

**THE SECRETARY-GENERAL’S POWER TO REFUSE TO REGISTER A
REQUEST FOR ARBITRATION UNDER THE ICSID CONVENTION**

SERGIO PUIG[†] AND CHESTER BROWN[‡]

Introduction.....	1
I. Background to the Provision	4
A. Drafting of Article 36(3) of the ICSID Convention.....	4
B. Context for the Exercise of the Secretary-General’s “Screening Power”	6
II. Issues Arising in the Exercise of the Secretary-General’s Screening Power	9
A. The Decision is Based on the Evidence in the Request for Arbitration.....	9
B. Form of the Documentation Accompanying the Request for Arbitration.....	12
C. Obligation to Register a Request as Soon as Possible unless the Dispute is “Manifestly outside the Jurisdiction of the Centre”	12
D. The Decision only Concerns the Formal Requirements of Jurisdiction	15
1. Whether the Parties Have Given their Consent to ICSID Arbitration	15
2. Whether there is a Legal Dispute which Arises Directly out of an Investment...	17
3. Nationality of the Parties to the Dispute	21
III. Additional Aspects of the “Screening Power”	24
A. Applicable Test for Claims under the ICSID Additional Facility	24
B. Form and Effect of the Secretary-General’s Decision	26
C. Relationship between Article 36(3) of the Convention and Rule 41(5) of the Arbitration Rules.....	28
Conclusions.....	28

INTRODUCTION

Under Article 36(3) of the ICSID Convention, the ICSID Secretary-General can refuse to register a request for arbitration if he or she finds, on the basis of the information contained in the request, that the dispute is “manifestly outside the jurisdiction of the

The authors are grateful to Meg Kinnear, Martina Polasek, and the anonymous reviewer for their helpful comments on an earlier draft. The views expressed in this article are personal and are not necessarily those of any institutions or organisations with which the authors are presently or have in the past been affiliated.

[†] Lecturer in Law and Teaching Fellow (SPILS), Stanford Law School; formerly Counsel, ICSID.

[‡] Associate Professor, Faculty of Law, University of Sydney; Barrister, 7 Selborne Chambers, Sydney; Door tenant, Essex Court Chambers, London; and Maxwell Chambers, Singapore.

Centre.”¹ Often referred as the “screening power” of the Secretary-General,² Article 36(3) of the ICSID Convention is limited to the issue of the jurisdiction of the Centre. This means that in deciding whether to register a request for arbitration, the Secretary-General is not entitled to consider the merits of the dispute.

In 2006, the ICSID Administrative Council approved amendments to Rule 41(5) of the ICSID Arbitration Rules and Article 45(6) of the Additional Facility Rules (“Rule 41(5)”), which now provide a textual basis for ICSID tribunals to dismiss summarily claims that are “manifestly without legal merit”.³ In contrast to the screening procedure under Article 36(3) of the ICSID Convention, Rule 41(5) of the ICSID Arbitration Rules permits ICSID tribunals to consider the merits of the claim in deciding whether it should be dismissed summarily. At a level of generality, Article 36(3) and Rule 41(5) serve complementary functions, namely the efficient filtering of manifestly unworthy claims from other claims which are potentially meritorious. However, the two provisions operate in different ways.

Until recently, Article 36(3) of the ICSID Convention had been relatively uncontroversial. However, some critics have argued that it is becoming more difficult to persuade the Secretary-General to register a request for arbitration than it is to persuade an arbitral tribunal to exercise jurisdiction over a claim, and have noted that this is “troubling, given that there is no appeal open to a putative claimant should the Secretary-General refuse to register a request for arbitration.”⁴ Others have harshly criticized the

¹ *Convention for the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) (‘ICSID Convention’), Art 36(3).

² See, e.g., Martina Polasek, ‘The Threshold for Registration of a Request for Arbitration under the ICSID Convention’ (2011) 5 *Dispute Resolution International* 177, 178; Christoph Schreuer *et al*, *The ICSID Convention: A Commentary* (2nd ed, 2009), 86, 468; and Antonio Parra, ‘The Screening Power of the ICSID Secretary-General’ (1985) 2(2) *News from ICSID* 10.

³ For a detailed review of the amendments, see especially Aurelia Antonietti, ‘The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules’ (2006) 21 *ICSID Review – Foreign Investment Law Journal* 427. For an analysis of Rule 41(5) of the ICSID Arbitration Rules, see especially Chester Brown and Sergio Puig, ‘The Power of ICSID Tribunals to Dismiss Proceedings Summarily: An Analysis of Rule 41(5) of the ICSID Arbitration Rules’ (2011) 10 *Law and Practice of International Courts and Tribunals* 227.

⁴ Stephen Sutton, ‘*Emilio Augustin Maffezini v Kingdom of Spain* and the ICSID Secretary-General’s Screening Power’ (2005) 21 *Arbitration International* 113, 125.

Centre for declining to refuse the registration of certain claims.⁵ In light of this debate, the Centre's renewed emphasis on timeliness in the registration process and the adoption of the new Rule 41(5),⁶ it is appropriate to consider the purpose and operation of the Secretary-General's screening power. This evaluative process is complex, given that the Centre publishes only limited information about its decisions to refuse to register requests for arbitration. However, in this article we have considered all the examples reported by ICSID staff where claims were found to be "manifestly outside the jurisdiction of the Centre".⁷ Of the 13 occasions on which the Secretary-General has refused to register a request for arbitration, this article covers eight such instances, while excluding (at least) two known instances where the requesting parties apparently expected the refusal, so that they could set in motion another procedure for the settlement of the dispute.⁸

This article is organized as follows. Part I examines the background to Article 36(3) of the ICSID Convention and reviews its context of application. Part II offers an analysis of Article 36(3) and the Secretary-General's practice in refusing to register requests for arbitration, which has been revealed by current or former ICSID staff. Part III considers a number of additional aspects of Article 36(3), being the applicable test for registration of requests for arbitration brought under the ICSID Additional Facility Rules, the form and effect of the Secretary-General's decision, and the relationship of Article 36(3) with Rule 41(5) of the ICSID Arbitration Rules. The main purpose of this article is to assess the practice of ICSID in the process of registration of arbitration requests and to provide a practical review of the main case-related function of the Secretary-General.

⁵ See especially letter dated 15 January 2008 from Sarah Anderson, Institute for Policy Studies (and 863 signatories in total) to Robert Zoellick, President of the World Bank, available at <www.ipsdc.org/reports/080115-boliviapetition-en.pdf> (last accessed 23 January 2012).

⁶ Polasek, above n 2, 183 (noting changes in practice "because of the recent streamlining of the registration process and the possibility of raising objections to be heard on an expedited basis.")

⁷ Ibid, 187. Regulation 23(1) of the ICSID Administrative and Financial Regulations provides in part that the Secretary-General shall maintain a register for all "requests" for arbitration. Regulation 23(2) provides that such registers shall be open for inspection by any person in accordance with rules to be promulgated by the Secretary-General. To the authors' knowledge, no such rules have been promulgated.

⁸ Ibid, 187-188 (reporting that "during the 45 years of ICSID's existence, ICSID has refused registration of 13 requests. Several of these requests were based on a contract containing a pathological ICSID clause and a second alternative forum clause that could only be set in motion after a formal refusal from ICSID. In other words, the requesting parties expected the refusal.")

