Arbitration) (remarking, *inter alia*, that ICSID’s then-new premises were “appalling, and by any standard unfit for their purpose”).

<sup>65</sup> *Id.* at 5-6.

<sup>66</sup> See generally News Release, ICSID, Roberto Danino New Secretary-General of ICSID (Sept. 4, 2003), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive\\_%20Announcement1](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement1); News Release, ICSID, Appointment of Acting Secretary-General (Feb. 1, 2006),

[http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive\\_%20Announcement28](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement28); *Ana Palacio Elected ICSID Secretary-General*, ICSID (Sept. 20, 2006)

<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement1>; News Release, ICSID, Ana Palacio Leaves ICSID (April 30, 2008),

<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement12>; News Release, ICSID, Meg Kinnera Elected ICSID Secretary-General (Feb. 23, 2009),

<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement15>.

<sup>67</sup> See generally Jeffrey Atik, *Legitimacy, Transparency and NGO Participation in the NAFTA Chapter 11 Process*, in *NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS* 135 (Todd Weiler ed., 2004); Martin Hunter and Alexei Barbuk, *Non-Disputing Party Interventions in Chapter 11 Arbitrations*, in *NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS* 151 (Todd Weiler ed., 2004); V.V. Veeder, *The Transparency of International Arbitration: Process and Substance*, in *PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION* 88 (Loukas A. Mistelis and Julian D.M. Lew eds., 2006); Paul Freidland, *The Amicus Role in International Arbitration*, in *PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION* 321 (Loukas A. Mistelis and Julian D.M. Lew eds., 2006); Jack J. Coe, Jr., *Transparency in Investor State Arbitration—Adoption, Adaptation, and NAFTA Leadership*, 54 *KANSAS L. REV.* 1339 (2006) [hereinafter *NAFTA Leadership*]; J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, 52 *MCGILL L.J.* 681, 706–08 (2007).

<sup>68</sup> See generally Coe, *NAFTA Leadership*, *supra* note 67.

<sup>69</sup> See News Release, ICSID, Amendments to ICSID Rules and Regulations (Apr. 5, 2006), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive\\_%20Announcement26](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement26).

<sup>70</sup> News Release, ICSID, Suggested Changes to the ICSID Rules and Regulations (May 12, 2005) (on file with ICSID).

authorizing tribunals to accept amicus filings, subject to certain conditions,<sup>71</sup> and to permit non-disputants to observe hearings, provided neither party objects.<sup>72</sup>

Amicus filings had been accepted even before the ICSID Rules changes, and several tribunals have been prepared since the revisions to allow such submissions.<sup>73</sup> Indeed, at least among some arbitrators, there has developed the view that to permit amicus submissions in appropriate circumstances “is an important element in the overall discharge of the Arbitral Tribunal’s mandate, and in securing wider confidence in the arbitral process itself.”<sup>74</sup>

## X. JURISPRUDENTIAL COHERENCE IN THE MARKETPLACE OF IDEAS

ICSID’s cardinal role in investor-State arbitration places it in the center of another legitimacy-related debate; that examining whether the investment and arbitral jurisprudence being produced is sufficiently principled and coherent to guide and treat fairly States and investors. An ordered system of precedent constraining tribunals does not formally operate in the investor-State realm. Even though tribunals are generally alerted by the parties to the reasoning of other tribunals, markedly divergent analyses have been applied to substantially similar BIT texts. Fully settled understandings therefore have not become associated with the oft-examined concepts of “fair and equitable treatment,”<sup>75</sup> “measures tantamount to expropriation,” “full protection and security,”<sup>76</sup> “umbrella” clauses<sup>77</sup> and the “most favored nation” guarantee.<sup>78</sup>

The much discussed solution of instituting an appellate mechanism of some type,<sup>79</sup> though supported by many States and commentators,<sup>80</sup> has yet to be pursued in a concrete fashion. As a partial solution to the problem of “ad hocery,” some arbitrators have announced that they will adopt established trends when they perceive them, rather than further splinter BIT jurisprudence by formulating *de novo* rules of decision in each case.<sup>81</sup>

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<sup>71</sup> See GUIDE, *supra* note 9, at 15, 141 (discussing revised Rule 37).

<sup>72</sup> ICSID Arbitration Rules, Rule 32; see GUIDE, *supra* note 9, at 15.

<sup>73</sup> See GUIDE, *supra* note 9, at 15, 141.

<sup>74</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Procedural Order No. 5, para. 50 (November 27, 2006), <http://italaw.com/documents/Biwater-PO5.pdf>.

<sup>75</sup> See also J. Christopher Thomas, *Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators*, 17 ICSID REV. 21 (2002); Kenneth Vandeveld, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U. J. INT’L L. & POL. 43 (2010).

<sup>76</sup> See GUIDE, *supra* note 9, at 74-96.

<sup>77</sup> *Id.* at 92-96 (reviewing umbrella clause jurisprudence; additionally concluding that there is “no *jurisprudence constante*” on umbrella clauses).

<sup>78</sup> *Id.* at 82-87.

