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NOTE

The Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of forty modules.

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OVERVIEW

This Module deals with the most common procedural issues encountered in arbitration proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the Convention).

The procedural issues encountered in an ICSID arbitration are likely to be similar to issues encountered in other forms of arbitration. However, the ICSID system is unique in retaining its autonomy and independence from the application of national systems of law or the interference of national courts. As a result, the Convention and its related instruments provide a specific and comprehensive procedural regime for the conduct of ICSID arbitrations, which must be adhered to by the parties to an arbitration.

Arbitration is a consensual process, whereby the parties retain extensive freedom or autonomy to determine the rules of procedure that should govern the arbitration. Proceedings under the Convention are no different, as the parties retain extensive autonomy in this respect. This autonomy is limited, however, by the mandatory provisions of the Convention which provide a framework that governs the arbitral procedure.

In addition, the Administrative Counsel of ICSID has adopted Administrative and Financial Regulations and Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules). These rules and regulations contain further mandatory provisions that limit the autonomy of the parties.

The majority of the cases that are being brought before ICSID today are cases arising out of international treaties. These tend to take two forms, either bilateral investment treaties entered into between States concerning the promotion and protection of foreign investment (BITs) or multilateral agreements, such as the North American Free Trade Agreement (NAFTA) or the Energy Charter Treaty that contain dispute resolution clauses in favour of ICSID arbitration. Many of these treaties contain mandatory provisions that the parties must abide by in the initiation and conduct of arbitration proceedings.

OBJECTIVES

Upon completion of this Module the reader should be able to:

- Describe the initiation of ICSID arbitration.
- Explain the process of constituting the tribunal.
- Define the significance of the Arbitration Rules.
- Summarize the rules governing the place and the costs of proceedings.
- Discuss the procedure before the tribunal.
- Analyse the consequences of non-cooperation by a party.
- Delineate the role of provisional measures in ICSID arbitration.
- Recount the elements that must be contained in awards.

INTRODUCTION

The basic framework of the arbitration procedure under the Convention¹ is set out in Chapter IV, which contains Articles 36 to 55. The topics covered range from the institution of proceedings to the recognition and enforcement of the resulting awards. In addition, Articles 56 to 63 deal with the replacement and disqualification of arbitrators, the cost of the proceedings and the place of the proceedings.

Arbitration Rules

The Convention contains a large number of procedural rules, some of which go into considerable detail. The Rules of Procedure for Arbitration Proceedings (Arbitration Rules) adopted by the Administrative Council pursuant to Article 6(1) of the Convention provide even more depth and detail. The current set of Rules was adopted by the Administrative Council on September 26, 1984 and took effect immediately.²

Article 44 of the Convention

The Convention's key procedural provision in respect of arbitration proceedings is contained in Article 44:

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

Autonomy of the parties

In principle, the parties to an ICSID arbitration can depart from the provisions of the Arbitration Rules. Furthermore, several of the articles in Chapters IV to VII of the Convention proclaim the freedom of the parties to agree on the matter at hand or on alternatives to the provision in question. Unlike the Arbitration Rules, the Institution Rules³ and the Centre's Administrative and Financial Regulations⁴ are not subject to modification by the parties. The parties may derogate from the latter, only when expressly permitted to do so.

Hierarchy of procedural rules

Although the parties do retain considerable discretion in specific respects to tailor their arbitration procedure, they are nevertheless bound by the mandatory provisions of the Convention and related instruments, which form the apex of a hierarchy of procedural rules. This interrelationship of the various procedural rules has been described as follows:

- 1 • Mandatory provisions of the Convention.
- 2 • The Administrative and Financial Regulations and the Institution Rules (except to the extent that variation is permitted by their

¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965, in force October 14, 1996; 575 UNTS 159; 4 ILM 532 (1965); 1 ICSID Reports 3.

² Rules of Procedure for Arbitration Proceedings (Arbitration Rules), 1984, 1 ICSID Reports 157.

³ Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, 1984, 1 ICSID Reports 153.

⁴ Administrative and Financial Regulations, 1 ICSID Reports 35.

own terms).

- 3 • Procedures agreed to by the parties.
- 4 • Provisions of the Convention that are open to modification by the parties.
- 5 • The Arbitration Rules.
- 6 • Decisions of the tribunal on procedural matters.⁵

***The ICSID Additional
Facility***

Non-Contracting States or their nationals may become parties to proceedings under the ICSID Additional Facility (see Module 2.2, Section 6). Disputes administered by the Centre in such cases are subject to the Additional Facility Arbitration Rules. This Module is solely concerned with disputes that fully satisfy the Convention's jurisdictional requirements and will not deal with disputes under the Additional Facility.

⁵ C. Schreuer, *The ICSID Convention: A Commentary*, Article 44, para. 55, p. 685 (2001).

1. INITIATION OF ARBITRATION PROCEEDINGS

a) Commencing the Arbitration

Request for arbitration

A claimant wishing to commence an ICSID arbitration must address its request for arbitration (the request) to the ICSID Secretary-General. Article 36(1) of the Convention provides:

Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

The request may come from either the host State or the investor, although the request is far more likely to be filed by the investor. The investor does not require the prior permission of its national State to institute proceedings. The request may also be filed jointly by both parties, as expressly foreseen in Institution Rule 1.

The provisions of Article 36(1) of the Convention are elaborated further in the Institution Rules. Thus, Institution Rule 1 provides that the request must be made in writing, indicate that it relates to an arbitration (or conciliation), be dated and signed and drawn up in an official language of the Centre.

Languages and number of copies

The three official languages of the Centre are English, French and Spanish (Administrative and Financial Regulation 34). Institution Rule 4 specifies the number of signed copies of the request that need to be served on the Centre (an original, plus five copies).

Lodging fee

The request should be accompanied by the appropriate lodging fee in accordance with Administrative and Financial Regulation 16. The fee is non-refundable in the event of withdrawal or refusal of the request by the Secretary-General. As of January 1, 2002, the fee was US\$5000.⁶ In accordance with Institution Rule 5, non-payment of the lodging fee will prevent the Secretary-General from proceeding with the arbitration, apart from acknowledging receipt of the request.

Information required

Article 36(2) of the Convention specifies the information to be included in the request:

The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

The requirements of Article 36(2) of the Convention are further amplified in Institution Rule 2. The information to be furnished must satisfy the jurisdictional

⁶ See the Schedule of Fees, dated January 1, 2002, available on the ICSID website.

requirements of the Centre, both *ratione materiae* and *ratione personae*. In addition, information must be provided in respect of the parties' consent to arbitration.

**Rule 2 of the
Institution Rules**

The information specified in Institution Rule 2 must be provided and cannot be waived by the parties. Failure to furnish the necessary information may prevent the Secretary-General from being able to register the request under Article 36(3) of the Convention, as discussed below. The following information must be provided under Institution Rule 2.

Designation of parties

The request must identify precisely each party to the dispute and include their address (Rule 2(1)(a)). In the event that one of the parties is a constituent subdivision or agency of a Contracting State that has been designated to the Centre by that State pursuant to Article 25(1) of the Convention, the claimant must provide evidence to this effect together with the request (Rule 2(1)(b)).

Consent

The request must indicate the date of consent (Rule 2(1)(c)) and provide evidence of the instruments in which consent is recorded (Rule 2(2)), including details of consent in respect of any constituent subdivisions or agencies, if appropriate.

Nationality

Details must also be provided with respect to the nationality of the investor demonstrating that it is a national of a Contracting State (Rule 2(1)(d)). In the event that the investor is a juridical person incorporated in the Contracting State that is party to the dispute, the request must include details of any agreement of the parties that the investor should be treated as a national of another Contracting State in accordance with Article 25(2)(b) of the Convention.

Issues in dispute

Finally, the request must contain information on the issues in dispute to show that there is a legal dispute between the parties in connection with an investment (Rule 2(1)(e)).

Additional information

In addition to the mandatory requirements of Institution Rule 2, Rule 3 provides that the request may contain additional information, regarding, in particular, any agreement between the parties concerning the number of arbitrators and the method of their appointment. Other procedural agreements, concerning, for example, the language of the proceedings or the place of proceedings may also be included.