I. BACKGROUND TO THE PROVISION

A. Drafting of Article 36(3) of the ICSID Convention

The ICSID Convention requires the Secretary-General to perform a variety of functions as legal representative, registrar and principal officer of the Centre.⁹ In the context of a claim brought by an investor against the host State of the investment, one of the most important functions is the decision to register the proceeding. The registration of such a claim is based on the so-called power of the Secretary-General to “screen” requests established in Article 36(3).¹⁰

The preliminary draft of the ICSID Convention did not contain any provision on the screening of requests for arbitration.¹¹ However, in the eyes of some delegates participating in the drafting of the Convention, it was necessary that before “setting the Centre’s machinery into motion”, the jurisdictional requirements should be established, especially consent to arbitration.¹² Several delegates called for the request for arbitration to contain *prima facie* evidence that the dispute fell within the jurisdiction of ICSID. Accordingly, the first draft of the Convention provided that a party wishing to institute proceedings should include in its request to that effect “information concerning the subject-matter of the dispute, the identity of the parties and their consent ... sufficient to establish *prima facie* that the dispute is within the jurisdiction of the Centre.”¹³ However, at a subsequent meeting of the Legal Committee on Settlement of Investment Disputes, the delegates explicitly rejected this proposal because it seemed to give the Secretary-General “the character of a jurisdictional authority”.¹⁴

⁹ See, e.g., Schreuer, above n 2, 37-42 (Article 11); “Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention for the Settlement of Investment Disputes between States and Nationals of other States”, in ICSID, *ICSID Convention, Regulations and Rules* (ICSID/15, April 2006), para 20 (“Report”).

¹⁰ Report, above n 9, para. 20.

¹¹ Schreuer, above n 2, 468.

¹² Ibid.

¹³ Ibid.

¹⁴ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Documents Concerning the Origin and the Formation of the Convention* (1968), vol II, at 774 (“*History of the ICSID Convention*”). The Legal Committee was convened in Washington, DC. Representatives from

But there was, nonetheless, support for a certain threshold that a request for arbitration had to satisfy in order to be registered by ICSID.¹⁵ For example, if respondent States are subjected to frivolous proceedings under the ICSID system, the effective lack of a mechanism to ensure security for costs means that those States may be required to absorb the cost of participating in international proceedings which utterly lack foundation. There was also a desire to protect States from the “embarrassment” that might be caused by the commencement of proceedings.¹⁶ This consideration is clear from the Report of the Executive Directors, which expresses concern about the effects of unfounded claims on the reputation of respondent States:

“20. [...] The Secretary-General is given this limited power to ‘screen’ requests for conciliation or arbitration proceedings with a view to avoiding the embarrassment to a party (particularly a State) which might result from the institution of proceedings against it in a dispute which it had not consented to submit to the Centre, as well as the possibility that the machinery of the Centre would be set in motion in cases which for other reasons were obviously outside the jurisdiction of the Centre e.g., because either the applicant or the other party was not eligible to be a party in proceedings under the Convention.”¹⁷

The “screening power” of the Secretary-General helps to guard against this risk, protecting the institution as well as the parties and attempts to ensure the *bona fide* use of

61 countries sat on the Legal Committee. The official function of the Legal Committee was to act as an advisory organ to the Executive Directors of the World Bank, under whose sponsorship the ICSID Convention was formulated: *ibid.* The Legal Committee also carefully considered the First Draft of the Convention on an article-by-article basis. During the consideration of this article, the representative of Tunisia, Mr Ghachem, suggested that a negative wording would “better convey the intention of giving to the Secretary-General power for only a formal screening.”

¹⁵ This is not a unique feature of ICSID. Indeed as Parra notes, “the rules of many other arbitration institutions also contain provisions giving their administrative or supervisory organs the power to review requests in order to make certain that the institutions’ machinery will not unnecessarily be set in motion”: Parra, above n 2, 10.

¹⁶ *History of the ICSID Convention*, above n 14, at 772. During the consideration of this article, Mr. Broches also pointed out that preventing “unfounded proceedings for the sole purpose of intimidation” was an important reason to introduce the screening procedure.

¹⁷ Report, above n 9, at para. 20.

the Centre's facility.¹⁸ As finally adopted, Article 36(3) of the Convention provides as follows:

“The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.”¹⁹

Article 36(3) thus gives the Secretary-General the role of a “gatekeeper” to the jurisdiction of the Centre.²⁰ The screening power is limited in nature, and any decision taken by the Secretary-General should not be understood as a decision on the jurisdiction of a future ICSID arbitration tribunal or conciliation commission.²¹ Rather, the Secretary-General's screening power is intended to avoid spurious or inadequate claims being filed where a tribunal, once established, would surely find itself without any jurisdiction to deal with the claim. This is also reflected in the Report of the Executive Directors:

“38. [...] It is to be noted in this connection that the power of the Secretary-General to refuse registration of a request for conciliation or arbitration [...] is so narrowly defined as not to encroach on the prerogative of Commissions and Tribunals to determine their own competence and, on the other hand, that registration of a request by the Secretary-General does not, of course, preclude a Commission or Tribunal from finding that the dispute is outside the jurisdiction of the Centre.”²²

B. Context for the Exercise of the Secretary-General's “Screening Power”

In order to commence an arbitration proceeding under ICSID, a party must submit a request for arbitration in writing. The request for arbitration must be made in conformity with the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration

¹⁸ Parra, above n 2, 11-12.

¹⁹ ICSID Convention, Art 36(3).

²⁰ Sutton, above n 4, 125.

²¹ The Secretary-General has an identical “screening power” in the case of requests for conciliation: ICSID Convention, Art 28(3).

²² Report, above n 9, para. 38.

Proceedings (“the Institution Rules”). Rule 1 of the Institution Rules provides that any Contracting State or national of a Contracting State who wishes to commence conciliation or arbitration proceedings “shall address a request to that effect in writing to the Secretary-General at the seat of the Centre.” There are a number of further formal conditions: the request must (a) indicate “whether it relates to a conciliation or an arbitration proceeding”; (b) be drawn up in an official language of the Centre’ (i.e., English, French or Spanish); and (c) be dated and signed.²³

Rule 2 of the Institution Rules sets forth the requirements for the contents of the request for arbitration (or conciliation, as the case may be). Under Rule 2, the request must: (a) identify each party to the dispute;²⁴ (b) state, if one of the parties is a constituent subdivision or agency of a Contracting State, that it has been designated to the Centre as such under Article 25(1) of the ICSID Convention;²⁵ (c) indicate the dates of consent to the jurisdiction of the Centre, and the ‘instruments in which [the consent] is recorded’;²⁶ (d) indicate, with respect to the party that is a national of a Contracting State, “its nationality on the date of consent”, and if the party is a natural person, confirm his or her nationality on the date of the request, and also confirm that he or she does not have the nationality of the Contracting State which is party to the dispute, either on the date of consent or the date of the request;²⁷ and if the party is a juridical person having the nationality of the Contracting State party to the dispute, the request should indicate the agreement of the parties that the party should be treated as a national of another Contracting State.²⁸ The request must also “contain information concerning the issues in dispute indicating that there is, between the parties, a legal dispute arising directly out of an investment”,²⁹ and the request must also “state, if the requesting party is a juridical

²³ Institution Rules, Rule 1(1).

²⁴ Ibid, Rule 2(1)(a).

²⁵ Ibid, Rule 2(1)(b).

²⁶ Ibid, Rule 2(1)(c).

²⁷ Ibid, Rule 2(1)(d).

²⁸ Ibid, Rule 2(1)(d).

