



**Energy Charter Secretariat: Executive Training Programme**

**Dispute Settlement  
Conduct of the proceedings**

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## Introduction

- Investor-State Dispute Settlement (“**ISDS**”) is becoming increasingly important.
  - The overall number of known treaty-based ISDS cases reached 514 in 2012 and 95 countries have responded to one or more such cases;
  - 58 new ISDS cases are known to have been initiated in 2012 => the highest number of treaty-based disputes filed in a single year;
  - Of those 58 new disputes 39 were filed with the International Centre for Settlement of Investment Disputes (“**ICSID**”)

» Source: UNCTAD ‘Recent Developments in ISDS’, May 2013.

## Terms of Reference (ICSID)

### Contents of the [arbitration] Request

The request shall:

- (a) designate precisely each party to the dispute and state the address of each;
- (e) contain information concerning the issues in dispute indicating that there is, between the parties, **a legal dispute arising directly out of an investment**; and
- (f) state, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request.

» Source: Rule 2 - *Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the Institution Rules) of ICSID*

## DSG Terms of Reference

### § 2. 1 Initiation of Arbitration Proceedings

- Arbitration commences by means of a request for arbitration sent to the Secretary-General. A request must contain *inter alia*: (1) information concerning the issues in dispute; (2) identity of the parties; (3) their consent to arbitration. A claimant must observe the procedural requirements contained in the parties' arbitration agreement or document containing consent. **The Secretary-General will refuse to register the request if s/he finds that the dispute is manifestly outside its jurisdiction.** Once registered, the Secretary-General will notify the parties of the registration on the same day.

## Written and Oral Procedures (ICSID)

### Normal Procedures

- Except if the parties otherwise agree, the proceeding shall comprise two distinct phases: a written procedure followed by an oral one.
  - » Source: Rule 29 - *Rules of Procedure for Arbitration Proceedings (the Arbitration Rules) of ICSID*

## Exchange of Written Pleadings (ICSID)

### The Written Procedure

- (1) In addition to the request for arbitration, the written procedure shall consist of the following pleadings, filed within time limits set by the Tribunal:
  - (a) a memorial by the requesting party;
  - (b) a counter-memorial by the other party;
- and, if the parties so agree or the Tribunal deems it necessary:
  - (c) a reply by the requesting party; and
  - (d) a rejoinder by the other party.
- (3) **A memorial shall contain:** a statement of the relevant facts; a statement of law; and the submissions.
- **A counter-memorial, reply or rejoinder shall contain** an admission or denial of the facts stated in the last previous pleading; any additional facts, if necessary; observations concerning the statement of law in the last previous pleading; a statement of law in answer thereto; and the submissions.
  - » Source: Rule 31 - *Rules of Procedure for Arbitration Proceedings (the Arbitration Rules) of ICSID*

## DSG – General Instructions on Written Pleadings

### § 2. 3 Conducting the Arbitration

#### [The Written Procedure]

- In the written phase, the parties present their case in memorials containing statements of fact and law, accompanied by supporting documentation. Subsequent memorials must contain a response to the previous memorial either accepting or rejecting the statements of fact and responding to the statement of law.

## Provisional Measures (ICSID)

### Provisional Measures

- (1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be **recommended** by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
- (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
- (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

» Source: Rule 39 - *Rules of Procedure for Arbitration Proceedings (the Arbitration Rules) of ICSID*

## DSG - Provisional Measures

### § 2.4 Provisional Measures

- Subject to the parties' agreement, the tribunal may recommend provisional measures for the preservation of the rights of either party. Tribunals **may only recommend measures** and cannot issue binding orders. A request by a party must be of an urgent nature that cannot await the final award. The parties cannot seek conservatory orders from national courts, unless they have expressly reserved this right in their agreement recording consent to arbitration.

## Hearing (ICSID)

### The Oral Procedure

- (1) The oral procedure shall consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts.
- (2) Unless either party objects, the Tribunal, after consultation with the Secretary-General, **may allow other persons**, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, **to attend or observe** all or part of the hearings, subject to appropriate logistical arrangements. **The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.**
- (3) The members of the Tribunal may, during the hearings, put questions to the parties, their agents, counsel and advocates, and ask them for explanations.

» Source: Rule 32 - *Rules of Procedure for Arbitration Proceedings (the Arbitration Rules) of ICSID*

## DSG - Hearing

### § 2.3 Conducting the Arbitration

- During an oral hearing before the tribunal, the tribunal may pose questions to the parties, as well as their witnesses and experts, who may also be examined and cross-examined by the parties.