Summary of case

As the request is also the first document that is likely to be read by the parties, it is useful for the claimant to provide a summary account of its case on the merits, explaining the various grounds that it is relying upon in bringing its claim.⁷

BITs

Although the ICSID Convention does not provide a time limit within which a

⁷ J. Townsend, *The Initiation of Arbitration Proceedings: «My Story Had Been Longer»*, 13 *ICSID Review – FILJ* 21 (1998), at p. 24.

request must be made, such limits may exist in relation to the parties' arbitration agreement. As discussed above, the majority of cases before ICISID today arise out of BITs entered into between States for the promotion and protection of foreign investment.⁸ Many of the BITs do however make certain time limits a condition of consent. Typically, they require that six months must have elapsed since the events giving rise to a claim or since the investor gave notice of a potential dispute between the parties. The purpose of these requirements is to prevent investors from instituting proceedings against a host State in what is likely to be a high profile dispute, without allowing the State an opportunity to resolve the dispute amicably. In addition, the requirement of a notice period means that the host State will not be surprised when it receives a copy of the investor's request from ICSID.

NAFTA

Proceedings commenced pursuant to Chapter XI of NAFTA also provide for a notice period of six months.⁹ Moreover, under the provisions of NAFTA, a claim may only be allowed within three years from the date on which the investor acquired knowledge of the relevant facts.¹⁰

b) Registration of the Request by the Secretary-General

Screening of requests

Once the request has been received by the Centre, the Secretary-General must screen the request prior to its registration, in accordance with Article 36(3) of the Convention:

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.

The powers of the Secretary-General are amplified in Institution Rule 6. The screening power enjoyed by the Secretary-General is designed to avoid the filing of spurious or incomplete requests or situations where a tribunal, once established, would almost certainly find itself without jurisdiction.

The power enjoyed by the Secretary-General in this respect is similar to the power enjoyed by the International Court of Arbitration of the International Chamber of Commerce to satisfy itself that *prima facie* an ICC arbitration agreement exists between the parties.

The decision of the Secretary-General is made primarily on the basis of the information contained in the request, and the Secretary-General must assume that the information supplied in the request is correct. In the event that the request is incomplete or inadequate, the Centre is likely to contact the requesting party in order to supplement the request.

⁸ As of December 2000, three quarters of the active cases before the Centre were based on BITs or multilateral agreements. E. Obadia, *Current Issues in Investment Disputes*, *The Journal of World Investment*, Vol. 2, No. 1, p. 219.

⁹ Article 1120(1), 32 ILM 643 (1993).

¹⁰ Articles 1116(2) and 1117(2).

<u>Pre-filing of requests</u>	Advance consultation with the Centre or the filing of a draft request prior to the formal lodging of the request is possible and is beneficial to the claimant in avoiding the cost and delay involved in having its request rejected. ¹¹
<u>Refusal to register</u>	The Secretary-General will only refuse to register the request if it is manifestly outside the jurisdiction of ICSID. Examples would include instances where one party is neither a Contracting State or a national of a Contracting State, or in the event that no evidence was furnished of written consent to the Centre's jurisdiction. ¹² Thus, by providing the information required under Institution Rule 2 and paying the lodging fee, the claimant can be assured that its request will be lodged.
<u>Notice of registration</u>	Once a request has been registered, the Secretary-General notifies the parties of the registration on the same day (Institution Rule 6(1)(a)). The notice of registration must contain certain information as set out in Institution Rule 7, including, <i>inter alia</i> , the date of registration, the appropriate address for communication between the parties and an invitation to the parties to provide details of any agreed provisions regarding the number and method of appointment of arbitrators.
<u>Withdrawal of requests</u>	A request cannot be unilaterally withdrawn once it has been registered (Institution Rule 8). Thereafter, the proceedings may be discontinued at a party's request, only with the other party's agreement under Arbitration Rule 44. Alternatively, the parties may jointly seek the discontinuance of the proceedings following a settlement, pursuant to Arbitration Rule 43.

Summary:

- **ICSID arbitrations are commenced by means of a request for arbitration sent to the Secretary-General.**
- **A request must contain the information specified in Article 36(2) of the Convention and Rule 2 of the Institution Rules.**
- **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 he finds that the dispute is manifestly outside the jurisdiction of the Centre.**
- **Once registered, the Secretary-General will notify the parties of the registration on the same day.**

¹¹ C. Brower, *The Initiation of Arbitration Proceedings: «Jack be Nimble, Jack be Quick...!», 13 ICSID Review – FILJ 15 (1998).*

¹² Note C. to Institution Rule 6 of 1968, 1 ICSID Reports 58.

2. THE ARBITRAL TRIBUNAL

Parties' freedom of choice

Articles 37 to 40 of the Convention deal with the constitution of tribunals under the ICSID system.

Once the request for arbitration has been registered, Article 37(1) of the Convention provides that the tribunal is to be constituted as soon as possible thereafter. As discussed in the preceding section, if the parties have reached an agreement concerning the number of arbitrators and the method of their appointment, such information may be included in the request.

a) Constituting the Arbitral Tribunal

An uneven number of arbitrators

Article 37(2)(a) of the Convention has mandatory effect and cannot be deviated from by agreement of the parties. It provides that the tribunal must consist of a sole arbitrator or any uneven number of arbitrators to which the parties agree. Although the Convention foresees the possible appointment of a sole arbitrator or an uneven number greater than three, in practice, the vast majority of ICSID tribunals have been constituted with three arbitrators.

Rule 2 procedure

Arbitration Rule 2 provides a specific procedure to be followed by the parties to facilitate an agreement on the constitution of the tribunal:

- (1) *If the parties, at the time of the registration of the request for arbitration, have not agreed upon the number of arbitrators and the method of their appointment, they shall, unless they agree otherwise, follow the following procedure:*
 - (a) *the requesting party shall, within 10 days after the registration of the request, propose to the other party the appointment of a sole arbitrator or of a specified uneven number of arbitrators and specify the method proposed for their appointment;*
 - (b) *within 20 days after receipt of the proposals made by the requesting party, the other party shall:*
 - (i) *accept such proposals; or*
 - (ii) *make other proposals regarding the number of arbitrators and the method of their appointment;*
 - (c) *within 20 days after receipt of the reply containing any such other proposals, the requesting party shall notify the other party whether it accepts or rejects such proposals.*
- (2) *The communications provided for in paragraph (1) shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General. The parties shall promptly notify the Secretary-General of the contents of any agreement reached.*
- (3) *At any time 60 days after the registration of the request, if no agreement on another procedure is reached, either party may inform the Secretary General that it chooses the formula provided for in Article 37(2)(b) of the Convention. The Secretary-General shall thereupon promptly inform the other party that the Tribunal is to be constituted in accordance with that Article.*

Rule 2 is designed to make it possible to achieve an agreement between the parties and finalize the appointment of a tribunal within 90 days, before the procedure outlined in Article 38 of the Convention becomes available. Thus, whilst preserving the parties' freedom of choice in appointing the tribunal, Rule 2 limits the potential for procrastination.

Default procedure

If the parties have not reached an agreement in respect of the composition of the tribunal, either in the instrument containing consent or within 60 days after the registration of the request, the following default provisions of Article 37(2)(b) take effect:

Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.

In order to expedite the process further, Arbitration Rule 3 provides a procedure to be followed if the tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention as follows:

- (1) *If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention:*
 - (a) *either party shall in a communication to the other party:*
 - (i) *name two persons, identifying one of them, who shall not have the same nationality as nor be a national of either party, as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal; and*
 - (ii) *invite the other party to concur in the appointment of the arbitrator proposed to be the President of the Tribunal and to appoint another arbitrator;*
 - (b) *promptly upon receipt of this communication the other party shall, in its reply:*
 - (i) *name a person as the arbitrator appointed by it, who shall not have the same nationality as nor be a national of either party; and*
 - (ii) *concur in the appointment of the arbitrator proposed to be the President of the Tribunal or name another person as the arbitrator proposed to be President;*
 - (c) *promptly upon receipt of the reply containing such a proposal, the initiating party shall notify the other party whether it concurs in the appointment of the arbitrator proposed by that party to be the President of the Tribunal.*
- (2) *The communications provided for in this Rule shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General.*

Rule 3 requires each party to nominate both its party appointed arbitrators and the president of the tribunal at the same time, thus expediting the constitution of the tribunal. The agreement of the parties is not required for the appointment of party appointed arbitrators. Only the appointment of the president is subject to the agreement of the parties. The parties retain the right

to modify or extend the procedure set out in Rule 3 by agreement. The parties' choice of arbitrators is unencumbered subject only to the limitations discussed further below. Thus, the parties are not required to appoint arbitrators from the Panel of arbitrators, as discussed further below.

Appointment of arbitrators

Once an arbitrator has been appointed by a party, it is incumbent on the parties to notify that appointment to the Secretary-General, who will seek acceptance from the individual concerned (Arbitration Rule 5). In the event that the person appointed fails to accept the appointment within 15 days (Arbitration Rule 5(3)), the party concerned will be given the opportunity to make another selection.