²⁹ Ibid, Rule 2(1)(e).

person, that it has taken all necessary internal actions to authorize the request.”³⁰ The request must be supported by the documentation specified in Rule 2(2).³¹

Under Rule 3 of the Institution Rules, the request for arbitration may also provide some “optional information” which may have been agreed by the parties, such as “the number of conciliators or arbitrators and the method of their appointment, as well as any other provisions agreed concerning the settlement of the dispute.”³²

Rule 4(1) indicates that the claimant must submit five additional signed copies of the request for arbitration to ICSID,³³ and under Rule 4(2), any documentation submitted with the request must conform to the requirements of Regulation 30 of the ICSID Administrative and Financial Regulations (which requires, *inter alia*, that the documents be provided in one of ICSID’s official languages, *i.e.*, English, French and Spanish).³⁴ Under Rule 5, the Secretary-General is to acknowledge receipt of the request for arbitration,³⁵ but take no further action until the prescribed fee has been received.³⁶ Once the fee has been received, the Secretary-General is to “transmit a copy of the request and of the accompanying documentation to the other party.”³⁷

The content of Rule 6 of the Institution Rules essentially mirrors the provisions of Article 36(3) of the ICSID Convention. It is worth setting out Rule 6 in full:

“(1) The Secretary-General shall, subject to Rule 5(1)(b), as soon as possible, either:

³⁰ Ibid, Rule 2(1)(f). This provision was included to reflect a practice developed after two cases registered in 1992 revealed the need for it: *Vacuum Salt Products Limited v Republic of Ghana* (ICSID Case No ARB/91/1, Award of 16 February 1994), and *Scimitar Exploration Limited v Bangladesh and Bangladesh Oil, Gas and Mineral Corporation* (ICSID Case No ARB/92/2, Award of 4 May 1994). See Antonio Parra, ‘The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes’ (2007) 41 *The International Lawyer* 47, 53-54.

³¹ Institution Rules, Rule 2(2).

³² Ibid, Rule 3.

³³ Ibid, Rule 4(1).

³⁴ Ibid, Rule 4(2). Regulation 30(3) of the ICSID Administrative and Financial Regulations provides that documentation filed in support of a request for arbitration “which is not in a language approved for the proceeding in question, shall ... be accompanied by a certified translation into such a language.”

³⁵ Institution Rules, Rule 5(1)(a).

³⁶ Ibid, Rule 5(1)(b).

³⁷ Ibid, Rule 5(2).

- (a) register the request in the Conciliation or the Arbitration Register and on the same day notify the parties of the registration; or
 - (b) if he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre, notify the parties of his refusal to register the request and of the reasons therefor.
- (2) A proceeding under the Convention shall be deemed to have been instituted on the date of the registration of the request.”³⁸

II. ISSUES ARISING IN THE EXERCISE OF THE SECRETARY-GENERAL’S SCREENING POWER

A. The Decision is Based on the Evidence in the Request for Arbitration

On the face of Article 36(3) of the ICSID Convention, as well as Rule 6 of the Institution Rules, the Secretary-General must make his or her decision on “the basis of the information contained in the request.”³⁹ However, ICSID practice suggests that the request can be supplemented by information either at the petitioner’s own initiative, or in response to requests for clarification that may be made by the Centre. In this regard, Ibrahim Shihata and Antonio Parra expressed the view that:

“Arbitration causes high cost to the parties and possible embarrassment to a State party in particular – costs that could perhaps be avoided through vesting a broader screening power in the Secretary-General. In any event, arbitration requests should, particularly if they rely on general consents such as those contained in investment treaties, provide adequate information on the relevant jurisdictional requirements. The ICSID Secretariat does not take questionable information for granted and often requires claimants to submit further information before a decision to register the case is made.”⁴⁰

Indeed in several instances where the request has been considered incomplete or inadequate, or the Secretary-General has otherwise had questions regarding the plausibility or credibility of the information provided in the request, the Centre has

³⁸ Ibid, Rule 6.

³⁹ ICSID Convention, Art 36(3).

⁴⁰ Ibrahim Shihata and Antonio Parra, *The World Bank in a Changing World* (2000), p 808.

contacted the requesting party in order to supplement the request.⁴¹ This is also the case, when by the claimant's own admission, there are elements that may preclude the registration under the ICSID Convention. Professor Schreuer also notes that:

“If the request does not conform to the requirements of the Convention or the Institution Rules, the Secretary-General will consult with the requesting party. This also applies if he or she feels that additional information is needed. He or she will give the party concerned an opportunity to supplement or correct the request before taking a decision on its registration.”⁴²

While the information can be supplemented, the Secretary-General is limited as to the materials to which it can have regard, being namely “the information *furnished by the applicant himself*” with the request or in any supplementary communication.⁴³ At this stage, the potential respondent to the proceeding is informed of the request, but need not be heard and any demand made by the potential respondent against registration should not influence the Secretary-General's decision. Unless there are obvious reasons seriously to doubt the plausibility or credibility of the information provided in the request, the Secretary-General should accept *pro tem* the information as alleged by the petitioner and the information on which the petitioner relies, to assess whether, on the basis of the set of facts (again, subject to a test of plausibility or credibility), a tribunal might have jurisdiction.

The Centre sometimes receives formal or informal comments aimed at preventing the registration of a claim either by the potential respondent or by civil society groups.

⁴¹ See, e.g., Schreuer, above n 2, 466.

⁴² Schreuer, above n 2, 466 (footnotes omitted). Schreuer lists the following cases where this type of consultation has taken place prior to registration of the request: *Fedax NV v Venezuela* (ICSID Case No ARB/96/3, Decision on Jurisdiction of 11 July 1997), para. 2; *Olguin v Paraguay* (ICSID Case No ARB/98/5, Award of 26 July 2001), paras. 5, 7; *MTD v Chile* (ICSID Case No ARB/01/7, Award of 25 May 2004), para 3; *Salini v Jordan* (ICSID Case No ARB/02/13, Decision on Jurisdiction of 29 November 2004), para 2; *Compania de Aguas del Aconquija SA and Vivendi Universal SA v Argentina* (ICSID Case No ARB/97/3, Decision on Jurisdiction of 14 November 2005), paras 100-101, and others. For a recent example, see, e.g., *EDF (Services) Ltd v Romania* (ICSID Case No ARB/05/13, Award of 8 October 2009), para. 4.

⁴³ Aron Broches, ‘A Guide for Users of the ICSID Convention’ (1991) 8(1) *News from ICSID* 7 (emphasis in original).

However, according to Martina Polasek, the Centre has never refused to register a request on the basis of an objection from a respondent or, presumably, a third party.⁴⁴ This practice suggests that despite not having a formal process, the Centre considers in good faith arguments aimed at preventing registration, but ultimately makes an independent assessment of jurisdiction for the purpose of registration. This practice is arguably aimed at balancing the potential of undue influence against the registration of a case under the ICSID Convention and differs from the practice of other arbitral institutions where formal procedures give the respondent the opportunity to reply to the request before the case is referred to an arbitral tribunal.⁴⁵

In view of the absence of a formal process, the need for some flexibility to consider arguments aimed at preventing registration can be illustrated with the following example. Ana Palacio, the former Secretary-General of ICSID, referred to the “numerous petitions from civil society organizations and political pressure not to proceed with the registration” in a case brought under the ICSID Convention against Bolivia after Bolivia’s denunciation of the ICSID Convention was notified to ICSID, but before the expiration of the six-month period under Article 71 of the Convention, when the denunciation is deemed to take effect.⁴⁶ When compared to other institutions, the nature of ICSID arbitration, as well as the different stakeholders in ICSID proceedings, warrant maintaining independence while considering the plurality of voices and interests the institution must accommodate and manage. Therefore, an approach that considers in good faith reasonable arguments aimed at preventing registration, even if unsolicited, seems appropriately sensitive.

⁴⁴ Polasek, above n 2, 181 (stating that “ICSID has never refused to register a request on the basis of an objection from a respondent”).