# The Award (ICSID)

## The Award

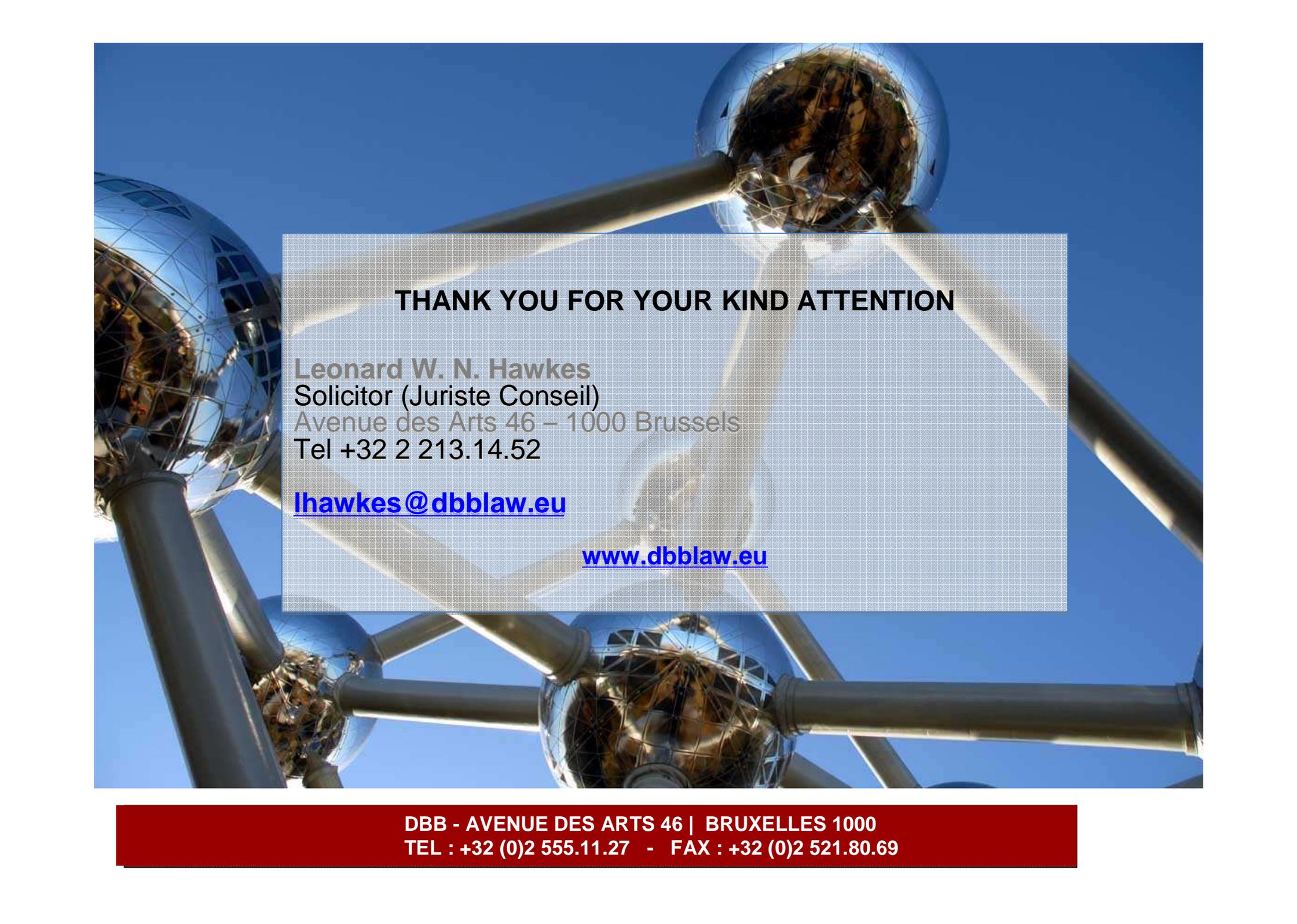
- (1) The award shall be in writing and shall contain:
  - (a) a precise designation of each party;
  - (b) a statement that the Tribunal was established under the Convention, and a description of the method of its constitution;
  - (c) the name of each member of the Tribunal, and an identification of the appointing authority of each;
  - (d) the names of the agents, counsel and advocates of the parties;
  - (e) the dates and place of the sittings of the Tribunal;
  - (f) a summary of the proceeding;
  - (g) a statement of the facts as found by the Tribunal;
  - (h) the submissions of the parties;
  - (i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; and
  - (j) any decision of the Tribunal regarding the cost of the proceeding.
- (2) The award shall be signed by the members of the Tribunal who voted for it; the date of each signature shall be indicated.
- (3) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

» Source: Rule 47 - *Rules of Procedure for Arbitration Proceedings (the Arbitration Rules) of ICSID*

## **DSG - The Award**

### **§ 2.5 The Award**

- Tribunals must decide questions by majority. Abstention by an arbitrator will count as a negative vote. An award must deal with all questions submitted by the parties that are decisive to the tribunal's reasoning. Failure to do so may lead to annulment of the award. An award must contain sufficient reasoning to explain how the tribunal reached its conclusion. Failure to provide such reasoning may lead to annulment of the award.

A low-angle photograph of the Atomium structure in Brussels, Belgium, showing its iconic spherical nodes and connecting tubes against a clear blue sky. The structure is made of polished metal, reflecting the sky and surrounding environment.

**THANK YOU FOR YOUR KIND ATTENTION**

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