Constitution of the tribunal

In accordance with Arbitration Rule 6, the tribunal is deemed to be constituted and the proceedings to have begun on the date that all of the arbitrators have accepted their appointment.

Fallback procedure

Under Article 38 of the Convention, if the tribunal is not constituted within 90 days from the date of registration of the request, the Chairman of the Administrative Council¹³, at the request of either party, will appoint any arbitrators that the parties have failed to appoint. This provision provides a fallback procedure that may be triggered by either of the parties when faced with an uncooperative counter party.

As the constitution of the tribunal often takes more than 90 days, the parties may agree to extend this period. Even in the absence of an agreement between the parties, the Chairman of the Administrative Council will not intervene without being prompted by one of the parties.¹⁴

Although the request under Article 38 is made to the Chairman of the Administrative Council, it should be made through the Secretary-General in accordance with Administrative and Financial Regulation 24(1).

Consultation with the parties

Once a request has been made by one of the parties, the Chairman of the Administrative Council must consult both parties as far as possible. Although the Chairman of the Administrative Council is free to disregard the views or objections raised by the parties in appointing an arbitrator, in practice, their views are unlikely to be ignored, unless such objections are not reasonable. The obligation to consult extends to any arbitrators not yet appointed at the time the request is made.

The Chairman of the Administrative Council must perform his obligation to appoint within 30 days of receiving a request by the parties (Arbitration Rule 4(4)), although the requirement of 30 days may be extended by agreement of the parties. In appointing an arbitrator, the Chairman of the Administrative Council acts on the recommendation of the Secretary-General. The Chairman of the Administrative Council's choice of arbitrators is limited in two respects.

¹³ Under Article 5 of the Convention the President of the International Bank for Reconstruction and Development is ex officio Chairman of ICSID's Administrative Council.

¹⁴ See Rule 4 of the Arbitration Rules for further clarification in this respect.

First, under Article 38, the Chairman of the Administrative Council is prohibited from appointing arbitrators of the same nationality as the foreign investor or the host State.¹⁵

Second, in accordance with Article 40(1) of the Convention, the Chairman of the Administrative Council may only appoint arbitrators from the Panel of Arbitrators. This will be discussed in further detail below.

Limitation on the choice of the parties

Although the parties have broad freedom to designate the arbitrators of their choice, their freedom of choice is limited in three respects, as follows: (i) the nationality of the arbitrators is subject to Article 39 of the Convention; (ii) the arbitrator must possess the qualities set out in Article 14(1) of the Convention; and (iii) the appointed arbitrator must be independent of the parties. These limitations are discussed below.

Nationality of arbitrators

Article 39 of the Convention provides that the majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute. The practical effect of Article 39 is that where there are three arbitrators, the parties cannot appoint arbitrators of the same nationality as themselves. This would be possible, however, if there were five or more arbitrators.

In the rules of other arbitral institutions it is not usual to impose restrictions on the nationality of arbitrators appointed by the parties, in the context of investor/State arbitration. By contrast, the Convention aims to minimize the likelihood of party appointed arbitrators being predisposed in favour of the parties appointing them.

The prohibition against national arbitrators does not apply if each individual arbitrator has been chosen by agreement of the parties.

Qualities required of arbitrators

Pursuant to Article 40(2) read in conjunction with Article 14(1) of the Convention, arbitrators (and persons appointed to the Panel of arbitrators) must have the following qualities: high moral character; recognised competence in the field of law, commerce, industry or finance; reliability to exercise independent judgment. The list of qualities required of arbitrators is set out in Article 14(1) of the Convention.

Requirement of independence

In addition to the qualities set out in Article 14(1) of the Convention, potential arbitrators should also be independent of the parties. Thus, the existence of a possible conflict of interest in a particular case would be a bar to the appointment of an arbitrator. Although this is not expressly provided for in the Convention, Arbitration Rule 6 requires that each arbitrator sign a declaration before or at the first session of the tribunal providing details of all past and

¹⁵ This limitation on the choice of the Chairman of the Administrative Council only applies if the choice is being made in accordance with the provisions of Article 38 of the Convention. It therefore does not apply if the Chairman of the Administrative Council is acting as an appointing authority chosen by the parties in appointing an arbitrator.

present professional, business and other relationships with the parties.

The Panel of arbitrators

Articles 12 to 16 of the Convention establish a Panel of Arbitrators to be maintained by the Centre. The Panel is made up of arbitrators appointed by Contracting States (4 appointees by each State) and by the Chairman of the Administrative Council (10 appointees). The Panel of Arbitrators provides the parties with a list of arbitrators that they may select from, although their choice is not restricted to the Panel. The appointments made by the Chairman of the Administrative Council under the provisions of Article 38 of the Convention must be made from the Panel.

Summary:

- **Parties are free to designate the arbitrators of their choice when constituting the arbitral tribunal. When a tribunal is to be composed of three members, as is most commonly the case, each party is entitled to appoint an arbitrator.**
- **Failure to agree on the composition of the tribunal will trigger the default provision of Article 37(2)(b) of the Convention: three arbitrators, two appointed by the parties and the third by agreement.**
- **If the tribunal is not constituted within 90 days of the date of registration of the request, either party may request that the remaining arbitrators be appointed by the Chairman of the Administrative Council.**
- **In a tribunal composed of three arbitrators, the parties may not appoint their nationals or co-nationals as arbitrators, unless each arbitrator has been chosen by agreement.**
- **Arbitrators must have a high moral character, recognised competence in the field of law, commerce, industry and finance and be able to exercise independent judgment.**
- **A Panel of Arbitrators is maintained by the Centre. All appointments made by the Chairman of the Administrative Council must be made from the Panel. However, parties are not required to appoint arbitrators from the Panel.**

b) Replacement and Disqualification of Arbitrators

Vacancy on the tribunal

Article 56(1) of the Convention provides that once a tribunal has been constituted and the proceedings begun, the tribunal's composition shall remain unchanged. In the event that an arbitrator should die, become incapacitated or resign, the resulting vacancy will be filled in accordance with Articles 37 to 40 of the Convention, as discussed above.¹⁶

¹⁶ In accordance with Rule 11(1) of the Arbitration Rules, a vacancy should be filled by the same method by which the original appointment had been made. This is subject to the condition that if the party or parties fail to make an appointment within 30 days, the appointment will be made by the Chairman of the Administrative Council (Rule 11(2) of the Arbitration Rules).

The purpose of these provisions is to avoid undue delay and to provide for the swift appointment of an arbitrator in the event of a vacancy on the tribunal.¹⁷

Suspension of proceedings

Upon notification to the parties of a vacancy occurring in any of the circumstances described in Article 56(1), the Secretary-General is obliged to suspend the proceedings until the vacancy has been filled (Arbitration Rule 10).

Resignation

In the event of a resignation, Arbitration Rule 8(2) provides that the resigning arbitrator must submit his resignation to the other members of the tribunal. If the resigning arbitrator was appointed by one of the parties, the other members of the tribunal must consider the reasons for the resignation and whether to consent thereto.

Consent of the other arbitrators

Article 56(3) provides that, in the event of the resignation of a party appointed arbitrator without the consent of the other members of the tribunal, the resulting vacancy will be filled by the Chairman of the Administrative Council from the Panel of Arbitrators. This is an exception to the principle that vacancies should be filled by the same method used for the original appointment. Although the resignation of an arbitrator can thus, not be prevented, there is a sanction attached to a resignation of a party appointed arbitrator that is not accepted by the other arbitrators. The resulting vacancy will be filled by the Chairman of the Administrative Council, rather than the party who made the original appointment.

Procedure following new appointment

Once the vacancy has been filled, the proceedings shall continue from the point they had reached at the time the vacancy occurred. In the event that the oral procedure had already commenced, the new arbitrator has the discretion to request its recommencement (Arbitration Rule 12).

Disqualification

Articles 57 and 58 of the Convention deal with the grounds and process of disqualification of arbitrators. Article 57 provides that:

A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

Procedure for disqualification

The initiative for disqualification must come from a party. In accordance with Arbitration Rule 9, a party proposing disqualification must do so promptly, *i.e.*, as soon as the party has learnt of the grounds for possible disqualification and, in any event, before the close of the proceedings. A party that fails to object promptly to a violation of a relevant rule is deemed to have waived its

¹⁷ It is generally considered in international arbitration that a tribunal may not continue with the proceedings in a truncated form, *i.e.*, when it is not fully constituted. There has been considerable discussion of whether such truncated tribunals can legitimately continue to administer the arbitration. The Convention's provisions deal with such an eventuality by suspending the proceedings until the tribunal is fully reconstituted.

right to object, in accordance with Arbitration Rule 27.