⁴⁵ See for example Article 5(1) and 6(3) of the ICC Rules of Arbitration (2012). The ICC International Court of Arbitration has discretionary authority under Article 6(4) of the ICC Rules of Arbitration (2012) to make a *prima facie* determination on the issue of jurisdiction when jurisdiction is contested. This also contrasts with the position in the case of applications under Rule 41(5) of the ICSID Arbitration Rules; the formulation of Rule 41(5) implies that the Tribunal is not limited as to the materials to which it can have regard in deciding on any objection. In this sense, it differs from Article 36(3) of the ICSID Convention: *Rachel S Grynberg, Stephen M Grynberg, Miriam Z Grynberg, and RSM Production Corporation v Grenada* (ICSID Case No ARB/10/6, Award of 10 December 2010), para 6.1.4.

⁴⁶ Ana Palacio, ‘Recent Institutional Developments’ (2007) 24(2) *News from ICSID* 20.

B. Form of the Documentation Accompanying the Request for Arbitration

As has been noted above, a prospective claimant under the ICSID Convention must provide certain documentation to accompany its request for arbitration.⁴⁷ A failure of the petitioner to include with the request for arbitration evidence of, for example, the written consent to ICSID's jurisdiction, could result in the Secretary-General's conclusion that the dispute is manifestly outside the jurisdiction of the Centre.⁴⁸

The Secretary-General has demonstrated flexibility on the requirement contained in Rule 4(2) of the Institution Rules that the documents attached to the request must be furnished by the prospective claimant in one of the official languages of the Centre.⁴⁹ For instance, even if the translation is deficient, the Centre may still decide to register the case. For example, in *SPP v Egypt*, the ICSID Tribunal that decided the case observed that the Secretary-General had registered the request although he had reached the conclusion that the English translation of the instruments which were put forward as the basis for the Centre's jurisdiction (namely, Egyptian Law No 43 of 1974) did not adequately reflect the Arabic text. As Schreuer reports, "[t]he tribunal undertook a detailed analysis of the Arabic original of this text on the basis of which it found that it had jurisdiction."⁵⁰

C. Obligation to Register a Request as Soon as Possible unless the Dispute is "Manifestly outside the Jurisdiction of the Centre"

A third feature of Article 36(3) consistent with the Secretary-General's practice is that when exercising his or her functions under Article 36(3), the Secretary-General is

⁴⁷ See Part I(B).

⁴⁸ Polasek writes that if a request for arbitration requires clarification in order to pass the threshold for registration, the requesting party will be invited to clarify relevant issues, supplement the request or respond to specific questions of the Centre: Polasek, above n 2, 182. This would arguably be the case if evidence of consent was missing.

⁴⁹ ICSID Institution Rules, Rule 4(2); see also ICSID Administrative and Financial Regulations, Reg 30(3); and Schreuer *et al*, above n 2, 470.

⁵⁰ Schreuer *et al*, above n 2, 470. The *SPP v. Egypt* case was initiated on the basis of consent to ICSID arbitration expressed in an Egyptian Law for the encouragement and protection of investment. The then Secretary-General had doubts about the applicability of the Law to the investment in question, but allowed the matter to proceed to arbitration. The issue of jurisdiction was resolved in favour of the claimant: *SPP v. Egypt* (ICSID Case No ARB/84/3, Decision on Jurisdiction of 14 April 1988).

obliged, as soon as possible, to register the request or notify the parties of the refusal.⁵¹ The Secretary-General must proceed to registration or refuse to register and cannot postpone registration. However, in special circumstances, according to Polasek, the Centre may grant a short delay to act on the request.⁵² It is unclear when the Centre would grant such a delay. Arguably, if the delay is triggered by a procedural rule that must be satisfied by claimants before initiating arbitration such as the requirement to furnish evidence that all the necessary internal actions to authorize the request had been taken by a juridical person, the Secretary-General would delay the registration for a short period of time until the procedural rule is satisfied.⁵³ However, as discussed further below, if the delay is requested to satisfy a condition of jurisdiction such as a cooling-off period, the Centre will not grant a delay to act on the request.

The adoption of a negative formulation in Article 36(3), i.e., “[t]he Secretary-General shall register the request unless ...”, has been considered to imply that the Secretary-General has a general obligation to register.⁵⁴ This is corroborated by the requirement that any refusal to register must be made on the basis that the dispute is “*manifestly*” outside the jurisdiction of the Centre. The practice of the Centre seems in line with the drafting history of the Convention, where Mr Broches stated that the Secretary-General’s power to refuse registration “would apply where there was not the slightest doubt that the party was in bad faith or misinformed.”⁵⁵ Consistent with this view, in the Notes published with the first edition of the ICSID Regulations and Rules, “*manifest*” is understood as meaning “beyond reasonable doubt” that the Centre has no jurisdiction, “whatever evidence or argument may be produced subsequently”.⁵⁶ A clear instance of the application of the “beyond reasonable doubt” test can be seen in the Secretary-

⁵¹ ICSID Convention, Art 36(3). See also Rule 6(1) of the Institution Rules.

⁵² See Polasek, above n 2, 185.

⁵³ Institution Rules, Rule 2(1)(f) & 2(2).

⁵⁴ *History of the Convention*, above n 14, 775. Mr. Tsai, the delegate from China noted that during the drafting the modification of the article changed the entire “picture” of the registration process. Under the first draft the requesting party had the burden “to prove [to] the satisfaction of the Secretary-General that there was a *prima facie* case. Now the burden of proof [is] on the Secretary-General to prove that the case [is] outside of the jurisdiction of the Centre.”

⁵⁵ *Ibid*, 772.

⁵⁶ Note C to ICSID Arbitration Rule 6 in ICSID Regulations and Rules, Doc. ICSID/4/Rev. 1(1968).

General's approach in *Plama Consortium Ltd v Bulgaria*, where the Secretary-General stated in a letter dated 4 June 2003 that:

“... I have carefully studied the request for arbitration and all of the related correspondence and documents that we have received from the Republic of Bulgaria and from Plama Consortium Limited. I do not find with the required degree of certainty (“beyond reasonable doubt”) that the request is unregistrable under the provisions of the Energy Charter Treaty. I must therefore register the request under those provisions. The formal notice of registration will shortly be sent to the parties.”⁵⁷

Sutton adds that “a manifest absence of jurisdiction means one that could not conceivably be cured by any evidence or argument.”⁵⁸ For Professor Schreuer this standard means “easily recognizable”.⁵⁹ He gives the following examples of where the dispute would be manifestly outside the jurisdiction of ICSID:

“This would be the case if neither party is a Contracting State or a duly designated subdivision or agency of a Contracting State or if neither party is a national of a Contracting State. It would also be the case if there is no showing of a written consent to jurisdiction.”⁶⁰

But if there is the “slightest doubt”, the Secretary-General “should ... register the request and leave the decision as to jurisdiction to the arbitral tribunal.”⁶¹ In other words, where a tenable argument exists for as well as against registration of the request, it cannot be said that the dispute is “manifestly” outside the Centre’s jurisdiction, and therefore the Secretary-General must register the request for arbitration.

⁵⁷ *Plama Consortium Ltd v Bulgaria* (ICSID Case No ARB/03/24, Decision on Jurisdiction of 8 February 2005), para 232.

⁵⁸ Sutton, above n 4, p. 121.

⁵⁹ Schreuer, above n 2, 470.

⁶⁰ *Ibid.*

⁶¹ Aron Broches, *Selected Essays: World Bank, ICSID and Other Subjects of Public and Private International Law* (1995), 437.