<sup>79</sup> See generally Barton Legum, *The Introduction of an Appellate Mechanism: The U.S. Trade Act of 2002*, in ANNULMENT OF ICSID AWARDS 289 (Emmanuel Gaillard and Yas Banifatemi eds., 2004); William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 AM. REV. INT’L ARB. 531, 533-34 (2000) (arguing that international commercial arbitration in general would benefit from elective appellate mechanisms).

<sup>80</sup> See generally Jack J. Coe, Jr., *Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA?*, 19 J. INT’L ARB. 185, 206-07 (2002) (discussing need for an appellate regime); William S. Dodge, *International Decision: Metalclad Corp. v. Mexico*, 95 AM. J. INT’L L. 910, 918 (2001) (appellate body could be given power to correct errors of law).

<sup>81</sup> See Alvarez, *supra* note 3, at 368-433.

## XI. ADR—ON THE HORIZON?

As the *Guide* explains, the ICSID's Convention established a conciliation regime.<sup>82</sup> Conciliation, however, has not been used often.<sup>83</sup> A number of commentators from practice, government and academia nevertheless have suggested that the existing investor-State disputes mechanism could benefit from more routine use of mediation (conciliation).<sup>84</sup>

It is a fact that investor-State disputes often settle, and that mediation has enjoyed good success with respect to B-to-B disputes. It is plausible therefore that investor-State settlement rates might be increased by introducing a dynamic third-party process proven capable in other contexts of generating (sometimes very quickly) more satisfactory outcomes than bilateral negotiations alone. At present, those investor-State cases that settle often do so only after appreciable costs have been incurred. Those that do not settle, in turn, generally require each side to commit significant resources to the arbitration enterprise and to cope with considerable disruption in pursuit of an outcome that typically is uncertain.<sup>85</sup>

The ICSID Secretariat has expressed interest in exploring ADR of a more dynamic kind than that contemplated in the Convention. It will be complemented in its efforts by work at the United Nations Conference on Trade and Development (UNCTAD)<sup>86</sup> and the International Bar Association.<sup>87</sup>

## XII. A WORTHY BOOK

Given the existing rich array of reference material touching upon investor-State disputes, one is entitled to ask whether another book on investor-State arbitration could be justified, even one merely updating an existing work. In its coverage, conciseness, reliability, compact format and step-saving attributes, the *Guide's* second edition should stand up well to scrutiny. Certainly in terms of the developments to have occurred since 2004, the second edition needs little justification: there have been revisions to the ICSID Arbitration Rules and considerable jurisprudence developed during the last few years, and although the book is not principally about substantive investor protection law, its synopses of common BIT protections as construed by tribunals are clear and surprisingly comprehensive.<sup>88</sup>

The book additionally has several features that make it unlikely to be ignored by counsel when briefing a client or preparing to launch an ICSID case. Particularly noteworthy are the *Guide's* tables. How often has an expropriation been established and in which cases? (*See* Table II F). Which cases have found breaches of umbrella clauses or of the promise of fair and equitable treatment? (*See* Table II, G and A). Which arbitrators have been willing to award costs and how regularly have costs been granted?

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<sup>82</sup> GUIDE, *supra* note 9, at 21-22.

<sup>83</sup> *Id.* at 22 (citing six attempts to conciliate producing only some verifiable success).

<sup>84</sup> *See generally* U.N. CONFERENCE ON TRADE & DEV., INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION (2010); Mark A. Clodfelter, *Why Aren't More Investor-State Treaty Disputes Settled Amicably?*, in INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION II (Susan D. Franck & Anna Joubin-Bret eds., 2011); Jeswald W. Salacuse, *Is There a Better Way: Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 FORDHAM INT'L L.J. 138, 143-147 (2007); Susan Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161 (2007); Jack J. Coe, Jr., *Toward a Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch*, 12 U.C. DAVIS J. INT'L L. & POL'Y 7 (2005).

<sup>85</sup> *See generally* *Prospects*, *supra* note 37, at 77-81.

<sup>86</sup> *See generally* UNCTAD, INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION (2010).

<sup>87</sup> A sub-committee of the IBA's Mediation Section has produced a set of mediation rules specific to investor-state disputes (on file with the author).

<sup>88</sup> *See* GUIDE, *supra* note 9, at 74-96.

(*See* Table III D). How often have challenges to arbitrators been successful? (*See* Table III C). Those who have investigated these and similar questions by searching the available websites will readily appreciate the amount of work the authors have done for the reader.<sup>89</sup>

Given the foregoing, ICSID experts—both counsel and arbitrators—should find the reference a reliable traveling companion, while newcomers to the field ought to regard it as required reading. Certainly, my students have found the book an efficient vehicle by which to acquire quickly a solid understanding of the ICSID regime and BIT jurisprudence before digging in more deeply. This “market test” would seem to bode well for the book’s utility in the hands of others. In short, the second edition of the *Guide* is both a wonderful research tool and a reliable reference that seems to have no counterpart in the market. It makes a distinctive contribution.

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<sup>89</sup> If pressed to quibble, one might argue for a more comprehensive index, or a more exhaustive bibliography. These, of course, are minor and perhaps idiosyncratic complaints, and run counter to the authors’ goal of producing a handy desk-reference rather than a treatise.