Grounds for disqualification

Under the first sentence of Article 57 of the Convention, a party may propose the disqualification of an arbitrator on account of any fact indicating a manifest lack of the qualities required by Article 14(1) of the Convention in relation to members of the Panel. These were set out above. The requirement that the lack of qualities must be “manifest” implies a heavy burden of proof on the party proposing disqualification.

Conflicts of interest

In addition to the grounds under Article 14(1) of the Convention, an arbitrator would be subject to disqualification if it could be shown that the arbitrator had a conflict of interest.

A proposal for disqualification based on the alleged lack of independence of the arbitrator was presented by Indonesia against the arbitrator appointed by Amco in the case of *Amco v. Indonesia*.¹⁸ Indonesia’s proposal was based upon previous professional contacts between the arbitrator and Amco, which were not in dispute. Thus, such contacts included, previous tax advice given by the challenged arbitrator to the individual who controlled the claimant companies, as well as the fact that the arbitrator’s law firm and Amco’s counsel had had a joint office and profit sharing arrangements for many years, although the profit sharing had ended prior to the commencement of the arbitration. Indonesia’s proposal was rejected by the other arbitrators, who held that the mere appearance of partiality was not a sufficient ground for disqualification. The challenging party must prove not only facts indicating lack of independence, but also that the lack is “manifest” or “highly probable”, not just “possible” or “quasi-certain”. They concluded that the facts did not prove that the challenged arbitrator had a manifest lack of independence.¹⁹

Nationality conditions

The second sentence of Article 57 of the Convention provides for the possibility of disqualification where the nationality conditions of Section 2 of Chapter IV of the Convention have been breached. However, disqualification on this basis is highly unlikely, as any deviation from the nationality requirements of Article 39 of the Convention would usually be noted during the appointment process.

Proposal to disqualify

Article 58 sets out the procedure for dealing with a proposal to disqualify. Normally, the unchallenged members of the tribunal will decide upon the matter. In the event that the two (in the case of three arbitrators) unchallenged arbitrators disagree, the final decision will be made by the Chairman of the Administrative Council, who shall also make the decision in the event that a sole arbitrator is challenged. Further details in this respect are contained in Arbitration Rule 9.

¹⁸ *Amco v. Indonesia*, Decision on Jurisdiction, September 25, 1983, 1 ICSID Reports 389.

¹⁹ W. M. Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 *International and Comparative Law Quarterly* 26, at p. 45 (1989).

In the event that a proposal for disqualification is successful, the resulting vacancy is to be filled by the same method by which the original appointment had been made (Arbitration Rule 11).

Summary:

- **Upon notification of a vacancy in the tribunal, the proceedings are suspended by the Secretary-General.**
- **Normally, vacancies are filled by the same method as the original appointment.**
- **Resignation of a party-appointed arbitrator requires the consent of the other arbitrators. Without consent, the vacancy is filled by the Chairman of the Administrative Council.**
- **An arbitrator may also be disqualified for a manifest lack of the qualities required by Article 14(1) of the Convention, lack of independence or breach of the nationality requirements set forth in Article 39 of the Convention.**

3. CONDUCTING THE ARBITRATION

Section 3 of Chapter IV of the Convention (Articles 41 to 47), which is entitled “Powers and Functions of the Tribunal”, deals with the tribunal’s conduct of the arbitration.

a) The Rules of Procedure

Autonomous nature of ICSID arbitration

Unlike in other forms of administered arbitration, in an ICSID arbitration neither the parties nor the tribunal are constrained by the arbitration legislation of any national legal system. In particular, the mandatory requirements of the arbitration law at the seat of the arbitration do not apply; nor does the public policy of any national system of law. In this respect, the ICSID system is unique.

Article 44 of the Convention

The Convention contains a number of provisions that deal with the procedure to be followed by the tribunal. Article 44 is the primary provision with respect to the procedural rules of the arbitration. It provides that:

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

Parties’ autonomy

Article 44 provides that the proceedings shall be governed primarily by the Convention and the Arbitration Rules, although the parties are free to exclude or modify those rules by agreement.

Arbitration Rules

Although the parties retain the freedom to shape the procedural rules governing the arbitration, the most likely scenario once proceedings have commenced is the adoption of the Arbitration Rules, either through express confirmation or by default in the absence of an agreement to the contrary. In this case, the Arbitration Rules in force at the time of consent become binding on the parties and on the tribunal.²⁰

Agreement of parties

It is also possible that, during the course of the arbitration, the parties are able to reach agreement on specific procedural points. The most common examples tend to be with respect to the place of proceedings or the time limits for the constitution of the tribunal.

Procedural lacunae

In the event of a *lacuna* in the rules of procedure provided by the Convention or the Arbitration Rules, the tribunal has the power to close such gaps in accordance with Article 44 of the Convention.

²⁰ *Liberian Eastern Timber Company (LETCO) v. The Government of the Republic of Liberia, Award, March 31, 1986, 2 ICSID Reports 343, at 357.*

Summary:

- The ICSID system is unique in maintaining its autonomy from national systems of law.
- Article 44 of the Convention directs the parties to apply the Arbitration Rules, in the absence of an agreement to the contrary.
- In the event of a procedural *lacuna*, the tribunal has the power to close such gaps.

b) The Tribunal's First Session

Preliminary procedural consultation

Pursuant to Arbitration Rule 19, the tribunal shall make the orders required for the conduct of the arbitration. This is normally done following a preliminary procedural consultation (or first session) with the parties. The tribunal's first session also presents the parties with an opportunity to agree on matters of procedure, as foreseen in Arbitration Rule 20.

Procedural issues

Procedural issues that may be addressed include: the number of arbitrators necessary for a *quorum*, the language of the proceedings, the number and sequence of pleadings, the time limits for pleadings and the apportionment of costs. As discussed above, as long as the Convention or the Administrative and Financial Regulations are not violated, the tribunal will apply any procedure agreed to by the parties.

Organization of the first session

The tribunal's first session should be held within sixty days of its constitution, or within any other time period agreed to by the parties. The tribunal will meet at the Centre, at a place arranged by the Centre or anywhere else agreed to by the parties in accordance with Article 63 of the Convention after consultation with the Secretary-General and approval by the tribunal (Arbitration Rule 13).

Deliberations of the tribunal

The deliberations of the tribunal take place in private and are kept secret. The president of the tribunal presides over deliberations, conducts hearings and sets the date and time of its sessions (Arbitration Rules 14 and 15).

Time limits

The tribunal establishes any necessary time limits for the various steps of the proceedings and may grant extensions to any time limits set (Arbitration Rule 26).

Summary:

- Within 60 days of its constitution (unless otherwise agreed by the parties), the tribunal shall conduct its first session.
- The tribunal shall seek the views of the parties on questions of procedure and issue the orders required for conduct of the arbitration.

c) The Written and Oral Procedure

Arbitration Rule 29 provides for two distinct phases of the proceedings: a written procedure followed by an oral one. This is subject to modification by the parties.

Written phase

Under Arbitration Rule 31, the pleadings required in the written phase include, in addition to the request for arbitration, the filing of a memorial by the requesting party to be followed by the filing of a counter-memorial by the other party. If the tribunal requests or the parties agree, they may also file additional memorials.

Information to be included in memorials

Arbitration Rule 31(3) requires that a memorial contain a statement of the relevant facts, a statement of law and the party's submissions. A counter-memorial, reply or rejoinder must contain a denial or admission of the statement of facts contained in the previous memorial, any additional facts, a response to the statement of law in the last pleading and the submissions of the party. In addition, the parties are expected to submit supporting documentation in support of their memorials (Arbitration Rule 33).

Pre-hearing conference

A pre-hearing conference is permitted under Arbitration Rule 21 and may be initiated by the Secretary-General, the president of the tribunal or the parties. The Secretary-General or the president of the tribunal may request the holding of a pre-hearing conference to arrange for an exchange of information between the parties, including, for example, the stipulation of uncontested facts in order to expedite the proceedings. In addition, the parties themselves may request such a pre-hearing conference, subject to the discretion of the president of the tribunal. Unlike the Secretary-General or the president of the tribunal, they may also request such a conference be held to consider the issues in dispute with a view to reaching an amicable settlement.