D. The Decision only Concerns the Formal Requirements of Jurisdiction

A related question concerns the Centre's task in assessing the request. The Secretary-General makes the decision to register considering both the Convention's jurisdictional requirements as well as the criteria for jurisdiction in the investment instrument concerned. This entails a double review of the criteria for coverage of the parties and the dispute, first from the viewpoint of the ICSID Convention and then from the viewpoint of the instrument containing the consent, whether it be an investment treaty, a contract or domestic legislation.⁶²

The jurisdiction of the Centre is dealt with in Articles 25 to 27 and 36(2) of the ICSID Convention, as further amplified in the Institution Rules, the requirements of which have been set out above. The investment instruments will certainly differ, but they may restrict the consent to arbitration by, for example, requiring the exhaustion of local or administrative remedies in accordance with Article 26 of the Convention or limiting the class or classes of disputes which it would consider submitting to the jurisdiction of the Centre under Article 25(4).⁶³

In analysing whether a claim is “manifestly outside the jurisdiction of the Centre” the Secretary-General considers certain formal requirements, which are considered in the following paragraphs.

1. Whether the Parties Have Given their Consent to ICSID Arbitration

The consent of the parties – whether generalized or included in an investment contract – is the cornerstone of the jurisdiction of the Centre. The request must indicate the date of consent and provide evidence of the instruments in which consent is recorded. If the case involves a constituent subdivision or agency of the Contracting Party designated to the

⁶² Antonio Parra, ‘The Institution of ICSID Arbitration Proceedings’ (2003) 20(2) *News from ICSID* 12.

⁶³ It should be added, however, that a notification under Article 25(4) is not interpreted as a reservation to the ICSID Convention. Notifications under Article 25(4) are “for information purposes only and are designed to avoid misunderstandings”: Schreuer, above n 2, 343-344.

Centre by that State the request should also including details of consent with respect to that potential respondent. If evidence of consent is manifestly lacking, the Secretary-General will refuse to register the request.

In at least one case, the relevant State agency which was the respondent of the purported claim had not been designated to ICSID. Accordingly, the Secretary-General refused the registration for manifest lack of consent.⁶⁴ On another occasion, at the time of filing the request for arbitration, the cooling-off or negotiation period under the investment treaty had not been satisfied. In this case, the dispute was considered by the Secretary-General to be manifestly outside the jurisdiction of the Centre in spite of the claimant's request to register the request on the date when the condition became satisfied.⁶⁵ As Polasek explains, the Secretary-General must proceed to registration or refuse to register "as soon as possible", which means that ICSID cannot postpone registration until a particular claim is ripe.⁶⁶ However, if a claimant files a request relying on a treaty-based most-favoured-nation ("MFN") clause to import the provisions that the host State has included in a treaty entered into with a third State the Centre will most likely register the claim (again, subject to a test of plausibility).⁶⁷

Given the different views on this issue, such a decision to register would be most sensitive. One contentious issue in the scope of investor-State dispute settlement provisions in investment treaties is the effect of MFN clauses, and the extent to which such clauses can be used by a claimant to take advantage of a more favourable investor-State dispute settlement clause in another investment treaty. In these situations, as in general cases of absence of proof of explicit consent to arbitration, it may be a delicate task to determine that consent is incorporated by reference to another treaty. Hence, these issues, for the most part, have been left by the Centre to the jurisprudence of ICSID tribunals. The legal analysis may be complex, and whether an MFN clause is deemed to encompass ICSID arbitration arguably raises issues which are not properly disposed of in

⁶⁴ Polasek, above n 2, 188.

⁶⁵ Ibid, 185.

⁶⁶ Ibid, 185.

⁶⁷ Ibid, 184 (arguing that this should be the case "unless it manifestly evident that the MFN argument is not applicable").

the Article 36(3) screening process. Thus, as long as an investment treaty refers to ICSID arbitration of disputes and both treaties deal with the protection of investment, it is not for the Secretary-General to interpret the scope of the MFN clause – provided that the reference may indeed be read, to the Secretary-General’s satisfaction, as the manifestation of consent to the arbitral mechanism invoked.

Notably, what can be inferred from the refusals reported by Polasek is that the consent to arbitration has a *ratione temporis* element for the purpose of registration. At least one purpose of establishing time limit requirements at this stage is to prevent investors from instituting proceedings without allowing the State an opportunity to resolve the dispute amicably. This explains the requirement in the Institution Rules of asking prospective claimants to indicate the date of the consent and provide evidence of the instrument where it is recorded.⁶⁸ However, other matters – such as whether a dispute can be brought after the denunciation of the ICSID Convention but before the six-month expiration term, or whether ICSID arbitration should apply only to disputes arising after the entry into force of a treaty – are issues *ratione temporis* which may be quite complex and should appropriately be left to determination by arbitral tribunals.⁶⁹

2. *Whether there is a Legal Dispute which Arises Directly out of an Investment*

The jurisdiction of the Centre is limited to legal disputes arising directly out of an investment. These elements circumscribe the scope of application of the Centre’s jurisdiction *ratione materiae*. The Report of the Executive Directors makes clear that the jurisdiction of the Centre is not open to “mere conflicts of interests” and “must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.”⁷⁰ Moreover, the report adds that “[n]o attempt was made to define the term ‘investment’”.⁷¹ Thus, three analytically distinct jurisdictional elements (*ratione materiae*) can be identified: (i) the existence of a

⁶⁸ Institution Rules, Rule 2(2).

⁶⁹ *Empresas Lucchetti SA v Peru* (ICSID Case No ARB/03/4, Award of 7 February 2005), paras. 54-62.

⁷⁰ Report, above n 9, para. 26.

⁷¹ *Ibid*, para. 27.

legal dispute; (ii) the existence of an investment; and (iii) the directness of the relationship between the legal dispute and the investment.

The first of these issues – the question of the existence of a legal dispute – should not be a difficult requirement to meet. The Permanent Court of International Justice (“PCIJ”), as well as the International Court of Justice (“ICJ”), have observed that a legal dispute is “a disagreement on a point of law or fact, a conflict of legal views or interest between two persons” or as a situation in “which two sides hold clearly opposite views concerning the question of the performance or non-performance” of a legal obligation.⁷² ICSID Tribunals have adopted similar descriptions of “disputes”, often relying on the PCIJ’s and ICJ’s definition.⁷³

It is clear that ICSID Tribunals have the power to determine the extent of their jurisdiction, or *compétence de la compétence*.⁷⁴ Thus, it would be wrong for the Secretary-General to make *ex ante* determinations that neutralise the functions of an arbitral tribunal based on the lack of legal dispute. This means that it is unlikely that the Secretary-General would refuse to register a case on this ground. There has only been one occasion on which the Centre received a request for arbitration that did not clearly indicate the legal basis of the dispute it sought to submit to the Centre. In this case, as reported by Alejandro Escobar:

“[T]he request for arbitration alleged that the respondent State had increased logging levies, thereby upsetting the claimant’s expectations under a logging concession. The

⁷² See, e.g., *Mavrommatis Palestine Concessions (Greece v United Kingdom)*, Ser A, (No 2), 11 (PCIJ, 1924); *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion)* [1950] ICJ Rep 65, 74; *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* [1962] ICJ Rep 319, 328; *East Timor (Portugal v Australia)* [1995] ICJ Rep 90, 99-100; for the ICJ’s most recent discussion of what constitutes a “dispute”, see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) (Preliminary Objections)*, (Judgment of 1 April 2011), paras 29-30. Christoph Schreuer has concluded that arguments attempting to deny the existence of a dispute have hardly ever succeeded: Christoph Schreuer, “What is a Legal Dispute?” (2009) 1 *Transnational Dispute Management*, 21, also available at <www.univie.ac.at/intlaw/wordpress/pdf/95.pdf> (last accessed 23 January 2012).

⁷³ Schreuer, “What is a Legal Dispute?”, above n 72, 2.