Oral hearing

In accordance with Arbitration Rule 29, the parties are entitled to an oral hearing. Hearings are private and therefore closed to the public. Arbitration Rule 32 provides that the tribunal shall, with the consent of the parties, decide which persons (other than the parties, their agents, counsel and advocates) attend the hearing. At the hearing, the parties may present witnesses of fact and experts. According to Rule 32(2), witnesses and experts may only attend the hearing during their testimony, unless the parties agree to allow them to attend the hearing in its entirety. During the hearing the tribunal may put questions to the parties, their agents, counsel and advocates, as well as witnesses and experts. In addition to the tribunal, the parties may examine the witnesses of fact and experts (Arbitration Rule 35).

Closure of proceedings

Arbitration Rule 38 provides for an order to be made by the tribunal closing the proceedings, once the presentation of the case by the parties is completed and the case has been fully submitted. Once the proceedings have been closed, the period fixed in Arbitration Rule 46 for the rendering of the tribunal's award begins to run (see below). The tribunal may reopen the proceedings if there is

new evidence or there is a vital need for clarification of specific points.

Summary:

- **Proceedings include a written and an oral phase, unless the parties agree otherwise.**
- **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.**
- **Parties may hold a pre-hearing conference with the tribunal to consider the issues in dispute with a view to reaching an amicable settlement.**
- **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.**

d) Dealing with Evidence

Memorials

The parties are expected to plead their case in their memorials. Memorials should include a statement of facts, together with all the evidence necessary to support their case. Arbitration Rule 33 provides:

Without prejudice to the rules concerning the production of documents, each party shall, within time limits fixed by the Tribunal, communicate to the Secretary-General, for transmission to the Tribunal and the other party, precise information regarding the evidence which it intends to produce and that which it intends to request the Tribunal to call for, together with an indication of the points to which such evidence will be directed.

Tribunal's discretion

The tribunal retains complete discretion in judging the admissibility and the probative value of any evidence that is produced by the parties (Arbitration Rule 34(1)). The tribunal is not bound by the parties' submissions in this respect.

The tribunal's power with respect to the taking of evidence is confirmed by Article 43 of the Convention, which provides that, except as the parties otherwise agree, the tribunal is empowered to require the production of documents or other evidence (witnesses and experts) and to make any relevant site visits. The tribunal's power in calling for the production of evidence is further amplified in Arbitration Rule 34(2).

The parties are required to cooperate with the tribunal's requests, which may take the form of procedural orders.

e) Failure to Present Case and Discontinuance of Proceedings

Non-participation of one party in the arbitration proceedings does not prevent the tribunal from rendering an award, provided that a grace period has been given to the party failing to present its case (Article 45(2) of the Convention).

Arbitration Rule 34(3), dealing with the production of evidence requested by the tribunal, provides that the tribunal shall take formal note of the failure by a party to comply with its obligations and of any reasons given for such failure. However, the failure of a party to appear or to present its case is not deemed as an admission of the other party's assertions, as confirmed by Article 45(1) of the Convention.

Thus, notwithstanding the failure of one party to participate in the arbitration, the tribunal is required to verify the assertions of the other party.

In *LETCO v. Liberia*²¹ the respondent failed to appear or present its case. The tribunal confirmed in its award that it had not taken for granted the assertions made by the claimant, but had submitted them to careful scrutiny. The tribunal's actions included the appointment of an accounting firm charged with examining the claimant's claim for damages.

Discontinuance of proceedings

Proceedings may be discontinued in three ways. First, the parties may agree to discontinue or to settle. The tribunal may, if the parties so request in writing and provide a signed copy of a settlement agreement to the Secretary-General, record such settlement in the form of an award (Arbitration Rule 43).

Second, pursuant to Arbitration Rule 44, either party may request a discontinuance, which the tribunal will grant if the other party does not object.

Finally, the proceedings shall be deemed discontinued if the parties fail to act during six consecutive months (or any other time period, as agreed between them and approved by the tribunal), in accordance with Arbitration Rule 45.

f) Ancillary Claims

Consolidation of claims

Article 46 of the Convention deals with the possibility of consolidating closely related claims by the same parties into one set of proceedings. The provisions of the Convention are further amplified in Arbitration Rule 40(1). In addition to the primary claim underlying the dispute, the Convention permits the filing of any incidental, additional or counter-claim (ancillary claims).

Requirements for consolidation

In order to be admissible, ancillary claims must comply with two separate requirements under the Convention. First, ancillary claims will be allowed as

²¹ *LETCO v. Liberia, Award, March 31, 1986, 2 ICSID Reports 343.*

long as they are within the scope of the parties' consent to arbitration and otherwise within the jurisdiction of the Centre pursuant to Article 25 of the Convention. Second, the requirements of Article 46 of the Convention must be fulfilled. According to Note B(a) to Arbitration Rule 40 of 1968:

[...] to be admissible such claims must arise "directly" out of the "subject-matter of the dispute" (French version: "l'objet du différent"; Spanish version: "la diferencia"). The test to satisfy this condition is whether the factual connection between the original and the ancillary claim is so close as to require the adjudication of the latter in order to achieve the final settlement of the dispute, the object being to dispose of all the grounds of the dispute arising out of the same subject matter.²²

Rule 40(2) provides that the requesting party must file any additional or incidental claim no later than in its reply. The other party must file any counter-claim no later than in its counter-memorial. This allows the continuation of the arbitration without further delay. Any later presentation of an ancillary claim by a party would have to be justified and would require a specific decision of the tribunal, after hearing the objections (if any) of the other party.

g) Place of Proceedings

The provisions of the Convention dealing with the issue of the place of proceedings are contained in Articles 62 and 63 of the Convention.

Seat of ICSID

Article 62 of the Convention sets out the basic rule (subject to the exceptions contained in Article 63): proceedings shall be held at the seat of the Centre, Washington D.C.,

Seat has no legal significance

Unlike other types of arbitration, ICSID arbitration is entirely self-contained, and therefore the seat of the proceedings has no legal significance. The choice of the place of proceedings is largely a matter of convenience for the parties and the arbitrators.

Parties may choose place of proceedings

Pursuant to Article 63 of the Convention (Arbitration Rule 13(3)), the parties may agree to hold the proceedings elsewhere than at the seat of the Centre, provided that the Centre has made arrangements with another appropriate institution.

Possible places of proceedings

Apart from the Permanent Court of Arbitration at The Hague, which is specifically mentioned in Article 63 of the Convention, the Centre has made arrangements with a number of institutions in many venues around the world, including: Kuala Lumpur, Cairo, Sydney, Melbourne and Singapore.²³

Offices of the World Bank

Should the parties wish to hold the proceedings in a place other than the seat of the Centre or the places mentioned above, they must seek the approval of

²² 1 ICSID Reports 100.

²³ A. Parra, *The Role of the ICSID Secretariat in the Administration of Arbitration Proceedings Under the ICSID Convention*, 13 ICSID Review – FILJ 85 (1998), at 93.

the tribunal, following consultation with the Secretary-General. Thus, for example, a number of arbitrations have been held at the offices of the World Bank in Paris.

4. PROVISIONAL MEASURES

Parties in international arbitration may often wish to apply to the tribunal for provisional measures in order to safeguard their rights pending the tribunal's final decision. Article 47 of the Convention provides:

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

Tribunal may recommend measures

As indicated in Article 47 of the Convention, the tribunal cannot issue binding orders in the case of provisional measures but may merely recommend them. Nevertheless, the lack of binding force does not deprive the tribunal's recommendations of legal relevance, as the tribunal has the power to take into account the parties' conduct during the proceedings in rendering its award.

Enforceability of tribunal's recommendations

The tribunal's power to recommend provisional measures raises questions as to the enforceability of the tribunal's recommendations, in particular, whether a domestic court will enforce a recommendation of an ICSID tribunal. In several cases involving a conflict between the exclusive jurisdiction of ICSID and actions commenced before national courts, the courts appear to have been strongly influenced by the tribunal's recommendations.

In the case of *MINE v Guinea*,²⁴ the respondent sought an order from the tribunal recommending the discontinuance of various attachment orders issued by several national courts (including the Court of First Instance of Geneva) following applications made by MINE. The tribunal's recommendation to discontinue all proceedings in domestic courts was based on the exclusive remedy provision of Article 26 of the Convention. The tribunal's recommendation that all pending litigation before national courts be discontinued constituted one of the grounds cited by the Court of First Instance of Geneva in support of its decision to lift the attachment orders.²⁵

Types of measures

The types of measures recommended so far have been varied and depend on the circumstances of each case. They have ranged from recommendations concerning the preservation and discovery of documents²⁶ to measures recommending the dismissal of actions before local courts.