⁷⁴ ICSID Convention, Art 41(1); see generally Chester Brown, “The Inherent Powers of International Courts and Tribunals” (2005) 76 *British Yearbook of International Law* 195.

request did not cite a relevant legal provision. In fact, the concession contract attached to the request specifically provided that logging levies could be increased. The Secretariat asked the requesting party for clarification on this point, but the request was not pursued and was eventually withdrawn.”⁷⁵

While likely advancing an unmeritorious claim, the request in this example could not be considered *manifestly* outside of the jurisdiction of ICSID. Therefore, it was wise of the Secretary-General to take some precautions and ask for clarification on this point before making a final decision (which, in this case, was ultimately not necessary). Other examples of requests that may face similar responses from ICSID would include requests which fail to indicate the disagreement between the claimant and the respondent State. Failure to clarify these questions to the Secretary-General’s satisfaction may render the request *manifestly* outside of the jurisdiction for lack of a legal dispute.

Second, the Secretary-General has analysed, for the purpose of satisfying her or his authority under Article 36(3), which type of economic activity qualifies as an “investment” under the Convention. As is well known, the ICSID Convention offers no definition of the term “investment”, nor does the Convention attempt to introduce any notion of what should be considered an investment for the jurisdiction of the Centre.⁷⁶ This unrestricted reference to investment means that ICSID doors were left open to any “plausibly economic activity or asset”.⁷⁷ As explained by Ibrahim Shihata:

“The absence of a clear definition of the notion of investment in the ICSID Convention, deplored by certain commentators, has, in effect, been a wise precaution. It permits the Convention to be adapted to changes in the form of cooperation between investors and host States and to respond to the needs of ICSID users.”⁷⁸

⁷⁵ Alejandro Escobar, ‘International Centre for Settlement of Investment Disputes: 2.5 Jurisdiction *Ratio Materia*’, in UNCTAD, *Dispute Settlement* (2003), 9-10, available at <www.unctad.org/en/docs/edmmisc232add4_en.pdf> (last accessed 23 January 2012).

⁷⁶ Report, above n 9, para 27.

⁷⁷ Julian Davis Mortenson, “The Meaning of ‘Investment’: ICSID’s *Travaux* and the Domain of International Investment Law” (2010) 51 *Harvard International Law Journal* 257, 260.

⁷⁸ I. Shihata, *ICSID Annual Report* (1984), 9.

The practice of ICSID suggests that the Secretary-General has generally adopted a broad interpretation of the term “investment” for the purpose of registration. According to Polasek, registration has been refused in two instances due to the absence of an “investment”.⁷⁹ In one case, being a claim submitted by Asian Express International against Greater Colombo Economic Commission, the Secretary-General refused the registration of a case involving a supply contract for the sale of goods.⁸⁰ Similarly, the ICSID Secretary-General refused registration of a request of another dispute arising out of a supply contract for the sale of goods. The Secretary-General found that the transaction manifestly could not be considered an “investment” and, therefore, that the dispute was manifestly outside the jurisdiction of the Centre.⁸¹ According to Polasek, the registration is likely to be refused only in “circumstances where the investment is a simple commercial transaction that clearly falls outside the broadest interpretation identified by ICSID jurisprudence.”⁸²

Without more information about these two instances where requests have been rejected, or what the Centre understands by the term “simple commercial transaction”, it is not possible to give a clear indication as to the threshold for a transaction to be considered an “investment” for registration purposes, although of course this is a fact-intensive inquiry which requires the facts and circumstances of each case to be considered carefully. However, it is unlikely that all disputes involving supply contracts for the sale of goods would be suitable for cursory rulings at the point of registration.⁸³ The Centre itself has acknowledged in the past that in regard to transactions relating to the supply of services, the exact nature of the transaction is not always apparent at the outset, and may fit either category. Given the different views on this issue, it is difficult to conclude that a dispute

⁷⁹ Polasek, above n 2, 188.

⁸⁰ Ibrahim Shihata reported in the ICSID Annual Report of 1985 that: “[t]he Secretary-General found that the dispute [submitted by Asian Express International against Greater Colombo Economic Commission] was ‘manifestly outside the jurisdiction of the Centre’”: Ibrahim Shihata, *ICSID Annual Report* (1985), 6. See also (1984) 1(2) *News from ICSID* p. 6.

⁸¹ Reported in Ibrahim Shihata and Antonio Parra, “The Experience of the International Centre for Settlement of Investment Disputes” (1999) 14 *ICSID Review – Foreign Investment Law Journal* 299, 308, fn 27.

⁸² Polasek, above n 2, 188. Under Article 4(3) of the Additional Facility Rules proceedings may not be instituted with respect to “ordinary commercial transactions”. However, the rules do not define this term.

⁸³ See especially *Malaysian Historical Salvors Sdn Bhd v Malaysia* (ICSID Case No. ARB/05/10, Decision on Annulment of 19 April 2009), para. 69.

arising out of a supply contract will be “manifestly outside the jurisdiction of the Centre” in all cases.⁸⁴ Thus, whether supply contracts can be categorized as investments for the purpose of the Convention should, in principle, be left for a tribunal deciding on its competence under Article 41 of the Convention.⁸⁵

The third issue concerns the role of the Secretary-General in deciding if the dispute arises directly out of an investment. This is often referred to as a requirement that a reasonable proximity of the dispute to investment is shown.⁸⁶ Requests that show that the dispute is only “peripherally or indirectly linked to an investment operation” will not fall within ICSID’s jurisdiction.⁸⁷ Aron Broches remarked that proximity is an independent question that shall be assessed during the registration process.⁸⁸ This was illustrated by the Secretary-General in a refusal where the Centre decided that a particular “dispute did not arise directly out of [a] transaction that could be regarded as an investment (e.g., ownership of equity in the company party to the contract).”⁸⁹ The same distinction was made by the ICSID Tribunal in *Amco Asia v Indonesia*, which decided that a dispute not arising directly out of any other transaction that could be regarded as an investment would be outside the jurisdiction of the Centre.⁹⁰

3. Nationality of the Parties to the Dispute

The requirement of the nationality of the parties to the disputes creates three main elements which the Secretary-General analyses as part of her screening function: (a) the

⁸⁴ Georges Delaume, “ICSID and the Courts” (1984) 1(1) *News from ICSID* p. 8: “[I]t must be acknowledged that, particularly in regard to transactions relating to the supply of services, the exact nature of the transaction is not always apparent at the outset. Marginal cases falling between investments proper and commercial ventures are not rare and may fit either category.”

⁸⁵ See for example, *Jan de Nul v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Decision on Jurisdiction, of 16 June 2006); *Joy Mining Machinery Equipment Ltd v Arab of Republic of Egypt* (ICSID Case No ARB/03/11, Award on Jurisdiction of 6 August 2004); *Salini Costruttori SpA v Kingdom of Morocco* (ICSID Case No ARB/00/4, Decision on Jurisdiction of 23 July 2001).

⁸⁶ Escobar, above n 75, 11.

⁸⁷ Ibid.

⁸⁸ Broches, above n 59, 168-170.

⁸⁹ Escobar, above n 75, 17.

⁹⁰ *Amco Asia v Indonesia* (ICSID Case No ARB/81/1 (Resubmitted Case), Decision on Jurisdiction of 10 May 1988), 1 ICSID Reports 543, 565, paras 125-127 (concluding that the dispute “was not specially contracted for in the investment agreement and does not arise directly out of the investment.”)

State party named in the request has to be a Contracting State; (b) in the case of a constituent subdivision or agency, the consent to the Centre's jurisdiction shall be approved by the State to which it belongs under Article 25(3) of the ICSID Convention; and (c) in order to gain access, the claimant needs to be a party to the dispute, and, in the case of a claim under an investment treaty, must qualify as a covered national of the other State party to that treaty.

At the stage of registration, the first two elements would appear to be relatively uncontroversial and require only limited analysis. In at least one case, the Secretary-General refused to register claims involving a constituent subdivision or agency of a contracting State because it was not approved by the State as Article 25(3) requires and the State had failed to designate the constituent subdivision or agency under Article 25(1).⁹¹ In *Perenco Ecuador Limited v. Republic of Ecuador et al*, the Secretary-General registered a claim against Petroecuador, a company not formally designated under Article 25(1). In this case however, Petroecuador was the successor to the Corporación Estatal Petrolera Ecuatoriana, a company that had been officially designated (and never 'undesignated') by Ecuador.⁹²

More analysis is however required in order to establish whether the claimant satisfies the nationality requirements. First, the Secretary-General is required to consider two questions, namely: (i) whether the claimant is a party to the dispute; and (ii) whether the claimant satisfies the nationality requirements. This distinction derives from Rule 2(1) that lists these as two separate requirements, in part to reflect the complexities if the petitioner is a juridical person.⁹³ The Convention distinguishes between a natural person and a juridical person.⁹⁴ The latter type of person will qualify as a national of a Contracting State through its place of incorporation or seat of business, or will possess the host State's nationality and still qualify as a national of another Contracting State

⁹¹ Polasek, above n 2, 188.

⁹² *Perenco Ecuador Limited v. Republic of Ecuador et al* (ICSID Case No. ARB/08/6, Decision on Jurisdiction of 30 June 2011), para. 232. Ecuador challenged the jurisdiction of the Tribunal on the basis of Article 25(1). The Tribunal found that it lacked jurisdiction over Petroecuador on a different basis, and therefore did not consider it necessary to address this issue.

⁹³ Institution Rules, Rule 2(1)(a) & (d).

⁹⁴ ICSID Convention Art 25(2).

under an exception contained in Article 25(2)(b), which is discussed below. In this case, the claimant will be required to furnish supporting documentation to satisfy the elements of nationality.

Second, to satisfy the nationality requirements the claimant has to fulfil a “positive” and “negative” requirement. To satisfy the “positive” requirement for purposes of Article 36(3), claimants are required to indicate that they are nationals of a Contracting State or furnish evidence that they should be treated as a national of another Contracting State for the purposes of the Convention.⁹⁵ Under Article 25(2)(b), a legal person which had the nationality of the State party to the dispute would be eligible to bring a claim to ICSID if that State had agreed to treat it as a national of another Contracting State because of “foreign control”.⁹⁶ Thus, if the Secretary-General decided on the basis of the information provided in the request for arbitration that the claimant was not under foreign control, she or he may refuse to register the case for not satisfying the positive requirement of nationality.

There is no reported instance of a refusal on this basis. The determination would certainly need to be made on the facts of each case, and it would be difficult to deny registration for lack of control. The Convention does not contain a definition of “control” and ICSID jurisprudence on this point is not clear. In any event, for the purpose of registration, the Centre should also look closely to the investment instrument and in the absence of a manifest indication that the claimant lacks the claimed nationality, the Secretary-General should register the request.

To satisfy the “negative” requirement, claimants must not have the nationality of the host State.⁹⁷ At least in one case, the Secretary-General has decided that there was manifestly no dispute between a Contracting State and a national of another Contracting State after

⁹⁵ Ibid, Art 25(2), and Institutional Rules, Rule 2.

⁹⁶ See *Perenco Ecuador Limited v. Republic of Ecuador et al* (ICSID Case No. ARB/08/6, Decision on Jurisdiction of 30 June 2011), para. 70. The Tribunal also concluded that Article 25(2)(b) of the ICSID Convention “provides a means for parties to agree that a national of a State that ordinarily could not bring an international claim against its own State would be granted standing under the Convention.”

⁹⁷ Ibid.

an aggrieved individual declared to be a national of the two States parties to the bilateral investment treaty concerned.⁹⁸ Article 25(1) of the ICSID Convention expressly disallows the jurisdiction of the Centre to any person who had the nationality of the Contracting State party to the dispute. Hence, a dispute involving a person who has the nationality of the Contracting State party to the dispute would be considered manifestly outside the jurisdiction of the Centre.

III. ADDITIONAL ASPECTS OF THE “SCREENING POWER”

A. Applicable Test for Claims under the ICSID Additional Facility

Article 36(3) only applies to cases brought under the ICSID Convention. However, in cases under the Arbitration (Additional Facility) Rules (“the Additional Facility Rules”), Article 4 requires registration “as soon as” the Secretary-General has “satisfied himself that the request conforms in form and substance to the provisions of Article 3”. Article 3 requires that one of the matters as to which the Secretary-General must be “satisfied” with respect to both “form and substance” is that the request has set out, *inter alia*, “provisions embodying the agreement of the parties to refer the dispute to arbitration.”

Neither Article 36(3) of the ICSID Convention nor Rule 6 of the Institution Rules contains the requirement of Article 4 of the Additional Facility Rules. The view might be put that it is easier for a claimant to satisfy the test of the request for arbitration being “manifestly outside” the jurisdiction of ICSID, than it is to “satisfy” the Secretary-General as to “form and substance” concerning the matters listed in Article 3 of the Additional Facility Rules. Moreover, under the Additional Facility Rules the Secretary-General has the power to “approve” an alleged agreement to arbitration “only if” the requirements are met.⁹⁹ In other words, the Secretary-General has plenary authority to

⁹⁸ Parra, “The Institution of ICSID Arbitration Proceedings”, above n 62, 13.

⁹⁹ Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (“Additional Facility Rules”), 2006. Article 4(2) “In the case of an application based on Article 2(a), the Secretary-General shall give his approval only if (a) he is satisfied that the requirements of that provision are fulfilled at the time, and (b) both parties give their consent to the jurisdiction of the Centre under Article 25 of the Convention (in lieu of the Additional Facility) in the event that the jurisdictional

verify the existence of consent to submit a dispute to arbitration under the Additional Facility Rules.

In *Nova Scotia Power Incorporated (Canada) v Bolivarian Republic of Venezuela*, a Tribunal interpreted these provisions and considered that the Secretary-General of ICSID should reject applications for approval under Article 4(2) of the Additional Facility Rules only if she “determines that the dispute is manifestly outside the scope of the Additional Facility (applying by analogy the criteria laid down in Article 36(3) of the Washington Convention to refuse registration of a normal ICSID arbitration), and allows all other cases decided by the arbitrators, as a matter of admissibility or competence.”¹⁰⁰ This seems to be a debatable reading of this provision since, as explained, Article 4(2) of the Additional Facility Rules allows a conceivable inference of purely discretionary rejection, whereas under Article 36(3) of the ICSID Convention, the power of the Secretary-General is restricted by the negative formulation of the provision, which requires registration of the request *unless* she is convinced that the request is manifestly outside the jurisdiction of ICSID.

The distinct language in the Additional Facility Rules and the ICSID Convention referred to above may also expose a fundamental difference between arbitration under the Additional Facility Rules and arbitration under the ICSID Convention which merits some consideration here. The self-contained and delocalized enforcement scheme shelters awards rendered under the ICSID Convention from the scrutiny of national courts. However, it is inherent in the Additional Facility mechanism that subsequent control may vest in national courts. Therefore, in Additional Facility cases, the Secretary-General’s authority to verify to her satisfaction, for example, the existence of consent responds to the need to discharge an important duty of control to prevent, for example, the exposure of the institution if jurisdiction is contested in a set-aside proceeding.

requirements *ratione personae* of that Article shall have been met at the time when proceedings are instituted.”

¹⁰⁰ *Nova Scotia Power Incorporated (NSPI) v Bolivarian Republic of Venezuela* (Award on Jurisdiction of 22 April 2010) para. 133.