Parties' discretion

The tribunal's power to recommend such measures is subject to the parties' agreement, wherein they can choose to modify or even exclude this power. The procedural framework for making a request to the tribunal is set out in Arbitration Rule 39.

²⁴ *Maritime International Nominees Establishment (MINE) v Republic of Guinea*, Award, January 6, 1988, 4 ICSID Reports 54.

²⁵ *The decision of the Tribunal de Première Instance, Geneva, March 13, 1986*, 4 ICSID Reports 41.

²⁶ See *AGIP SpA v Government of the People's Republic of Congo*, Award November 30, 1979, 1 ICSID Reports, 306.

Procedure for making a request

At any time during the proceedings, a party may request that provisional measures for the preservation of its rights be recommended by the tribunal (Arbitration Rule 39(1)). The tribunal may only recommend such measures after giving each party an opportunity to present its observations (Arbitration Rule 39(4)).

Necessity and urgency

Provisional measures will only be recommended in situations of absolute necessity. Although the Convention does not expressly require the requesting party to demonstrate the urgent nature of its request, it is universally accepted that provisional measures will only be recommended where the matter cannot await the final determination of the dispute.

Application to national courts

Arbitration Rule 39(5) precludes the parties from seeking provisional measures from national courts unless they have provided otherwise in the agreement recording their consent.²⁷

Therefore, unless the parties have expressly reserved their rights to seek protection from national courts, they will be precluded from doing so once the proceedings have commenced.

Summary:

- **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 ICSID arbitration.**

²⁷ For a further discussion of this issue, see Fouchard, Gaillard, Goldman, *On International Commercial Arbitration*, para. 1309, p. 713 (1999).

5. THE AWARD

Articles 48 and 49 of the Convention deal with “the Award”. Apart from a few particularities, the rules concerning the form and rendering of ICSID awards do not differ substantially from those contained in most other international arbitration rules.

Article 48 of the Convention deals with a number of issues concerning the duties and powers of the tribunal in rendering an award and the publication of the Award, as follows:

- (1) *The Tribunal shall decide questions by a majority of the votes of all its members.*
- (2) *The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.*
- (3) *The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.*
- (4) *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.*
- (5) *The Centre shall not publish the award without the consent of the parties.*

Mandatory provisions

The provisions of Article 48 of the Convention are mandatory and may not be deviated from. Only subparagraph 5 offers the parties a choice.

Questions decided by majority

Article 48(1) of the Convention provides tribunals with the power to decide questions by a majority. This provision is not limited to the rendering of awards, but relates also to other questions that the tribunal may have to decide during the arbitration procedure.²⁸ One exception is the tribunal’s power to fix time limits, which may be delegated to the president of the tribunal in accordance with Arbitration Rule 26(1).

According to Arbitration Rule 16(1), abstention by a member of the tribunal will count as a negative vote.

a) Formal and Substantive Requirements of an Award

The Convention does not provide a definition of what constitutes an award, although the correct identification of an award is important in the context of the requirements of Article 48, as well as the post-award remedies provided in Articles 49 to 52 of the Convention. For the purposes of this Module, a decision rendered by the tribunal that finally disposes of the questions before it can be described as an award. This includes a decision declining jurisdiction. Thus, an award can be distinguished from the other decisions that a tribunal may

²⁸ This provision is mirrored in Rule 16(1) of the Arbitration Rules.

make during the course of the proceedings, for example, procedural orders or a recommendation of provisional measures.

Article 48(2) of the Convention requires that an award must be in writing and be signed by all members of the tribunal.

Requirements of an award

Arbitration Rule 47 further provides that an award must comply with the following requirements:

- (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 proceedings;*
 - (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.*

Although many of the requirements of Rule 47 are taken for granted in international arbitration, the rule is much more detailed than comparable provisions in other arbitration rules.

Individual or dissenting opinions

In accordance with Article 48(4) of the Convention, an arbitrator may attach an individual opinion to the award. This applies equally to dissenting opinions or concurring opinions. Such opinions can also take the form of declarations if they only address a few discrete points of contention in the award.

Exhaustiveness

Article 48(3) requires that the award deal with all questions submitted to the tribunal. The requirement of exhaustiveness is mirrored in Arbitration Rule 47(1)(i).

The requirement that the tribunal must hand down an award dealing with the dispute in an exhaustive manner has not been construed, however, as requiring the tribunal to deal with every argument advanced by the parties in their pleadings. Rather, the requirement has been interpreted in ICSID proceedings as meaning only that the tribunal must deal expressly in its award with questions that are decisive.

Failure by a tribunal to deal expressly with a decisive question in its award has

been held to be tantamount to a failure to state reasons, and thus to constitute a possible ground for annulment of the award in accordance with Article 52(1)(e) of the Convention (See Module 2.8).

An award must be reasoned

In addition to the requirement of exhaustiveness, Article 48(3) of the Convention requires that an award shall state the reasons upon which it is based. ICSID tribunals invariably provide reasons. A question that may arise, however, is what constitutes a reason.

Failure to state reasons is expressly foreseen in Article 52(1)(e) of the Convention as a ground for annulment of the award. This requirement, like the requirement of exhaustiveness, has also been subject to interpretation by several *ad hoc* Committees (See Module 2.8).

Summary:

- **Tribunals must decide questions by majority. Abstention by an arbitrator will count as a negative vote.**
- **An award rendered by a tribunal must conform with the requirements set out in Arbitration Rule 47.**
- **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.**

b) The Publication of Awards

Publication by ICSID is conditional on consent of parties

Article 48(5) of the Convention is similar to the rules of other arbitration institutions in restricting the arbitral institution (ICSID) from publishing the award without the consent of the parties. If the parties give their consent, the award is normally published by ICSID in the ICSID Review – Foreign Investment Law Journal and on the ICSID website.²⁹

This rule was enacted in order to assure the parties that ICSID would respect and protect the privacy of the proceedings.

Certain information is made public

The Secretariat of ICSID is able, however, to reveal certain information about ICSID cases, as provided for in Administrative and Financial Regulations 22 and 23. Such information concerns all requests registered with the Centre. The information is provided in the biannual ICSID News and in the ICSID Annual Reports. It can also be found on the ICSID website (www.worldbank.org/icsid), under the sub-heading “ICSID Cases”.

The information available relates to the date of the request, the membership

²⁹ Rule 48(4) of the Arbitration Rules does, however, permit the Centre to include in its publications excerpts of the legal rules applied by the tribunal.

and constitution of the tribunal, the subject matter of the dispute and the outcome of the proceedings.

**Restrictions
on the parties**

Notwithstanding the prohibition against publication by ICSID contained in Article 48(5) of the Convention, there is no express prohibition against publication by the parties of the award or a commentary on the award's findings without obtaining the consent of the other party.

**Implied duty of
confidentiality**

In the absence of an express provision on confidentiality, several ICSID tribunals have addressed the question of whether there exists an implied duty of confidentiality as between the parties to an ongoing proceeding.³⁰

*Amco v Indonesia*³¹ was the first case to address this issue. In that case, the tribunal refused to recommend the provisional measures sought by Indonesia to restrain Amco from discussing the case publicly. The tribunal concluded that “it is right to say that the Convention and the Rules do not prevent the parties from revealing their case; ...”³²

c) The Date of the Award

Dispatch of the award

Article 49 (1) of the Convention provides that the Secretary-General shall promptly dispatch certified copies of the award to the parties.

Signature of the award

The requirement that the award be signed by the arbitrators is a standard feature of international arbitration (Arbitration Rule 47(2)). The date of the last signature acts as the trigger for the Secretary-General's duty to dispatch the award to the parties pursuant to Arbitration Rule 48(1).

**Award is rendered on
its date of dispatch**

Under Article 49(1) of the Convention, the award is deemed to have been rendered on the date of its dispatch by the Secretary-General. The exact date is important in view of the time limits imposed by the Convention for the post-award remedies of rectification, revision and annulment.

**Closure of
proceedings**

Arbitration Rule 46 provides that an award must be drawn up and signed by the members of the tribunal within 60 days after the closure of the proceedings. The tribunal may extend this deadline by 30 days, if it would otherwise be unable to draw up the award.³³

³⁰ The issue of an implied obligation of confidentiality in non-ICSID arbitration has recently been examined before the courts of two jurisdictions. See the decision of the High Court of Australia in *Eso Australia Resources Limited v. Plowman (Minister for Energy and Minerals)* (1995) 128 ALR 391; and the judgment of the Swedish Supreme Court in the *Bulbank* case, which have held that there is no general duty of confidentiality in an arbitration agreement. For commentary on these decisions, see H. Bagner, *The Confidentiality Conundrum in International Commercial Arbitration*, ICC Bulletin, Vol. 12/No. 1, p. 18. For a discussion of recent ICSID cases dealing with the issue of confidentiality, see M. Stevens, *Confidentiality Revisited*, ICSID News, Vol. 17, No. 1, p. 1.