B. Form and Effect of the Secretary-General's Decision

If the relevant information and accompanying documentation demonstrate that the formal requirements of jurisdiction are satisfied, and the lodging fee has been paid, the Secretary-General is obliged to register the request.¹⁰¹ The registration shall be notified to the parties on the same day.¹⁰² In the case of refusal, the Secretary-General has to notify the parties of the reasons therefor.¹⁰³ Although nothing in the rules requires the Secretary-General to notify a refusal in writing, a decision not to register is likely to be controversial. As a matter of good practice, the Secretary-General states the reasons upon which the decision is based in writing, leaving no hint of arbitrariness and opacity.

There is no recourse against a decision refusing to register the request. However, the decision is without prejudice to the right of the requesting party to re-submit the request to the Centre should the reasons for non-registration no longer be applicable.¹⁰⁴ In other words, the decision of refusal to register does not have *res judicata* effect.

The registration of a request triggers a number of consequences. Among others, the proceedings are formally instituted from the date of registration,¹⁰⁵ and the tribunal is to be constituted “as soon as possible” after that date.¹⁰⁶ More importantly, the date of registration may be very relevant to determine an element of jurisdiction, such as the nationality of the investor at the time of the institution of the proceeding. However, the decision to register a request for arbitration does not, in any way, bind the tribunal in its determination of competence. In *AMT v Zaïre*, the tribunal noted the registration of the request in accordance with Article 36(3), and said that the registration:

“does not prevent the Tribunal from examining the competence of ICSID because, evidently, article 36(3) does not confer upon the Secretary-General of ICSID responsible

¹⁰¹ In practice, the Secretary-General would only assess whether or not a claim is registrable after the lodging fee is paid.

¹⁰² Institution Rules, Rule 6(1)(a).

¹⁰³ Ibid, Rule 6(1)(b).

¹⁰⁴ Polasek, above n 2, 185.

¹⁰⁵ Institution Rules, Rule 6(2).

¹⁰⁶ ICSID Convention, Arts 37 and 38.

for the registration of Request, notably as concerns verification of the competence of the Centre, the task other than a mere obligation of an extremely high control which in the execution does not in any sense bind the Tribunal in any way in the latter's appreciation of its own competence or lack thereof."¹⁰⁷

On several occasions the Centre has had the opportunity to clarify the limits and the nature of the registration decision. For example, one of the main amendments of the Institution Rules in 2003 was to add, in Rule 7, the requirement that notices of registration include a reminder to the parties that the decision was without prejudice to the powers and functions of the tribunal in regards to jurisdiction or the merits.¹⁰⁸ The amendments to the ICSID Arbitration Rules, the Additional Facility Rules and the Administrative and Financial Regulations of 2006 also discussed the limits of the finding of the Secretary-General. An ICSID Discussion Paper of 22 October 2004 states that if the Secretary-General of ICSID refuses to register the request, "the case will proceed no further."¹⁰⁹ But ICSID noted in the Discussion Paper that the screening power does not extend "to the merits of the dispute or to cases where jurisdiction is merely doubtful but not manifestly lacking."¹¹⁰

Finally, the Secretariat is also powerless to prevent the initiation of proceedings that clear this jurisdictional threshold, but are frivolous as to the merits.¹¹¹ In such cases, as the ICSID Discussion Paper noted, "the request for arbitration must be registered and the

¹⁰⁷ *AMT v Zaire* (ICSID Case No. ARB 93/1, Award of 21 February 1997), paras. 5.01.

¹⁰⁸ Parra, "The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes", above n 30, at 63 (according to Parra this was an amendment codifying the practice of the Secretariat.)

¹⁰⁹ ICSID Secretariat, 'Possible Improvements of the Framework for ICSID Arbitration' (Discussion Paper of the ICSID Secretariat of 22 October 2004), para 9, available at <www.worldbank.org/icsid> (last accessed 23 January 2012).

¹¹⁰ *Ibid.*

¹¹¹ Prior to the adoption of the new Rule 41(5), this was a source of recurring complaints from some respondent governments giving rise to a provision for the early dismissal by arbitral tribunals of claims "manifestly without legal merit". This important innovation "allows a party to request the tribunal, at an early stage in the proceeding, to dismiss all or part of a claim on an expedited basis", on the grounds that the claim is "manifestly lacking in legal merit", even though it has been registered by the ICSID Secretary-General. In his assessment of the new provision, Antonio Parra, the former Deputy Secretary-General of ICSID, opined that it provides for the early dismissal of "frivolous" or "patently unmeritorious claims": Parra, "The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes", above n 30, 56.

parties invited to proceed to constitute the arbitral tribunal.”¹¹² Once the tribunal is constituted, it may then dismiss the claim summarily under Rule 41(5) of the ICSID Arbitration Rules, find that it has no jurisdiction or dismiss or uphold the claim on the merits.¹¹³

C. Relationship between Article 36(3) of the Convention and Rule 41(5) of the Arbitration Rules

Finally, the power of the Secretary-General to refuse to register a request for arbitration is limited to the issue of the jurisdiction of ICSID, and it does not permit the merits of the dispute to be taken into account.¹¹⁴ In contrast, Rule 41(5) of the ICSID Arbitration Rules is broader in that it permits other issues to be considered by an arbitral tribunal in deciding whether the claim is “manifestly without legal merit”; an objection under Rule 41(5) can be made either with respect to the jurisdiction of the Tribunal or the merits of the claim.¹¹⁵

CONCLUSIONS

Some observers have questioned whether all countries have fully grasped the implication of participating in the ICSID system and have called for a more restrictive approach when determining the existence of jurisdiction under ICSID.¹¹⁶ Other observers have noted that it is becoming more difficult to persuade the Secretary-General to register a request for arbitration and that the Secretary-General has reinterpreted the screening powers.¹¹⁷ At least when it comes to the screening power of the Secretary-General, the authors can

¹¹² ICSID Discussion Paper, n 109.

¹¹³ *Ibid.*

¹¹⁴ Antonietti, above n 3.

¹¹⁵ *Brandes Investment Partners LP v Venezuela* (ICSID Case No ARB/08/3, Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules of 2 February 2009) paras 50-55; *Global Trading Resource Corporation and Globex International, Inc v Ukraine* (ICSID Case No ARB/09/11, Award of 1 December 2010) (‘*Global Trading*’) para 30; *Rachel S Grynberg, Stephen M Grynberg, Miriam Z Grynberg, and RSM Production Corporation v Grenada* (ICSID Case No ARB/10/6, Award of 10 December 2010), para 6.1.1; see further Brown and Puig, above n 3.

¹¹⁶ See, e.g., Sébastien Manciaux, “The Notion of Investment: New Controversies” (2008) 9 *Journal of World Investment and Trade* 443, 445–47.

¹¹⁷ Sutton, above n 4, 126.

express some scepticism of both arguments. The first view is simply inapplicable in the context of Article 36(3), as the Secretary-General's role is not to seek to mitigate the unanticipated consequences of States entering into investment treaties, and it also fails to appreciate the Secretary-General's power to refuse registration, which only applies where there is not the slightest doubt that jurisdiction is lacking. The second is simply not consistent with the practice of ICSID as revealed by the reported decisions to refuse to register a request for arbitration under the ICSID Convention; 13 decisions refusing to register requests for arbitration over a period of 45 years – in which 372 cases have been registered – does not suggest that the Secretary-General has taken an unnecessarily strict approach.¹¹⁸

The Secretary-General's practice in applying Article 36(3) highlights the importance but also the diligence that the Secretary-General has applied in the registration process. Moreover, the practice reveals the wisdom of including a limited screening power in the Convention and the importance of reserving the difficult and complex questions of jurisdiction to the arbitral tribunals.

¹¹⁸ According to the ICSID website, there are 142 cases currently pending before ICSID tribunals, and 230 cases have been concluded: <www.worldbank.org/icsid> (last accessed 25 January 2012).