³¹ *Amco v Indonesia*, Decision on Provisional Measures, December 9, 1983, 1 ICSID Reports 410.

³² *Ibid.*, p. 412.

³³ This requirement also extends to individual or dissenting opinions.

Arbitration Rule 38 provides that the tribunal shall declare the proceedings closed when the parties' presentation of their case is completed. In practice, tribunals have enjoyed a great deal of discretion in declaring the proceedings closed by treating the provisions of Rule 38 with some flexibility and declaring proceedings closed once they are confident that they can render an award within the deadline of Arbitration Rule 46.

6. COSTS OF THE ARBITRATION

Articles 59 to 61 of the Convention deal with the costs of the proceedings.

Charges incurred by the Centre

Article 59 of the Convention deals with the charges incurred for the use of the facilities of the Centre. These are determined by the Secretary-General in accordance with the Administrative and Financial Regulations. The only fixed general charge is the lodging for a request for arbitration (or other types of requests, for example, annulment).

Lodging fee

As of July 1, 2002, this fee was US\$7,000. The Schedule of Fees is amended from time to time and can be found on the ICSID website under the sub-heading of “ICSID Publications”.

Administrative charge

In addition to the lodging fee, an administrative charge is payable to the Centre following the constitution of the arbitral tribunal. The amount of that charge was US\$3,000 as of July 1, 2002. The Centre also charges for its disbursements and out of pocket expenses in each case. These expenses are borne by the parties to the arbitration, in accordance with Article 61(2) of the Convention and include expenses for the services of persons (such as interpreters, reporters and secretaries) especially engaged by the Centre.

Special services

The Centre is also able to perform special services in connexion with a proceeding (for example, the provision of translations or copies), if the requesting party has provided a deposit in advance sufficient to cover the resulting charges (Administrative and Financial Regulation 15).³⁴

Fees and expenses of the tribunal

Article 60 of the Convention deals with the fees and expenses of the arbitrators and provides that the tribunal shall determine the fees and expenses of its members within limits established by the Administrative Council. Administrative and Financial Regulation 14 provides the basis for the remuneration of arbitrators and the reimbursement of their expenses. In accordance with the Schedule of Fees, dated July 1, 2002, arbitrators are entitled to receive a fee of US\$2,000 per day of meetings or other work performed in connexion with the proceedings in addition to receiving reimbursement for any direct expenses reasonably incurred.

However, nothing precludes the parties from agreeing in advance with the tribunal that the arbitrators shall be remunerated on some other basis.

In addition, arbitrators are entitled to subsistence allowances and reimbursement of travel expenses within limits set forth in Administrative and Financial Regulation 14. These ancillary expenses are determined on the basis of a detailed memorandum on fees and expenses of arbitrators, which can be found on the ICSID website under the sub-heading of “ICSID Publications”.

³⁴ See the Schedule of Fees, dated July 1, 2002, available on the ICSID website.

All payments to arbitrators are made by ICSID

All payments of fees and expenses due to the members of the arbitral tribunal are to be made exclusively by ICSID, in accordance with Administrative and Financial Regulation 14(2).

Advance payments

The payments by ICSID to the arbitrators are financed through advance payments made by the parties, in accordance with Administrative and Financial Regulation 14(3). The payments are made on the basis of statements prepared by the secretary of the tribunal on behalf of the Secretary-General.

The advance payments are apportioned equally between the parties. In the event of failure by one of the parties to make the necessary payments within 30 days, ICSID will inform the parties of the default and allow either party to make the outstanding payment.

Non-payment may cause suspension

In the event of non-payment of the advance by either party within a further 15 days after the initial notice of default has been issued, the proceedings may be stayed at the instigation of the Secretary-General. A stay of over six months may cause the discontinuance of the proceedings by the Secretary-General.

Parties' legal costs

Article 61(2) of the Convention also deals with the issue of the parties' own legal costs and provides the arbitral tribunal with broad discretion to determine how the costs should be allocated between the parties, as follows:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connexion with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

Practice of ICSID tribunals

There is no uniform practice amongst ICSID tribunals in apportioning costs. In the majority of cases, tribunals have decided that the parties should bear equally the costs of the arbitration (the fees and expenses of the arbitrators and ICSID's charges) and that each party should bear its own legal costs. Mostly, tribunals do so without providing any reasons.³⁵

In those instances where reasoning has been provided, tribunals have tended to point to the parties' good faith and cooperation with the tribunal,³⁶ or noted that neither party had been wholly successful.³⁷

In a number of cases, tribunals have determined that costs should follow the event and therefore have awarded costs, including the victorious party's legal costs.³⁸

³⁵ *Klockner v. Cameroon*, Award, October 21, 1983, 2 ICSID Reports 4; *Vacuum Salt v. Ghana*, Award, February 16, 1994, 4 ICSID Reports 320; *AMT v. Zaire*, Award, February 21, 1997, International Arbitration Report, vol. 12, 4/97; *Cable TV v. St. Kitts and Nevis*, Award, January 13, 1997, 13 ICSID Review – FILJ 328.

³⁶ *Atlantic Triton v. Guinea*, Award, April 21, 1986, 3 ICSID Reports 42.

³⁷ *Atlantic Triton v. Guinea*, Award, April 21, 1986, 3 ICSID Reports 42; *SOABI v. Senegal*, Award, February 25, 1988, 2 ICSID Reports 273; and *Tradex Albania v. Albania*, Award, April 29, 1999, 14 ICSID Review – FILJ 197.

In other cases, the award of costs has reflected the relative success of the two parties on the merits.

In *AAPL v Sri Lanka*,³⁹ the tribunal, having found in favour of the claimant only with respect to some of its claims, decided that the costs of the arbitration (including the fees of the tribunal and the costs of the Centre) should be borne 60 per cent by the respondent and 40 per cent by the claimant. In addition, the respondent bore one third of the claimant's legal costs, in addition to the entirety of its own legal costs.

Finally, tribunals may also penalize parties that they perceive have acted in an uncooperative or dilatory manner by awarding costs against them.⁴⁰

In the case of *LETCO v Liberia*,⁴¹ the respondent failed to participate in the proceedings. In addition, it instituted proceedings before its national courts with respect to the dispute in violation of Article 26 of the Convention. Further to the claimant's request, the tribunal awarded the claimant costs in full. Its decision was largely based on the respondent's "procedural bad faith".⁴²

Summary:

- **Unless the parties agree otherwise, the tribunal has broad discretion to apportion the costs of the arbitration.**
- **The costs of the arbitration include three distinct elements:**
 - (i) the charges and expenses incurred by ICSID;
 - (ii) the fees and expenses of the tribunal; and
 - (iii) the parties' legal costs.
- **The first two categories are financed by means of advance payments made by the parties.**
- **There is no uniform practice amongst ICSID tribunals in apportioning costs between the parties.**

³⁸ For example, *AGIP v Congo*, Award, November 30, 1979, 1 ICSID Reports 306 and *Wena Hotels Limited v. the Arab Republic of Egypt*, Award, 8 December 2000 (unpublished).

³⁹ Award, June 27, 1990, 4 ICSID Reports 246.

⁴⁰ *Benvenuti & Bonfant Srl v. Congo*, Award, August 8, 1980, 1 ICSID Reports 330.

⁴¹ *LETCO v. Liberia*, Award, March 31, 1986, 2 ICSID Reports 343.

⁴² *Ibid*, at p. 378.

TEST MY UNDERSTANDING

After having studied this Module the reader should be able to answer the following questions. Most answers should go beyond a simple yes/no alternative and would require a brief explanation.

1. What information must a potential claimant include in its request for arbitration in instituting ICSID arbitration proceedings?
2. What are the official languages of the Centre?
3. Under what circumstances can the Secretary-General refuse to register the request for arbitration?
4. Is the parties' choice of arbitrators constrained in any way under the Convention?
5. In the event that the parties cannot agree on the number and method of appointment of the arbitrators, what is the procedure provided for by the Convention?
6. What action can a claimant take when faced with a respondent who is refusing to nominate an arbitrator after 90 days have passed from the date of registration?
7. Can the parties agree to modify or exclude the Arbitration Rules?
8. What is the written procedure that is typically adopted by parties in presenting their case in an ICSID arbitration?
9. Under what circumstances can the parties introduce additional claims in the arbitration?
10. Can the parties refer to a national court to obtain provisional measures?
11. What are the duties of a tribunal in rendering an award?
12. Must the tribunal deal with every argument raised by the parties in their submissions?
13. Can one party disclose information concerning the award without obtaining the consent of the other party to the arbitration?
14. What is the effective date of the award for the purposes of annulment proceedings pursuant to Article 52 of the Convention?
15. What is the practice of ICSID tribunals in apportioning costs between the parties?

HYPOTHETICAL CASES

Coalco Corporation v. The Republic of Somandia

In June 2000, Coalco Corp. and the Republic of Somandia entered into an investment agreement with respect to an investment by Coalco in the coal mining industry in Somandia. In their agreement, the parties agreed to submit any dispute to ICSID arbitration. Both the Republic of Somandia and Utopia (Coalco's country of establishment) have ratified the ICSID Convention.

Pursuant to the parties' agreement, Somandia undertook to provide Coalco with all necessary permits to enable it to start exploring for coal in a remote region of the country in the province of East Kalit. Coalco's attempts to commence exploration activities were thwarted, however, by a decree passed by the regional government of East Kalit declaring the region where Coalco was set to explore as a natural reserve, prohibiting any exploration or drilling activities.

Unable to commence exploration, Coalco has filed a request for arbitration with the Centre against the Republic of Somandia for breach of their investment agreement and losses incurred.

The request was registered by the Secretary-General on March 1, 2001. In their investment agreement, the parties did not specify the composition or method of appointment of an arbitral tribunal. Accordingly, together with its request, Coalco proposed a sole arbitrator and nominated a national of a third country.

The Republic of Somandia has failed to acknowledge receipt of Coalco's request and has therefore not nominated any arbitrators.

Advise Coalco on the following issues:

1. It is now May 1, 2001 and Coalco suspects that the Republic of Somandia has no intention of participating in the arbitration. What steps can Coalco take in order to ensure the constitution of the tribunal as soon as possible? Are there any limitations on the composition of the tribunal?
2. Following the constitution of the tribunal, Somandia fails to attend the tribunal's first session organized in Washington D.C. and instead confirms by letter to the tribunal that it will not participate in the proceedings. Discuss what impact Somandia's failure to participate will have on the proceedings, especially on the procedure to be followed by the tribunal.
3. In July 2001, Coalco's offices in Takara (Somandia's capital city) are raided by the police and all documents contained therein are removed on the orders of Somandia's Minister of Investment. The documents removed included evidence that Coalco had assembled with respect to the arbitration. Discuss what steps Coalco can take in order to safeguard

- its interests in the arbitration. Can Coalco make an application to the District Court of Takara?
4. As part of its prayer for relief in its memorial submitted in the arbitration, Coalco requests that the tribunal order Somandia to reimburse all of its costs incurred in connexion with the arbitration. Assuming that Coalco is partly successful in its claim against Somandia, discuss the tribunal's options in awarding costs.
 5. The award was rendered on April 1, 2002. For strategic reasons, Coalco has decided to publicize the contents of the award. Advise on whether it can do so and, if so, what options it has in doing so.

Osteria Ltd. v. The Republic of Moravia

Osteria Ltd., a company established under the laws of Utopia, operates a number of mussel farms in the Republic of Moravia. Osteria's farms suffered major damage after they were attacked by a separatist guerilla faction opposed to the government of Moravia.

Both Utopia and Moravia have ratified the Convention. Furthermore, since 1990, there exists a treaty between the two countries for the promotion and protection of foreign investment (the BIT). Pursuant to the terms of the BIT, Moravia is obliged to accord Utopian investors fair and equitable treatment and full protection and security (and *vice versa*).

In accordance with the provisions of the BIT, in the event of a legal dispute between a foreign investor and the host State that cannot be settled within six months of being brought to the attention of the host State, the dispute is to be settled by means of ICSID arbitration.

Osteria has been advised that it may have grounds under the BIT to bring an arbitration against Moravia with respect to the damage that it has suffered.

As Osteria's counsel, advise it on the steps that it needs to take in order to initiate ICSID arbitration proceedings. In addition, prepare a procedural timetable demonstrating the various steps involved up to the rendering of the award.

FURTHER READING

Books

- **Fouchard, Gaillard, Goldman**, On International Commercial Arbitration (1999).
- **Schreuer, C.**, The ICSID Convention: A Commentary (2001).

Articles

- **Bagner, H.**, The Confidentiality Conundrum in International Commercial Arbitration, ICC Bulletin, Vol. 12/No. 1 (2001), p. 18.
- **Broches, A.**, Observations on the Finality of ICSID Awards, 6 ICSID Review – FILJ 321 (1991).
- **Brower, C.**, The Initiation of Arbitration Proceedings: “Jack be Nimble, Jack be Quick...!”, 13 ICSID Review – FILJ 15 (1998).
- **Parra, A.**, The Limits of Party Autonomy in Arbitration Proceedings under the ICSID Convention, ICC Bulletin, Vol. 10/No. 1 (1999), p. 27.
- **Parra, A.**, The Role of the ICSID Secretariat in the Administration of Arbitration Proceedings Under the ICSID Convention, 13 ICSID Review – FILJ 85 (1998).
- **Paulsson, J.**, Arbitration Without Privity, 10 ICSID Review – FILJ 232 (1995).
- **Obadia, E.**, Current Issues in Investment Disputes, The Journal of World Investment, Vol. 2, No. 1, p. 219.
- **Obadia, E.**, ICSID, Investment Treaties and Arbitration: Current and Emerging Issues, ICSID News, Vol. 18, No. 2, p. 4.
- **Stevens, M.**, Confidentiality Revisited, ICSID News, Vol. 17, No. 1, p. 1.
- **Townsend, J.**, The Initiation of Arbitration Proceedings: “My Story Had Been Longer”, 13 ICSID Review – FILJ 21 (1998), at p. 24.
- **Tupman, W.M.**, Challenge and Disqualification of Arbitrators in International Commercial Arbitration, 38 International and Comparative Law Quarterly 26 (1989).

Documents

- ICSID website:
<http://www.worldbank.org/icsid>
- ICSID Administrative and Financial Regulations:
<http://www.worldbank.org/icsid/basicdoc/35.htm>

- ICSID Institution Rules:
<http://www.worldbank.org/icsid/basicdoc/57.htm>
- ICSID Arbitration Rules:
<http://www.worldbank.org/icsid/basicdoc/63.htm>
- NAFTA Cases:
[http:// www.naftaclaims.com](http://www.naftaclaims.com)

Cases

- *AGIP SpA v Government of the People's Republic of Congo*, Award, November 30, 1979, 1 ICSID Reports, 306.
- *Amco Asia Corporation and Others v. The Republic of Indonesia*, Decision on Jurisdiction, September 25, 1983, 1 ICSID Reports 389.
- *AMT v. Zaire*, Award, February 21, 1997, International Arbitration Report, vol. 12, 4/97.
- *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, Award, June 27, 1990, 4 ICSID Reports 246.
- *Atlantic Triton v. Guinea*, Award, April 21, 1986, 3 ICSID Reports 42.
- *Benvenuti & Bonfant Srl v. The Government of the People's Republic of Congo*, Award, August 8, 1980, 1 ICSID Reports 330.
- *Cable Television v. St. Kitts and Nevis*, Award, January 13, 1997, 13 ICSID Review – FILJ 328 (1998).
- *Klöckner v. Cameroon*, Award, October 21, 1983, 2 ICSID Reports 4.
- *Liberian Eastern Timber Company (LETCO) v. The Government of the Republic of Liberia*, Award, March 31, 1986, 2 ICSID Reports 343.
- *Maritime International Nominees Establishment (MINE) v Republic of Guinea*, Award, January 6, 1988, 4 ICSID Reports 54.
- *MINE v Guinea*, Decision on annulment, December 22, 1989, 4 ICSID Reports 79.
- *SOABI v. Senegal*, Award, February 25, 1988, 2 ICSID Reports 273.
- *Tradex Albania v. Albania*, Award, April 29, 1999, 14 ICSID Review – FILJ 197.
- *Vacuum Salt v. Ghana*, Award, February 16, 1994, 4 ICSID Reports 320.
- *Wena Hotels Limited v. the Arab Republic of Egypt*, Award, December 8, 2000, 41 ILM 896 (2002).